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COMMONLY USED ABBREVIATIONS

CETS	Council of Europe Treaty Series
Charter	Charter of Fundamental Rights of the European Union [2016] OJ C 202/389
CJEU	Court of Justice of the European Union
Commission	European Commission
Council	Council of the European Union
Dz.U.	Dziennik Ustaw Rzeczypospolitej Polskiej [Journal of Laws of the Republic of Poland]
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (European Convention on Human Rights, as amended)
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
MLA Convention	Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/3
OJ C	Official Journal of the European Union, the C series
OJ L	Official Journal of the European Union, the L series
PPU	Urgent preliminary ruling procedure
Res	Resolution
TFEU	Treaty on the Functioning of the European Union, consolidated version [2016] OJ C 202/1
TUE	Treaty on European Union, consolidated version [2016] OJ C 202/1
UNGA	United Nations General Assembly
UNTA	United Nations Treaty Series

Codes and short names of the EU Member States and the United Kingdom of Great Britain and Northern Ireland[1]

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czechia
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece

1 *Interinstitutional Style Guide* (Publications Office of the European Union 2022) <https://data.europa.eu/doi/10.2830/215072>.

ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SI	Slovenia
SE	Sweden
SK	Slovakia
UK	United Kingdom

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What are the main problems facing EU criminal law today?

Ariadna H. Ochnio
Hanna Kuczyńska

EU criminal law has to confront a number of issues affecting almost every area of social life, starting with the use of cutting-edge technology, based on artificial intelligence, including accelerating climate change and environmental degradation, refugee flows, and ending with the recurring crises of the rule of law. The policy of solving these problems will influence the direction of the development of EU criminal law in the near future. However, a wide array of problems make it difficult to discuss them all in one collective study. It is rather easier to identify some thematic circles around which the EU is now focusing its criminal justice strategies. For this reason, this book deals with a selected number of issues of EU criminal law.

The first thematic circle covers issues related to ensuring the equivalent protection of the rights of participants in criminal proceedings in all Member States in order to achieve a uniform level of legal certainty for everyone throughout the EU. The EU action plan now focuses on strengthening the neglected rights of victims, as reflected in the 'Strategy on victims' rights (2020–2025)'.[1] The second covers issues related to strengthening mutual trust and thereby facilitating cooperation in criminal matters and mutual recognition of decisions. The third covers issues related to combating serious offences and organised crime. In this respect, it can be observed that the dismantling of so-called 'safe havens' and the fight against environmental crime are currently at the forefront of the EU criminal justice strategy.[2]

1 Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'EU Strategy on victims' rights (2020–2025)', Brussels, 24 June 2020, COM(2020) 258 final.

2 See Commission, 'EU strategy on criminal justice' <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/eu-strategy-criminal-justice_en> accessed 6 April 2022.

Since the adoption of the Treaty of Lisbon,[3] on the basis of its Article 82, judicial cooperation in criminal matters in the Union has been based on the principle of mutual recognition of judgments and judicial decisions and also includes the approximation of the laws and regulations of the Member States. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council have established minimum rules. These should take into account the differences between the legal traditions and systems of the Member States. These rules concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision. The field of regulation is thus wide and is becoming wider every year, meaning further new directives. Operating on the basis of Article 288 para 3 of the TFEU, the EU regulates more and more issues in the common area of criminal proceedings.

However, 'European criminal procedure' is still in a nascent state. An important element in creating its solid foundations is the judicial dialogue between national courts, the CJEU and the ECtHR. After opening a new chapter in this dialogue by the landmark judgment of the ECtHR in the case *Gregorian Bilovaru and Codrut Moldovan v France*,[4] particular attention should be paid to the issue of 'equivalent protection'.[5] The rights violated by the application of the EU criminal law instrument (the European Arrest Warrant) may also be assessed in terms of the violation of the standards decreed in the ECHR. It is worth quoting a conclusion here, which concerns the importance of the *Bilovaru and Moldovan* judgment, formulated in the literature by Leandro Mancano. This states that if the protection of ECHR rights appears to be manifestly insufficient, the conduct of the national authorities 'will not escape scrutiny' and this judgement 'opens the door to new scenarios in the EU-ECHR relationship with regard to the EAW, and the two-step test in particular'.[6] In this book the issue of judicial dialogue is developed by Joanna Beata Banach-Gutierrez in the chapter entitled 'The prohibition of inhuman or degrading treatment, as a binding norm in EU criminal law'. The Author remarks that judicial dialogue between national courts, the CJEU and the ECtHR is a significant component enhancing the respect for human rights.

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3 Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1.

4 *Gregorian Bilovaru and Codrut Moldovan v France* Apps nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

5 On the presumption of equivalent protection (so called the 'Bosphorus presumption') see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005); *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012); *Sofia Povse and Doris Povse v Austria* (dec.) App no 3890/11 (ECtHR 18 June 2013); *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).

6 Leandro Mancano, 'Judicial Cooperation, Detention Conditions and Equivalent Protection. Another Chapter in the EU-ECHR Relationship: *Bivolaru and Moldovan v. France*' (2022) 56 Revista General de Derecho Europeo 207, 231.

Currently, in the area of cooperation in criminal matters multiple legal instruments, in particular directives, function and continuous new directives are being adopted. It is impossible, in the frames of one publication, to discuss all the issues of key importance. However, an attempt will be made in order to discuss the most urgent challenges.

The first area of research in the field of cooperation should relate to the rights of parties in criminal procedure. The rights of the accused are currently regulated in numerous directives: 2013/48/EU;[7] 2010/64/EU;[8] 2012/13/UE;[9] (UE) 2016/1919;[10] 2016/343/UE;[11] the rights of the victim stem from directives: 2004/80/EC[12] and 2012/29/UE.[13] The chapter 'Right of access to a lawyer in Polish preparatory proceeding, comments on the Directive 2013/48/EU' by Justyna Głębocka, analyses one of the most substantive lacunas of the Polish criminal procedure. This text presents the main issues related to the right of access to a lawyer in Polish preparatory proceedings in the context of the standard established in Directive 2013/48/EU. The deadline for its implementation expired on 27 November 2016, and, although the Polish legislator tried to transpose its provisions by means of the 2018 Polish Code of Criminal Procedure (hereinafter the CCP) amendment, it did not substantially change any rights falling within the scope of the right to a formal defence. In this text a wide scope of procedural rights connected to, and resulting from, the right of access to a lawyer during a Polish preparatory proceeding is discussed which leads to the conclusion that there is a fundamental difference in the level of protection guaranteed by the Directive and that provided by Polish procedural law. The Directive more broadly defines the definition of 'the suspect', and thus provides a broader personal scope of this protection and also guarantees a wider range of procedural activities at which an advocate should be present, thus also offering a wider material scope of this right. The discrepancies between the guarantees provided for in

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

8 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

9 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

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

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

12 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L 261/15.

13 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

the Directive, and those offered by the CCP to the suspect, concern the very essence of this law, as it is currently understood in the field of European law. It is evident, which also results from the analysis of the jurisprudence of the European Court of Human Rights, that currently the right to defence is understood differently in the field of European law than it is adopted in Polish law. The main challenge for the Polish legislator will be to adopt these policies.

The most significant instrument of cooperation in criminal matters is the Framework Decision 2002/584 on EAW.[14] The important legal problems related to this instrument have recently been addressed by the CJEU. One of the most controversial issues, as regards the execution of decisions in criminal matters on the basis of the mutual recognition principle, is the question of whether, and, if so, to what extent, the execution of a EAW can be denied by the authorities of the requested State if certain fundamental rights standards are not upheld in the requesting State.[15] The safeguards in question, which recently come into question, include especially the right to be tried before an independent and impartial judge. This discussion is inextricably linked to the discussion about the rule of law in Poland – however, this question goes beyond the boundaries of the present text. The doubts about the independence and legitimacy of a court in Poland have led to the issuance of the judgment in Case C-216/18 PPU *LM*,[16] where the Court established a two-pronged test. The test requires that, if the executing judicial authority called upon to decide whether a person in respect of whom an EAW has been issued, supposes that there is a real risk of breach of the fundamental right to a fair trial, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his or her personal situation, as well as to the nature of the offence for which he or she is being prosecuted and the factual context that form the basis of the European arrest warrant, there are substantial grounds for believing that person will run such a risk if he or she is surrendered to that State. Additionally, in the Joined Cases, C354/20 PPU and C412/20 PPU *L and P*,[17] the Court used the test, adding, that the authority cannot deny the status of 'issuing judicial authority' to the court which issued that EAW and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, without carrying out a specific and precise verification which takes account of, *inter alia*, his or her personal situation, the nature of the offence in question and the factual context in which that

14 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190/1.

15 See on that issue extensively: Thomas Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe' [2020] (4) EUCRIM 321-330.

16 Case C-216/18 PPU *LM*, EU:C:2018:586.

17 Joined Cases C 354/20 PPU and C 412/20 PPU *L and P*, EU:C:2020:1033.

warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled. Although some persons could probably have expected the overt denial of such EAWs, this was not the case in either of the cases. The CJEU was at the same time cautious and conservative.[18] This line of jurisprudence certainly shows the willingness, on the one hand, to strengthen the functioning and support the fundamental meaning of the mutual recognition of decisions principle. On the other hand, these judgments communicate a more significant problem: that cooperation in criminal matters is not merely based on procedural norms and formal activities but is bound with the deeper issues of mutual trust in each other's minimal procedural guarantees.

This issue, partly discussed in the text by Martyna Kusak in the perspective of the meaning of mutual trust between the Member States for admissibility of evidence in criminal matters, that remains of fundamental importance for the cooperation in criminal matters, is related to the procedural challenges and consequences of the Directive 2014/41/UE of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO).[19] This Directive created a mechanism that allows for the transfer of evidence between the EU Member States. The implementation of this new mechanism of cooperation has led to several practical problems, especially with the lack of adequate provisions regulating admissibility of evidence acquired in other Member States, due to the fact that the EIO Directive cannot require a judge to admit evidence in trial, nor indicate what evidential value and relevance the evidence should have. Therefore, the admission of evidence depends on the independent decision of a national judge under national law.[20] *De lege ferenda* it should be postulated to introduce a clear and precise regulation, which would indicate on what terms the evidence gathered as a result of issuing the EIO should be admitted. A uniform system is needed, predictable and clear, allowing for admitting evidence obtained as the result of the issuance of an EIO. Therefore, there are proposals to adopt a directive regarding the admissibility of evidence in the territory of the European Union.[21]

18 Przemysław Saganek, 'The Execution of European Arrest Warrants Issued by Polish Courts in the Context of the CJEU Rule of Law Case Law' (2020) 40 Polish Yearbook of International Law 275 <https://doi.org/10.24425/pyil.2021.138441>.

19 [2014] OJ L 130/1.

20 Inés Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence: Is a Fundamental Rights-Based Refusal the Solution?' (2015) 6 New Journal of European Criminal Law 8-31; Marcello Daniele, 'Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles' (2015) 6 New Journal of European Criminal Law 179-19; Balázs Garamvölgyi, Katalin Ligeti, Anna Ondrejová and Margarete von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU' [2020] (3) EUCRIM 201-208; Hanna Kuczyńska, 'Admissibility of Evidence Obtained as a Result of Issuing an European Investigation Order in a Polish Criminal Trial' (2021) 46 Review of European and Comparative Law 67 <https://doi.org/10.31743/recl.11815>.

21 See Andrea Ryan, *Towards a System of European Criminal Justice. The problem of admissibility of evidence* (Routledge 2014) 249.

This would regulate the rules for the admission of evidence obtained in other Member States – whether in a general form or just requiring compliance with certain minimum standards or constituting that the evidence obtained in an illegal manner would always be unacceptable. Currently, most authors assume that

> *essentially relations between the requesting State and the executing State in the Directive are based on «blind recognition», founded on the identical trust of the States without any possibility to «contradict» the selection of the procedural form of collection of the evidence according to discretion of the executing State.*[22]

In reality, practitioners are still confronted with case-by-case efforts to enhance mutual admissibility of evidence and with questions of admissibility triggered by incompatibilities in evidentiary proceedings.[23]

It is impossible to ignore the challenges related to the establishment of the European Public Prosecutor's Office (EPPO).[24] It was created to serve as an enhanced cooperation instrument among the 22 Member States, on the basis of Article 86 of the TFEU, which serves as the legal basis for the creation of the EPPO, but was brought into life and made possible via the Council Regulation (EU) 2017/1939.[25] The key function of the EPPO is the investigation and prosecution of crimes against EU financial interests, as defined by the Directive on the Protection of Financial Interests of the Union (PIF Directive).[26] Employing its Delegated European Prosecutors at a national level, the EPPO is inserted in, and interacts with, national criminal justice systems. If prosecuted by the EPPO, PIF crimes are to be judged and adjudicated by national judges. The newly established

22 See Raimundas Jurka, Jolanta Zajančkauskienė, 'Movement of Evidence in the European Union: Challenges for the European Investigation Order' (2016) 9 Baltic Journal of Law and Politics 75 and also the cited article by: Lorena Bachmaier Winter, 'European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for European directive' (2010) 9 Zeitschrift für Internationale Strafrechtsdogmatik 586 <http://www.zis-online.com/dat/artikel/2010_9_490.pdf> accessed 15 April 2022.

23 Martyna Kusak, *Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search* (Maklu 2016) 173; Martyna Kusak, 'Mutual admissibility of evidence and the European investigation order: aspirations lost in reality' (2019) 19 ERA Forum 391-400 <https://doi.org/10.1007/s12027-018-0537-0>.

24 Described in detail in: European Parliament: The European Public Prosecutor's Office: strategies for coping with complexity Budgetary Affairs Policy Department D for Budgetary Affairs Directorate General for Internal Policies of the Union, PE 621.806, May 2019, <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/621806/IPOL_STU(2019)621806_EN.pdf> accessed 11 April 2022.

25 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.

26 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29.

European Public Prosecutor's Office commenced its operational work on 1 June 2021[27] and since then has registered more than 2,500 crime reports from participating EU Member States and private parties. More than 500 investigations have been opened, with some crime reports still under evaluation.[28] *Prima facie* it can be seen that it faces four fundamental challenges: firstly, resulting from the fact that it is not an EU-wide instrument of cooperation as five Member States (Denmark, Hungary, Ireland, Poland and Sweden) have decided not to join it. The second challenge relates to the pioneer character of this enterprise. It is necessary to answer the basic questions about how many prosecutors there should be in each of the Member States and what types of support and equipment will they receive and what the overall budget of the EPPO will be. The first European Chief Prosecutor Laura Codruţa Kövesi, said:

> *the EPPO is the most exciting challenge of our generation. For the first time, a European Union body will investigate, prosecute, and bring to trial criminal offences. Of course, it will not be easy to find solutions for 22 different judicial systems, especially because there is no precedent for a European Public Prosecutor's Office.*[29]

The third challenge could be identified as how to improve cooperation with the already existing authorities, such as OLAF and thus benefit from each other's networks and experiences.[30] The last challenge is the independence of the EPPO: an efficient and impartial European public prosecution service cannot exist without the effective, external independence of the EU institutions and Member States. The EPPO Regulation has laid the foundation for ensuring the independence of the new body. Its real functioning, however, requires joint and determined action by those who make up the EPPO, the EU institutions, and the Member States.[31]

A number of issues related to the EPPO, from the perspective of a non-participating state, was raised by Barbara Dudzik in the chapter 'European Public Prosecutor's Office – relations with Poland as a state not participating in enhanced cooperation'. The Author presents the arguments that the EU regulations of cooperation of non-participating Member States (hereinafter the NPMS) with the EPPO are not clear enough, which

27 Hans-Holger Herrnfeld and Judith Herrnfeld 'The European Public Prosecutor's Office – where do we stand?' (2021) 22 ERA Forum 655-673.

28 European Public Prosecutor's Office, 'Mission and tasks' <https://www.eppo.europa.eu/en/mission-and-tasks> accessed 11 April 2022.

29 Laura Codruţa Kövesi, 'Editorial' [2021] (1) EUCRIM 1-2.

30 Julia Echanove Gonzalez de Anleo and Nadine Kolloczek, 'The European Anti-Fraud Office and the European Public Prosecutor's Office: A Work in Progress' [2021] (3) EUCRIM 187-190; Petr Klement, 'Reporting of Crime Mechanisms and the Interaction Between the EPPO and OLAF as Key Future Challenges' [2021] (1) EUCRIM 51-52.

31 Maria Concepción Sabadell Carnicero, 'The Independence of the European Public Prosecutor's Office' [2021] (1) EUCRIM 57-58.

may contribute to the differentiation of solutions for this cooperation with individual NPMS. She also signals the need for Poland to establish formal rules for the cooperation with the EPPO. It should be noted that a working agreement has recently been signed by Hungary (in force from April 6, 2021).

One of the most important challenges today is also how to use the opportunities offered by artificial intelligence (AI) in criminal matters with respect to the provisions of the Charter, especially Articles 6, 7, 8, 11, 12, 13, 20, 21, 24 and 47.[32] A number of measures have already been implemented in the field of data collection and processing, for example in Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA.[33]

The issue of the use of AI in the criminal justice sector is addressed in the Commission's white paper of 19 February 2020 entitled 'Artificial Intelligence – A European approach to excellence and trust.'[34] In the white paper, the Commission indicated that AI brings not only opportunities,[35] but also potential risks in terms of 'opaque decision-making, gender-based or other kinds of discrimination, intrusion in our private lives or being used for criminal purposes'.[36] In addition, in the Resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters,[37] the European Parliament stressed '(...) the potential for bias and discrimination arising from the use of AI applications such as machine learning, including the algorithms on which such applications are based' (8).[38] Given the complex conditions in which AI 'learns' and 'works', the European Parliament in the

32 See for example Jacek Sobczak, 'Komentarz do Artykułu 8' in Andrzej Wróbel (ed), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* (C.H. Beck 2020) 269-314. See also the Preamble to the Charter (para 4); Andrzej Wróbel, ibid 23 (para 46).

33 [2016] OJ L 119/89.

34 Commission, White paper of 19 February 2020 entitled 'Artificial Intelligence – A European approach to excellence and trust', Brussels, 19 February 2020, COM(2020) 65 final.

35 See for example Neil Shah, Nandish Bhagat and Manan Shah 'Crime forecasting: a machine learning and computer vision approach to crime prediction and prevention', 2021 (4) Visual Computing for Industry, Biomedicine, and Art <https://doi.org/10.1186/s42492-021-00075-z>; Aaron Shapiro 'Reform predictive policing' (2017) 541 Nature 458 <https://doi.org/10.1038/541458a>.

36 See for example Aleš Završnik, 'Criminal justice, artificial intelligence systems, and human rights' 2020 (20) ERA Forum 567 <https://doi.org/10.1007/s12027-020-00602-0>; Aleš Završnik 'Algorithmic justice: Algorithms and big data in criminal justice settings' 2021 (18) European Journal of Criminology 623 <https://doi.org/10.1177/1477370819876762>.

37 European Parliament Resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)), P9_TA(2021)0405 <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0405_EN.pdf> accessed 6 April 2022.

38 See also Independent High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (European Commission 2019) <https://ec.europa.eu/newsroom/dae/redirection/document/60419> accessed 6 April 2022.

quoted Resolution called for four essential elements for its correct use and supervision to be guaranteed: algorithmic explainability, transparency, traceability and verification.[39]

On April 17, 2018, the Commission presented two proposals: the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters[40] and the Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.[41] In the interim, negotiations are underway to conclude an agreement with the United States and for the Second Additional Protocol to the Council of Europe 'Budapest' Convention on Cybercrime.[42] In the context of these negotiations, an interesting remark about the possible, external effect (beyond the EU territory) of EU law on e-evidence was raised in the subject literature.[43]

The present book only addresses a small number of the aspects of the problems belonging to the thematic range of using modern technologies for criminal justice purposes. In the chapter 'Mutual trust to obtain electronic evidence in the EU: is the bar low or high?' Martyna Kusak argues that trust gaps can affect *inter alia* 'fundamental rights of data subjects, application of the rule of speciality or mutual admissibility of evidence'. As a certain remedy she proposes the introduction of minimum standards in terms of the transparent conditions for the legality of the collection of electronic evidence and the rules increasing the procedural rights of data subjects. In addition, the chapter on 'Data retention obligations in the context of CJEU case law' by Marcelina Marcia, refers to this extensive topic. According to the Author, in the context of the CJEU position, the law on data retention requires changes in most Member States. However, the consensus on solutions across the EU may be hampered by the argument of the effectiveness of the law enforcement systems.

The book also covers other issues related to the jurisprudence of the CJEU. It is the Court that gives a specific, and final shape, to provisions regulating cooperation in criminal matters. There are several judgments that give a margin of appreciation to the Members States in the interpretation of the EU legal provisions. There are, however, other areas of cooperation, in which the Court is strict and leaves no discretion as to the way a specific problem should be solved by Member States. There can be no doubt that EU law is governed by the case law established by the CJEU. Although the rulings of the Court do not normatively bind

39 European Parliament Resolution (n 37), 17.

40 Commission, Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters Strasbourg, 17 April 2018, COM(2018) 225 final.

41 Commission, Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, Strasbourg, 17 April 2018, COM(2018) 226 final.

42 Council of Europe Convention on Cybercrime, Budapest, 23 November 2001, ETS 185.

43 See Chloé Brière, 'EU Criminal Procedural Law onto the Global Stage: The e-Evidence Proposals and Their Interaction with International Developments' (2021) 6 European Papers. A Journal on Law and Integration 493 <https://doi.org/10.15166/2499-8249/479>.

the *erga omnes* Member States, even in the systems of continental law, it is common to believe that the ruling of a domestic court, deviating from the interpretation adopted by the CJEU, cannot be considered accurate and issued on the basis of 'properly applied legal workshop'.[44]

There was no margin of discretion for the Member States left in the CJEU judgment of 5th of December 2019, in the case C-671/18 *Centraal Justitieel Incassobureau*,[45] where the Court resolved doubts as to whether, in accordance with EU law, it is possible to impose a financial penalty for a road traffic offence on a person designated on the basis of a legal presumption as the owner of a car by the register of vehicles of another Member State – and this issue has been discussed by Hanna Kuczyńska. Based on the provisions of Article 7(2)(g) and Article 20(3) of Council Framework Decision 2005/214/JHA of 24 February 2005, on the application of the principle of mutual recognition to financial penalties,[46] the Court concluded that a financial penalty issued in another Member State should be executed, even if the person sentenced (punished) presents a certificate demonstrating that he or she was not the owner of the vehicle before the executing authority. In the text the reasons for such an interpretation will be presented in which, first of all, the binding effects of the mutual recognition of decisions in criminal matters are of importance. In the opinion of the Court, the principle of mutual recognition of judgments in criminal matters is of fundamental importance, which implies that, in the executing State, its authorities cannot assess the substantive grounds for its issuance, i.e. they cannot assess the conclusions resulting from the evidence. Although the Court found that the importance of the protection of fundamental rights cannot be called into question, it also pointed out that it must be balanced by the consequences of applying other legal principles in force in EU law, in this case the principle of mutual recognition and the admissibility of relying on the effects of applying legal presumptions. Additionally, although fundamental rights are immovable, as evidenced by the content of Article 20(3) of Framework Decision, these have their end and limits as they are not absolutely binding rights. The end of their validity is to be the issuance of a final decision.

The book discusses the consequences of the CJEU judgment of 24 June 2019, in the case C-573/17 *Popławski (II)*[47] in relation to the Member States' declarations limiting the temporal application of the Framework Decision 2008/909,[48] made under its Article 28(2)

44 Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice. Unfinished Business* (Cambridge University Press 2014) 127; Mattias Derlén and Johan Lindholm, 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2015) 16 German Law Journal 1073-1098.

45 Case C-671/18 *Centraal Justitieel Incassobureau,* EU:C:2019:1054.

46 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16.

47 Case C-573/17 *Popławski (II),* EU:C:2019:530.

48 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

and allowing for mutual recognition in judgments in criminal matters imposing custodial sentences on the basis of this legal act, that has been presented in the text by Michał Hara. The CJEU, in this case, opted for a strict interpretation of EU law, stating that any declaration made after the adoption of the Framework Decision is invalid and cannot bear legal consequences. However, this interpretation leads to a conflict with national law where, as in Poland, national law states otherwise; since a framework decision, while binding, does not have a direct effect and, therefore, cannot require national authorities to refrain from applying their national laws. This case is one of the examples where there is tension in the interpretation adopted by the Court and national laws.

On the example of these issues, it can clearly be observed that it is crucial, for the proper functioning of EU cooperation in criminal cases, to implement correctly the provisions of the directives and framework decisions in the Member States and in the light of the interpretation as given by the CJEU. As the law of the EU must operate in the framework of the national legal systems, without the willingness and ability to adopt the solutions set by the EU legislator, the cooperation will not function effectively. EU cooperation is therefore dependent on the reception of the EU legislation and CJEU case law in the Member States.[49] It has become 'commonplace' to say that crime does not stop at national borders. Such situations result in the inability of domestic law to protect citizens against crime without ensuring cooperation of other states. Therefore, cooperation is advantageous for all the Member States of the European Union. A paradox of the European integration is that 'the only possibility to cope effectively with problems caused by incomplete integration is only by further integration'.[50] It is impossible to ignore the growing 'Europeanisation' of criminal law and equally the growing demands of reshaping it in such a way as to make it more effective and functional.[51] Conversely, the need for political will of closer integration seems to be lacking at this time. The main task before national legislators should be to stop national thinking about strictly national systems of criminal procedure and to start analysing the system of cooperation within the EU as a common area of criminal procedure. It is discernible that the EU will become a legal system of multiple sources: the development of EU law shows a constant proliferation of legal sources and a rising phenomenon of reciprocal assimilation between sets of norms of various origins (the EU law and law from conventional sources, e.g. the Council of Europe), especially in recent years. The precedents established by the CJEU play a significant part in this process. It must also be underlined how the impact of European criminal law, in one respect, creates new mechanisms of cooperation that

49 Gaetano De Amicis, 'Guest editorial' [2020] (4) EUCRIM 253-254.

50 Ulrich Sieber, 'Memorandum für ein Europäisches Modellstrafgesetzbuch' (1997) 52 Juristenzeitung 375-376. The Author calls an irony the phenomenon of fighting against problems caused by transfer of competences by the Member States on the part of international organizations, through transferring even wider scope of the competences.

51 Wolfgang Schomburg, 'Are we on the Road to a European Law-Enforcement Area? International Cooperation in Criminal Matters. What Place for Justice?' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 51-52.

should be incorporated into the law of the Member States, but on the other hand this leads to new problems connected with reconciling this mechanism with the existing legal orders of the Member States – as the cooperation should be both effective and in compliance with the law of the States.

As far as EU substantive, criminal law is concerned, the issues such as combatting environmental crime and eliminating the differences between national legislations, thus allowing the profits of organised crime to be exploited, gain a strong significance. Human trafficking, child sexual abuse, terrorism and cybercrime also play an important role in building the EU's criminal justice strategy. In response to pressing environmental problems, the EU adopted the European Green Deal. An action plan provides for, *inter alia*, an appropriate criminal reaction to environmental crime.[52] According to the Green Deal: 'The Commission will also promote action by the EU, its Member States and the international community to step up efforts against environmental crime' (Section 4).[53] A Proposal for a Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC[54] is an attempt to fulfil the Commission commitment. The proposal deals with the minimum rules concerning the definition of criminal offences and sanctions in order to protect the environment more effectively (Article 1). In addition, it provides for solutions aimed at strengthening coordination and cooperation between competent authorities within a Member State (Article 19).

One of the objectives of the adopted 'EU Strategy to tackle Organised Crime 2021–2025' is the elimination of profits generated by organised crime and preventing infiltration into the legal economy and society.[55] A particularly difficult challenge is to prevent the use of virtual currencies and blockchain technology to commit crimes, especially money laundering. Improving the fight against money laundering is envisaged by the new package of proposals presented by the Commission in July 2021: the Proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010,[56] the Proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist

52 Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal', Brussels, 11 December 2019, COM(2019) 640 final.

53 Ibid, 23.

54 Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Brussels, 15 December 2021, COM(2021) 851 final.

55 Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy to tackle Organised Crime 2021–2025, Brussels, 14 April 2021, COM(2021) 170 final, Section 3.

56 Proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, Brussels, 20 July 2021, COM(2021) 421 final.

financing,[57] the Proposal for a Directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849,[58] the Proposal for a Regulation on information accompanying transfers of funds and certain crypto-assets (recast).[59]

The EU's criminal policy promotes the principle that crime does not pay. Much effort has been made at an EU level to support the social impact of this principle, both in the area of harmonisation of asset recovery law and in the area of mutual recognition of freezing orders and confiscation orders. Nevertheless, there are still areas that require a major overhaul of EU criminal law.[60] In this book, these problems are discussed by Ariadna H. Ochnio in the chapter entitled 'Addressing barriers to victims' rights to recovered assets in the mechanism for mutual recognition of freezing and confiscation orders'. The Author argues that the promotion of social and public re-use of assets through EU policy and law is not a sufficient impetus to reform national systems for the recovery of crime-related assets that focus on state rather than social goals and neglect the rights of victims of crime. In her opinion, Member States should be strictly obliged in EU criminal law to enable social and public re-use of the recovered assets.

The next chapter dealing with the multifaceted topic of depriving the perpetrators of the benefits of the crime is that of Gniewomir Wycichowski-Kuchta entitled '*In rem* confiscation in EU law after the *Agro in 2001* judgement. The Polish perspective'. The CJEU in the judgment, issued on March 19, 2020 in the case C-234/18 *Agro in 2001*,[61] took the position that the Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property,[62] does not preclude national legislation providing for the confiscation of illegally obtained assets ordered by a national court 'following proceedings which are not subject either to a finding of a criminal offence or, *a fortiori*, the conviction of the persons accused of committing such an offence'.[63] However, in the analysis of this judgment, the Author formulates a number of critical remarks concerning

57 Proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Brussels, 20 July 2021, COM(2021) 420 final.

58 Proposal for a Directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, Brussels, 20 July 2021, COM(2021) 423 final.

59 Proposal for a Regulation on information accompanying transfers of funds and certain crypto-assets (recast), Brussels, 20 July 2021, COM(2021) 422 final.

60 See also Ariadna H. Ochnio 'The Tangled Path From Identifying Financial Assets to Cross-Border Confiscation. Deficiencies in EU Asset Recovery Policy' (2021) 29 European Journal of Crime, Criminal Law and Criminal Justice 218-240 <https://doi.org/10.1163/15718174-bja10024>.

61 Case C-234/18 *Agro in 2001*, EU:C:2020:221.

62 Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [2005] OJ L 68/49.

63 See also Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39.

the scope of the judicial examination of the case. He also poses an open question about the protection of fundamental rights in proceedings concerning extra-criminal confiscation.

As regards the approximation of the laws and regulations of the Member States, this book also presents two studies on criminal law, regulated at the level of the EU, and implemented, in a more or less competent way, into the legal systems of the Member States. The text by Klaudia Jakubowicz discusses 'Attempts to harmonise the definition of the crime of rape in the European Union through the scope of German, Spanish and Swedish legislation'. The text presents this problem on two levels of analysis: firstly, on the level of the measures taken by the European Union to combat gender-based violence, including attempts to ratify the Istanbul Convention[64] and, secondly, on the level of national legislation, that is the regulations concerning the definition of the crime of rape in three European Union states: Germany, Spain and Sweden, where particular attention is given to the adaptation of the definition of rape in line with the standard established by the Istanbul Convention.

The study entitled 'Pharmaceutical crime in the European Union – selected issues' presented by Aleksandra Komar-Nalepa, analyses the main directions of the dynamically developing pharmaceutical crime that the European Union and all its Member States have to deal with, as well as the attempts to indicate further necessary systemic solutions to prevent this type of crime. The author presents the most common types of pharmaceutical crimes in the European Union, analyses the normative activity of its organs, aimed at preventing this type of crime, and the harmonisation of the laws of the Member States in this area. She also tries to identify the causes of the current problems with the effectiveness in the fight against this type of crime in the European Union. In conclusion, the author presents proposals for consideration of the introduction of further pan-European legal regulations and formulates appropriate *de lege ferenda* conclusions in this regard.

In addition, the book deals with the still current and unresolved problem of the alternatives to imprisonment. Jolanta Jakubowska-Hara, in the chapter entitled 'Alternatives to imprisonment in the light of Polish and EU provisions of law' presents, *inter alia,* the statistical data on the final and binding convictions of adult persons in Poland in the period 2010 to 2018. The Author indicates that the prison population factor in Poland in 2020 was 195.3, which is very high compared to other European countries. Against this background, she formulates the question of whether the idea of using the deprivation of liberty as a last resort has been properly adapted. In particular in the context of the Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice.[65]

Contemplating the future of EU criminal law, one should take into consideration the challenges resulting from the Russian aggression on Ukraine. This conflict may lead to new problems in the application of EU law on numerous grounds: transborder

64 Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS 210.

65 Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice [2019] OJ C 422/9.

crimes against the refugees; crimes connected to immigration. It will be the time for proving the effectiveness of mutual cooperation in criminal matters in prosecuting the crimes of international law: aggression, war crimes, crimes against humanity and genocide. The EU has implemented the first measures in order to address this problem: Eurojust supported the setting up of a joint investigation team (JIT) into the alleged core international crimes committed in Ukraine. The responsible, national authorities: the Prosecutor General of Lithuania, the Polish Minister of Justice and Prosecutor General and the Ukrainian Prosecutor General, signed a JIT agreement on 25 March 2022 to enable the exchange of information and facilitate investigations into war crimes, crimes against humanity and other core crimes. In this case, the participation in the JIT may be extended to other EU Member States, third countries or other third parties in due course. The main task of this JIT is, at this time, to support the gathering of evidence and its swift and secure exchange between partners, as well as the transmission of information and evidence. This form of cooperation will support coordination of the actions into the case of Russian aggression between all national investigating and prosecuting authorities that have parallelly initiated investigations. The team cooperates with the International Criminal Court (ICC), and the Office of the Prosecutor (OTP-ICC) is invited to join and support the JIT, in accordance with the provisions of the Rome Statute.[66]

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Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16

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66 Eurojust, 'Eurojust supports joint investigation team into alleged core international crimes in Ukraine' <https://www.eurojust.europa.eu/news/eurojust-supports-joint-investigation-team-alleged-core-international-crimes-ukraine> accessed 11 April 2022.

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The prohibition of inhuman or degrading treatment, as a binding norm in EU criminal law

Joanna Beata Banach-Gutierrez

Abstract

The protection of human rights in criminal proceedings is still an ongoing challenge for the countries of the EU. The subject of research for the purposes of this study was the case law of the CJEU and the ECtHR, focusing on the prohibition of inhuman or degrading treatment of prosecuted persons in cross-border criminal proceedings. The research was conducted on the basis of decisions concerning the transfer of prosecuted persons under the European arrest warrant process between EU Member States, and extradition proceedings in their relations with third countries. The research findings indicate that 'judicial dialogue' between the CJEU and the ECtHR has a positive impact on strengthening the protection of human rights in cross-border criminal proceedings. The recent case law of both CJEU and ECtHR confirms that the prohibition of inhuman or degrading treatment is of an absolute character, constituting a binding norm in EU criminal law. As a result, all EU Member States are obliged to comply with it.

Keywords

EU criminal law, human rights, 'judicial dialogue', mutual recognition principle, cross-border criminal proceedings

INTRODUCTION

Respect for human rights constitutes one of the main values on which the European Union was founded, as fully reflected in the wording of Article 2 of the TEU. The idea of respecting human rights is deeply rooted in the norms of, both the Universal Declaration of Human Rights[1] and the system of the European Convention on Human Rights (ECHR).[2]

It has been noted that the specific feature of human rights is that the State is first and foremost obliged to respect human rights. It is assumed that such a system of protection allows provision of some security for individuals against any negative actions of the state apparatus, as well as ordering the State to protect their rights and freedoms.[3] Moreover, the peremptory nature of the norms of international human rights law is also emphasized.[4]

When referring to the protection of the fundamental rights of the individual in EU law, it should be remembered that their development took place through the case law of the CJEU. This is the Court which first held that fundamental rights form a part of the general principles of EU law. Furthermore, in order to protect fundamental rights, the national court is bound by the constitutional traditions of the Member States and may not take measures that would be contrary to the fundamental rights established and guaranteed by their constitutions (*Erich Stauder v City of Ulm*, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futternüttel*, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*).[5]

Based on the case law of the CJEU, one may conclude that, firstly, the EU system of protection of fundamental rights is subject to gradual development. And, secondly, it confirms respect for fundamental rights which are guaranteed by the ECHR, and also those resulting from the constitutional traditions common to the EU Member States. However, the responsibility for ensuring such a compliance is upon the national courts.[6] Further, the catalog of rights adopted in the Charter should be recognized as a landmark in strengthening the respect for the fundamental rights of individuals. Indeed, rights for years covered within various international documents have successfully been combined in one legal document, constituting a set of fundamental rights for 'citizens of the EU'.

1 Universal Declaration of Human Rights (1948), UNGA Res 217 A(III).

2 Allan Rosas, 'The European Union and Fundamental Rights: Vanguard or Villain?' [2017] (7) Adam Mickiewicz Law Review 7.

3 Krzysztof Orzeszyna, Michał Skwarzyński, Robert Tabaszewski, *Prawo międzynarodowe praw człowieka* (C.H. Beck 2020) 13-14.

4 Lidia Brodowski, 'Zakaz tortur, nieludzkiego lub poniżającego traktowania albo karania w kontekście ekstradycji – zagadnienia wybrane na tle orzecznictwa ETPC', in Brygida Kuźniak and Milena Ingelevič-Citak (eds) *Ius cogens – soft law. Dwa bieguny prawa międzynarodowego publicznego* (Wydawnictwo Uniwersytetu Jagiellońskiego 2017) 147-159; Orzeszyna, Skwarzyński, Tabaszewski (n 3) 13-18.

5 Case 29/69 *Erich Stauder v City of Ulm*, EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; Case 4/73 *Nold*, EU:C:1974:51.

6 Rosas (n 2).

Importantly, under Article 6 of the TEU, the Charter acquired the same legal force as the Treaties (Article 6 (1) (1) of the TEU). It should also be stressed that the fundamental rights, guaranteed by the provisions of the ECHR, and those which are resulting from the constitutional traditions common to the Member States, became general principles of the Union's law (Article 6 (3) of the TEU). The analysis of the *acquis communautaire* / EU in the field of judicial cooperation in criminal matters allows for the conclusion that the protection of human rights is a priority here, which is closely related to the contemporary tendency to humanise criminal law. At this point, it is necessary to focus attention on the special importance of 'judicial dialogue' between the CJEU and national courts, as well as between the CJEU and the ECtHR, which consequently affects the unification of judicial practice in the EU Member States.[7]

In principle, cooperation between the national criminal justice systems of the EU Member States presumes a high degree of mutual trust, when it comes to the issue of respect for human rights. However, as the case law of the CJEU illustrates, mutual trust between States cannot remain unconditional. There are allowed to limit it 'in exceptional circumstances', deeply rooted in the protection of fundamental rights. In addition, a special controlling role is played by the ECtHR. Factually, in the event of a possible breach of the binding human rights standards, States are liable under the ECHR system. Such a controlling approach is confirmed in the recently issued judgement in *Bilovaru and Moldovan v France*.[8] The limits applied to the principles of mutual recognition and mutual trust in judicial practice may therefore result from the obligation to comply with the norms of international human rights law. Returning to the main point, one may say that EU criminal law from the perspective of cross-border criminal proceedings (and domestic criminal proceedings) should ensure the most effective protection of human rights.[9]

1. The right to dignity, as a foundation for human rights

In the context of EU criminal law and criminal justice, the right to respect for human dignity (Article 1 of the Charter) is of particular importance. The right to dignity is commonly recognized, as a foundation for other fundamental rights.[10]

7 Orzeszyna, Skwarzyński, Tabaszewski (n 3) 122-129; Rosas (n 2) 11-15.

8 *Gregorian Bilovaru and Codrut Moldovan* Apps nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

9 Joanna Beata Banach-Gutierrez, 'Przekazywanie ściganych europejskim nakazem aresztowania: ewolucja zasad wzajemnego zaufania i uznawania w sprawach karnych' in Piotr Góralski (ed), *Prawo karne na rozdrożu: współczesne tendencje i kierunki zmian* (Instytut Wydawniczy EuroPrawo 2021) 445-473.

10 Joanna Beata Banach-Gutierrez, Christopher Harding, 'Fundamental Rights in European Criminal Justice: an Axiological Perspective' (2012) 20 European Journal of Crime, Criminal Law and Criminal Justice 239.

As has been aptly argued, dignity *per se* results from the fact that man exists as an individual being. As a legal value, it is at the same time a certain kind of foundation, the basis of human rights, and the goal, the culmination of the legal structure of these rights. Dignity empowers an individual in the axiological system of human rights, granting him tools in the form of rights and freedoms.[11]

Under Polish law, the Preamble of the Constitution of the Republic of Poland provides an obligation for 'respect to the inherent dignity of the person'. Further, in the light of Article 30 of the Constitution 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities'.[12] The literature emphasises that dignity is a general clause, which means that the entire Constitution should be read in the light of the call that is expressed in the text of its Preamble, ordering all those who apply the provisions of the Constitution of the Republic of Poland to care for inherent human dignity.[13]

2. Towards the prohibition of inhuman or degrading treatment

The question of prohibition of inhuman or degrading treatment is inextricably linked with respect for the dignity of the human being. It was introduced into EU law on the basis of Article 4 of the Charter. Its provisions reflect fully international human rights law, including Article 3 of the ECHR.[14] In addition, reference should be made to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; [15] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[16] Also, Article 40 of the Constitution of the Republic of Poland contains such a prohibition.

Hence, the prohibition of inhuman or degrading treatment should be taken seriously by all of national authorities.[17] The Preamble to Council Framework Decision

11 Orzeszyna, Skwarzyński, Tabaszewski (n 3) 20.

12 The Constitution of the Republic of Poland (1997), Dz.U. (1997), No 78, item 483 with subsequent amendments.

13 Orzeszyna, Skwarzyński, Tabaszewski (n 3) 25.

14 Ibid, 331-343.

15 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 85

16 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), ETS 126.

17 Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, 'Artykuł 40 Konstytucji RP – zakaz tortur, nieludzkiego i poniżającego traktowania w działaniach Rzecznika Praw Obywatelskich' <https://bip.brpo.gov.pl/sites/default/files/%2Fart%2040.pdf> accessed 20 July 2021; Ewa Dawidziuk, *Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych* (Wolters Kluwer 2013).

2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States directly refers to the observance of human rights (Recitals 12 and 13 of the Preamble).[18] In the light of today's international norms on the protection of human rights, prohibition of inhuman or degrading treatment should be considered, in terms *jus cogens* norms. In effect, it provides an absolute ground for refusing to execute a European arrest warrant (EAW),[19] as well as refusal of extradition to third countries.[20]

3. The importance of the 'judicial dialogue' between the CJEU and the ECtHR for strengthening the protection of human rights in EU criminal law

3.1. Surrender of the prosecuted persons under the European Arrest Warrant process between EU countries

Analysing the case-law of the CJEU on the protection of human rights in cross-border criminal proceedings, one should pay attention, first of all, to three crucial judgments which refer to conditions of imprisonment, namely *Aranyosi and Căldăraru*,[21] *ML*[22] and *Dorobantu*.[23]

In the joined cases *Aranyosi and Căldăraru*, the CJEU especially recalled that the EAW mechanism operates on the basis of the principles of mutual recognition and mutual trust among the EU Member States. However, at the same time the Court in its judgement also made reference to 'exceptional circumstances'.

Hence, the Union principle of mutual recognition is not absolute, as exceptions are allowed, with references to 'exceptional circumstances' laid down in Article 4 of the Charter. In practice, it means that Article 4 of the Charter is binding on the EU Member States. In other words, when applying EU law the national courts are obliged to respect the provisions of the

18 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States [2002] OJ L 190/1.

19 Cf Article 607p para 1 (5) of the Polish Code of Criminal Procedure (1997) [Kodeks postępowania karnego], Dz.U. (1997), No 89, item 555 with subsequent amendments, which provides for an obligatory refusal to execute the EAW, if this could lead to violation of the freedoms and human rights. 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' **(**2021) 10 Central and Eastern European Migration Review, 95 <https://doi.org/10.17467/ceemr.2021.02>.

20 Brodowski (n 4).

21 Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru* v *Generalstaatsanwaltschaft Bremen*, EU:C:2016:198. Adriano Martufi, Daila Gigengack, 'Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings' (2020) 11 New Journal of European Criminal Law 282 <https://doi.org/10.1177%2F2032284420946105>.

22 Case C-220/18 PPU *ML*, EU:C:2018:589.

23 Case C-128/18 *Dumitru-Tudor Dorobantu*, EU:C:2019:857.

Charter. Also, the CJEU indicates that the absolute nature of the norms respecting human rights is confirmed in the provisions of the ECHR. It is argued that specifically, Articles 1 and 4 of the Charter and Article 3 of the ECHR, enshrine one of the fundamental values of the EU and its Member States, that means respect for the dignity of the human being and inextricably linked with it the prohibition of inhuman or degrading treatment (paras 82-87).[24]

Referring to the conditions of deprivation of liberty in the State issuing the EAW and the criteria that should be adopted in order to assess compliance with Article 4 of the Charter, it was the CJEU that issued two successive rulings of key importance for the national criminal justice system. These are respectively the judgments in the cases *ML* and *Dorobantu*. In accordance with the CJEU ruling in the *ML* case, although the issuing State provides for legal measures that enable the verification of the lawfulness of the conditions of deprivation of liberty (detention conditions) in the light of fundamental rights, the judicial authorities that execute this order are obliged to individually assess the situation of each person concerned (paras 75-76). At the same time, the CJEU, referring to the case law of the ECtHR, noted among other elements, that to constitute a violation of Article 3 of the ECHR, ill-treatment must reach a minimum level of severity which depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases the sex, age and state of health of the victim (para 91).[25]

In turn, when ruling in the *Dorobantu* case, the CJEU noted that:

> *Framework Decision 2002/584 explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5)* (para 48).

Nonetheless, the CJEU also pointed out that 'in exceptional circumstances' and on the basis of specific information, it is possible to place other limitations on the principles of mutual recognition and mutual trust between Member States, bearing in mind Article 4 of the Charter and Article 3 of the ECHR (paras 48-50).[26]

3.2. Surrender of citizens of the European Union and Member States of the European Free Trade Association (EFTA) in extradition proceedings

Regarding the surrender of European Union citizens to third countries in extradition proceedings, one should take into account the case law of the CJEU, in such cases as:

24 Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, EU:C:2016:198.

25 Case C-220/18 PPU *ML*, EU:C:2018:589.

26 Case C-128/18 *Dumitru-Tudor Dorobantu*, EU:C:2019:857.

Petruhhin,[27] *Pisciotti*,[28] *Raugevicius,*[29] *Ruska Federacija*[30] oraz *Generalstaatsanwaltschaft Berlin* (*Extradition vers l'Ukraine*).[31]

When ruling in the cases of *Petruhin* (para 60) and *Raugevicius* (para 49), the CJEU argues that in the event that a third country sends a request to a Member State for the extradition of a national of another Member State, the former must consider whether the extradition would infringe the fundamental rights guaranteed by the Charter, in particular Article 19. To recall Article 19 (2) of the Charter reads that 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

Furthermore, in *Pisciotti*, the CJEU referring to the national court questions held *inter alia* that:

> *in a case, such as that in the main proceedings, in which a Union citizen who has been the subject of a request for extradition to the United States under the EU-USA Agreement has been arrested in a Member State other than the Member State of which he is a national, for the purposes of potentially acceding to that request, Articles 18 and 21 TFEU must be interpreted as not precluding the requested Member State from drawing a distinction, on the basis of a rule of constitutional law, between its nationals and the nationals of other Member States and from granting that extradition whilst not permitting extradition of its own nationals, provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to a European arrest warrant and the latter Member State has not taken any action in that regard* (para 56).[32]

The CJEU's position was next confirmed in the case of *Ruska Federacija*, recalling that given the lack of an international agreement between the EU and a third country in the field of extradition, Member States should retain the competence to establish provisions on extradition. However, Member States are obliged to exercise this competence in compliance with EU law (para 48). Accordingly, if the concerned national (in this case, an Icelandic national) claims a serious risk of experiencing inhumane or degrading treatment in the event of extradition, the requested Member State should, prior to possible extradition, verify that their surrender will not infringe the rights set

27 Case C-182/15 *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*, EU:C:2016:630.
28 Case C-191/16 *Romano Pisciotti* v *Bundesrepublik Deutschland*, EU:C:2018:222.
29 Case C-247/17 *Denis Raugevicius*, EU:C:2018:898.
30 Case C-897/19 PPU *Ruska Federacija v I.N.*, EU:C:2020:262.
31 Case C-398/19 *Generalstaatsanwaltschaft Berlin*, EU:C:2020:1032.
32 Case C-191/16 *Romano Pisciotti v Bundesrepublik Deutschland*, EU:C:2018:222.

out in Article 19 (2) of the Charter (para 64). As the CJEU points out, if the requested State considers that Article 19 (2) of the Charter does not preclude the execution of the extradition request, there is still the necessity to examine whether the discussed restriction is proportionate to the objective of preventing the risk of impunity for the prosecuted person (para 69).[33]

In turn, in *Generalstaatsanwaltschaft Berlin* (*Extradition vers l'Ukraine*), the CJEU referred to the admissibility of surrendering BY, a Ukrainian and Romanian citizen, to Ukrainian authorities for the purpose of conducting criminal proceedings against him. In this case, the CJEU found that, if the Member State of the prosecuted person has been duly informed, the requested Member State may continue the extradition procedure and, where appropriate, extradite this person in the event of a failure to issue an EAW within a reasonable time by the Member State of which he or she is a national, taking into account all of the circumstances of the case (para 53). At the same time, the requested Member State should indicate to the Member State of which the prosecuted person is a national, a reasonable time limit after which, if there is no EAW issued by that State, the person will be extradited. When setting such a time limit, the Member State is obligated reconsider of all the circumstances of the case, in particular the duration of possible pre-trial detention and the complexity of the case (para 55).[34]

3.3 ECtHR judgment in *Bivolaru and Moldovan v France*

The judgment in the case of *Bivolaru and Moldovan v France*[35] is the third judgment of the ECtHR after the judgments in *Pirozzi v Belgium*[36] and *Romeo Castaño v Belgium*[37] 'controlling' the operation of the EAW mechanism between EU Member States. It has been said that in *Bivolaru and Moldovan v France*, the ECtHR delivered a landmark judgment in relation to the execution of EAWs between EU Member States, as well as the presumption of equivalent protection of human rights.[38]

Despite the merger of two cases concerning Romanian nationals, *G. Bilovaru* and *C. Moldovan,* the ECtHR ruled differently in relation to each of the applicants. The ECtHR found that the execution of the EAW resulted in a violation of Article 3 of the

33 Case C-897/19 PPU *Ruska Federacija v I.N.*, EU:C:2020:262.

34 Case C-398/19 *Generalstaatsanwaltschaft Berlin*, EU:C:2020:1032.

35 *Gregorian Bilovaru and Codrut Moldovan v France* Apps nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

36 *Pirozzi v Belgium* App no 21055/11 (ECtHR, 17 April 2018). The ECtHR found no violation of Articles 5 (1) (right to liberty and security) and 6 (1) (right to a fair trial) of the ECHR.

37 *Romeo Castaño v Belgium* App no 8351/17 (ECtHR, 9 July 2019). The ECtHR found a violation of Article 2 of the ECHR (right to life).

38 William Julié and Juliette Fauvarque, 'Bilovaru and Moldovan v. France: a new challenge for mutual trust in the European Union?', 22 June 2021 <https://strasbourgobservers.com/2021/06/22/bivolaru-and-moldovan-v-france-a-new-challenge-for-mutual-trust-in-the-european-union/> accessed 3 December 2021.

ECHR in the case of *Moldovan* and no such violation in the *Bilovaru* case. Both applicants argued that the execution of the EAW by French judicial authorities constituted a violation of Article 3 of the ECHR. In the *Moldovan* case, the ECtHR found that the information provided was sufficient to confirm that the conditions of detention posed a real risk of inhuman and degrading treatment. Moreover, the French judicial authorities should not have relied on the assurances of the Romanian authorities regarding the improvement of these conditions. The analysis of the materials in the *Bivolaru* case led the ECtHR to a different conclusion. Firstly, it underlined that asylum rights were granted by the Swedish authorities to the complainant prior to Romania's accession to the EU. In the opinion of the ECtHR, in circumstances where there are doubts as to the admissibility of the execution of an EAW, the French judicial authority should have asked the CJEU for a preliminary ruling. Secondly, it was noted that the information provided by the applicant regarding the conditions of his detention, as well as the risk of persecution on the grounds of his religious beliefs, was insufficient to establish a violation of Article 3 of the ECHR.[39]

Conclusions

In conclusion, one may admit that the visible 'judicial dialogue' between the CJEU and national courts, as well as between the CJEU and ECtHR, is a very important factor in strengthening respect for human rights. Without any doubt, the existing 'judicial dialogue' is crucial for establishing the European area of freedom, security and justice, in which human rights protection takes a central place. Such a 'judicial dialogue' allows for the operation of minimum common standards in the national criminal justice systems of all EU Member States, in accordance with the international norms.

The prohibition of inhuman or degrading treatment is a premise for limitations of the principles of mutual recognition and mutual trust in transnational judicial cooperation by the EU Member States. It should be applied by competent national authorities, both in domestic criminal proceedings and cross-border proceedings. In practice, this means that the prohibition of inhuman or degrading treatment should be observed at all stages of criminal proceedings, applying also to those persons who are detained at a Police Station, and during the course of interrogation.

To conclude, in light of EU criminal law, one may state that the prohibition of inhuman or degrading treatment is truly a binding norm upon all EU Member States. The approach undertaken by the Union's policy seems to be relevant with the contemporary humanisation of criminal law, which is based on international protection of human rights.

39 Ibid*; Gregorian Bilovaru and Codrut Moldovan v France* Apps nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

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Right of access to a lawyer in Polish preparatory proceedings, comments on the Directive 2013/48/EU

Justyna Głębocka

Abstract

This article aims to present the main issues related to the right of access to a lawyer in Polish preparatory proceedings in the context of the Directive 2013/48/EU. The deadline for its implementation expired on 27 November 2016, and although the Polish legislator tried to transpose its provisions by means of the 2018 amendment, it did not substantially change any rights falling within the scope of the right to a formal defence. The scope of the procedural right of access to a lawyer during a Polish preparatory proceeding raises a number of doubts regarding its compliance with EU law, particularly at the earliest stage of such a proceeding.

Keywords

access to a lawyer, right to a defence, suspect, rights upon deprivation of liberty, rights of suspects, Directive 2013/48/EU

Introduction

The right of access of accused persons to a lawyer is an essential part of the right of defence, and thus of a fair trial. At the European level, this issue was originally regulated in Article 6(3) letter c of the ECHR and repeated in Article 47 of the Charter. In 2013,

Directive 2013/48/EU[1] was adopted, which regulated at the EU level the minimum standards determining the scope of an accused person's right of access to a lawyer in criminal proceedings. Directive 2013/48/EU directly refers to Article 47 and 48(2) of the Charter and Article 6 of the ECHR. Furthermore, the standards set out therein should be ensured at least to the extent defined in the Strasbourg jurisprudence.[2] However, one must emphasise that it is extremely dynamic and has changed significantly in recent years.[3]

The deadline for the implementation of this Directive for Member States was 27 November 2016. By the Amendment Act of 10 January 2018,[4] the Polish legislator decided to 'transpose' its provisions in a specific way, through the information that the amendment, although it does not contain any provision relating to the right of access to a lawyer, is an expression of the implementation of the Directive.[5] Therefore, the issue of adapting regulations on criminal proceeding to EU standards still remains valid.

The main difficulties resulting from the application of the right of access to a lawyer within the meaning of the Directive in Polish criminal proceedings primarily relate to a preparatory proceeding conducted by non-judicial authorities at the earliest stage of criminal proceeding where there may be a significant restriction of the right to liberty. It is at this stage of the proceedings that there is a high risk of obtaining evidence through methods of coercion or oppression in defiance of the will of the accused. As ECtHR points out, early access to a lawyer is part of procedural safeguards, especially with regard to the very essence of the privilege against self-incrimination.[6] Various experiences in different countries show that the Police are not necessarily interested in lawyer participation in pre-trial interrogations.[7] With greater reason, it seems necessary that the relevant provisions regarding the preparatory proceedings ensure the right of access to a lawyer

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

2 From the beginning of the drafting process, the contents of the Directive were largely based on the case law of the ECtHR, particularly the case of *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008); see Anneli Soo, 'Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13th of September 2016)' (2017) 4 European Journal of Crime, Criminal Law and Criminal Justice 327.

3 Wojciech Jasiński, 'Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski' (2019) 1 Europejski Przegląd Sądowy 24.

4 Ustawa o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw (2018) [Amendment Act to the Code of Criminal Procedure], Dz.U. (2018), item 201.

5 Hanna Kuczyńska, 'Bezpośrednie stosowanie dyrektywy UE w sprawach karnych. Skutki braku implementacji dyrektywy UE' in Dominika Czerniak and Jerzy Skorupka (eds), *Europejskie gwarancje prawidłowego wymiaru sprawiedliwości w sprawach karnych* (C.H. Beck 2019) 73, 76.

6 *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).

7 Violet Mols, 'Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers' (2017) 8 New Journal of European Criminal Law 300, 305.

in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

This article tries to answer the question whether the provisions of the Polish Code of Criminal Procedure (1997) [*Kodeks postępowania karnego*],[8] with regard to the early stage of the proceedings, i.e. the preparatory proceedings, remain consistent with the provisions of the Directive. It indicates the main areas relating to the personal and material scope of the right of access to a lawyer that raise doubts in relation to EU standards. Finally, it also suggests changes that should be implemented in the Polish Code of Criminal Procedure as soon as possible in order to avoid the need to apply the Directive directly.

1. The scope of the right of access to a lawyer in Polish preparatory proceedings

The right of access to a lawyer, in accordance with the concept adopted by the ECtHR, refers to the formal aspect of the right to defence, consisting of the possibility of having a professional lawyer and unlimited use of their assistance throughout the entire criminal proceeding.[9] Obviously, this right should also include the opportunity for a lawyer to exercise a number of rights, allowing for real conduct of defence activities, including the right to unhampered contact with the suspect. At the same time, the method of informing the suspect about the right of access to a lawyer is significant, as is the manner of notifying the defence lawyer about the time and place of acts they may participate in.

The right of access to a lawyer in the Polish model of criminal proceedings is regulated at several levels. The main normative act relating to criminal proceedings is the Code of Criminal Procedure of 1997. The relevant provisions relating to the right to defence, including formal defence, are also found in the Constitution.[10] The scope of this right is also influenced by the provisions of ECHR and the Strasbourg jurisprudence. Direct impact in this field also results from EU legislation, primarily the provisions of the Directive. When comparing these levels, clear discrepancies can be noticed.

The main difficulties relate to the personal scope of the protection provided for by the Directive, the scope of activities in which the presence of a lawyer should be respected, as well as the manner that ensures the right of access to a lawyer.

8 Dz.U., (1997), No 89, item 555 with subsequent amendments.

9 Although Article 2(4) of the Directive indicates its application relates to proceedings before a court having jurisdiction in criminal matters, which could suggest that the preparatory proceedings remain outside its scope, its detailed provisions and the preamble itself imply it applies from the earliest stage of criminal proceedings, such as investigative activities conducted by the police or other law enforcement.

10 The Constitution of the Republic of Poland (1997), Dz.U. (1997), No 78, item 483 with subsequent amendments.

1.1. The personal scope of the right of access to a lawyer

The first question one should answer is to whom the Polish Code of Criminal Proceedings (CCP) grants the right of access to a lawyer. The issue of the right to defence is regulated in the Polish legal order on several levels. It is guaranteed, both at the level of the constitution and the Code of Criminal Procedure itself, but it should be emphasized that the subjective scope of this right in the CCP is narrower than the constitutional one. In both levels, there is no doubt that the suspect has the right to a defence. The difficulties under the Code of Criminal Procedure arise in relation to the moment when this right is granted. This problem directly translates into the right of access to a lawyer, which is part of the right to defence. The existing constitutional standard provides for the right to defence, including the right of access to a lawyer from the first action directed against a specific person. To this extent the provisions of CCP are inconsistent with the constitutional provision granting the same right to every person, regardless of their procedural status.[11] Article 6 of the CCP expressly grants the right to defence only to the formal party of the proceeding, therefore at the stage of pre-trial proceeding, it is only available after a decision has been issued to present charges or charges have been presented in relation to interrogation as a suspect.[12] A suspected person is not a formal party to the proceeding, *ergo* their status is not the same as that of a suspect and may only use the guarantees and rights that have explicitly been granted to them. A literal interpretation of the provision, conferring the right to a defence under the CCP, earnestly questions the possibility of extending it to the suspected person. Importantly, the legislator also fails to introduce a formal definition of a suspected person, and the doctrine adopts numerous definitions.[13]

At the stage of negotiating the contents of the Directive, the subjective scope of the right of access to a lawyer triggered a wide discussion between the Member States.[14] Ultimately,

11 Dariusz Dudek, *Konstytucyjna wolność człowieka a tymczasowe aresztowanie* (Lubelskie Wydawnictwa Prawnicze 1999) 202; Włodzimierz Wróbel, 'Konstytucyjne prawo do obrony w perspektywie prawa karnego materialnego' in Violetta Konarska-Wrzosek, Jerzy Lachowski and Józef Wójcikiewicz (eds), *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi* (Wolters Kluwer Polska 2010) 225; Ryszard A. Stefański, 'Prawo do obrony osoby podejrzanej' in Tomasz Grzegorczyk, Jacek Izydorczyk and Radosław Olszewski (eds), *Z problematyki funkcji procesu karnego* (Wolters Kluwer Polska 2013) 296, 308; Sławomir Steinborn and Małgorzata Wąsek-Wiaderek, 'Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej' in Maria Rogacka-Rzewnicka, Beata T. Bieńkowska, Hanna Gajewska-Kraczkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego* (Wolters Kluwer Polska 2015) 429, 430.

12 Article 71 para 1 of the CCP.

13 More on the definition of a suspected person see: Szymon Pawelec and Aleksandra Komar 'Problem reprezentacji praw osoby podejrzanej a rola profesjonalnego pomocnika na wczesnym etapie postępowania przygotowawczego' in Iwona Sepioło (ed), *Nullum crimen sine lege* (C.H. Beck 2013) 327, 327-329.

14 Alicja Klamczyńska, Tomasz Ostropolski, 'Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy' [2014] (15) Białostockie Studia Prawnicze 143, 147.

Article 2(1) of the Directive declares it applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. Furthermore, Article 3(2) clarifies that access to a lawyer shall be granted to the suspect or accused person without undue delay, starting with the earliest investigative steps indicated therein. The intention of the EU legislator was, in one respect, to extend the right of access to a lawyer not only for the accused at the stage of court proceedings, but also for suspects against whom preliminary proceedings are conducted, and in the other, that this right be guaranteed as early as possible, regardless of whether these are the formally presented charges or the investigating measures taken against a given person that *ipso facto* prove the pending proceeding is directed against them. This interpretation remains consistent with the Strasbourg standard.[15] Numerous representatives of the doctrine follow such argumentation,[16] pointing out that the right of access to a lawyer under the Directive shall be granted since the authorities carry out any investigative act against a person because he is being suspected of committing a crime, and also without undue delay if deprived of liberty.[17] With such an interpretation, the provisions of the Polish CCP remain in opposition not only to the constitutional guarantees but also to those granted by the Directive. It should be noted, however, that representatives of the Polish executive interpreted the provisions of the Directive differently and argue that the provisions of the Directive should be applied to a formal suspect, while a suspected person is not covered by its guarantees. Consequently, in their view, the Polish CCP, which grants the right of access to a lawyer only with respect to the suspect, fully reflects its provisions and there is no need for any adjustments.[18]

Acknowledging the position that the Directive introduces order to the right of access to a lawyer from the earliest possible moment, one must realise that Polish pro-

15 Małgorzata Wąsek-Wiaderek 'Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej' [2019] (1) Europejski Przegląd Sądowy 17, 18.

16 See *inter alia:* ibid; Piotr Kardas 'Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Salduz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata' [2019] (1) Europejski Przegląd Sądowy 4, 5; Klamczyńska, Ostropolski (n 14) 150; Tomasz Tadeusz Koncewicz and Anna Podolska 'Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim' [2017] (9) Palestra 9, 13-14; Sławomir Steinborn in 'Opinia Komisji Kodyfikacyjnej Prawa Karnego w sprawie implementacji w prawie polskim dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE' <www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego> accessed 9 August 2021.

17 Lorena B. Winter 'The EU Directive on the Right to Access to a Lawyer: A Critical Assessment' in Stefano Ruggeri (ed), *Human Rights in European Criminal Law* (Springer International Publishing Switzerland 2015) 111.

18 See Helsińska Fundacja Praw Człowieka [Helsinki Foundation for Human Rights], 'Odpowiedź podsekretarza stanu Ministerstwa Sprawiedliwości z dnia 13 lutego 2017 r. na pismo sekretarza zarządu Helsińskiej Fundacji Praw Człowieka z dnia 24 stycznia 2017 r. w sprawie implementacji dyrektywy 2013/48/UE' <www.hfhr.pl/wp-content/uploads/2018/05/HFPC-dyrektywa-ue-odpowiedz-MS.pdf> accessed 9 August 2021.

visions, which do not directly grant the suspected person the right to a defence, remain incompatible with EU law. The constitutional case law presenting the constitutional standard[19] fails to solve existing dilemmas. Even if one assumes that the right to defence is granted from the first action directed against a specific person, regardless of their status, one should also note that such a right comes down to a mere general declaration, supported by neither the specific rights resulting from the provisions of the Code of Criminal Procedure nor clear remedies in the event of its violation under the CCP. The practical and effective protection of the suspected person may only result from the direct application of the provisions of the Directive, which, however, should not constitute an alternative to the obligation to implement it.[20]

1.2. The material scope of the right of access to a lawyer

The very essence of the right of access to a lawyer is the possibility of a defence attorney to participate in certain activities of the preparatory proceeding. The issues in this respect primarily relate to the scope of the investigative acts, in which the suspect may request access to a lawyer, the method of instructing them about such a right, and to the real problems arising from notifying the lawyer about the undertaken procedural acts, as well as to the possibility of preparing a defence. The Amendment Act of 10 January 2018, designed in theory to implement the Directive, did not substantially revise any provisions on the formal right to a defence.

1.2.1. Questioning

The basic procedural step to be referred to is the questioning. Under the *Salduz* doctrine, as a rule, a suspect should always have the right of access to a lawyer prior to and during all questioning by any of the law enforcement authority.[21] However, on the basis of Polish regulations, there is not unquestionable, guaranteed right off access to a lawyer when questioning a suspect. Pursuant to Article 301 of the CCP, the participation of an appointed lawyer should be ensured on a motion from the suspect. *Expressis verbis* it follows from this provision that the right to demand the participation of a lawyer is applicable only in relation to a suspect. For this reason, it is doubtful that Article 301 of

19 See, *inter alia,* the following rulings of the Polish Constitutional Tribunal [*Trybunał Konstytucyjny* (TK)]*:* K 37/11, 11 December 2012, [2012] (11) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 133; K 19/11, 3 June 2014 [2014] (6) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 60; K 30/11, 8 October 2013 [2013] (7) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 98. In this context see also Marek Zubik 'Konstytucyjne aspekty prawa wyboru obrony i obrońcy w sprawach karnych w perspektywie orzecznictwa Trybunału Konstytucyjnego' [2019] (1) Europejski Przegląd Sądowy 11.

20 Kuczyńska (n 5) 88.

21 Steven Cras, 'The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings' [2014] (1) EUCRIM 32, 38.

the CCP could be the foundation of such a power in relation to a witness who, during an interrogation, might become a suspect or even a decision might be made to press charges against them. This provision also does not directly explain what the real scope of rights are of a suspect who, whilst oblivious, responded to a summons to a witness which led to charges being pressed.[22] In accordance with the standards resulting from the Directive in such a situation, law enforcement should first instruct on the right to request defence and, if the suspected person requires so and a lawyer is available, adjourn the proceeding until legal counsel is present. Only on this basis would a witness or a suspected person be able to participate in the hearing in the presence of their lawyer. However, it has to be pointed out that, despite the correctness of such a rule, the practical implementation of this rule may be difficult, particularly, as during the questioning of a witness it is unclear when the person will start to be considered a suspected person and no longer a witness.[23]

In addition to the above-mentioned difficulties related to the subjective scope, the following problems should be highlighted, the general nature of which Article 301 of the CCP does not explain. The first of them refers to the disputed question whether it concerns an already appointed defence lawyer, as indicated by its literal wording,[24] or whether it results from an order to allow the suspect to appoint a lawyer if they have not yet appointed one.[25] The question whether this right is available only once,[26] or it applies to all subsequent hearings during the entire preparatory proceeding,[27] also raises controversy. Furthermore, there are factual problems related to the possibility of contacting a lawyer, if one has not been appointed, the manner of notifying a legal counsel about the investigation act, the waiting time for their arrival, enabling the suspect to contact the lawyer in order to prepare a defence, as well as the consequences of their failure to appear before authorities.[28] The current shape of the regulation under Article 301 of the CCP makes the right of access to a lawyer often deceptive, as it allows

22 Based on Article 313 of the CCP, questioning is not necessary to create an accused party, which means that after issuing and announcing the decision on presenting charges, the suspected person becomes a formal suspect, and consequently also becomes the addressee of the right under Article 301 of the CCP.

23 Winter (n 17) 111.

24 Jan Grajewski *Przebieg procesu karnego* (C.H. Beck 2013) 59; Michał Kurowski in Dariusz Świecki (ed), *Kodeks postępowania karnego. Komentarz*, Vol. 1, paras 1-424 (Wolters Kluwer Polska 2018) 1135.

25 Piotr Hofmański, Elżbieta Sadzik and Kazimierz Zgryzek in Piotr Hofmański (ed), *Kodeks postępowania karnego. Komentarz do artykułów 297-467*, Vol. 2 (C.H. Beck 2011) 30.

26 Tomasz Grzegorczyk *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz* (Wolters Kluwer Polska 2008) 638; Jacek Kosonoga in Ryszard A. Stefański (ed), *System Prawa Karnego Procesowego. Postępowanie przygotowawcze,* Vol. 10 (Wolters Kluwer Polska 2016) 777-778; Kurowski (n 24) 1134-1135.

27 Piotr Krzysztof Sowiński *Uprawnienia składające się na prawo oskarżonego do obrony* (Wydawnictwo Uniwersytetu Rzeszowskiego 2012) 287.

28 Sławomir Steinborn 'Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi *de lege lata* i *de lege ferenda*' [2019] (1) Europejski Przegląd Sądowy 38, 41-42.

the questioning to be carried out without the participation of a lawyer even in spite of such a demand, in far too many situations. For example: 1) the suspect has not yet appointed a lawyer, 2) the suspect appointed a lawyer, but not knowing that they will be questioned as a suspect appeared themselves, while the authorities did not adjourn the proceedings until they arrival of a lawyer, 3) the lawyer failed to attend, also in the case of a justified absence, 4) there is another questioning of the suspect, while the previous one took place in the presence of a lawyer. One might come to the conclusion that the procedural obligations of the authorities related to ensuring access to a lawyer have been set at an extremely low level.[29]

1.2.2. Other investigative acts

The Directive, by establishing the minimum levels of the right of access to a lawyer, is not limited to questioning only, other investigative acts also come under scrutiny in terms of how access to a lawyer should be ensured. This group includes: 1) identity parades, 2) confrontations and 3) reconstructions of the scene of a crime. The provisions of the Polish, criminal procedure do not establish separate conditions for the participation of a lawyer during these activities, therefore general rules should be applied.

The provisions relating to an interrogation apply to a confrontation, since in the Polish, legal order it is considered a type of this act. Henceforth, the above-mentioned remarks remain analogous. However, it should be emphasised that, in practice, the application of Article 301 of the CCP may be questionable in a situation when the suspect was accompanied by a lawyer during the previous questioning. As a result, the literal wording of this provision raises doubts as to whether this right is still valid for each subsequent investigating act. If, however, the confrontation concerns a suspected person or a witness, the problems under CCP relating to the personal scope of the right of access to a lawyer remains relevant. It should be remembered that both the witness and the suspected person under the CCP do not enjoy the status of a party. Consequently, at best, they can appoint an attorney, but only when their interests require it. This is, ultimately, decided by the authority. The Directive regulating the right of access to a lawyer does not grant the witness one, but the suspected person's rights should be ensured to a degree that allows for the practical and effective exercise of the right to defence.

Moreover, referring to the act of an identity parade (regulated in Article 173 of the CCP), one should note that this is an activity that, in practice, mainly concerns the suspected person, not the formal suspect. Therefore, it should be concluded that, in this respect, the Polish provisions do not refer to the participation of a lawyer during such an act at all. Carrying it out in the *in personam* stage clearly does not place the suspect in a more favourable position. Article 173 of the CCP does not establish an independent basis. Therefore the general provisions of Article 316 and 317 of the CCP, concerning

29 Ibid, 42.

the participation of the parties and their lawyers in the activities of the preparatory proceeding, should be applied. For this reason, an established lawyer should, as a rule, be allowed to participate in the act of an identity parade, which is unique by definition. However, it is not without significance that there are no regulations on the method of notifying the parties about investigative acts, particularly specifying the minimum time between the notification and the date of the planned action, as well as the possibility of preventing the parties and their lawyers from undertaking any measures should the risk of loss or distortion of evidence arise in the case of a delay. The application of Article 317 of the CCP can cause even more problems, as it introduces a principle allowing participation in investigative acts only on request of the defence. In the absence of an announcement of the planned date to the defence, it basically is a barrier to exercise one's rights. Moreover, in this case, the legislator provides for the possibility of refusing admission to participate due to the important interest of the investigation. Comments on Articles 316 and 317 of the CCP also apply to the act of crime scene reconstruction.

1.2.3. Deprivation of liberty

The guarantees relating to the right of access to a lawyer upon deprivation of liberty constitute an issue that requires separate discussion. Article 245 of the CCP (along with Article 244 para 2 of the CCP), granting the detained person the right of access to a lawyer, is a source of a number of difficulties in practice.

First, the instruction for the detained does not contain specific information about practising lawyers who could assist them in the course of the proceedings. In fact, the detained is often unable to independently indicate the contact data that would allow them to establish contact with their lawyer on short notice. To increase the efficiency of exercising the right of access to a lawyer, it would be advisable to provide, at each police station, an appropriate list of lawyers with their contact details and the possibility of introducing voluntary duty hours at night and on non-working days for lawyers who could help with arrests and interrogations.[30] At the same time, the mere provision of access to a lawyer through the duty counsel system may not suffice in connection with the adoption of the Directive (EU) 2016/1919[31] and it would be necessary to ensure immediate access to a lawyer as part of legal aid and the system of the rapid appointment of a lawyer funded by the state.[32] The indicated problems with access to a lawyer are

30 Postulated by the Helsinki Foundation for Human Rights, the Polish Bar Council and the Warsaw Bar Council. Postulates of Helsinki Foundation for Human Rights, the Polish Bar Council and the Warsaw Bar Council <www.hfhr.pl/wp-content/uploads/2019/10/Lista-postulat%C3%B3w_EDP.pdf> accessed 6 August 2021.

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

32 Wąsek-Wiaderek (n 15) 20.

visible not only in relation to the detained, but also those deprived of liberty for other reasons, such as being temporarily detained in another case or serving a prison sentence.

Second, doubts with regard to questioning remain analogous to those regarding detention. In addition, in this case, in Polish, domestic law there are no specific regulations that would define the method of ensuring contact with a lawyer, including the waiting time for their arrival. It is obvious that it is impossible to ensure unrestricted access to a lawyer due to the rapid pace of a detention procedure. One should, however, keep in mind that certain minimal standards, similar to those set out in Article 8 of the Directive, must be fulfilled. As an exception, the Directive provides for the possibility of introducing certain temporary restrictions on access to a lawyer. However, each time they should meet strict conditions, primarily relating to proportionality and necessity. Moreover, any decision limiting that access should be submitted to judicial review. In the interim, in accordance with Article 245 of the CCP, a detained person may not be refused contact with an attorney. However, no provision of the Code obliges the authorities to interrupt the interview or not to proceed with it if the counsel has not yet presented themselves.[33] The Code regulations allow the detainee to be questioned in the absence of a lawyer, even if they submit such a request.[34] Moreover, practice shows that detainees face real obstacles when seeking professional legal assistance and this contact is sometimes impeded by law enforcement officers.[35]

Incidentally, it is worth mentioning that doubts as to compliance with the Directive also appear with regard to the hearing procedure referring to temporary detention. *De lege lata*, before applying a preventive measure, the suspect should be questioned, whereas the appointed counsel should be allowed to participate in the hearing if they are present. At the same time, this provision refers only to an appointed lawyer (see previous comments). Moreover, according to Article 249 para 3 of the CCP, there is no obligation to notify a lawyer of the time and place of such a hearing[36] which clearly contradicts the right of access to a lawyer.

1.2.4. Confidentiality of contact with a lawyer

One should also consider the method of exercising contact with a lawyer. The provisions of the Directive explicitly require respect for the confidentiality of communication between a suspect and their legal counsel, including meetings, correspondence, telephone conver-

33 Dominika Czerniak, *Europeizacja postępowania dowodowego w polskim procesie karnym. Wpływ standardów europejskich na krajowe postępowanie dowodowe* (C.H. Beck 2021) 156.

34 Ibid.

35 Adam Klepczyński, Piotr Kładoczny and Katarzyna Wiśniewska *O (nie)dostępnym dostępie do adwokata. Raport na temat wdrożenia Dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE* (HFHR 2017) 37-38 <www.hfhr.pl/wp-content/uploads/2018/01/HFHR_JUSTICIA2017_National-Report_PL.pdf> accessed 10 January 2022.

36 Piotr Kruszyński 'Tymczasowe aresztowanie' in Piotr Kruszyński (ed) *Nowe uregulowania prawne w kodeksie postępowania karnego z 1997 r.* (Dom Wydawniczy ABC 1999) 221, 234.

sations and other forms of communication permitted under national law. It should be emphasised, however, that the confidentiality of these contacts is not subject to limitations or exceptions under Article 8 of the Directive. The application of temporary derogations has been provided for the right to ensure immediate contact with a lawyer upon deprivation of liberty. An in depth analysis of the provisions of the Directive, including the preamble, should lead to the conclusion that the purpose of any restrictions is to delay access to a lawyer and the possibility of carrying out activities in their absence, not to interfere with the confidentiality of any such contact.[37] Taking this into consideration, the provisions of Article 73 and 245 para 1 of the CCP, to the extent that they allow for the presence of the prosecutor or another person authorised by the prosecutor's office during meetings of the temporarily arrested or detained with an appointed defender or a lawyer, as well as the control of correspondence for a period of 14 days from the date of temporary arrest, should be considered contradictory to the Directive.[38] Without going into a detailed analysis of these limitations, the following problems arising from them should be indicated: 1) the freedom of contact has been guaranteed with regard to the appointed counsel, therefore it does not refer directly to meetings with a lawyer who is not yet appointed, 2) the condition allowing the use of restrictions is of a general nature, which, in fact, allows for its wider application,[39] 3) the decision to admit the presence during meetings and control of correspondence is not subject to appeal.[40]

2. Remedies

No less important is the issue of remedies in the event of a violation of the right of access to a lawyer. The appropriate system of corrective measures support the implementation of guarantees resulting from such a right. The provisions of the Directive remain rather

37 Recital 33 of Directive states that the MS should respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in Directive, without derogation. Klamczyńska, Ostropolski agree with this view (n 14) 159; however Steinborn sees it differently arguing that confidentiality may be subject to time limits, see Steinborn 'Dostęp do obrońcy' (n 28) 44.

38 It is noteworthy that the Polish Constitutional Tribunal takes the position that limiting the unhampered contact of the accused and the defender is, especially at the initial stage of the proceedings, constitutionally and conventionally permissible. See: SK 39/02 of 17 February 2004, [2004] (2) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 7; K 25/11 of 10 December 2012, [2012] (11) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 132.

39 One should mention that the practice of law enforcement indicates that the premise intended to refer to exceptional situations is used as a rule; see Klepczyński, Kładoczny, Wiśniewska (n 35) 31.

40 The postulate to grant the detained the right to appeal against the decision issued pursuant to Article 73 para 2 or 3 of the CCP is raised by Maciej Fingas 'O konieczności poszerzenia zakresu kontroli zażaleniowej nad niektórymi decyzjami dotyczącymi praw oskarżonego – wybrane problemy implementacji unijnych dyrektyw w polskim procesie karnym' [2018] (1) Białostockie Studia Prawnicze 47, 58-59; Steinborn 'Dostęp do obrońcy' (n 28) 44.

enigmatic in this regard. In fact, Article 12(1) states that Member States shall ensure that suspects or accused persons in criminal proceedings have an effective remedy under national law in the event of a breach of the rights under this Directive. In the original draft, the exclusion of unlawfully gathered evidence had been provided. However, due to the objections of the Member States, the decision was made to depart from this concept.[41] *De lege lata*, the provision of Article 12(2) read together with the Preamble, only suggests the need to consider the exclusion of evidence obtained in breach of Article 3(6) of the Directive, in order to preserve the fairness of the proceeding.[42] The current Strasbourg jurisprudence also rejected the thesis about the automatic influence of the violation of the right of access to a lawyer on the lack of fairness of the entire proceeding.[43]

In practice, this issue is extremely important. Statements received from the suspect at the initial stage of the preliminary proceeding may be of key importance for the case. The presence of a legal counsel during questioning, especially at an early stage of the proceeding, helps respect the right not to incriminate oneself, prevents testimonies obtained by means of violence, threats, torture or inhuman and degrading treatment, required respect for the principle of equality of arms, and takes into account the mental health and physical condition of the suspect. It also presents an opportunity to better assess the situation and prepare a line of defence.[44] Moreover, the ECtHR has repeatedly ruled that it is practically impossible to remedy a violation of the right of access to a lawyer at a later stage of a criminal trial.[45] In this respect, the scope of the possibility to use evidence from statements received in the lawyer's absence is of significant importance.

In the current Polish legal status, it should be considered that limiting the right of access to a lawyer during investigative acts does not exclude the possibility of recognising such evidence as the basis for decisions of the court adjudicating on the merits. In accordance with the principle of free assessment of evidence expressed in Article 7 of the CCP, the authorities form their beliefs on the basis of all the evidence gathered, only with the exception of that for which certain exclusions are in force. Free assessment requires the court to thoroughly analyse the circumstances of how evidence was being gathered, which involves the need to assess, *inter alia*, the conditions for questioning in the absence

41 For more details see Anneli Soo 'Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel' (2017) 25 European Journal of Crime, Criminal Law and Criminal Justice 31, 35.

42 Kuczyńska (n 5) 100-102.

43 *Ibrahim and others v United Kingdom* Apps nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 February 2016).

44 Andrzej Sakowicz 'Zakaz dowodowego wykorzystania wyjaśnień podejrzanego występującego bez obrońcy bądź pod nieobecność obrońcy' [2019] (1) Europejski Przegląd Sądowy 47, 49 with literature and jurisprudence indicated therein.

45 *Panovits v Cyprus* App no 4268/04 (ECtHR, 11 December 2008). However, this does not change the fact that the current jurisprudence indicates that generally it is permissible to limit the right of access to a lawyer at the stage of preparatory proceedings for compelling reasons (see *Ibrahim and Others v United Kingdom*).

of a lawyer. Nevertheless, there is no legal basis for the automatic admission that evidence obtained in violation of the right of access to a lawyer should, by definition, be excluded. This is confirmed both by the previously indicated provisions of the Directive and the ECtHR jurisprudence. Under Polish legislation, violating the provisions on gathering evidence does not in itself result in the exclusion of the evidence provided as such an outcome does not result directly from a specific provision. Therefore, the exclusion of evidence will cover, for example, statements received under duress or under the influence of a threat (Article 171 para 7 of the CCP), which may, in some cases, be related to the absence of a defence lawyer, while the violation of the right of access to a lawyer in itself does not lead to excluding evidence. Moreover, one should bear in mind that Polish provisions allow for a wide range of procedural acts in the absence of a lawyer. Doubts may arise in connection with a clear violation of the provisions of the procedure, such as the lack of instructions on the right to access to a lawyer and performing acts despite the clear objections of the suspect who demands the presence of a lawyer.

Representatives of the doctrine, who are in favour of imposing an exclusion of a suspect's statements taken in absence of a lawyer from evidence,[46] refer to the Article 170 para 1 (1) and Article 168a of the CCP which presents many problems of interpretation and its editing is not unambiguous. Regardless of the presented different interpretations of the indicated provision[47], both doctrine and jurisprudence state, however, that this provision should be understood as meaning that evidence gathered in violation of procedural provisions is legally inadmissible, if at the same time it was obtained in violation of constitutional or international rights of an individual, including the rights resulting from the standard of a fair trial. As noted by the Supreme Court, despite the introduction of a general rule on the admissibility of illegal evidence: 'Article 168a of the CCP may not constitute the legal basis for admitting evidence obtained in violation of procedural provisions or by means of a prohibited act, if gathering such evidence would render the process unfair within the meaning of Article 6(1) of the ECHR'.[48] A problem, however, arises from the correlation between the right of access to a lawyer and the rule of fair trial in the jurisprudence of the Strasbourg Court, which are not uniform in this respect.

There is no doubt that a fair trial consists of a number of procedural safeguards, including the right to a defence, both material and formal. The European Parliament and the Council, as well as the ECtHR itself, ultimately do not support an absolute exclusion of gathered evidence in the event of the violation of the right of access to a lawyer in a criminal case. Furthermore, although, initially, the jurisprudence was heading in this

46 Sakowicz (n 44).

47 Anna Demenko, 'Selected remarks on the accused's right of access to a lawyer under Directive 2013/48/EU' [2018] (12) Palestra 14, 16.

48 Polish Supreme Court [*Sąd Najwyższy* (SN)] decision of 26 June 2019, IV KK 328/18, [2019] (8) Orzecznictwo Sądu Najwyższego w sprawach Karnych i Wojskowych, item 46.

direction,[49] the latest judicature indicates opposite tendencies.[50] The continental model of elimination of evidence obtained in violation of law characterised by the fact, that 'the admissibility of deficiently gathered or presented evidence can be freely assessed by a judge, who takes into account the principles arising from the Constitution, the ECHR and generally recognized values'.[51] The ECtHR claims that each case should be analysed *ad casu*, taking into account all circumstances and, only on this basis, should a court decide on the impact of the evidence when passing a sentence. The assessment of the violation of the right of access to a lawyer from the point of view of a fair trial requires, each time, an examination of the following factors: 1) whether there was a restriction on the right to a lawyer, 2) whether there were compelling reasons for this restriction, 3) whether the proceedings, as a whole, were fair.[52] For this reason, deriving evidence exclusion from an international norm seems too far-reaching a conclusion. Moreover, although the fairness of proceedings, the objectives of the Directive, the general sense of justice and the principle of trust in national authorities speak for such a need, there are currently no clear, legal grounds for such a solution. Currently, the general rules related to the control of verdicts issued by courts of first instance, are the only true remedy that allow for a possible correction of such violations. Therefore, any deficiencies in access to a lawyer may constitute the basis for a change or revocation of a judgment issued, as part of the appeal procedure, due to a violation of procedural provisions that may have affected the judgment.

Conclusions

The analysis of applicable provisions leads to the conclusion that the right of access to a lawyer in the Polish, criminal procedure is not in compliance with the Directive. The adopted, legal solutions allow for wide deviations from this principle, thus violating the standards adopted by the Directive. The optimism of the executive in this regard is unjustified and the very 'fashion' of implementing the Directive raises serious doubts, especially in the light of the above-mentioned issues. To reiterate, it is necessary to postulate the introduction of rapid, legislative changes by clearly extending the scope of the right of access to a lawyer. In this respect, it is extremely important to indicate the need for:

49 *Salduz v Turkey*; *Adamkiewicz v Poland* App no 54729/00 (ECtHR, 2 March 2010); *Demir v Turkey* App no 25381/02 (ECtHR, 28 July 2009); *Brusco v France* App no 1466/07 (ECtHR, 14 October 2010).

50 See, *inter alia,* the following rulings of the ECtHR: *Ibrahim and others v United Kingdom* Apps nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 February 2016); *Artur Parkhomenko v Ukraine* App no 40464/05 (ECtHR, 16 February 2017); *Zherdev v Ukraine* App no 34015/07 (ECtHR, 27 April 2017).

51 Hanna Kuczyńska, 'Mechanisms of elimination of undesired evidence from criminal trial: a comparative approach' (2021) 7 Revista Brasileira de Direito Processual Penal 43, 72 <https://doi.org/10.22197/rbdpp.v7i1.473>.

52 See for example *Tandoğan v Turkey* App no 27300/12 (ECtHR, 13 July 2021).

1. a clear extension of the subjective scope of the right to defence, also to the suspected person,
2. the amendment of Article 301 of the CCP, explicitly granting the right to demand the presence of a lawyer during each questioning of the suspected person or suspect, while a justified absence of the lawyer should obstruct the course of the act,
3. practical and effective safeguards of the access to a lawyer, also by the detained, through appropriate and accessible instructions, providing lists of advocates along with contact details of those who provide legal assistance in criminal matters, regulating the minimum waiting time for a lawyer to arrive and not performing any activities during this time,
4. clear specification of the premises justifying temporary restrictions to the right of access to a lawyer,
5. the amendment of Article 73 and 245 para 1 of the CCP by ensuring the confidentiality of contact with a lawyer, unlimited in time and type,
6. regulation of the rules for notifying a lawyer about the time and place of a procedural act, taking into account the real possibilities of participation in said act,[53]
7. the exclusion of unlawfully gathered evidence in relation to violation of the right of access to a lawyer.[54]

Amendments in the scope outlined above seem necessary in order to implement the Directive into the Polish legal system. Although there are alternative mechanisms to ensure the effectiveness of its operation. For example, through its direct application, which is possible in relation to the rights granted to individuals improving their legal situation in criminal proceedings[55] or indirect application, consisting in interpreting national provisions while taking into account their wording.[56] It must be stressed that this is insufficient to respect the suspect's fundamental procedural guarantees.

53 In this context, it is worth paying attention to the solutions adopted in France, where the advocate should be notified of the date of the requested procedural act no later than 2 days before the planned date of its conduct (Article 82-2 of the French CCP), and in the case of a planned hearing of a party, no later than 5 days before the act (Article 114 of the French CCP). Of course, in urgent situations, the authorities may shorten these deadlines, but nevertheless this is an exception to the general rule requiring notification of activities in such a way that it is possible to actually exercise one's rights.

54 Although the exclusion of unlawfully gathered evidence was not introduced in the Directive, it is worth mentioning that in 12 MS there are specific countermeasures for violation of the right to access a lawyer, and in most of them it is prohibited to use evidence gathered unlawfully (Belgium, Bulgaria, the Czech Republic, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain), while another 4 have general remedies for violation of procedural rights, including exclusion of unlawfully obtained evidence (Estonia, Germany, Luxembourg, the Netherlands). For more details see Anneli Soo 'How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed' (2017) 8 New Journal of European Criminal Law 73, 69-74.

55 Klamczyńska, Ostropolski (n 14) 161 referring to the ruling of the European Court of Justice in Case 41/74 *Van Duyn v Home Office*, EU:C:1974:133 and in Case 148/78 *Italy v Ratti*, EU:C:1979:110.

56 In this context, see, *inter alia,* the following rulings of the CJEU: Case C-105/03 *Italy v Pupino*, EU:C:2005:386, Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen*, EU:C:1984:153, Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, EU:C:1990:395.

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European Public Prosecutor's Office – relations with Poland as a state not participating in enhanced cooperation

Barbara Dudzik

Abstract

This article deals with a new European institution: the European Public Prosecutor's Office (the EPPO). The author discusses the origins of the EPPO, the issue of cooperation between the EPPO and non-participating states, Poland's position on non-participation in enhanced cooperation, as well as the proposed solution for mutual cooperation between Poland and the EPPO. The position adopted by Poland includes the necessity to amend the provisions of the Polish Code of Criminal Procedure, because in the current legal framework the EPPO is not an entity authorised to operate in cross-border legal actions with Poland. To establish mutual cooperation, the next step should be to conclude a working agreement. In the final conclusions, the author indicates that even if Poland, due to the voluntary status of participation in enhanced cooperation, was entitled to refuse to participate, it is nevertheless still obliged to cooperate with the EPPO. It is therefore necessary for Poland to immediately adopt solutions that will make this cooperation possible. Failure to introduce these solutions can be regarded as a breach of Treaty obligations (Article 258 of the TFEU). An alternative solution to the current situation is for the Commission to use its power to propose legislative measures to ensure effective mutual cooperation between Poland and the EPPO.

Keywords

European Public Prosecutor's Office (the EPPO), non-participating Member State

Introduction

The European Public Prosecutor's Office (the EPPO) – the new independent public prosecution office of the EU, established for investigating, prosecuting, and bringing to judgement crimes against the financial interests of the EU – commenced its operations on 1 June 2021. The expectations of the EPPO are enormous. Although the first months of the EPPO's operation show that it is a body that carries out its tasks actively and consistently, it is still far too early to assess the legitimacy of the establishment of this institution and the effectiveness of its activities. This study aims to present the current situation of Poland as a non-participating Member State (hereinafter the NPMS), in particular to answer the questions of whether Poland has an obligation to cooperate with the EPPO and what legal possibilities exist to establish a legal framework for this cooperation.

1. The journey from the *Corpus Juris* to Council Regulation (EU) 2017/1939

The idea of a European Public Prosecutor's Office was first included in the *Corpus Juris* project (1997).[1] The concept of establishing this body aroused considerable interest and became the subject of lively scientific and political discourse. The deliberations concerned all issues related to the EPPO: the purposefulness of its establishment, its competences, structure, principles of functioning, and rules of cooperation with Member States and EU institutions. Another important stage in the discussion on the creation of the European Public Prosecutor's Office was the publication by the European Commission of the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (2001).[2] However, of great importance for the establishment of the EPPO was the adoption of the Treaty of Lisbon, which provided the legal basis for the creation of this body. Pursuant to Article 86 (1) of the TFEU:

> *in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust.*

1 Barbara Namysłowska (ed), *Corpus Iuris zawierający przepisy karne mające na celu ochronę interesów finansowych Unii Europejskiej. Wydanie dwujęzyczne angielsko-polskie, Bilingual edition English-Polish* (C.H. Beck 1999). See also 'Florence version': Mireille Delmas-Marty, John A.E. Vervaele, *The Implementation of the Corpus Juris in the Member States* (Intersentia 2000) (4 Vol.).

2 Commission of the European Communities, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, Brussels, 11 December 2001, COM (2001) 715 final.

A further part of this provision sets out the procedure for establishing the EPPO, also providing for the option of using enhanced cooperation in this area, and indicates in a very general way the competences of the new body. On 17 July 2013, the Commission published a proposed regulation regarding the establishment of the EPPO.[3] On one hand, it was already the culmination of many years of discussion on this issue, and on the other hand, it reignited the intense debate about the subject.[4] The Commission's proposal did not meet with unanimous approval. The parliaments of the Member States sent opinions (the so-called 'yellow card procedure') raising a whole range of objections to the proposal.[5] Despite this, the Commission considered that there was no need to withdraw or amend the proposal and maintained it unchanged. By ignoring the concerns raised, the Commission has shown its determination in pursuing the establishment of the EPPO.[6] Legislative work on the proposal continued over the ensuing years, with many changes made to the draft.[7] Despite the changes introduced and the many discussions held between academics, practitioners, representatives of EU institutions and politicians, the idea of creating a European Public Prosecutor's Office was not accepted by all Member States. It therefore became clear that the establishment of the EPPO was only possible through enhanced cooperation.[8] And ultimately, that is what

3 European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17 July 2013, COM(2013) 534 final.

4 See more Lorena Bachmaier Winter, 'The potential contribution of European Public Prosecutor in light of the proposal for regulation of 17 July 2013' (2015) 23 European Journal of Crime, Criminal Law and Criminal Justice 121-144; Katalin Ligeti, 'The European Public Prosecutor's Office: How should the rules applicable to its procedure be determined?' (2011) 123 European Criminal Law Review 123-148; Katalin Ligeti, Michele Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' (2013) 4 New Journal of European Criminal Law 7-21; Michiel Luchtman, John A.E. Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)' (2014) 10 Utrecht Law Review 132-150; Grażyna Stronikowska, *Prokuratura Europejska jako instrument ochrony interesów finansowych Unii Europejskiej* (C.H. Beck 2020) 127-129 and the literature referred to therein; John A.E. Vervaele, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in Willem Geelhoed, Leendert H. Erkelens, Arjen W.H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer 2018) 11-19.

5 See more Marek Tomczyk, *Prokuratura Europejska. Geneza, ewolucja koncepcji oraz kluczowe kontrowersje w perspektywie funkcjonowania organu* (Instytut Wydawniczy EuroPrawo 2018) 186-188.

6 Ibid, 188.

7 Tomasz Ostropolski, 'Współpraca wymiarów sprawiedliwości w sprawach karnych' in Jan Barcz (ed), *System Prawa Unii Europejskiej. Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna.,* Vol. 8 (C.H. Beck 2021) <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damzygm4tkmy> accessed 7 June 2022.

8 On the implications of the establishment of the EPPO through enhanced cooperation see Szymon Pawelec, 'Implications on Enhanced Cooperation for the EPPO Model and Its Functioning' in Leendert H. Erkelens, Arjen W.H. Meij, Marta Pawlik (eds), *The European Public Prosecutor's Office. An Extended Arm or a Two – Headed Dragon?* (Springer 2015) 209-227; Julian J.E. Schutte, 'Establishing Enhanced Cooperation Under Article 86 TFEU' in Leendert H. Erkelens, Arjen W.H. Meij, Marta Pawlik (eds), ibid 195 – 208; Sławomir Steinborn, 'Komentarz do Artykułu 86 TFUE' in Dawid Miąsik, Nina Półtorak and Andrzej Wróbel (eds), *Traktat o funkcjonowaniu Unii*

happened. On 3 April 2017, sixteen Member States gave notice of their intention to engage in enhanced cooperation to establish the EPPO.[9] Shortly after, on 12 October 2017, the Council adopted Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter Regulation 2017/1939).[10] By that time, four more countries had joined enhanced cooperation (Austria, Estonia, Italy and Latvia) with two more (the Netherlands and Malta) joining after the adoption of the regulation. Thus, currently the EPPO is made up of 22 Member States. The following states remain outside the EPPO: Poland, Hungary, Sweden, Denmark and Ireland.[11]

Pursuant to Article 328 of the TFEU, enhanced cooperation is open to all Member States, so non-participating countries can join at any time if they fulfil the conditions set out in the regulation establishing the EPPO and respect the legal acts already adopted under this cooperation. It is also worth emphasising that participation in enhanced cooperation is voluntary and should remain so. Any other solution would contradict the essence of this mechanism, which serves to promote deeper integration within a narrower group of those Member States that are prepared to do so and are willing to cooperate.[12] Enhanced cooperation can provide the impetus for other countries to take the same steps, but it should not be used as an instrument to put pressure on non-participating states.[13]

2. Why is Poland not participating in enhanced cooperation?

Poland, despite active participation in many years of work on the final shape of the EPPO, decided not to join enhanced cooperation.[14] The reasons justifying Poland's refusal to

Europejskiej. Komentarz, Vol. I (Wolters Kluwer 2012) <https://sip.lex.pl/#/commentary/587327160/124600?pit=2022-03-13&keyword=Traktat%20o%20funkcjonowaniu%20Unii%20Europejskiej&tocHit=1&cm=SREST> accessed 12 March 2022.

9 Belgium, Bulgaria, the Czech Republic, Croatia, Cyprus, Germany, Greece, Finland, France, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain.

10 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.

11 Denmark and Ireland benefit from an opt-out clause in the area of EU freedom, security and justice. And in April 2019, the Prime Minister of Sweden announced his intention to join the EPPO.

12 Justyna Maliszewska – Nienartowicz, 'Zasada wzmocnionej współpracy w prawie Wspólnoty Europejskiej – od Traktatu Amsterdamskiego po projekt Traktatu Konstytucyjnego' [2007] (1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 33, 35.

13 On the origins and perils of enhanced cooperation see more Sławomir Dudzik, 'Mechanizm wzmocnionej współpracy na tle konstytucyjnych zasad porządku prawnego Unii Europejskiej' [2003] (1) Kwartalnik Prawa Publicznego 7-39 <https://bazhum.muzhp.pl/media/files/Kwartalnik_Prawa_Publicznego/Kwartalnik_Prawa_Publicznego-r2003-t3-n1/Kwartalnik_Prawa_Publicznego-r2003-t3-n1-s7-39/Kwartalnik_Prawa_Publicznego-r2003-t3-n1-s7-39.pdf> accessed 12 March 2022; Monika Szwarc, *Zróżnicowana integracja i wzmocniona współpraca w prawie Unii Europejskiej* (Prawo i Praktyka Gospodarcza 2005) 176-285 and the literature referred to therein.

14 At this point, one should also emphasise the very extensive Polish academic output on the subject of

co-create the EPPO were indicated, *inter alia*, in the official response to a parliamentary inquiry, No 6373, concerning this issue.[15] It turns out that the key argument against joining enhanced cooperation by Poland was reservations about the scope of competences of this EU body. This response indicates that the Polish side, during negotiations regarding the proposed regulation on the establishment of the EPPO and directive on the fight against fraud to the Union's financial interests by means of criminal law (the 'PIF directive'[16]), had consistently opposed the proposal excluding the investigation of VAT offences from the exclusive competence of the Member States. It was argued that in such cases it is difficult to speak of any harm to the EU's financial interests, since VAT revenues are primarily national budgetary revenues. In addition, Poland questioned the jurisdiction of the EPPO over offences involving the use of EU funds if the harm to the EU budget would be minimal compared to the harm to the national budget. Poland's reservations were also provoked by the EPPO's powers to prosecute offences described as 'inseparable' from offences detrimental to the EU's financial interests. It was argued that such a broad and, at the same time, vaguely defined scope of competences was related to the potential extension of the jurisdiction beyond the limits set out in Article 86 of the TFEU and the risk of interference by an external entity (the EPPO) in the powers of the Member States. Another argument raised by the Polish side was related to the lack of control over the activities of the EPPO by the Court of Justice of the EU (the CJEU). It was argued that due to the European nature of the EPPO and the cross-border dimension of its jurisdiction, control of its activities should also lie with a supranational court. It was proposed that the CJEU be guaranteed the right to hear appeals against the EPPO decisions that would have cross-border effects. Concerns were also raised about the case management system, which allows the EPPO to have extremely wide access to information and data held by national authorities with powers to conduct preparatory proceedings, while requiring the development of costly IT systems. There were also concerns about the complex structure of the EPPO, the complicated and lengthy decisionmaking processes, and the large amount of bureaucratic obligations imposed on national authorities.[17]

It is worth adding that the abovementioned reservations from the Polish side were also raised by other countries in the course of work on establishing the EPPO. Although the controversy over the EPPO has not gone away, and many issues still remain problematic, in the end only five countries decided not to participate in enhanced cooperation, with Sweden declaring its willingness to join in 2022. In conclusion, Poland has the right

the EPPO, in particular: regular scientific conferences organised by Towarzystwo Badawcze Prawa Europejskiego (Cracow 1999, Warsaw 2003–2018).

15 Sejm Rzeczypospolitej Polskiej, VIII kadencja, Archiwum, Response from the Undersecretary of State in the Ministry of Justice of 25 January 2018 to parliamentary inquiry No 6373 on the European Public Prosecutor's Office <https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=565CA1EC&view=null> accessed 31 January 2022.

16 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29.

17 Response (n 15).

to refuse to participate in enhanced cooperation establishing the EPPO[18], however, at any time, it may change its mind and join enhanced cooperation. It is hard to disagree with Krisztina Karsai's opinion that 'participation in the EPPO primarily appears as a political rather than a professional issue in Member States'.[19] Therefore, without a change in the approach towards cooperation with the EU, it is difficult to expect Poland to join the EPPO in the near future. The lack of participation of all EU Member States in the EPPO raises concerns about the effectiveness of the EPPO's actions.[20] It has been pointed out that if 'states like Poland and Hungary do not participate in the future, the EPPO cannot fulfil its fundamental role of protecting the EU and its financial solidarity interests in an efficient and comparable way within the EU territory'.[21] The above concerns seem legitimate, however, it should be noted that it is reasonable to raise this point against all non-participating Member States (the NPMS), not just Poland and Hungary.

3. Judicial cooperation between the EPPO and non-participating Member States

Non-participating Member States[22] are also not bound by the provisions of Regulation 2017/1939.[23] However, this does not mean that they can ignore the existence of the

18 It should be stressed that the opinion that Poland is a country 'in which corruption and EU fraud-related problems are widespread and apparently not effectively prosecuted' (Fabio Giuffrida, 'Now or Never: the European Public Prosecutor's Office and Enhanced Cooperation', Societal Security Network <http://observatory.societalsecurity.net/blog/now-or-never-european-public-prosecutor%E2%80%99s-office-and-enhanced-cooperation> quoted after: Constanza Di Francesco Maesa, 'Repercussions of the Establishment of the EPPO via Enhanced Cooperation. EPPO's Added Value and the Possibility to Extend its Competence' [2017] (3) EUCRIM 156, 157 is false and the clearest rebuttal calls for directly quoting the statement of the Vice-President of the European Commission, Vera Juorova: 'I do not understand why Poland has not joined the European Public Prosecutor's Office, because, incidentally, it does not have aboveaverage problems with abuse in this area. On the contrary, Poland has always been regarded as one of the countries that spend European funds very well', Deutsche Welle, Statement by Vera Juorova <https://www.dw.com/pl/jourov%C3%A1-polacy-czy-w%C4%99grzy-nie-chc%C4%85-wr%C3%B3ci%C4%87-do-re% C5% BCim% C3% B3w-authoritarian / a-57310910)> accessed 31 January 2022.

19 Krisztina Karsai, 'The European Public Prosecutor's Office and Hungary. Challenge or Missed Opportunity?' (Transparency International Hungary 2020), 7 <https://transparency.hu/wp-content/uploads/2021/02/europai_ugyeszseg_eng_VEGSO.pdf> accessed 31 January 2022. See more about political aspects of the establishment of the EPPO Celina Nowak, 'Prokuratura Europejska – idea się urzeczywistnia' [2013] (11) Prokuratura i Prawo 19, 41-42.

20 Szymon Pawelec, 'Uwagi na temat zakresu kompetencji przyszłej Prokuratury Europejskiej' [2014] (5-6) Palestra 25, 38.

21 Lothar Kuhl, 'The European Public Prosecutor's Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?' [2017] (3) EUCRIM 135, 140.

22 Regulation 2017/1939 refers to non-participating Member States and third countries, but these are not synonymous expressions, as the latter are not EU countries.

23 Hans-Holger Herrnfeld, Judith Herrnfeld, 'The European Public Prosecutor's Office – where do

EPPO and refuse to cooperate with it. On the contrary, as EU Member States, they have a duty of sincere cooperation, which flows from Article 4 of the Treaty on European Union (the TEU). It is worth quoting *in extenso* Recital 110 of the preamble to Regulation 2017/1939, which states:

> *Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO are not bound by this Regulation. The Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO. This should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully respecting the Union acquis in this field as well as the duty of sincere cooperation in accordance with Article 4 (3) TEU.*

What is more, Article 325 of the TFEU stipulates that both the EU and its Member States are obliged to counter all activities affecting the financial interests of the Union, and that the Member States are obliged to take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

In this regard, the question arises of how the NPMS should fulfil their obligation to cooperate with the EPPO. The answer to this question is not simple, especially since the provisions of Regulation 2017/1939 concerning the EPPO's relationship with the NPMS are unclear or even slightly contradictory.[24]

The rules governing the relationship of the EPPO with the NPMS are set out in the cited Recital 110 of the Preamble as well as in Articles 99 and 105 of Regulation 2017/1939.[25] Pursuant to Article 99 (1) of Regulation 2017/1939, the EPPO, to the extent necessary for the performance of its tasks, may establish and maintain cooperation with the authorities of the NPMS. The EPPO may also exchange any information with them if it is relevant for the performance of its tasks, and Regulation 2017/1939 does not

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we stand?' (2021) 22 ERA Forum 655,668 <https://doi.org/10.1007/s12027-021-00688-0>.

24 Nicholas Franssen, 'The future judicial cooperation between the EPPO and non-participating Member States' (2018) 9 New Journal of European Criminal Law 291, 297.

25 It is worth mentioning that in the proposal of the regulation on the establishment of the EPPO, published on 17 July 2013, there were no provisions that would regulate the cooperation of the EPPO with the NPMS. This omission was surprising, as it was already known that at least three Member States – Denmark, the United Kingdom and Ireland – would not participate in the establishment of the EPPO (Recitals 47 and 48 of the Preamble). It was only during the Slovak Presidency (July – December 2016) that the issue of the EPPO's relations with the NPMS was considered. These efforts resulted in the addition of a new provision, Article 59a, to the proposal (later Article 105 of the Regulation). See European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17 July 2013, COM(2013) 534 final.

provide otherwise (Article 99 (2)). Article 99 (3) of Regulation 2017/1939 provides for the possibility of concluding working arrangements between the EPPO and the NPMS. These arrangements shall be of a technical or operational nature and serve in particular to facilitate cooperation and information exchange between the parties. However, they may not constitute the basis for an exchange of personal data, nor may they have legally binding effects on the Union or its Member States. Article 99 of Regulation 2017/1939 contains the common provisions and applies to the EPPO's relations with its partners (not only countries not participating in enhanced cooperation, but also with institutions and bodies or EU administrative entities).

In contrast, Article 105 of Regulation 2017/1939 is more specific and applies only to the cooperation of the EPPO with the NPMS. In the first paragraph of this Article, the working arrangements referred to in Article 99 (3) are clarified by indicating that they may in particular relate to the exchange of strategic information and the secondment of liaison officers to the EPPO. In accordance with Article 105 (2), the EPPO may designate, in agreement with the competent authorities, contact points in the Member States that do not participate in enhanced cooperation in order to facilitate cooperation in accordance with the EPPO's needs. The issues regulated in paragraphs 1 and 2 of Article 105 do not raise major doubts, contrary to paragraph 3 of this Article.[26] It suggests that a specific legal instrument should be the preferred and overarching basis for cooperation between the EPPO and the NPMS.[27] It is only in the absence of this legal instrument that Member States shall designate the EPPO as the competent authority for cooperation on matters within the scope of the EPPO's cognisance in its relations with the NPMS. However, such a solution is very ambiguous and raises many doubts.[28] As non-participating Member States are not bound by the provisions of Regulation 2017/1939, it is possible that they would not consider it sufficient for participating states to designate the EPPO as the competent authority for the purposes of cooperation. This is the position of Poland, which is reflected in the proposed amendments to the Code of Criminal Procedure (hereinafter the CCP).[29]

26 Article 105 (3) states: 'In the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO.'

27 The literature indicates ambiguity as to the legal basis on which it should be based: Dominik Brodowski, 'Commentary to the article 105' in Hans – Holger Herrnfeld, Dominik Brodowski and Christoph Burchard (eds), *European Public Prosecutor's Office. Article-by-Article Commentary* (C.H. Beck, Hart, Nomos 2021) 638.

28 Ibid; Franssen (n 24); Karsai (n 19).

29 Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments.

4. Judicial cooperation between the EPPO and Poland

Although Poland does not participate in enhanced cooperation and is not bound by the provisions of Regulation 2017/1939 (Recital 110), as already mentioned, as a Member State it is nonetheless obliged to sincerely cooperate with the Union, as required by Article 4 of the TEU. To date, however, no solutions have been adopted that would allow for cooperation between the Polish judicial authorities and the EPPO. Although in August 2021 a draft act, amending the CCP, which related to the matter in question (hereinafter the draft act)[30] was published on the website of the Government Legislation Centre [Rządowe Centrum Legislacji, RCL], it was removed after a dozen or so days. After that, there was no other proposal made for the legislation necessary to enable Poland to cooperate with the EPPO.

The aforementioned draft act provided for the introduction of a new provision to the CCP – Article 615 a. According to the initially designed solutions, the relations between the Polish bodies responsible for criminal proceedings and the EPPO were to be regulated within:

- Chapter 62 of the CCP ('Legal aid and service in criminal cases'); in the explanatory memorandum to the draft, it was specified that it refers in particular to the provisions concerning the establishment of an investigative team,
- Chapter 62c of the CCP ('Requesting a Member State of the European Union to take investigative measures on the basis of a European Investigation Order'),
- Chapter 62d of the CCP ('Request by a Member State of the European Union to take investigative measures on the basis of a European Investigation Order'),
- Chapter 63 of the CCP ('Takeover and transfer of criminal prosecution'); in the explanatory memorandum, it was specified that it refers in particular to the regulations relating to jurisdictional conflicts,
- Chapter 65b of the CCP ('Request of a European Union Member State to surrender the prosecuted person on the basis of a European arrest warrant'),
- Chapter 65d of the CCP ('Request of a European Union Member State to enforce a judgement issued in order to ensure the proper course of the proceedings'),
- Chapter 67 of the CCP ('Final Provisions'),
- 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.[31]

The indicated legal framework does not include Chapters 62a and 62b of the CCP, on freezing of evidence and assets in the EU, which have been omitted as they apply only

30 Draft act of 24 August 2021 amending the Act – Code of Criminal Procedure (No UD 244). See also Krzysztof Sobczak, 'Polska będzie współpracować z Prokuraturą Europejską' <https://www.prawo.pl/prawnicy-sady/prokuratura-europejska-polska-bedzie-wspolpracowac-jest-projek,510222.html> accessed 31 January 2022.

31 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 [2018] OJ L 303/1.

in relations with Denmark and Ireland, while cooperation in this respect with other EU Member States takes place (since 19/12/2020) on the basis of the directly applicable provisions of the abovementioned Regulation 2018/1805.

The authors of the draft act emphasised that an amendment to the provisions of the CCP is necessary because in the current legal circumstances the EPPO is not an entity authorised to operate in crossborder procedural activities with Poland. Therefore, it is not possible for Polish courts and prosecutors to provide legal assistance to the EPPO, nor is it possible for Polish courts and prosecutors to submit requests for legal assistance to the EPPO. The reason for this is that the EPPO is a body of the EU and not a body of those Member States participating in enhanced cooperation. And *de lege lata*, the provisions of the CCP provide a basis for the application of EU legal instruments only in relations with EU Member States and their competent authorities, and not in relations with EU authorities. At the same time, it was emphasised that this problem cannot be solved only through notifications submitted pursuant to Article 105 (3) of Regulation 2017/1939 by the participating Member States, designating the EPPO as an entity authorised to act in legal transactions in criminal matters, including to enforce judgements issued by the competent authorities of the Member States not participating in enhanced cooperation.

In other words, the Polish side assumed that since the EPPO, given the current wording of the CCP, is not an entity authorised to operate in cross border legal transactions, this state of affairs can only be changed by amending this Code. This modification will create a legal framework for mutual cooperation that will be equivalent to an act of the legislature, and the principles of this cooperation will be specified in an agreement subsequently concluded between the State Prosecutor's Office of the Republic of Poland and the EPPO.[32]

The proposed solution deserves approval and therefore it is difficult to find any rational justification for abandoning further work on the draft act regulating this issue, especially considering that without adopting the proposed changes, cooperation between Poland and the EPPO is impossible. In the context of the tense relations between Poland and the EU, the reasons for desisting may therefore be political rather than substantive.

De lege lata, there are no legal instruments that would allow Poland to cooperate with the EPPO. This situation should be changed as soon as possible, because Poland, as an EU Member State, cannot ignore the establishment of the EPPO. Maintaining a different position could be seen as a breach of Treaty obligations (Article 258 of TFEU).

On 16 February 2022, the European Chief Prosecutor sent a letter to the European Commission, indicating that Poland refused to cooperate with the EPPO.[33]

32 It should be noted that Hungary signed a working arrangement on cooperation with the EPPO, which entered into force on 6 April 2021. European Public Prosecutor's Office, 'EPPO signs working arrangement with the Office of the Prosecutor General of Hungary' <https://www.eppo.europa.eu/en/news/eppo-signs-working-arrangement-office-prosecutor-general-hungary> accessed 13 March 2022.

33 European Public Prosecutor's Office, 'Letter sent to European Commission regarding Poland's refusal

Therefore, it seems that the issue of creating legal possibilities for mutual cooperation should immediately become the subject of legislative work.

Conclusions

The issue of cooperation between the EPPO and the countries not participating in enhanced cooperation has not been regulated in a clear and transparent manner. As a consequence, interpretations have diverged, which has led to the adoption of different models of cooperation between the EPPO and the NPMS.

Referring to the question posed in the introduction, it should be recognised that the Member States have always had the right to decide to join enhanced cooperation for the EPPO, or to remain outside. However, if they decide not to join, there is still an obligation imposed on them to cooperate with the EPPO. In such cases it is necessary to take immediate action to introduce the legal possibility of mutual cooperation. The absence of relevant provisions can be viewed as a failure to fulfil Treaty obligations (Article 258 of TFEU). With regard to such cooperation, it is worth mentioning that according to Recital 110 to the Preamble of Regulation 2017/1939, the Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and EU Member States which do not participate in enhanced cooperation on the establishment of the EPPO. Consequently, it should be emphasised that the Commission has the competence to take action to establish a cooperation mechanism. Tapping into this competence is perhaps a way out of the current stalemate.

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Mutual trust to obtain electronic evidence in the EU: is the bar low or high?

Martyna Kusak

Abstract

The European Union is in urgent need of a specific, streamlined mechanism for the preservation and production procedures for electronic data stored by service providers. This is needed in order to accelerate the cross-border obtainment of such data and relieve the pressure on the mutual assistance system used in relations with non-EU states. Hence, in 2018, the European Union launched a proposal for electronic evidence gathering which introduced rules to facilitate cross-border access to four categories of data: subscriber data, access data, transactional data and stored content data, directly from the service providers in other jurisdictions. The proposed scenario of cooperation redefines the role that mutual trust plays in cross border evidence-gathering. Therefore, the aim of this research paper is to verify whether the European Union can afford this new model of cooperation in a tentative environment of mutual trust.

Keywords

electronic evidence, mutual trust, European Investigation Order

Introduction[1]

Over the years, the European Union has striven for a functionable instrument that would finally shape the, still non-existent, concept of mutual recognition of evidence

1 The paper has been supported by grant 2016/23/D/HS5/00182 awarded by the National Science Centre, Poland.

in criminal matters and replace the mutual legal assistance regime with a model which is underpinned by mutual trust, based on the principle of mutual recognition. This long-term plan has been gradually slowed down by decreasing faith in mutual trust, originally presumed to exist between the Member States due to their shared commitment to human rights, the rule of law and democracy. In these circumstances, the European Union has introduced its flagship instrument for evidence-gathering, the European Investigation Order[2] (hereafter: EIO), which now plays a leading role in both obtaining and transferring evidence in criminal matters among the Member States. The context in which the EIO has grown, however, has impacted on a shape of this instrument, especially when it comes to its consistency with the principle of mutual recognition. Hence, it foresees a set of provisions which demonstrate mutual distrust, acknowledges possible breaches of fundamental rights and offers withdrawal scenarios in cases of conflicting, domestic standards for evidence-gathering. As it is, the EIO sets the scene for the forthcoming, legal framework governing electronic evidence, which significantly differs, in nature and scope, from the previous, mutual legal assistance and mutual recognition instruments, and also redefines the role of mutual trust.

This research paper analyses the electronic, evidence framework through the lens of mutual trust. The first section presents how the evidence-gathering instruments have evolved over the years as well as the main trust-related challenges. It also explains the need for a specific framework for electronic evidence and the main features that stem from this need. The second section outlines the mutual trust evolution, from overly optimistic, politically presumed full faith and trust to openly distrustful provisions, which, together, have set the scene for an electronic evidence framework. Against this backdrop, the third section measures the level of mutual trust using the EIO provisions and confronted with the specific modalities of the EU proposal. The aim is to verify whether the European Union can afford this new model of cooperation in the tentative, mutual trust environment.

1. The EU evidence-gathering environment

In the pre-mutual, recognition era, cooperation in evidentiary matters was mainly (but not only)[3] governed by the EU 2000 MLA Convention.[4] The Convention introduced a set of substantially interesting and important novelties, such as the *forum regit actum* principle

2 Directive 2014/41/EU regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.

3 Other relevant levels of cooperation were the Council of Europe, the Benelux Economic Union, the Nordic Union, and within the EU, the Schengen *acquis* and customs administration level.

4 Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/3.

(hereafter: FRA),[5] spontaneous information exchange at the judicial level of cooperation and direct transmission of requests for mutual assistance. This new framework of mutual assistance, created by the EU 2000 MLA Convention and supplemented by the Protocol of 2001, has been criticised for being far from complete as well as for showing a certain lack of balance.[6] At the same time, the Convention was not supposed to be the prime framework for EU evidence-gathering since the entire mutual assistance *acquis* (including the novelties and changes brought by the 2000 Convention and the 2001 Protocol) was going to be replaced in the years to come with mutual recognition schemes building on politically presumed full faith and trust between the Member States.[7]

Thus in 2003, the European Union launched its first mutual recognition-based instrument, the freezing order.[8] This order established the rules under which a Member State shall recognise and execute, in its own territory, a freezing order issued by a judicial authority of another Member State in order to secure objects, documents or data which could be produced as evidence in criminal proceedings in the issuing Member State. This instrument was limited in its scope and did not foresee exequatur procedures. It also abandoned a dual criminality check for offences qualified as so-called 'Euro crimes', which was a clear demonstration of a certain level of mutual trust between the Member States. The next step towards a mutual recognition system for evidence, which was closely linked to the freezing order, was the European Evidence Warrant[9] (launched in 2008). This warrant was designed to obtain and transmit objects, documents and data from other Member States for use in criminal proceedings in the issuing Member State. This instrument contained modalities that are typical for mutual recognition, such as the departure from a dual criminality check, if no house search is required, and for 'Euro crimes'. It is worth noting that the European Evidence Warrant was, to some extent, used to test the political feasibility of introducing more trust-oriented measures and to further limit double criminality. The Member States, however, were reluctant in this regard and the provisions concerning the mutual availability of measures were only partially incorporated.[10]

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5 According to this principle, the Member State receiving a mutual legal assistance request must in principle comply with the formalities and procedures expressly indicated by the requesting Member State unless they cause incompatibilities with the fundamental principles of the law of the executing Member State.

6 Gert Vermeulen, 'A EU conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters' (2006) 77 Revue internationale de droit pénal 79-95.

7 Ibid.

8 Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence [2003] OJ L 196/45.

9 Council Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L 350/72.

10 Charles Williams, 'The European Evidence Warrant: the Proposal of the European Commission' (2005) ERA Forum: Special Issue on European Evidence 25; Martyna Kusak, *Mutual admissibility of evidence in criminal matter: a study of telephone tapping and house search* (Maklu 2016) 80-82.

Although the European Evidence Warrant did not cover the obtainment of other types of evidence, the Commission considered it to be the first step towards replacing the existing regime of mutual assistance within the European Union by a single EU body of law based on mutual recognition and subject to minimum safeguards.[11] This plan, however, failed. The reason for this was that both of the mutual recognition instruments only covered existing evidence. This proved to be insufficient in the field of EU, cross-border evidence gathering, which, at the time still, mostly, relied on the mutual legal assistance provisions.

A new solution was sought and the European Union then deviated from a step-by-step approach (that inevitably led to fragmentation of the evidence-gathering regimes) to a comprehensive system, based on the principle of mutual recognition (MR), for the obtainment of evidence in cases with a cross-border dimension. This new system was launched in 2014 (with a transposition date of 2017) with a single instrument,[12] the European Investigation Order (hereafter: EIO), which governs both the collection of evidence (including real-time measures) and the obtainment of evidence that is already in the possession of the executing authority. The main reason that it was impossible, for almost a decade, to reach final agreement on the EIO, was the lack of political consensus and the reluctance of Member States to introduce the instrument, unsupported by measures to enhance mutual trust in the evidentiary context. Indeed, over the 20 years in which a considerable body of MR-based EU legal instruments have been introduced, mutual trust has been questioned and this has also had an impact on negotiations on the EIO. Therefore, the final version of the EIO reflects the decreasing level of mutual trust. This has resulted in a lack of inner coherency and doubtful consistency with the pure, mutual recognition philosophy. Despite ambitious plans,[13] the EIO was ultimately not accompanied by any minimum standards to facilitate the admissibility of evidence gathered by means of this instrument, which has also had an impact on its efficiency.

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11 Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, Brussels, 14 November 2003, COM(2003) 688 final.

12 It is, however, controversial to call the EIO a single instrument given that its Article 34 and the blurred scope of the term 'corresponding provisions' results in the use of some provisions of the EU 2000 MLA Convention. In addition, relations with Denmark and Ireland are still governed by the freezing order and the above-mentioned Convention.

13 Green paper on obtaining evidence in criminal matters from one Member State to another and securing its Admissibility, Brussels, 11 November 2009, COM(2009) 624 final; Commission, Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States [2005], COM(2005) 195 final; Commission, An area of freedom, security and justice serving the citizen, Brussels, 10 June 2009, COM (2009) 262 final; Commission, Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme, Brussels, 20 April 2010, COM(2010) 171 final; see also Gert Vermeulen, Wendy De Bondt and Yasmine Van Damme, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* (Maklu 2010) 113; Gert Vermeulen, *Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence* (Maklu 2011) 44-45.

Shortly after the EIO was introduced, it became evident that, at first glance, a broad scope would not be capable of addressing all fields of evidence gathering in the European Union. Rapid, digital progress has an increasing impact on the way humans live and communicate. This, in turn, affects the way in which criminal investigations are conducted. Consequently, not only cybercrime but a large number of other criminal offences are committed in a way that leaves digital traces that can serve as evidence. In order to effectively investigate and prosecute these offences, law enforcement agencies must have access to the digital data, which is mostly in the possession of service providers that are often located abroad. At an international level, this results in the need to resort to mutual, legal assistance and, at the EU level, to the European Investigation Order. Even the time needed to make use of the EIO procedure is far too protracted as relevant data can be lost in the meantime.[14] Therefore, it became necessary to develop a specific, more streamlined mechanism for the preservation and production procedures for electronic data stored by service providers, as well as to relieve the pressure on the mutual assistance system used in relations with non-EU states.[15] Hence, the European Union, in 2018, launched a Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters[16] (hereafter: Proposal) and a Proposal for a Directive of the European Parliament and of the Council, laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.[17] The proposed regulation introduces rules to facilitate cross-border access to four categories of data: subscriber data,[18] access data,[19]

14 Stanisław Tosza, 'The European Commission's Proposal on Cross-Border Access to E-Evidence. Overview and Critical Remarks' [2018] (4) EUCRIM <https://doi.org/10.30709/eucrim-2018-021>.

15 Since mutual assistance requests are often addressed to states which are hosts to a large number of service providers but which have no other relation to the case at stake.

16 Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, Brussels, 17 April 2018, COM(2018) 225 final.

17 Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, Strasbourg, 17 April 2018, COM(2018) 226 final.

18 'Subscriber data' means any data pertaining to: (a) the identity of a subscriber or customer such as the provided name, date of birth, postal or geographic address, billing and payment data, telephone, or email; (b) the type of service and its duration including technical data and data identifying related technical measures or interfaces used by or provided to the subscriber or customer, and data related to the validation of the use of service, excluding passwords or other authentication means used in lieu of a password that are provided by a user, or created at the request of a user, Article 2 of the Proposal.

19 'Access data' means data related to the commencement and termination of a user access session to a service which is strictly necessary for the sole purpose of identifying the user of the service, such as the date and time of use or the log-in to and log-off from the service, together with the IP address allocated by the Internet access service provider to the user of a service, data identifying the interface used and the user ID. This includes electronic communications metadata as defined in point (g) of Article 4(3) of [Regulation concerning the respect for private life and the protection of personal data in electronic communications], Article 2 of the Proposal.

transactional data[20] (the three categories commonly referred to jointly as 'non-content data') and stored content data.[21] The model adopted in the Proposal brings forward a European legal framework for electronic evidence which imposes an obligation on service providers covered by the scope of the instrument to respond directly to authorities without the involvement of a judicial authority in the Member State of the service provider.[22] The numerous, ongoing consultations will, very likely, have a reshaping effect on the e-evidence proposal, however, it is conceivable that a direct cooperation model will be introduced.[23]

2. UPS AND DOWNS OF MUTUAL TRUST

Back in the early 2000s, the European Union operated under strong, politically presumed mutual trust between the Member States which was grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.[24] This assumption was incorporated into the flagship mutual recognition instrument, the European Arrest Warrant.[25] After a few years of functioning with the EAW, the European Union began to gradually

20 'Transactional data' means data related to the provision of a service offered by a service provider that serves to provide context or additional information about such service and is generated or processed by an information system of the service provider, such as the source and destination of a message or another type of interaction, data on the location of the device, date, time, duration, size, route, format, the protocol used and the type of compression, unless such data constitutes access data. This includes electronic communications metadata as defined in point (g) of Article 4(3) of [Regulation concerning the respect for private life and the protection of personal data in electronic communications], Article 2 of the Proposal.

21 'Content data' means any stored data in a digital format, such as text, voice, videos, images and sound other than subscriber, access or transactional data, Article 2 of the Proposal.

22 Recital 9 of the Proposal.

23 Direct contact between the competent authorities and service providers has already been enacted at the Council of Europe level, acknowledging the importance of timely cross-border access to electronic evidence in specific criminal investigations or proceedings in view of the challenges posed by existing procedures for obtaining electronic evidence from service providers in other countries, see Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence. Explanatory Report [2021] <https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a48e4b> accessed 1 February 2022 point 9.

24 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] OJ C 12/10.

25 Framework decision on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1 and its Recital 10: The mechanism of the European arrest warrant is based on a high level of confidence 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, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

acknowledge the more political, than genuine, foundations of mutual trust[26]. The 2005 Hague Programme[27] talks about 'strengthening' mutual trust by the progressive development of a European judicial culture based on the diversity of the legal systems of the Member States and unity through European law. Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States [2005] refers to 'reinforcing' mutual trust by legislative measures.[28] The 2010 Stockholm Programme talks of finding new ways to 'increase reliance' on mutual trust,[29] which requires minimum standards and a reinforced understanding of the different legal traditions and methods[30]. Over the years also the CJEU has challenged the shape of mutual trust. In its early judgements of *Advocaten voor de Wereld*[31] and *Melloni*,[32] the Court operated under strong, mutual trust, whereas the newer judgements[33] have brought a significant, fundamental-rights driven[34] change to

26 See the criticism about the absence of an explicit ground for refusal based on human rights violations in: Anne Weyembergh, 'European Added Value Assessment The EU Arrest Warrant ANNEX I Critical Assessment of the Existing European Arrest Warrant Framework Decision' (2014) <https://doi.org/10.2861/44748>; <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979(ANN01)_EN.pdf>, accessed 24 May 2022.

27 The Hague Programme: Strengthening Freedom, Security and Justice in The European Union [2005] OJ C 53/1.

28 Commission, Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, Brussels, 19 May 2005, COM(2005) 195 final, para 19: 'The first endeavours to apply the MR principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation. This can revolve around two axes: ensuring that mutually recognised judgments meet high standards in terms of securing personal rights and also ensuring that the courts giving the judgments really were the best placed to do so. Taking MR a stage further might imply giving further consideration to certain measures to approximate legislation on substantive criminal law'.

29 The Stockholm Programme – An Open And Secure Europe Serving And Protecting Citizens [2010] OJ C 11/1: 1.2.1. '*Mutual trust. Mutual trust* between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area. Ensuring trust and, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future'.

30 Commission, Delivering an area of freedom, security and justice for Europe's citizens, (n 13): 'The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods. Establishing rights is not enough. Rights and obligations will become a reality only if they are readily accessible to those entitled to them. Individuals need to be empowered to invoke these rights wherever in the Union they happen to be'.

31 Case C-303/05 *Advocaten voor de Wereld VZW,* EU:C:2007:261.

32 Case C-399/11 *Melloni,* EU:C:2013:107.

33 Case C-404/15 *Aranyosi Căldăraru,* EU:C:2016:198; Case C-216/18 *LM,* EU:C:2018:586; Joined Cases C-354/20 and C-412/20 *L and P,* EU:C:2020:1033.

34 Tomasz Ostropolski, 'Współpraca wymiarów sprawiedliwości w sprawach karnych' in Jan Barcz (ed), *Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna. System Prawa Unii Europejskiej,* Vol. 8 (C.H. Beck 2021) 296-305.

this approach. This gives rise to a fundamental question: Has there ever been a sufficient, genuine and unambiguous foundations of 'mutual trust' basis in place?

3. Evidence gathering and mutual trust: the lessons from the EIO

The EIO, which was designed to exist in the fluctuating mutual trust environment, raises a number of concerns with regard to the lawfulness of the evidence obtained using this instrument and the level of protection of the fundamental rights of the persons involved in cross-border investigative measures.[35] In opposition to this approach, the European Union launched its proposal on electronic evidence, which is a door opener to free movement of electronic data across the Member States. It has to be stressed that the e-evidence Proposal is not a typical mutual recognition instrument since it ensures the mutual recognition of those judicial decisions in which a judicial authority in the issuing jurisdiction directly addresses and imposes obligations on a service provider from another jurisdiction (including those beyond the EU) without the prior intervention of a judicial authority in that other Member State.[36] Both the European Production or Preservation Order can lead to the intervention of a judicial authority of the executing State only if there is non-compliance, in which case enforcement will be required and the competent authority in the country in which the representative is located will intervene (in the role of an 'enforcing authority'). Nevertheless, as a principle, an authority in the country where the addressee of the order is located will not have to be directly involved in serving and executing the order. The e-Proposal has thus switched mutual recognition from the judicial level to the level of judicial–private data controllers.[37] This means the role of mutual trust has also changed: whereas it has traditionally been looked upon as two-directional trust divided between the executing (trusting the issuing) and issuing (trusting the executing) Member States,[38] now it seems to lose this significance.

35 Balázs Garamvölgyi, Katalin Ligeti, Anna Ondrejová, Margarete von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU' [2020] (3) EUCRIM <https://doi.org/10.30709/eucrim-2020-016>; Hanna Kuczyńska, 'Admissibility of Evidence Obtained as a Result of Issuing an European Investigation Order in a Polish Criminal Trial' (2021) 46 Review of European and Comparative Law 67 <https://doi.org/10.31743/recl.11815>.

36 Angel Tinoco-Pastrana, 'The Proposal on Electronic Evidence in the European Union' [2020] (1) EUCRIM <https://doi.org/10.30709/eucrim-2020-004>.

37 Marcin Rojszczak, 'e-Evidence Cooperation in Criminal Matters from an EU Perspective' (2022) Modern Law Review <https://doi.org/10.1111/1468-2230.12749>.

38 See elaborately Gert Vermeulen 'The EU's mutual trust and recognition bubble – Challenging the legitimacy of EU criminal policy and judicial cooperation in criminal matters' in Klaus Tiedemann, Urlich Sieber, Helmut Datzger, Christoph Burchard and Dominik Brodowski (eds), *Die Verfassung moderner Strafrechtspflege* (Nomos 2016) 181-210.

3.1. Fundamental rights protection

The proposed model for gathering e-evidence puts a lot of pressure on the issuing State and authority since the domestic law of this country will fully govern the process involved in accessing electronic data *via* a foreign service provider. The lack of judicial recognition in the executing Member State raises doubts about the level of protection of the fundamental rights of the data subjects, even though a direct channel of cooperation with service providers is necessary in view of the growing need for timely cross-border access to electronic evidence. The EIO is a good example here since it expressly acknowledges that breaches of fundamental rights may occur. Article 11(1)(f) introduces fundamental, rights-based grounds for refusal which free the executing State from executing the order if there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter.

As controversial as it is,[39] Article 11(1)(f) of the EIO Directive, both anticipates a fundamental rights breach scenario and provides the executing authority grounds for refusal. However, the Proposal puts a service provider (namely, an actor outside the criminal justice system) in charge. If the provider considers that the order manifestly violates the Charter of Fundamental Rights, it shall turn to the competent enforcement authority in the Member State concerned. In such cases, the competent enforcement authority may seek clarification from the issuing authority of the European Production Order either directly, via Eurojust or the European Judicial Network (Article 9(5)). This seems to impose a lot of responsibility on service providers who would actually be on the front line to detect 'manifest violations' that may lead to fundamental rights violations.

There is no convincing reason to believe that the gathering of electronic evidence will not provoke such breaches, especially since the EIO simply accepted the fact that fundamental rights-based concerns are inevitable. A closer look at the data which may be sought, which consists of both content and non-content data, will help to illustrate the potential scale of abuses. It is true that obtaining basic, subscriber information just for identification purposes (such as an account holder's name and address) is generally less invasive than obtaining transactional or content data. However, it is also true that non-content data, taken as a whole, is liable to cause very precise conclusions to be drawn concerning the private lives of the persons whose data was retained, thereby establishing a profile of the individuals concerned.[40] Leaving the power to access content data stored abroad with the issuing authorities also seems controversial as the domestic preconditions for such measures vary considerably.[41] Is also should be noted that at the

39 Due to its clear inconsistence with the mutual trust concept.

40 Joined Cases C203/15 and C698/15 *Tele2 Sverige* AB, EU:C:2016:970, para 99.

41 Martyna Kusak, 'Mutual admissibility of electronic evidence in the EU. A study of subscriber, access, transactional and content data stored by service providers', forthcoming.

Council of Europe level, the Second Protocol to the Budapest Convention[42] limited the possibility of directly contacting service providers to obtain subscriber data. There is no convincing reason to believe that the European Union operates under a much higher level of trust, which would justify the scope of the data that can be sought using the e-evidence Proposal. Article 1(1) of the Proposal, the Directive 2016/680 on personal data protection[43] and the Charter for Fundamental Rights will not be of much assistance here. A generic, fundamental rights foundation has already proven to be insufficient for enhancing mutual trust in criminal matters.[44] Additionally, data protection is not capable of accommodating all specific, evidence-oriented issues. Thus, it is simply naive to fully rely on the assumed commitment of Member States (in this case the issuing State) to respect fundamental rights.

A solution, which would eradicate these dilemmas, is to introduce common, EU minimum standards for stored subscriber, access, transactional and content data based on Article 82(2) TFEU.[45] Although adequate data protection is guaranteed by Directive 2016/680, which would also act as a default standard for the application of the e-evidence Proposal, the Member States still lack common, transparent terms with regard to the lawfulness of the way electronic evidence is gathered as well as the rules enhancing the procedural rights of the data subjects. Such standards would also play an important trust-building function as they would have an effect between all the agents involved in electronic evidence gathering (judicial authorities, data subjects, service providers), which would facilitate the overall application of the e-evidence framework.

3.2. Proportionality

As with the EIO, the Proposal relies on a self-proportionality assessment by the issuing authority. Again, it seems to be overly optimistic to blindly believe that the domestic preconditions for accessing data will adequately ensure a comparable level of proportionality. The comparative data actually suggests otherwise, in particular with regard to accessing stored content data which significantly differs across the EU Member States.[46] Whereas the EIO counterbalances this proportionality self-assessment with the distrust-based recourse to a different type of investigative measure (Article 10 EIO), the Proposal offers no solution other than for the service provider to resort to the executing State authority.

42 Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence [2021] CM(2021)57 final.

43 Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/ 89.

44 Vermeulen (n 38) 201-208.

45 This article opens up a possibility to adopt minimum rules facilitating, inter alia mutual admissibility of evidence in criminal matters.

46 Kusak (n 41).

This issue, moreover, could be addressed by means of minimum standards based on Article 82(2) TFEU, which would introduce common preconditions delineating, *inter alia*, proportionality features.

3.3. Speciality

The specialty principle is aimed at the cross-border collection and use of information and evidence and plays a key role in international cooperation in criminal matters, including in the context of mutual legal assistance. Even though it was introduced in the late 1980s, attention on informational or evidential specialty seems to be non-existent in times of post MR-based, mutual legal assistance instruments. The EIO also lacks any provisions or leadership on the *use* limitation for information and evidence gathered with this instrument, which causes a lot of practical difficulties.[47] Research on this issue has revealed that only a more detailed, generic specialty rule and data ownership principle have the potential to promote the free movement of information and evidence whilst equally enhancing the procedural rights positions of persons.[48]

This lesson from the EIO, however, has clearly not been learnt. In addition, the Proposal refrains from delineating for which purposes transferred personal data can be used by the receiving competent authority. In this context, the 'use limitation rules' seem to be of even more importance, given the scope and sensitivity of the data that may be sought.[49] Therefore, the data protection purpose-limitation principle should be promoted to act as a use limitation for personal data gathered under the Proposal, although the two principles do not fully equate with each other either conceptually or functionally.[50]

3.4. Lack of measures enhancing admissibility of evidence

Since the 1999 Tampere conclusions, the European Union has been striving for a model implementing *per se* admissibility of evidence in criminal matters. Since all the initial plans and ambitions failed, the EIO still relies on the *forum regit actum* principle,

47 European Judicial Network (EJN), Extract from the Conclusions of the 49th Plenary meeting of EJN <https://www.ejnforum.eu/cp/registry-files/3373/ST-15210-2017-INIT-EN-COR-1.pdf> 9 accessed 1 February 2022; see also Julio Barbosa e Silva 'The speciality rule in cross-border evidence gathering and in the European Investigation Order – let's clear the air' (2019) 19 ERA Forum 485-504.

48 Gert Vermeulen, Martyna Kusak, 'Unblurring the Fuzzy Line Between Specialty and Data Protection in EU Mutual Legal Assistance after the European Investigation Order', forthcoming.

49 See also the interesting considerations of Gert Vermeulen as to allowing the consent of the data subject as a basis for further use, drawn in the context of the Second Protocol to Budapest Convention, Inclusion of data protection safeguards relating to law enforcement trans-border access to data in the Second Additional Protocol to the Budapest Convention on Cybercrime (ETS 185), Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data, T-PD(2019)3, p. 5.

50 Vermeulen and Kusak (n 48).

which has not been complemented with any rules facilitating admissibility of evidence gathered by use of this instrument. This may lead to situations in which, due to the lack of transparent EU rules, operating under domestic approaches will raise admissibility concerns, lower the procedural guarantees of the persons involved in the measures and render the entire cooperation pointless.

Seemingly, gathering data directly from the service provider does not raise many concerns about the admissibility of evidence. The issuing authority will not be reliant on the procedural rules of the executing State, and the latter will not be involved whatsoever, leaving no room for questioning incompatibilities on access to data. Depending solely on the issuing State's rules may indeed be functional if evidence is to be used solely for the purposes of the ongoing proceedings in that State. It could, however, still be questioned if the data is already in the possession of the criminal justice authorities and is to be transferred to another EU Member State. In such a context, the State seeking the data (using the EIO) will be confronted about the way in which it was obtained by the authority from another EU State, with no opportunities to enhance its admissibility (FRA is clearly helpless here). From this point of view, the EIO and the Proposal are consistent in the fact that no efforts have been made to ensure the mutual admissibility of evidence. This issue can only be accommodated by the trust-building measures, which would reduce the disproportions between the EU Member States, namely the minimum standards based on Article 82(2) TFEU.

3.5. Legal remedies

It is safe to say that mutual trust could be significantly upgraded if the data subject is given effective procedural remedies against the evidentiary measure.[51] Even though the EIO ensures legal remedies equivalent to those available in a similar domestic case (Article 14), it has not made any efforts to ensure that such remedies actually exist. Hence, this provision becomes superfluous in cases in which domestic law does not provide such a remedy or if its execution is not feasible in certain stages of the procedure.

On the contrary, the Proposal introduces the rule that for suspects and accused persons, the right to an effective remedy should be exercised during the criminal proceedings. This may affect the admissibility or, as the case may be, the weight in the proceedings of the evidence obtained by such means. In addition, suspects and accused persons benefit from all procedural guarantees applicable to them, such as the right to information. Other persons, who are not suspects or accused persons, should also have the right to an effective remedy (Recital 56). This change of approach, which finally shapes the so-far patchwork landscape of rules on legal remedies and also serves a trust-building function, should be fully supported.

51 *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000).

CONCLUSIONS

The EIO's specific provisions clearly confirm the low level of mutual trust between Member States in the evidence-gathering context, which is supposed to be balanced by a set of provisions left to the executing authority (*inter alia* recourse to a different type of investigative measure grounds for refusal) and primarily by the FRA principle for the issuing authority. Without introducing any measures towards enhancing such trust, the EU has proposed a model for electronic evidence, which almost entirely relies on the issuing authority and the law of the issuing Member State, redefining the role that mutual trust plays in the mutual recognition context. In this new scenario, there is neither an executive authority entrusted with the way in which the measure was granted in the issuing State, nor the issuing State entrusted with the manner in which the measure was undertaken abroad. Cooperation is conducted directly between the issuing State and service provider unless the former refuses to cooperate or questions the proportionality of the measure. This constellation leads to the impression that, contrary to the EIO, this model can actually work, notwithstanding the insufficient level of mutual trust. However, as this paper reveals, the trust gaps will have a significant, negative impact on various agents and aspects of criminal justice, including the fundamental rights of data subjects, the application of the rule of speciality or mutual admissibility of evidence. The e-evidence Proposal has to be accompanied by modalities which enhance mutual trust across this context, which would also expand the indirect protectionist functions of Directive 2016/680 on personal data protection. This can be achieved by means of introducing minimum standards based on Article 82(2) TFEU which contain transparent terms related to the lawfulness of the way in which electronic evidence is gathered as well as rules enhancing the procedural rights of the data subjects.

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Data retention obligations in the context of CJEU case law

Michalina Marcia

Abstract

The aim of the article is to present the position of the CJEU on the conditions provided for data retention provisions, and to confront them with the regulations adopted in the national legal systems. The first part discusses the case law of the CJEU regarding data retention, the admissibility of retention as such, data categories covered by retention, duration, which authorities can require access to the retained data, judicial review, and the exceptions to the main principles. In the next part, the solutions adopted in the legal orders of Member States are briefly analysed, with particular focus on Poland, in the context of the above mentioned conditions. Finally, the article addresses the issue of the procedural status of service providers and their rights in criminal proceedings.

Keywords

data retention, digital evidence, traffic data, Directive 2006/24/EC, CJEU case law, right to a fair trial

Introduction

Data retention can be defined as an obligation imposed on providers of publicly available electronic communications services or of public communications networks (service providers) to collect and store, for a defined period of time, certain data which is generated or processed by them. This is done in order to ensure that the data is available

for the purpose of the investigation, detection and prosecution of serious crime.[1] This retention applies to traffic and location data concerning both legal entities and natural persons and to the related data necessary to identify a subscriber or registered user but it does not apply to the content of electronic communications.

Definitions of traffic data can be found across a wide range of legislation. One of them is provided by Article 1 of the Convention on Cybercrime (hereinafter the Budapest Convention).[2] According to this Convention, 'traffic data' is:

> *any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service* (Article 1(d)).

The CJEU has indicated that retention can, in particular, cover the data necessary for the location of the source of a communication and its destination. Additionally, to determine the date, time, duration and type of communication, identify the communication equipment used, locate the terminal equipment and communication data which comprises, for example, the name and address of the user, the telephone numbers of the caller, the person called and the IP address for Internet services. Despite the fact that retention manifestly does not allow for the collection of communications content, it can certainly be described as a surveillance measure.

The issue of data retention moreover seems to have come to the interest of the CJEU and EU legislative bodies.[3] In one respect, recent judgments of the CJEU have significantly restricted the possible scope and grounds for retention itself, whilst in another, the European Commission introduced a proposal for a regulation concerning,

1 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54, (Article 1(1)).On the invalidation of this directive see Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, EU:C:2014:238.

2 Council of Europe Convention on Cybercrime, Budapest, 23 November 2001, ETS 185.

3 See more Lilian Mitrou, 'The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive' in Kevin D. Haggerty and Minas Samatas (eds), *Surveillance and Democracy* (Routledge-Cavendish 2010) 127; Mark Taylor, 'The EU Data Retention Directive' (2006) 22 Computer Law & Security Review 309-312, Marie-Helen Maras, 'From targeted to mass surveillance: is the EU Data Retention Directive a necessary measure or an unjustified threat to privacy?' in Benjamin J. Goold, Daniel Neyland (eds), *New Directions in Surveillance and Privacy* (Routledge 2009) 74; Adam Juszczak, Elisa Sason, 'Recalibrating Data Retention in the EU. The Jurisprudence of the Court of Justice of the EU on Data Retention – Is this the End or is this the Beginning?' [2021] (4) EUCRIM 238-266, Thomas Wahl, 'CJEU: Data Retention Allowed in Exceptional Cases' [2020] (3) EUCRIM 184-186, Sophia Rovelli, 'Case Prokuratuur: Proportionality and the Independence of Authorities in Data Retention' (2021) 6 European Papers 199-210.

inter alia, the issue of data collection from other Member States by directly addressing the service providers which would execute the retention. This was in addition to a proposal for a directive regulating the appointment of legal representatives for service providers in connection with gathering evidence in criminal proceedings.[4] As a result, data retention creates a number of specific issues. The case law of the CJEU calls into question the compatibility of national regulations with the conditions set by this Court together with the future admissibility of evidence collected through data retention in the EU. Furthermore, the proposal for regulation mentioned above raises some doubts connected with the status of the service providers to which the requests for data will be filed.

The aim of the article is to indicate that data retention still remains one of the main problematic issues of EU criminal matters and judicial cooperation, due to the lack of legal conformity among the Member States. First, to support this thesis, the article will present the requirements established by the CJEU to identify the model data retention regulation that would be considered compliant with EU law. In the next part, the diversity of legal solutions in the Member States will be outlined in the context of the above-mentioned conditions with particular focus on the Polish legal system. The general scope of data retention, periods of retention and access to judicial review will be presented. Finally, the issue of the status of service providers will be discussed as another emerging issue connected with data retention. All these elements will make it possible to identify the current state, the future of data retention in the EU and to determine if amendments are needed at a national level to bring all the Member States into compliance with their commitments.

1. CJEU CONDITIONS ON DATA RETENTION

Data retention became an interest of the CJEU after its adoption in the European Parliament and Council Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (hereinafter Directive 2006/24/EC).[5] This directive itself caused a number of contro-

4 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters', Strasbourg, 17 April 2018, COM(2018) 225 final. See also Opinion of the European Economic and Social Committee on 'Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters' [2018] OJ C 367/88; Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings', Strasbourg, 17 April 2018, COM(2018) 226 final.

5 Directive 2006/24/EC (n 1).

versies among the European national courts.[6] Finally, in the judgment of 8 April 2014, the CJEU declared Directive 2006/24/EC invalid.[7] The CJEU has referred again to this issue *inter alia* in the cases: 1) *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*,[8] 2) *La Quadrature du Net and Others v Premier ministre and Others*,[9] 3) *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*,[10] 4) *Criminal proceedings against H. K.*[11]

In its recent rulings, the CJEU has adopted a much more protective approach towards fundamental rights, especially the right to privacy, and has formulated several conditions connected with retention itself and with the use of collected data in criminal proceedings. The CJEU underlined in *La Quadrature du Net and Others v Premier ministre and Others* (para 117)[12] that data may reveal information about a significant number of aspects of the private life of the persons concerned, including sensitive information such as sexual orientation, political opinions, religious, philosophical, societal or other beliefs and state of health. Given that such data, specifically, enjoys special protection under EU law, said data may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them. In particular, this data provides the means of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications.[13]

6 See for example Czech Constitutional Court, Decision of 22 March 2011, Pl. ÚS 24/10, <https://www.usoud.cz/en/decisions/2011-03-22-pl-us-24-10-data-retention-in-telecommunications-services> accessed 9 January 2022; Czech Constitutional Court, Decision of 22 December 2011, Pl. ÚS 24/11, <https://www.usoud.cz/en/decisions/2011-12-20-pl-us-24-11-telecommunication-services> accessed 9 January 2022; Alexander Kashumov, 'Data Retention in Bulgaria' in Marek Zubik, Jan Podkowik, Robert Rybski (eds), *European Constitutional Courts towards Data Retention Laws* (Springer 2021) 75-83; Cian Murphy, 'Romanian Constitutional Court, Decision No. 1258 of 8 October 2009' (2010) 47 Common Market Law Review 933-941; Niklas Vainio, Samuli Miettinen, 'Telecommunications data retention after *Digital Rights Ireland*: legislative and judicial reactions in the Member States' (2015) 23 International Journal of Law and Information Technology 290 <https://doi.org/10.1093/ijlit/eav010>; Ludovica Benedizione, Eleonora Paris 'Preliminary Reference and Dialogue Between Courts as Tools for Reflection on the EU System of Multilevel Protection of Rights: The Case of the *Data Retention Directive*' (2015) 16 German Law Journal 1727, <https://doi.org/10.1017/S2071832200021325>.

7 Joined Cases C-293/12 and C-594/12 (n 1).

8 Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, EU:C:2016:970.

9 Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier ministre and Others,* EU:C:2020:791.

10 Case C-623/17 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*, EU:C:2020:790.

11 Case C-746/18 *Criminal proceedings against H. K.,* EU:C:2021:152.

12 Joined Cases C-511/18, C-512/18 and C-520/18 (n 9).

13 Case C-623/17 (n 10) para 71.

In its rulings, the CJEU referred to the regulations covering all electronic communications systems and that apply to all users of such systems, without distinction or exception, with no restriction to a particular time period, geographical area, including or instead to suspects of serious crimes. The CJEU declared in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* (para 72) that mass, unrestricted retention cannot be perceived as compliant with the general principles of EU law, including the principle of proportionality, nor with the fundamental rights guaranteed in the Charter, especially the right to privacy.[14] According to the position expressed by the CJEU, in order to satisfy the requirement of proportionality, the individual regulations present in national legal systems must stipulate the clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, in order for the persons, whose personal data is affected, to have sufficient guarantees that data will be effectively protected against the risk of abuse (para 68).

Moreover, the CJEU underlined that the regulation in question must be 'legally binding under domestic law and, in particular, it must indicate in what circumstances, under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary.'[15] In *La Quadrature du Net and Others v Premier ministre and Others*[16] the CJEU indicated that these safeguards are especially needed when personal data is subjected to automated processing, particularly where there is a significant risk of unlawful access to that data and when the protection of the particular category of personal data that is sensitive data is at risk (para 132). In addition, the CJEU stressed the importance of identifying a particular situation and circumstances that give rise to criminal proceedings against a particular person, prior to imposing any obligations connected with executing retention (para 143). In the view of the CJEU, as expressed in *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*,[17] retention cannot be applied to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with the objective of countering serious crime and, in particular, without there being any relationship between the data whose retention is requested and a threat to public security.[18] Such a measure would be unjustified, disproportionate and incompatible with EU principles (para 105).

One of the most important aspects stipulated by the CJEU is an adequate review of access to retained data. In *European Commission v Federal Republic of Germany*, the CJEU gave a clear outline for the shape of this review. First, it should be carried out either by a court or by an independent administrative body. To be perceived as independent, that body must have a status enabling it to act objectively and impartially when carry-

14 Case C-623/17 (n 10).

15 Ibid, para 68.

16 Joined Cases C-511/18, C-512/18 and C-520/18 (n 9).

17 Joined Cases C-203/15 and C-698/15 (n 8).

18 Joined Cases C-293/12 and C-594/12 (n 1) paras 57-58; C-203/15 and C-698/15 (n 8), para 105.

ing out its duties and must, for that purpose, be free from any external influence (para 25).[19] Moreover, according to the position of the CJEU expressed in *Criminal proceedings against H. K*, that body must be a third party in relation to the authority which requests access to the data, in order that it be able to carry out the review objectively and impartially and free from any external influence.[20] In particular, in the criminal field, the requirement of independence entails that the authority entrusted with prior review must not be involved in the conduct of the criminal investigation in question and must have a neutral stance relative to the parties to the criminal proceedings (para 54).[21] Secondly, as a rule, the review should be executed prior to the access. In cases of duly justified urgency, the review must be conducted within a brief period of the data being accessed (para 51).[22] Finally, the decision of the court or competent body should refer not only to the strict procedural aspects, but must be able to strike a fair balance between, in one respect, the interests relating to the needs of the investigation in the context of combating crime and in the other, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access (para 52).[23]

However, the CJEU, in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*,[24] indicated that the importance of the objective of safeguarding national security, read in the light of Article 4(2) of the TEU goes beyond that of the other objectives justifying data retention, *inter alia,* the objectives of countering crime in general, even serious crime, and of safeguarding public security. Such threats can be distinguished by their nature and particular seriousness (para 135). According to the CJEU, the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives (para 136). In such cases, the Charter does not preclude a legislative measure which permits the competent authorities to order providers of electronic communications services to retain the traffic and location data of all users of their electronic communications systems for a limited period of time, on the proviso that there are sufficiently solid grounds for considering that the Member State concerned is confronted with a serious threat to national security which is shown to be genuine and present or foreseeable (para 138).[25] It does, however, remain unclear how the need for the collection of the data could be foreseen and, if this 'follow-up' procedure based on the exclusion of mass data retention and applicable

19 Case C-518/07 *European Commission v Federal Republic of Germany*, EU:C:2010:125, para 25; Opinion of the CJEU 1/15, 'Draft agreement between Canada and the European Union – Transfer of Passenger Name Record data from the European Union to Canada', EU:C:2017:592, paras 229-230; Case C-746/18 (n 11), para 53.

20 Case C-746/18 (n 11) paras 51-54.

21 Ibid, para 54; Opinion of AG Pitruzzella, EU:C:2020:18, para 126.

22 Case C-746/18 (n 11), para 51; Joined Cases C-511/18, C-512/18 and C-520/18 (n 9), para 189.

23 Case C-746/18 (n 11), para 52.

24 Case C-623/17 (n 10).

25 Case C-623/17 (n 10), paras 135-136.

only after the threat to national security is detected, can always be a sufficient measure to ensure the interests of the State in the face of such a threat.

Finally, in *Criminal proceedings against H. K*[26] the CJEU also addressed the issue of admitting evidence as grounds for a potential conviction. As a result, addressing the issue of the influence of data retention, not only on the right to privacy, but also on the right to a fair trial (paras 41-44). The CJEU indicated that the final evidential use of materials obtained through disproportionate and illegal electronic evidence gathering has a particular impact on the respect of the standard to a fair trial. The CJEU pointed out, *inter alia,* that the need to exclude information and evidence obtained in breach of Union law must be assessed, in particular, in the light of the risk, which the admissibility of such information and evidence presents, to respect for the adversarial principle and thus the right to a fair trial (para 44). Therefore, in the view of the CJEU, the principle of effectiveness imposes an obligation on the national criminal courts to disregard information and evidence obtained via the generalised and indiscriminate retention of traffic and location data, which is incompatible with EU law, or by means of unlawful access to those data sources by a competent authority (para 43). Especially if, in the framework of criminal proceedings instituted against persons suspected of committing a crime, these persons are not able to effectively respond to information and evidence belonging to an area not examined by the court and which may have a decisive influence on the assessment of the facts. Otherwise, the court would permit, to some extent, the possibility of violating the right to a fair trial by failing to ensure the right to active participation in the trial (para 44).

The issue of admissibility is one of the major factors connected with data retention that reflects the importance of compliance with some common standards developed among EU Member States. Research conducted by Eurojust shows a considerable amount of doubt connected with the future of admitting evidence, obtained by means of retention, inconsistent with the conditions imposed by the CJEU.[27] The literature on the subject indicates that, whilst in the Member States, during EU surveys, such evidence was still generally considered admissible for the purposes of the trial, its future, in the light of CJEU case law, remains uncertain.[28] Certainty among national legal systems is, however, one of the most important aspects of effective, judicial cooperation in criminal matters in the Union, based on the principle of mutual recognition of judgments and judicial decisions. Judicial cooperation must be grounded in mutual trust between

26 Case C-746/18 (n 11).

27 Eurojust, 'Data retention regimes in Europe in light of the CJEU ruling of 21 December 2016 in Joined Cases C-203/15 and C-698/15 – Report, 2017' <https://www.statewatch.org/media/documents/news/2017/nov/eu-eurojust-data-retention-MS-report-10098-17.pdf> accessed 9 January 2022; European Digital Rights, 'Eurojust: No progress to comply with CJEU data retention judgments' <https://edri.org/our-work/eurojust-no-progress-to-comply-with-cjeu-data-retention-judgements> accessed 9 January 2022.

28 Marcin Rojszczak,'The uncertain future of data retention laws in the EU: Is a legislative reset possible?' (2021) 41 Computer Law & Security Review <https://doi.org/10.1016/j.clsr.2021.105572>.

Member States.[29] If procedural rights, or the standards of human rights protection differ significantly in individual states, issues regarding the mutual admissibility of evidence will appear. If these disparities and uncertainties continue despite the judgments of CJEU, perhaps it will become necessary for the European Parliament and the Council to create an act harmonising data retention provisions in order to ensure efficient, judicial cooperation.

2. Data retention in Member States

According to the studies conducted by Eurojust and the European Commission and despite the recent rulings, a majority of Member States still include mass retention provisions[30] in their legal system and there are almost no examples of targeted retention of data linked to specific persons or geographical locations.[31] As the study conducted by the European Commission showed, non-content data is also retained by service providers for purposes other than law enforcement. These purposes include national security and internal and commercial purposes, such as invoicing, marketing, network security and taxation.[32] The average maximum time period for which data can be retained is twelve months. There are, however, some exceptions.[33] Additional 'freeze periods' are also recognised, which may be requested by law enforcement agencies for investigation purposes.[34] One of the positive aspects that can be found in the existing research is that the majority of the States that were subjected to research provide for some sort of control prior to access.[35] In some of the States, in the case of an urgent situation, an *ex post* review can be executed.[36]

Data retention regulations adopted in Member States generally differ from the strict conditions of the CJEU and there appear to be signals that some of the States have, for instance, relied on the national security threat exception to reintroduce mass data retention. *Inter alia,* the French government recently declared a systematic state of emergency in France, stating, therefore, that national security is under constant threat. On this basis, the Council of State [*Conseil d'État*] rendered a decision readopting

29 Agnieszka Grzelak, 'Komentarz do Artykułu 82' in Dawid Miąsik, Nina Półtorak, Andrzej Wróbel (eds), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz (art. 1-89)*, Vol. I (Wolters Kluwer 2012).

30 Exceptions could be found for instance in Austria. See Axel Anderl, Alona Klammer, 'Data Retention in Austria' in Marek Zubik, Jan Podkowik, Robert Rybski (eds), *European Constitutional Courts towards Data Retention Laws* (Springer 2021) 39-52.

31 Eurojust (n 27); European Commission, Directorate General for Migration and Home Affairs, Claire Dupont, Valentina Cilli, Ela Omersa and others, 'Study on the retention of electronic communications non-content data for law enforcement purposes: final report' (2020) Publications Office, 39-48 <https://data.europa.eu/doi/10.2837/384802>.

32 European Commission (n 31), 54-57.

33 Ibid, 16.

34 The maximum period of the freeze generally oscillate around three months, ibid, 94-96.

35 Ibid, 18, 78-81.

36 Ibid, 79-80.

previous data retention provisions. This can be viewed as an attempt to circumvent the CJEU judgment and its ban on non-targeted data retention.[37]

However, whilst many of the countries commenced work on amendments to the existing provisions, numerous requests for preliminary rulings were also issued by the national courts to check their compliance with EU law. One key example of a State, in which the CJEU case law seems to have had a strong impact, is Germany. Their existing data retention provisions are currently under suspension due to administrative court decisions. In the debate on the future of data retention, maintaining 'freeze periods' as the basis of data collection has been proposed.[38] Nevertheless, the suspended regulations still provided some important guarantees that were mentioned by the CJEU in the context of proportionality.

According to Section 100g of the German Code of Criminal Procedure,[39] for example, if certain facts give rise to the suspicion that someone has, as an offender or participant, committed one of the especially serious crimes or, in cases where there is criminal liability for attempting, has attempted to commit such a crime and the act weighs particularly heavily in the individual case as well, then traffic data stored in accordance with Section 113b of the Telecommunications Act may be captured, insofar as establishing the facts or determining the whereabouts of the accused would be considerably difficult in some other way or would be futile and the data capture is appropriate in relation to the importance of the matter. The second sentence of this Section clearly defines the term of 'especially serious crimes', leaving, as a result, very little up to the discretionary power of the law enforcement agencies. These provisions, therefore, include specific terms and conditions on which data can be accessed by law enforcement agencies and, as a result, reduce the risk of unnecessary interference with citizens' right to privacy, and give a sense of legal certainty.[40]

Conversely, the Polish regulations on data retention leave much to be desired. The general basis for the measure was included in the Telecommunications Act (2004),[41]

37 European Digital Rights, 'Data retention? Advocate General says *Asked and answered!*' <https://edri.org/our-work/data-retention-advocate-general-says-asked-and-answered> accessed 9 January 2022. Proposal for maintaining mass retention was also made in Denmark. Here, targeted retention was perceived only as an emergency plan in case the general data retention regime is brought down by courts.

38 Tutanota, 'Germany: Data retention to be abolished once and for all' <https://tutanota.com/blog/posts/data-retention-germany/> accessed 9 January 2022. Currently Federal Administrative Court in Leipzig filed the request for preliminary ruling to the CJEU to clarify if the data retention provisions outlined in Germany's Telecommunications Act comply with EU law.

39 German Code of Criminal Procedure, in the version published on April 7, 1987, BGBl. I, 1074, 1319 with subsequent amendments.

40 European Digital Rights, 'Digitalcourage fights back against data retention in Germany' <https://edri.org/our-work/digitalcourage-fights-back-against-data-retention-in-germany> accessed 9 January 2022; Bundesverwaltungsgericht, Press Release No 66/2019, 'EuGH soll Vereinbarkeit der deutschen Regelung zur Vorratsdatenspeicherung mit dem Unionsrecht klären' <https://www.bverwg.de/pm/2019/66> accessed 9 January 2022.

41 Telecommunications Act (2004), Dz.U. (2021), item 576.

which *de facto* provides for indiscriminate, general, non-targeted data retention. According to Article 180a of the Telecommunications Act, an operator of a public telecommunications network and a provider of publicly available telecommunications services are obliged, at their expense, to retain and store the data generated in the telecommunications network or processed by them within the territory of The Republic of Poland for a period of 12 months from the date of the merger or unsuccessful connection attempt. This data, according to Articles 180c and 180d of the Telecommunications Act, includes *inter alia* necessary data for tracing the network termination point, telecommunications terminal equipment, the end user originating the call or being called, in addition to identifying the date and time of a call and its duration, the type of the call, and the location of telecommunications terminal equipment.

The Telecommunications Act gives legal grounds for retention obligations that can be attributed to service providers. The powers of law enforcement agencies are determined by the provisions of the Polish Code of Criminal Procedure (1997), (hereinafter the CCP).[42] The already mentioned 'freeze period' is included in Article 218a of the CCP. According to the content of this Article, offices, institutions and entities conducting telecommunications activities or providing services by electronic means, and digital service providers, are obliged to immediately secure, at the request of the court or the prosecutor, contained in the decision, for a specified period, but not exceeding 90 days, IT data stored in devices containing this data on a carrier or in the IT system. In certain cases, this measure may be combined with an obligation to prevent access to this data. The legislator also provides for a right to appeal for persons whose rights have been violated in the course of proceedings. In addition, Article 218 para 1 of the CCP provides for the general possibility of requests for correspondence and parcels and the data referred to in Articles 180c and 180d of the Telecommunications Act, if they are relevant to the proceedings. Requests, as a rule, can be ordered by the court or the public prosecutor. Nevertheless, the system of gathering evidence by means of various surveillance measures is not uniform and, in fact, its dualistic nature can be identified as a potential source of fundamental rights infringement.

The Act on the Police (1990),[43] also provides for access to the retained data but with much fewer safeguards. First, it enables access by police officers, therefore broadening the scope of authorities competent to gather data (still limited to non-content data). Moreover, according to Article 20c of the Act on the Police, there is no need for either a reasonable suspicion that a crime was committed, nor that the person in question is in any way connected with any criminal activity. In addition, no clear time frames for applying the measure are set. Finally, and of particular importance, the regulation provides for no type of direct control over the actions taken by the Police. After the

42 Polish Code of Criminal Procedure (1997), Dz.U. (1997), No 89, item 555 with subsequent amendments.

43 Act on the Police (1990), Dz.U. (2021), items 1882, 2333, 2447, 2448.

constitutionality of the regulation was questioned,[44] the legislator added Article 20ca, according to which, control over the obtaining of telecommunications, postal or internet data by the Police is within the competence of the circuit court. Furthermore, every six months the competent authorities must submit a report to the circuit court covering the number of cases in which there was the obtaining of telecommunications, postal or internet data in the reporting period, the type of such data and legal classification of offences in relation to which telecommunications, postal or internet data has been requested, or information on obtaining data in order to save human life or health or to support search or rescue activities. In addition, the circuit court may request materials that justify the disclosure of data to the Police.

However, this type of review cannot be seen as a proper procedural guarantee compatible with the requirements set out by the CJEU. It does not have the *a priori* character, does not give an insight into the individual cases and makes it impossible to assess the legality and proportionality of the measure and whether it satisfies the standards of the right to privacy and to a fair trial. As a result, Poland not only allows for indiscriminate data retention, but is one of the few EU countries that does not require a review by a court or other independent body in the process of gathering retained data for criminal trial purposes.[45]

3. The status of service providers

A further issue that should be mentioned in connection with data retention, is the status of service providers. For the reason that data collection, including both the content of communication and traffic data, becomes more widespread in criminal proceedings, opinions have been expressed that service providers should be granted special status in a trial.[46] The question arises, if the prosecution orders the disclosure of information which is, to a certain degree, private in nature, is there the possibility of contesting it in any way, invoking the right to defence? Should service providers merely be treated as witnesses, or should they have a separate procedural status?[47]

The issue in question gains relevance in the light of the proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal

44 Judgment of the Polish Constitutional Tribunal of 30 July 2014, K 23/11, [2014] (7) Orzecznictwo Trybunału Konstytucyjnego, Series A, item 80. See also Małgorzata Tomkiewicz, 'Sądowa kontrola pozyskiwania danych telekomunikacyjnych, internetowych i pocztowych' [2018] (4) Państwo i Prawo 67.

45 See also European Commission (n 31) 80.

46 Michele Simonato, 'Defence rights and the use of information technology in criminal procedure' (2014) 85 Revue Internationale de Droit Pénal 261-310 <https://www.cairn.info/revue-internationale-de-droit-penal-2014-1-page-261.html> accessed 9 January 2022.

47 Ibid, 289.

matters (hereinafter the proposal for a Regulation).[48] The proposal for a Regulation provides the possibility for competent authorities of Member States to order that a service provider,[49] offering services in the Union, produces or preserves electronic evidence, regardless of the location of the data. A European Production or Preservation Order will be transmitted to the addressee, via a European Production Order Certificate (EPOC) or a European Preservation Order Certificate (EPOC-PR) (Article 8 (1)). According to Article 7(1) of the proposal for a Regulation, a European Production Order and a European Preservation Order may be addressed directly to a legal representative, designated by the service provider, for the purpose of gathering evidence in criminal proceedings.

The most important issue, connected with the status of service providers contained in the provisions of the proposal for a Regulation, is reflected in Articles 9 and 15. Article 9 generally provides the premises to decline to execute an EPOC. Firstly, it addresses the more technical and formal issues. Pursuant to Article 9(3), if an EPOC is incomplete, contains manifest errors or does not contain sufficient information to execute the EPOC and the addressee cannot comply with it, he or she will inform the issuing authority referred to in the EPOC without undue delay and ask for clarification. The grounds for denial are based on the impossibility of complying with an obligation imposed by *force majeure* or the fact that this obligation is not attributable to the addressee, or, if different, the service provider, due to the fact that the data subject is not their customer, or the data has already been deleted prior to receiving the EPOC. If the relevant conditions are fulfilled, the issuing authority shall withdraw the EPOC (Article 9 (4)).

However, according to Article 9(5) of the proposal for a Regulation, in cases where the addressee considers that an EPOC cannot be executed for reasons based solely on the information contained in the EPOC, it is apparent that it manifestly violates the Charter, or that it is manifestly abusive, the addressee shall also inform the competent enforcement authority in the Member State of the addressee. In cases such as these, the competent enforcement authority may seek clarification of the European Production Order from the issuing authority, either directly or via Eurojust or the European Judicial Network. In addition, Article 10 of the proposal for a Regulation contains provisions on executing an EPOC-PR, including those relating, *inter alia*, to *force majeure*. Furthermore, Article 15 of the proposal for a Regulation provides:

> *If the addressee considers that compliance with the European Production Order would conflict with applicable laws of a third country prohibiting disclosure of the data concerned on the grounds that this is necessary to either protect the fundamental rights of the individuals concerned or the fundamental interests*

48 Commission, Proposal for a Regulation (n 4). See Stanisław Tosza 'All evidence is equal, but electronic evidence is more equal than any other: the relationship between the European Investigation Order and the European Production Order' (2020) 11 New Journal of European Criminal Law 161 <https://doi.org/10.1177/2032284420919802>.

49 See definition of 'service provider' provided in Article 2 (3) of the proposal for a Regulation.

of the third country related to national security or defence, it shall inform the issuing authority of its reasons for not executing the European Production Order in accordance with the procedure referred to in Article 9(5).

The proposal for a Regulation, in fact, gives significant, procedural powers to service providers, including the ability to influence the fundamental rights guarantees. It would seem that these powers are, in fact, of a dual nature. Firstly, service providers have gained a number of review competences with regard to the individual acts. As a result, their decisions can influence the situation of the person whose data is the subject of the order. Secondly, it can be perceived as the manifestation of a separate procedural status for service providers, including rights directly attributable to them in the EU legal system. If the proposed regulation comes into force containing wording similar to the present draft, it will significantly influence the procedural situation of service providers within the EU Member States.

Conclusions

The issues connected with data retention remain one of the major issues of EU criminal law. The regulations of Member States on data retention continue to differ from the conditions established by the CJEU and not all of those involved are willing to adjust to them to comply with the CJEU decisions on this matter. One of the most common issues is clearly demonstrated by the continuation of indiscriminate, general and mass retention being allowed. Conversely, a number of the States have started to adapt their provisions, or at least elements of them, to the standards presented in CJEU case law. The variety of legal solutions that exist across Member States may affect the standards of human rights protection during the process of evidence collection. If this issue is not resolved in the near future, one possible consequence may be the hindrance of judicial cooperation and mutual admissibility of evidence.

With regard to the Polish legal system, the provisions on data retention and access of law enforcement agencies to retained data clearly need to be amended. The most urgently required change is connected with judicial review. Introducing a review, executed by an independent body, will secure fundamental rights and allow for a proportionality assessment in every individual case. An added change that could be considered by the legislator is the introduction of a catalogue of offences and cases in which access to data may be requested.

Finally, a matter that additionally needs reconsideration, at a national level, is the status of service providers. It would seem that this should occur irrespective of whether the proposed regulation is adopted by the European Parliament and the Council. The role of service providers is not only restricted to data retention, but can also have

a significant impact in the context of other surveillance measures.[50] Therefore, it would seem that they should at least be granted the right to file an appeal against a decision in which data is requested from them.

To conclude, amendments to the existing data retention provisions in most Member States seem to be necessary in the context of the CJEU case law. In cases of a lack of common willingness to comply with existing requirements, it may appear inevitable that a proposal will be filed for a harmonising act on the means of collecting digital evidence, including data retention, and formulating a number of common standards in this regard.[51] However, as some EU countries have expressed concern over the strict conditions of the CJEU and consider the retention of traffic data necessary to sustain an effective law enforcement system, it is uncertain whether a consensus can be achieved on this matter across the entire Union.

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50 The literature also points to the problem of privilege against self-incrimination – the actions of law enforcement agencies can be perceived as an attempt to bypass the requirements of fundamental rights guarantees. See Sarah Wilson 'Compelling Passwords from Third Parties: Why the Fourth and Fifth Amendments Do Not Adequately Protect Individuals When Third Parties Are Forced to Hand Over Passwords' (2015) 30 Berkeley Technology Law Journal 1-38 <http://www.jstor.org/stable/43917626> accessed 9 January 2022.

51 Especially taking into account that the Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters (n 4) clearly does not eliminate all discrepancies among national regulations and does not apply to all the problematic issues that the CJEU has referred to.

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The execution of financial penalties imposed based on vehicle registration data, a commentary on the CJEU judgment C-671/18 in the case *Centraal Justitieel Incassobureau*

Hanna Kuczyńska

Abstract

This article comments on the 5th of December 2019 CJEU judgment in the case C-671/18, where the Court resolved doubts as to whether, in accordance with EU law, it is possible to impose a financial penalty for a road traffic offence on a person designated on the basis of a legal presumption as the owner of a car by the register of vehicles of another Member State. This judgment was based on the provisions of Article 7(2)(g) and Article 20(3) of the Council Framework Decision, 2005/214/JHA, of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. The Court concluded that a financial penalty issued in another Member State should be executed, even if the person sentenced (punished) presents a certificate demonstrating that he or she was not the owner of the vehicle. In the text below the consequences of this attitude will be presented, as well as both the negative and positive arguments as to the way of reasoning of the Court.

Keywords

European Union, financial penalties, mutual recognition of decisions in criminal matters, Framework Decision 2005/214/JHA, presumption of liability

Introduction

The analysed judgment of the CJEU is of great practical importance; it applies not only to issues that may be of importance to every person traveling by car across the EU Member States, but also to persons who have sold (or maintain to have sold) the car whereas other persons travelling by the same car may have committed a road offence. The frequency of offenses against road traffic regulations by Polish drivers in the Member States is clearly demonstrated by the statistics: the data for 2019 shows that the National Contact Point [Krajowy Punkt Kontaktowy, Centralna Ewidencja Pojazdów i Kierowców (CEPiK)] received 1 953 788 inquiries about the data of drivers who exceeded the speed limit abroad. Most inquiries came from Germany, 1 055 196, Austria, 218 250 and France, 148 084.[1]

On the basis of the provisions of the Directive 2015/413/EU of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences, it is possible to conduct automated searches of data relating to vehicles and data concerning owners or holders of the vehicle in case of road traffic offences in transborder cases. The state, in which the offence was committed, can be granted access to national vehicle registration data (VRD) in the state of the perpetrator.[2] As a result of the implementation of this Directive, Member States can now share vehicle registration data in order to contact the interested person directly. Each State, in which the offence was committed, can contact the owner, the holder of the vehicle or the otherwise identified person suspected of committing the road-safety-related traffic offence in order to keep the person concerned informed of the applicable procedures and the legal consequences under the law of the Member State of the offence, in particular possible administrative or penal proceedings. Sending the information directly to the interested person allows that person to respond to the information letter in an appropriate way, in particular by asking for more information, by settling the fine or by exercising his or her rights of defence, especially in the case of mistaken identity. Most Member States have incorporated internal rules that allow for the imposition of a penalty not only on the person who committed the traffic offense but also on the owner of the vehicle.

In the context of the discussed judgment, it is worth mentioning that further proceedings with the fine imposed on the person concerned are covered by applicable legal instruments adopted at EU level and implemented into the legal orders of the EU Member States, especially the Council Framework Decision 2005/214/JHA

1 On the basis of data received from the Ministry of Digitalization by tvn24bis.pl, Auto-Świat, 'Dostajemy coraz więcej mandatów z zagranicy' <https://www.auto-swiat.pl/wiadomosci/aktualnosci/dostajemy-coraz-wiecej-mandatow-z-zagranicy-prawie-2-mln-w-2019-roku/nn9fvsz> accessed 2 January 2022.

2 Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences [2015] OJ L 68/9.

of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.[3] The fundamental rule of the cooperation in that matter is that the enforcement of the decision is governed by the law of the executing State in the same way, as if the financial penalty has been issued in the executing State.

In the analysed judgment of the CJEU, the Court underlined the obligation of the Member States to apply the principle of mutual recognition and the rules governing it, in particular, in this case, the principle according to which a decision imposing a financial penalty may be challenged in substance only in the issuing state. It considered that, even if a person did not own the car, and if he or she failed, or was unable to challenge a judgment effectively in proceedings pending in another Member State, there was no longer any possibility of challenging the correctness of a judgment in the executing state at the stage of execution of the sentence. Therefore, it is not possible, at the stage of executing a foreign judgment, to correct the mistake as to the identity of the car owner.

1. Execution of financial penalties in the EU Member States

In the territory of the EU Member States, the basis for recognition and enforcement of financial penalties are provisions of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition of financial penalties (later: Framework Decision 2005/214). The Framework Decision indicates in the Preamble that the principle of mutual recognition should apply to financial penalties imposed by judicial or administrative authorities for the purpose of facilitating the enforcement of such penalties in a Member State other than the State in which the penalties are imposed. It also covers the financial penalties imposed in respect of road traffic offences.

The basic principle on which the enforcement is founded is to ensure that the competent authorities in the executing state recognise and enforce the execution of the decision issued in the issuing state without further formalities. The executing judicial authority does not 'decide' to recognise a ruling but has a 'recognition obligation'. This obligation does not only cover recognition of the decision but also an obligation to take all the necessary measures for its execution, in the same manner and timing as if the decision had been issued in the executing state. In the case of the principle of mutual recognition of judgments in criminal matters as applied to execution of financial penalties, the *exequatur* procedure (procedure of conversion) applied in relation to the transfer of execution of decision on the basis of traditional international agreements was abandoned. Thus, it is

3 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16. The procedure was described in more detail – see Hanna Kuczyńska, 'Współpraca międzynarodowa w sprawach wykroczeń' in Marta Kolendowska-Matejczuk and Valeri Vachev (eds), *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?* (Rzecznik Praw Obywatelskich 2016) 121-127.

the decision, imposing a financial penalty issued in another Member State, that is directly enforceable, without the decision having to be converted on the basis of applicable law in the executing State. There is an exception provided in Article 8 of Framework Decision 2005/214 according to which it is established that if the decision is related to acts which were not carried out within the territory of the issuing State, the executing State may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the same kind under the national law of the executing State, when the acts fall within the jurisdiction of that State. Moreover, the competent authority of the executing State can, if necessary, convert the penalty into the currency of the executing State at the rate of exchange obtained at the time the penalty was imposed.

Only to a very narrow extent does the executing authority have the power to examine the conditions for the admissibility of transferring a penalty for enforcement by an authority of the issuing Member State. It may only examine formal grounds, e.g. the issue of the existence of competence of an authority of a Member State to transfer the penalty to be enforced.[4] It cannot assess whether such transfer of the penalty for execution was justified and expedient (or proportionate, which is, e.g. a condition for issuing a European Investigation Order). It may also refuse to execute such a judgment only on the basis of the grounds of non-recognition and non-execution, as listed in Article 7 of Framework Decision 2005/214.

This principle results in the inability to assess the validity and correctness of the issued decision by the authority of the executing State. Only in the issuing State it is possible to subject to appeal the very substantive decision imposing a financial penalty. In the executing State where the judgment is enforced, it is no longer possible to challenge the substantive decision by presenting evidence in defence of the sentenced person, as only enforcement proceedings are pending in that State. As a result of the appeal submitted in the executing state, it is only possible to refer the charges against the formal aspects of the executing procedure as provided in the law of the executing State. The appeal submitted in the executing State should therefore not relate to the merits of the decision imposing a financial penalty but may only raise issues relating to the enforcement proceedings pending in the executing State. The substantive grounds for issuing a decision imposing a financial penalty may only be raised in the issuing state where the decision was issued.

2. The application of the principle of mutual recognition to financial penalties

On the 5th of December the CJEU issued a judgment on the request for a preliminary ruling under Article 267 TFEU from the 'Sąd Rejonowy w Chełmnie' (the notion used in the judgment, District Court, Chełmno, Poland), received in the proceedings

4 See Sławomir Steinborn, 'Artykuł 611ff' in Jan Grajewski, Lech K. Paprzycki and Sławomir Steinborn (eds), *Kodeks postępowania karnego. Komentarz,* Vol. II (Wolters Kluwer Polska 2013) 1102.

brought by Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (Central Fine Collection Agency, Ministry of Justice and Security, later: CJIB). In this judgment it resolved doubts as to whether, in accordance with EU law, it is possible to impose a financial penalty on a person designated on the basis of a legal presumption as the owner of a car by the register of vehicles of another Member State.[5] This request for a preliminary ruling concerned the interpretation of Article 7(2)(g) and Article 20(3) of Council Framework Decision 2005/214. The financial penalty in question was imposed on the basis of a legal presumption provided for in Article 5 of the Highway Code in the Netherlands. According to this provision, if it is established that the offending conduct has been committed with or by means of a motor vehicle that has been assigned a registration number and it is not immediately possible to determine the identity of the driver of that vehicle, without prejudice to the provisions of Article 31(2) of that Code, the administrative penalty shall be imposed on the person in whose name the registration number was listed in the register at the time when the offending conduct took place.

This provision was utilised when on, 9 November 2017, the Central Fine Collection Agency delivered a decision requiring a person described as 'Z.P.' to pay a financial penalty in the amount of EUR 232 in respect of a road traffic offence committed by the driver of a vehicle registered in Poland in his name. This decision of 9 November 2017, requiring payment of the financial penalty, was notified by placing it in Z.P.'s letter box, as was the information about the deadline for exercising the right to contest the case, which was 21 December of that year. That period, in which the claimant could lodge an appeal, began not as of the actual receipt of the decision, but as of the date of that decision. In the absence of any appeal against the decision of 9 November 2017, that decision became final on 21 December 2017.

On the basis of the provisions implementing the Framework Decision into the Dutch legal order, the CJIB lodged a request for recognition and execution of a financial penalty imposed on Z.P. in the Netherlands in respect of a road traffic offence at the District Court in Chełmno.

As to the remaining facts of the case, the person sentenced and issued the financial fine, submitted before the Polish executing authority, the District Court in Chełmno, that on the date of the contested offence, he had sold the vehicle in question and had informed his insurer of that fact. However, he admitted that he did not inform the authority responsible for the registration of the vehicle of that sale.

Under those circumstances, the District Court in Chełmno decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> *(1) Should Article 7(2)(i)(iii) and Article 20(3) of [the Framework Decision] be interpreted as authorising a court to refuse to enforce a decision of an authority of an issuing State other than a court if it finds that the service of*

5 Case C-671/18 *Centraal Justitieel Incassobureau,* EU:C:2019:1054.

that decision was affected in such a way as to infringe a party's right to an effective defence before a court?
(2) In particular, can a finding in which, despite the service procedures in force in the issuing State and the time limits laid down for appealing a decision, as referred to in Article 1(a)(ii) and (iii) of [the Framework Decision] having been observed, the party residing in the State enforcing the decision did not have a real and effective opportunity to protect his rights at the pre-litigation stage of the proceedings due to not having been given sufficient time to respond to the notification of the imposition of the penalty in a proper manner, constitute grounds for refusal?
(3) Under Article 3 of [the Framework Decision], can the scope of legal protection afforded to persons against whom a financial penalty is to be recognised depend on whether the procedure for imposing the penalty was an administrative procedure, a procedure concerning a petty offence or a criminal procedure?
(4) In light of the objectives and principles set out in [the Framework Decision], including Article 3 thereof, are the decisions of non-judicial authorities, which are issued pursuant to the laws of the State issuing the decision concerned under which the person in whose name a vehicle is registered is held liable for road traffic offences, (that is to say, decisions issued solely on the basis of information obtained within the framework of the cross-border exchange of vehicle registration data and without any investigation being carried out in that case, including determining the actual offender), enforceable?

In answer to the doubts expressed by the Polish court, the Court of Justice adopted a restrictive interpretation of the Framework Decision provisions, deciding that:

1. Article 7(2)(g) and Article 20(3) of the Council Framework Decision 2005/214/JHA of 24 February 2005, on the application of the principle of mutual recognition to financial penalties, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where a decision requiring payment of a financial penalty has been notified in accordance with the national legislation of the issuing Member State indicating the right to contest the case and the time limit for such a legal remedy, the authority of the Member State of execution may not refuse to recognise and execute that decision provided that the person concerned has had sufficient time to contest that decision. This is for the national court to verify. That and the fact that the procedure imposing the financial penalty in question is administrative in nature, is not relevant in that regard.
2. Article 20(3) of the Framework Decision 2005/214, as amended by Framework Decision 2009/299, must be interpreted as meaning that the competent authority of the Member State of execution may not refuse to recognise and

execute a decision requiring payment of a financial penalty in respect of road traffic offences where such a penalty has been imposed on the person in whose name the vehicle in question is registered on the basis of a presumption of liability laid down in the national legislation of the issuing Member State, provided that that presumption may be rebutted.

3. The fundamental meaning of the principle of mutual recognition

The point of departure for the considerations of the Court was the opinion that it was impossible to abandon the basic assumptions, according to which the principle of mutual recognition of judgments in criminal matters operates. The Court underlined that the competent authority of the executing State is required, in principle, to recognise and execute the decision transmitted and may refuse, by way of derogation from the general rule, solely on one of the grounds for non-recognition or non-execution expressly provided for by the Framework Decision (para 33).

Only in the issuing State the proceedings on the merits is pending, aimed at the determination of the perpetrator of the traffic offense or the person who is the owner of the vehicle. Naturally, the condition for the recognition of the decision and execution of it is compliant with the relevant procedure in the issuing State, during which the person concerned should be 'in accordance with the law of the issuing State, informed personally or via a representative, competent according to national law, of his right to contest the case and of the time limits of such a legal remedy' (as in Article 7(2)(g)(i)). Thus, it is the legislation of the issuing States that regulates the model of the appeal procedure, as well as the method of informing the person concerned of the right to contest the case, the time limit for it, and the point at which that period begins. This information should be delivered effectively and allow for a genuine exercising of the right to defence.[6]

As a result of this assumption, the Court stated that:

In view of the fact that the principle of mutual recognition, which underpins the Framework Decision, means that, in accordance with Article 6 of that decision, the Member States are, as a rule, obliged to recognise a decision requiring payment of a financial penalty which has been transmitted in accordance with Article 4 of the Framework Decision without any further formality being required and to take, without delay, all the measures necessary for its enforcement, the grounds for refusal to recognise or enforce such a decision must be interpreted restrictively (para 31).

6 The same interpretation was used in another judgment – Joined Cases C-124/16, C-188/16 and C-213/16 *Tranca and Others,* EU:C:2017:228, para 42. See also, by analogy Case C-396/11 *Radu,* EU:C:2013:39, para 36 and the case-law cited.

This is already an established line of jurisprudence. In the *Baláž* case, judgment of 14 November 2013,[7] the Court underlined that the key question for assuming if the decision was issued in accordance with the law and if the person is to be regarded as having had the opportunity to have a case tried before a court having jurisdiction in particular in criminal matters, is weather that person was informed about his or her right to appeal against the impugned decision. In such a case, that person was required to comply with the indicated appeal procedure. In order to recognise the procedure as satisfying the judicial protection principle requirements, there is a requirement to ensure the actual and effective receipt of decisions, by utilizing an effective method of notification to the person concerned, as well as sufficient time to bring an appeal against such decisions and prepare that appeal. If that person does not exercise the right to appeal, as a result of which the decision imposing the fine becomes final, he or she cannot contest the decision on the stage of the executing procedure. According to the principle of mutual recognition, which underpins the Framework Decision, the Member States are, as a rule, obliged to recognise a decision requiring payment of a financial penalty which has been transmitted in accordance with Article 4 of the Framework Decision without any further formality being required and to take without delay all the measures necessary for its enforcement. The grounds for refusal to recognise or enforce such a decision must be interpreted restrictively. Denial of requests can only be the exception, also, when fundamental rights infringements may be at stake.[8]

4. The importance and consequences of fundamental rights protection

According to Article 20(3) of Framework Decision 2005/214, Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the TEU may have been infringed, oppose the recognition and the execution of decisions.

Furthermore, as with other legal instruments based on mutual recognition principle, this Framework Decision includes a reference in the Preamble to the respect for fundamental rights. According to the Preamble, this Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the TEU and reflected in the Charter. Based on these provisions, the Court, while affirming the fundamental importance of a kind of 'automaticity' in the enforcement of decisions issued in other Member States, recognised that there may be exceptional situations in which the principle of effective, judicial protection of the rights, which individuals derive from EU law, referred to in Article 19(1) TEU, may render the judgment impossible to

7 Case C-60/12 *Baláž,* EU:C:2013:733, para 29.

8 Thomas Wahl, 'CJEU: No Loopholes against Enforcement of Foreign Fines' [2019] (4) EUCRIM 246.

execute. The Court stressed that this is a general principle of EU law, stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, and which, is now reaffirmed by Article 47 of the Charter.[9]

Therefore, it results clearly from the text of the judgment that an exception to the general rule on the enforcement of a decision issued in other Member States 'without further questions' is a violation of fundamental rights in the procedure for issuing this decision. In the commented judgment the Court confirmed the existence of this exception to the principle of mutual recognition. However, it did not provide a list of sample infringements of fundamental rights nor did it provide any more detailed guidelines as to their nature.[10] It confirmed the existence of this ground for non-enforcement, pointing out that:

> *If, having regard to the information available, the competent authority of the Member State of execution determines that the certificate provided for in Article 4 of the Framework Decision suggests that fundamental rights or fundamental legal principles may have been infringed, that authority may oppose the recognition and execution of the decision transmitted.*

The Court has not closed, in principle, the way for the executing authority to recognise that there has been an infringement of fundamental rights.[11] As a result, it should be stated that referring to the existence of this exception is discretionary: it is the court of the executing State that must independently assess whether there are any suspicions, in a given case, that the fundamental rights may have been violated in the proceedings before the authority issuing the decision (not in the proceedings before the executing authority).

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9 The Court applied, to that effect, the principles adopted in its previous judgments: Case C-64/16 *Associação Sindical dos Juízes Portugueses,* EU:C:2018:117, para 35; Case C-625/11 *PPG and SNF v ECHA,* EU:C:2013:594, para 35; Case C-354/15 *Henderson,* EU:C:2017:157, para 72; Case C-432/05 *Unibet,* EU:C:2007:163, para 37; Case C-279/09 *DEB,* EU:C:2010:811, paras 29-33.

10 More on that topic: Valsamis Mitsilegas, 'The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust' (2019) 2 Revista Brasileira de Direito Processual Penal 591-592; Michiel Luchtman, 'Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters' (2020) 1 European Journal of Crime, Criminal Law and Criminal Justice 14-45.

11 Monika Stefaniak-Dąbrowska writes (although she formulates this conclusion in relation to infringements in the delivering and translation of decisions required by law by the authority of the issuing state) that 'the Court has in some way shifted to the authority executing the decision the burden of proving that there was no violation of fundamental rights in the procedure preceding the cross-border transfer of the sentence.' See Monika Stefaniak-Dąbrowska, 'Wzajemne uznawanie orzeczeń nakładających kary pieniężne w świetle standardów procesowych Unii Europejskiej' [2020] (9) Europejski Przegląd Sądowy 4-12.

However, notwithstanding the recognition of the exception of fundamental rights violation, the Court closed this door in regard to the circumstances of the case at hand:

> *Article 20(3) of the Framework Decision must be interpreted as meaning that the competent authority of the Member State of execution may not refuse to recognise and execute a decision requiring payment of a financial penalty in respect of road traffic offences where such a penalty has been imposed on the person in, whose name the vehicle in question is registered, on the basis of a presumption of liability laid down in the national legislation of the issuing Member State, provided that that presumption may be rebutted* (para 58),

thus establishing a new rule applicable in cross-border proceedings.

It should be noted that the justification of the CJEU judgment is limited and laconic in nature. The Court referred only in general terms to the existing rule and the possible exception to it. It assessed the potential violation of fundamental rights in a specific manner. The judgment allows only for an evaluation of whether the time limit for appeal was sufficient by assessing if the decision was effectively delivered. This is done in order to allow for a sufficiently extended period to bring a complaint and the preparation of such a contestation. If these premises existed, the requirement to respect the right to effective judicial protection was fulfilled.

As for the imposition of the penalty on the person indicated in the register as the owner of the vehicle, the Court only analysed the possibility of applying a legal presumption, reaching the correct conclusion, that it is possible to impose a penalty on the person to whom the vehicle is registered, on the basis of the presumption of liability provided for in the national regulations of the issuing State. In such a case, the competent authority of the executing State cannot refuse to recognise and enforce a decision imposing a penalty on that person for road traffic offenses, even in a situation where it is clear that the person concerned could have obtained the annulment of the fine had he been able to prove that he was not the owner or was not in possession of the vehicle at the time of the offending conduct.[12]

The Court speculated about the compliance of this provision with the principle of the presumption of innocence laid down in Article 48 of the Charter, which corresponds to Article 6(2) of the ECHR. It was on the basis of the jurisprudence of the ECtHR that it came to the conclusion that such a presumption is consistent with EU law. It considered that the case-law of the ECtHR concerning Article 6(2) which the Court of Justice takes into consideration, pursuant to Article 52(3) of the Charter, for the purposes of interpreting Article 48 of that Charter, is clear on the fact that a person's right in a criminal case to be presumed innocent and to require the prosecution to bear

12 See Centraal Justitieel Incassobureau (CJIB), Exécution des sanctions pécuniaires <https://eclan.eu/en/eu-case-law/centraal-justitieel-incassobureau-cjib-execution-des-sanctions-pecuniaires> accessed 26 January 2022.

the onus of proving the allegations against him or her is not absolute. Presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the ECHR, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence.[13] It noted that:

> *In that decision, the European Court of Human Rights held that Article 5 of the Netherlands Highway Code is compatible with the presumption of innocence, insofar as a person who is fined under that article can challenge the fine before a trial court with full competence in the matter and that, in any such proceedings, the person concerned is not left without any means of defence in that he or she can raise arguments based on Article 8 of the Highway Code* (para 55).

It may follow from the thesis of the judgment that the Court established an exception to the exception: while the violation of fundamental rights in the procedure of issuing a decision to be enforced may constitute an exception to the principle of mutual recognition of judgments in criminal matters, there is an exception to this conclusion: the accused may not rely on Article 20(3) of the Framework Decision 2005/214, arguing that he or she is not, and has not been, the owner of the vehicle, if he does not do so at the appropriate stage of the proceedings. The Court found that the application of such a presumption about the owner of the vehicle cannot constitute an infringement of fundamental rights. The procedural effect resulting from the functioning of this legal presumption is 'stamped' at this stage and, at the stage of enforcement of the judgment in the 'own' State, the provision of Article 20(3) cannot work. The Tribunal 'top down' decided that relying on this presumption could not be considered as falling within the scope of Article 20(3) of the Framework Decision.

Many questions arise on the basis of this judgment. First, about the scope of the rights of the accused in repressive proceedings. It follows from this ruling that the procedural rights of the accused exist only in the issuing State. The right to be presumed innocent and the right to defence cease with the delivery of a final decision. Second, about the extent of the national court's discretion in deciding whether to execute a decision that infringes fundamental rights; the Court has, in fact, ordered the domestic courts to refrain from examining a possible violation of fundamental rights in the case of using this specific legal presumption.

It seems strange that in the discussion about fundamental rights the notion of 'fair trial' does not appear even once in the judgment. Several assumptions can be made. Firstly, one may conclude that there can be no mention of the fair trial rights as long as all the procedural rights of the accused have been safeguarded. One cannot 'put the horse before the cart' and assess whether the fair trial rights have been violated if all the

13 Invoking *Falk v the Netherlands* App no 66273/01 (ECtHR, 19 October 2004).

formal elements of such rights were secured. If no provisions were infringed, fair trial rights could not be violated. However, this conclusion should be rejected. Secondly, an attitude can be adopted that the notion of fair trial presumes evaluation of criminal trial from a general perspective, evaluating whether the trial, seen as a whole, could be considered fair. Perhaps, it was not the wish of the makers of the Framework Decision to allow the executing authority to assess the fair trial safeguards in the issuing State. This conclusion should, also, be considered incorrect. Most probable is the third assumption: it may signify that it is exactly what should happen: the 'fundamental rights' notion has the same meaning as the 'fair trial principles', as the Court invoked Article 6 of the ECHR, creating thus a point of reference for the evaluation of fundamental rights' infringements.

5. The impact of the CJEU judgment on the Polish law

The thesis of this CJEU judgment was applied under Polish law in a similar factual situation. In the decision of 19 January 2021, III KK 130/20,[14] the Polish Supreme Court concluded that:

> *It does not preclude the execution of a financial penalty issued by a judicial authority of a European Union Member State pursuant to Art. 611ff of the Code of Criminal Procedure by a competent district court, if the decision is based on the presumption that the punished (sentenced) person is the perpetrator of the criminal act, even if the person before a Polish court challenges, even credibly, their authorship, provided it is established that the said presumption could have been levered in appeal proceedings conducted in a European Union Member State and that the punished (convicted) person, properly instructed by the authority of that state about the date and manner of lodging an appeal, had sufficient time for the preparation and contribution of this measure.*

In the case examined before the Supreme Court, the factual situation was quite different: in this case, the Polish authorities provided the Dutch authorities with incorrect data on the owner of the vehicle because of the mistake made in the register. In *Centraal Justitieel Incassobureau* the main 'character' of the case, Z.P., admitted that he did not inform the authority responsible for the registration of the vehicle of that sale (para 20 of the judgment). Meanwhile, in the case III KK 130/20, only the fact that the sale of the vehicle was not entered into the Central Vehicle Register (even if it had been correctly reported by the previous owner, who became the accused) led to the imposition

14 Polish Supreme Court, decision of 19 January 2021, III KK 130/20, [2021] (3) Orzecznictwo Sądu Najwyższego w sprawach Karnych i Wojskowych 11.

of a penalty on the given person for an offense that he was neither the perpetrator of, nor the owner of the car as the 'owner of license plates'.

Despite the different facts, the Supreme Court fully applied the thesis of the judgment in the case C-671/18. In this decision, the Supreme Court referred to the analysed judgment of the CJEU and emphasized that the key to the legal analysis of the legal situation of a person, who was not the owner of the vehicle at the time of committing a traffic offense, should be the finding, that the person on whom a fine was wrongly imposed, did not appeal the decision delivered by the issuing State. In this context, it pointed out that even the use of the appeal procedure, if it were ineffective, would not give the Polish court an opportunity to challenge the correctness of the executed decision. As a result, the Supreme Court stated that the decisive factor for the court's decision to execute the decision of an authority of another Member State should not be whether the judgment was issued against the beneficial owner of the vehicle, but that the person, designated by the Dutch authority, as the owner did not properly use an effective appeal procedure available in the issuing country. The decision of the authority of the issuing state was based on a lawful presumption that has not been effectively rebutted.

CONCLUSIONS

The justification of this decision lacks a more detailed consideration of the mutual relationship between the principles in force in EU law. It can, however, be presumed that the principle of mutual recognition of judgments in criminal matters is of fundamental importance. This implies that in the executing State, its authorities cannot assess the substantive grounds for its issuance, i.e. they cannot assess the conclusions resulting from the evidence. The issuance of a final decision must end such considerations. Only cases of violation of fundamental rights in these proceedings may constitute an exception to this rule. In this respect, the judicial authority of the executing State has the discretion to assess whether such an event took place. Until then, the judgment of the Court does not raise doubts and this thesis is, literally, derived from the provisions of the Framework Decision. The next, third, stage of the analysis raises doubts. For the Court top-down and, one can say, 'once and for all decided' that the accused may not rely on Article 20(3) of Framework Decision 2005/214 before the authorities of the executing State, arguing that he was not the owner of the vehicle. At this stage of the proceedings, such a presumption may no longer be called into question as it has already produced certain legal effects. The Court indicated that proceeding on the basis of such a presumption did not constitute an infringement of fundamental rights. Consequently, it 'removed' the facts as they were in the discussed case from the pool of possible 'violations of fundamental rights'. Therefore, the executing authority is unable to examine whether that presumption has been correctly applied. The Court closed the door to finding that the imposition of a fine on a person, indicated as the owner of the vehicle by the system

of records of a given state, may fall within the scope of Article 20(3) of Framework Decision 2005/214.

The CJEU judgment should be assessed as more pragmatic than fair. The thesis presented by the CJEU enables the functioning of the system in which it is possible to impose financial penalties for road law violations on the basis of a legal presumption as to the owner of the vehicle. It can be concluded that the Court in Luxembourg established a norm that must now be applied by the courts of the Member States, following the clause *dura lex sed lex*. According to the adopted attitude, it is imperative to comply with the principle of mutual recognition of decisions in criminal matters, irrespective of possible negative consequences for the rights of the respective person. Although the Court found that the importance of the protection of fundamental rights cannot be called into question, it also pointed out that it must be balanced by the consequences of applying other legal principles in force in EU law, in this case, the principle of mutual recognition and the admissibility of relying on the effects of applying legal presumptions. Furthermore, although fundamental rights are immovable, as evidenced by the content of Article 20(3) of Framework Decision 2005/214, the importance of which was emphasized by the Court, these have their end and limits, they are not absolutely binding rights. The end of their validity is to be the issuance of a final decision. There may be one more conclusion of a practical character resulting from the practical dimension of consequences of this ruling. An analysis of the documentation sent by the Dutch authorities in similar misdemeanour cases shows that the appeal procedure in such traffic offences cases cannot be described as clear and understandable to the average 'recipient of the financial penalty'. The average punished person, only with the greatest difficulty, can use the appeal procedure available in another Member State in a correct and effective manner. It could be practicable to discuss the possibility of adopting a transparent appeal procedure in each Member State, perhaps by standardizing the forms of instructions and developing clear and uniform rules for providing information on the appeal procedure, as well as the need to raise awareness of the need for an early procedural reaction to the information received from another Member State about the issuance of a judgment in a criminal case against the person.

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The system of transfer of sentenced persons within the EU in the light of the CJEU judgement in the *Popławski (II)* case

Michał Hara

Abstract

The author presents the consequences of the CJEU judgment of 24 June 2019 in case C-573/17 *Popławski* in relation to declarations limiting the temporal application of Framework Decision 2008/909 made under its Article 28(2). The CJEU clearly stated that any declaration made after the adoption of the Framework Decision is invalid and cannot bear legal consequences. As such, Member States should give effect to the Framework Decision as if the declaration had never been made. However, this may cause conflicts with their national laws enacted to implement such a declaration, since a framework decision, while binding, does not have a direct effect and, therefore, cannot require national authorities to refrain from applying their national laws. The author presents several ways this conflict can be resolved, in particular, through the pro-European interpretation of national law and the notion of dispersed constitutional review.

Keywords

mutual recognition of judgments, transfer of sentenced persons, Framework Decision 2008/909/JHA, direct effect of EU law

Introduction

The system of transfer of sentenced persons within the European Union forms a part of a larger network of legal instruments aiming to ensure mutual recognition and execution of judicial decisions between EU Member States. Its application, in the day-to-day operation of Member State courts, naturally provides certain practical difficulties and occasional obstacles.

This article seeks to present some of these difficulties relating to the application of the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union[1] (hereinafter: Framework Decision 2008/909) regulating this matter, as it was interpreted by the CJEU, in particular with regard to the possibility of applying the rules laid down in the Framework Decision to national judgments issued in individual cases prior to 5 December 2011.

Since this issue can potentially have a serious impact on the legal situation of persons sentenced to a custodial penalty (and any lawyers acting on their behalf), it was deemed necessary to explore in detail under what circumstances a Member State can, in fact, limit the temporal scope of application of the Framework Decision and what are the possible remedies in the event that this is done in breach of EU legal principles.

1. Council Framework Decision 2008/909

There are a great number of EU instruments enabling quick, effective and insofar as possible, simplified recognition of foreign judicial decisions in criminal matters. These relate to, *inter alia*, financial penalties, probation measures and exchange of evidence. Some of the most widely-known instruments in this field, however, relate to the recognition of decisions relating to the detention of suspected, accused or convicted persons.

There are two principal framework decisions[2] regulating this matter. The first one, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European

1 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/ 27.

2 The framework decision, as a legal instrument of the EU has been made obsolete with the adoption of the Treaty of Lisbon. Since its entrance into force, justice and home affairs are regulated by directives. However, framework decisions already in place when the Treaty of Lisbon was adopted remain in force, though they are being gradually replaced by relevant directives regulating the same legal matters (this process is sometimes referred to as the 'lisbonisation' of EU law).

arrest warrant and the surrender procedures between Member States[3] is probably the most recognisable legal instrument pertaining to cooperation in the area of justice and home affairs (JHA). The European Arrest Warrant (EAW) system has been a significant success for the EU, allowing for the swift transfer of accused and convicted persons between Member States. Fleeing to another Member State no longer affords an offender practical impunity.

The second instrument is the Council Framework Decision 2008/909 which only applies to sentenced persons. Since the EAW can also be employed to seek the surrender of already convicted persons[4], one might question the need to adopt a subsequent, separate instrument serving this purpose. However, the objective of Framework Decision 2008/909 is somewhat different to that of the EAW system. As indicated by its Article 3(1):

> *The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.*

The chief purpose of Framework Decision 2008/909 is not to aid law enforcement authorities but rather to enable a swifter and more thorough social rehabilitation of the convicted person.[5] This can be achieved more effectively if the convicted person serves the sentence in a Member State to which they have greater links, be they family, linguistic, cultural, social, economic or other (Recital 9). As such, the Framework Decision purposefully adopts the criterion of 'living' in a particular state (as explained in its recital 17), rather than that of citizenship or permanent residence.[6]

Framework Decision 2008/909 follows a fairly standard pattern for instruments related to the mutual recognition of judicial decisions (pioneered by the EAW), in that it provides rules for transferring the person, grounds for refusal, the obligation to respect fundamental rights and technical provisions, etc. However, its practical application over the years has understandably given rise to certain doubts and differences in interpretation. These are clarified by the case-law of the Court of Justice of the European Union

3 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

4 Indeed, a majority (57% as of 2019) of EAWs issued by Member States are issued for the purpose of execution of an already imposed sentence or detention order: Commission Staff Working Document Statistics on the practical operation of the European arrest warrant – 2019 (Brussels, 6 August 2021, SWD(2021) 227 final) <https://ec.europa.eu/info/sites/default/files/law/search_law/documents/eaw_statistics_2019_swd_2021_227_final_08_2021_en.pdf> accessed 22 January 2022.

5 See Sławomir Buczma, Michał Hara, Rafał Kierzynka, Paweł Kołodziejski, Andrzej Milewski and Tomasz Ostropolski, *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK* (C.H. Beck 2016) 1103.

6 Tomasz Ostropolski 'Współpraca wymiarów sprawiedliwości w sprawach karnych' in Jan Barcz (ed), *System Prawa Unii Europejskiej. Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna,* Vol. 8 (C.H. Beck 2021) 358.

chiefly as a result of a preliminary reference made by a Member State court unsure how to apply the framework decision provisions in a particular case.

2. THE C-573/17 *POPŁAWSKI* JUDGEMENT

One of the most important, recent rulings relating to this Framework Decision has to be the judgment of 24 June 2019 in the case C-573/17 *Popławski,*[7] sometimes referred to as the *Popławski (II)* case, as it was the second judgment issued by the CJEU in that particular matter.[8]

To fully understand the implications of that judgment one must first explore the temporal application of Framework Decision 2008/909. It came into force on the day of its publication (5 December 2008) and the implementation deadline was set by Article 29(1) for 5 December 2011. Article 28(1) further states that requests for the transfer of convicted persons received before 5 December 2011 shall be governed by legal instruments already in place before that date. This could be bilateral agreements but would most often mean the Council of Europe's Convention on the Transfer of Sentenced Persons of 21 March 1983 which came into force on 1 July 1985[9] (hereinafter: Strasbourg Convention). All requests received after 5 December 2011 are to be handled in accordance with the rules laid down by Framework Decision 2008/909, irrespective of when the decision imposing detention was issued.

As an exception to the above principles, Article 28(2) allowed any Member State to make a declaration stating that in cases where the final judgment has been issued before a date specified by that Member State, it will continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. The date in question itself could not be later than 5 December 2011. Several Member States availed themselves of this possibility: Ireland, Latvia, Lithuania, the Netherlands, Malta and Poland all made declarations that any judgment issued before 5 December 2011 would be subject to the old rules.[10] The CJEU later clarified that such a declaration may only cover judgments which became final before that set date and does not extend to judgments which, while issued before said date, became final after it.[11]

The crucial provision which affects the entirety of subsequent applications of the above derogation is contained in the phrase 'any Member State may, on the adoption of

7 Case C-573/17 *Popławski*, EU:C:2019:530.

8 The first being case C-579/15 *Popławski,* EU:C:2017:503.

9 ETS No 112. All EU Member States are parties to that Convention.

10 Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union – Declarations under Article 7(4) and Article 28(2) <https://www.ejn-crimjust.europa.eu/ejnupload/uploadFiles/ST09603-EN16.PDF> accessed 23 January 2022.

11 Case C-582/15 *van Vemde*, EU:C:2017:37.

this Framework Decision, make a declaration [...]' in Article 28(2). The text of Framework Decision clearly states that any declaration limiting the temporal scope of its application had to be made 'on its adoption'. Nevertheless, several of the abovementioned states made their declarations at a later date. This includes Poland whose declaration was made only in 2011.

This issue became the chief subject of the CJEU's judgment of 24 June 2019 in the case C-573/17 *Popławski*. In its preliminary referral, the Dutch Rechtbank Amsterdam (District Court in Amsterdam)[12] expressly asked whether a declaration of a Member State within the meaning of Article 28(2) of Framework Decision 2008/909, which it did not make 'on the adoption of this Framework Decision', but at a later date, has legal effect.

The CJEU's answer was unambiguous. Any declaration had to be made strictly on the date of the adoption of the Framework Decision, i.e. on 27 November 2008. A declaration made pursuant to Article 28(2) by a Member State, after Framework Decision 2008/909 was adopted, is not capable of producing legal effects.

The CJEU elaborated further on the legal consequences of making such a late, invalid declaration. It recalled that framework decisions had a specific, legal status as acts of law belonging to the former Third Pillar. They were addressed to Member States, rather than individuals, and had the aim of achieving a certain goal while leaving Member States some leeway in choosing the method of achieving that goal. Crucially, as a result, framework decisions could never have a direct effect.

As such, the CJEU stated that EU law does not require authorities in the Member States to refrain from applying their national provisions if they are found to be incompatible with the requirements of a framework decision. The authorities of the Member States, including the courts, are, nevertheless, required to interpret their national law, to the greatest extent possible, in conformity with EU law. This enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned. In other words, if there is any interpretation of national provisions at all, which would mean that the provisions of a framework decision are given effect, the authorities are obliged to employ that interpretation.[13]

3. Implementation of an invalid declaration made under Article 28(2)

These general issues have to be transposed onto practical considerations concerning the application of Framework Decision 2008/909 by Member States which made an

12 The Netherlands filed their declaration in 2009, i.e. also at a later date.

13 For an in-depth analysis of the issues of primacy and direct effect of EU law raised here, see e.g. Sim Haket, '*Popławski II*: A Half-Hearted Embrace of Hierarchical Supremacy' (2020) 13 Review of European Administrative Law 155; Dawid Miąsik, Monika Szwarc, 'Primacy and direct effect – still together: *Poplawski II*', (2021) 58 Common Market Law Review 571 <https://doi.org/10.54648/cola2021030>.

aforementioned, invalid declaration. Such Member States have naturally introduced provisions of national law which aim to give legal effect to such a declaration. Other Member States may have also adopted provisions allowing for cooperation with such Member States.[14]

Poland did this by way of Article 4(1) of the Act of 16 September 2011 on the amendment of the Act 'The Code of Criminal Procedure', the Act on public prosecution service and the Act on the National Criminal Register[15] (hereinafter: Amending Act). This provision expressly states that Chapters 66f and 66g of the Polish Code of Criminal Procedure (1997) [*Kodeks postępowania karnego*][16] (hereinafter: CCP), which regulate cooperation under the Framework Decision 2008/909 system, are not applied to judgments issued before 5 December 2011. As such, if a Polish court wishes to request another Member State for the recognition and enforcement of a custodial penalty imposed in Poland before that date, it would have to employ the earlier system based on the Strasbourg Convention.

As mentioned above, despite the declaration by Poland, under Article 28(2) of the Framework Decision being invalid, there are seemingly no grounds for a Polish court to refrain from following Article 4(1) of the Amending Act. The courts are bound to follow provisions of legal acts[17] unless they have been declared unconstitutional or are manifestly unconstitutional (e.g. because a similar provision has already been deemed unconstitutional).[18] Neither of these circumstances apply to Article 4(1) of the Amending Act. The CJEU clearly stated that EU law does not provide such grounds either.

Other Member States also continue to maintain provisions designed to give effect to an invalid declaration.[19] Again, the mere fact that these provisions are in contradiction with the Framework Decision (limiting its scope of application in a way not foreseen by the Framework Decision itself), does not mean that authorities in these States should refrain from applying their own national law.

If the abovementioned situation resulted merely in a minor technical misalignment between Polish and EU law, it would, probably, not warrant deeper examination. It does, however, have significant, practical ramifications for persons serving a custodial sentence.

14 An example of such a provision would be Section 102 of the German Gesetz über die internationale Rechtshilfe in Strafsachen [Act on international mutual legal assistance in criminal cases]. Even though Germany never made a declaration under Article 28(2) of framework decision 2008/909, it introduced provisions limiting its temporal scope of application in relations with states that did make one, including Poland.

15 Act of 16 September 2011 on the amendment of the Act – Criminal Procedure Code, Act on public prosecution service and Act on the National Criminal Register, Dz.U. (2011), No 240, item 1430.

16 Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments.

17 Article 178(1) of the Constitution of the Republic of Poland (1997).

18 However, as explained later, exceptions may be found here.

19 One could once again call on the example of Germany which maintains provisions limiting the scope of application of framework decision 2008/909 with countries which made an invalid declaration under Article 28(2).

Normally, the procedure for transferring a sentence to be served in a different State, under the Framework Decision 2008/909 system, is initiated by the sentenced person.[20] Whilst, as already mentioned, the goal of the Framework Decision is not to provide a benefit to the sentenced person if the requirements for the transfer are met, the sentenced person themselves is usually interested in being transferred to the executing Member State. In any case, the rule expressed in Article 611t CCP is that the consent of the sentenced person is required.[21]

However, sentenced persons who should have the option of their sentence being transferred under Framework Decision 2008/909 rules are, instead, denied this possibility as a result of Article 4(1) of the Amending Act. Applications made by such persons concerning sentences issued before 5 December 2011 are, instead, handled under the previous, Strasbourg Convention system, which is more formalised, lengthy and requires the consent of the Minister of Justice (Article 610 CCP). Furthermore, the old system is only available to foreigners, so a Polish national can never be transferred to another state under it, even if they have resided in that State for many years and do not have any ties to Poland anymore, apart from formally holding citizenship.[22] The Strasbourg Convention itself also requires that the transferred person be a national of the administering State (i.e. the State to which such person would be transferred).[23] Depending on the particular, factual circumstances concerning a given sentenced person, their transfer may therefore be either more difficult or completely unavailable, whereas if their case was handled under the Framework Decision 2008/909 system, they would be transferred through direct cooperation between judicial authorities.

4. The need for amendments to the law and attempts so far to introduce change

In the light of Poland's declaration under Article 28(2) of the Framework Decision being invalid and unable to cause any legal effect, as decided by the CJEU in the *Popławski (II)* case, there are currently no grounds to maintain the provision of Article 4(1) of the Amending Act in the legal system. It should be repealed as soon as possible in order to

20 It is however also possible for a court to initiate this procedure *ex officio*, (Article 611t para 1 CCP) or at the request of the Minister of Justice or an authority in the executing Member State (Article 611t para 2 CCP).

21 There are exceptions to this requirement if the sentenced person is a national of the executing Member State and has permanent or temporary residence there, or would be expelled to the executing state after serving the sentence, or fled to the executing state (Article 611t para 5 CCP).

22 Article 604 para 1(1) CCP in conjunction with Article 611b para 2(3) CCP expressly forbids the transfer of a person who is a Polish national. In a recent ruling the Supreme Court did however clarify that the Strasbourg Convention system is available to persons holding dual citizenship, including Polish (Supreme Court, decision of 7 April 2022, IV KK 578/21).

23 Article 3(1)(a).

ensure the conformity of Polish law with binding requirements of Framework Decision 2008/909, as interpreted by the CJEU. It is chiefly the duty of the legislature to bring national law in line with EU law devoid of direct effect.[24] The need to repeal Article 4(1) of the Amending Act was already brought up by the Polish Commissioner for Human Rights who issued two official addresses to the Minister of Justice indicating the aforementioned problem.[25] The Minister of Justice, however, did not respond to them in any way. It is therefore impossible to ascertain what reasons the Minister might have for not taking any legislative action in response to the *Popławski (II)* judgment.

The matter of temporal limitations to the application of Framework Decision 2008/909 has also been brought before the Constitutional Tribunal. A constitutional complaint was filed by an individual on 9 April 2019 and is being considered under case file No SK 77/20. The complainant alleges *inter alia* that Article 4(1) of the Amending Act is incompatible with Article 2 of the Polish Constitution[26] in conjunction with Article 15(1) sentence 3 of the International Covenant on Civil and Political Rights.[27] The complainant alleges that Article 4(1) of the Amending Act violates the prohibition of retroactivity in criminal law.

Whilst it can indeed be argued that Article 4(1) of the Amending Act is unconstitutional, it appears that the complaint filed under case file SK 77/20 omits the most pertinent reasons for it. The obligation to implement framework decisions binds the Polish government by dint of Article 34(2) of the TEU in its wording introduced by the Treaty of Nice, applicable until the entry into force of the Treaty of Lisbon. As a result, it constitutes an international obligation for Poland under public international law. Failure to properly implement a framework decision is, therefore, a breach of the TEU. The appropriate provisions of the Constitution, with which Article 4(1) of the Amending Act should therefore be confronted, are Articles 9[28] and 91(1),[29] as introducing temporal limitations of the application of Framework Decision 2008/909 in contradiction to its provisions (i.e. on the basis of an invalid declaration) constitutes faulty implementation

24 Miąsik, Szwarc (n 13) 583.

25 General addresses of 26 October 2020 and of 20 May 2021 (II.516.3.2020.MH): Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, 'Skazani na karę więzienia w Polsce skarżą się, że nie mogą być przekazani do innego państwa UE. Interwencja RPO', 26 October 2020 <https://bip.brpo.gov.pl/pl/content/rpo-skazani-w-polsce-nie-moga-byc-przekazani-do-innego-panstwa-ue> accessed 10 April 2022; Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, 'Niemożność przekazywania do innego państwa UE osób skazanych w Polsce na karę więzienia. Ponaglenie RPO do MS', 24 May 2021 <https://bip.brpo.gov.pl/pl/content/skazani-nie-moga-byc-przekazani-do-panstwa-ue-ponaglenie-rpo-ms> accessed 10 April 2022.

26 'The Republic of Poland is a democratic, rule of law state implementing the principles of social justice.'

27 International Covenant on Civil and Political Rights (1966), UNGA Res 2200A.

28 'The Republic of Poland complies with binding international law'.

29 'A ratified international agreement, following its publication in the Journal of Laws of the Republic of Poland, constitutes a part of the national legal order and is applied directly, unless its application is contingent on passing an Act of Law'.

and therefore a breach of international law. If a provision of national law is incompatible with binding international law (such as TEU), it is also incompatible with Articles 9 and 91(1) of the Constitution. In the aforementioned case, the Tribunal is, however, bound by the scope of the complaint filed by the complainant and is not authorised to extend or modify the provisions of constitutional control.[30]

Both the Sejm[31] and Public Prosecutor General[32] moved that the proceedings in case SK 77/20 be dismissed. In light of that, and the increasing doubts as to the impartiality of the Constitutional Tribunal, as well as a recent streak of decisions contesting the fundaments of EU law,[33] it seems extremely unlikely that it would rule that Article 4(1) of the Amending Act is, indeed, unconstitutional. It may never even consider the case at all since, as of May 2022, the date for a hearing has not even been set.

It therefore seems that urgent legislative action repealing Article 4(1) of the Amending Act is necessary in order to ensure the compliance of Polish national provisions with EU law, understood and applied with consideration for binding CJEU case-law.

5. Pro-EU interpretation of national law

Until the necessary legal changes are made, one must keep in mind the directions contained in the *Popławski (II)* judgment. The CJEU clearly stated that authorities in Member States should interpret their national provisions in such a way to give the broadest possible effect to Framework Decision 2008/909.

Laws implementing an invalid declaration under Article 28(2) of the Framework Decision are usually clear-cut, simply stating that certain provisions, or sections of legal acts implementing Framework Decision 2008/909, are not applied to judgments issued before 5 December 2011 (as is the case with Article 4(1) of the Amending Act). However, even with such seemingly unambiguous provisions, there is still room for pro-European interpretation.

30 Article 67(1) of the Act of 30 November 2016 on the organisation and proceedings before the Constitutional Tribunal, Dz.U. (2019), item 2393.

31 Procedural document of 22 February 2021, No BAS-WAK-1901/20.

32 Procedural document of 29 December 2020, No PK VIII TK 126.2020.

33 Polish Constitutional Tribunal, P 7/20, 14 July 2021 (the judgment pertaining to Article 4(3) TEU and Article 279 TFEU) <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa> accessed 8 July 2022; Polish Constitutional Tribunal, K 3/21, 7 October 2021 (the judgment pertaining to Articles 1, 2, 4(3) and 19(1) TEU), as well as decisions contesting provisions of the European Convention on Human Rights <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> accessed 8 July 2022.

First of all, while the CJEU clearly states that EU law does not require national authorities to refrain from applying their own laws, it certainly does not prevent them from doing so. If a court in an issuing Member State is able to find some way to circumvent the prohibition on using the Framework Decision 2008/909 system to pre – 5 December 2011 judgments in their national law, they are free, and indeed, obliged to do so.

In Poland this could potentially be achieved by employing the strict, hierarchical structure of sources of law as indicated by Article 8(1) and 87(1) of the Constitution and the notion of 'dispersed constitutional review' under which any court may decide not to apply a certain provision if it considers it contrary to the Constitution. This doctrine has its roots in Article 8(2) of the Constitution which states that the provisions of the Constitution are to be applied directly unless the Constitution itself states otherwise. As indicated above, it is feasible to demonstrate that Article 4(1) of the Amending Act is, indeed, incompatible with the Constitution. The doctrine of 'dispersed constitutional review' has recently gained popularity[34] and more widespread application due to the changes made to the Constitutional Tribunal, it is still, however, somewhat controversial. The Constitutional Tribunal naturally denies that such a possibility exists. The case-law of the Supreme Court, however, is known to allow for common courts to carry out constitutional review and refrain from applying provisions of law they found to be contrary to the Constitution.[35] In this way, a Polish court could potentially find Article 4(1) of the Amending Act unconstitutional, refuse to apply it and use the Framework Decision 2008/909 system even with regard to a judgment issued before 5 December 2011.

The obligation to apply a pro-European interpretation of national law also applies to executing Member States. While not expressly mentioned in the *Popławski (II)* judgment, this obligation arises directly from Article 4(3) TEU. This means that authorities in the executing Member State should also strive to give full effect to EU law (even if it does not have direct application, as is the case with framework decisions), rather than exploit national law in order to refuse to apply it.

In relation to the invalidity of declarations made under Article 28(2) of Framework Decision 2008/909, this may come into play if an authority in the executing State receives a request for recognition of a custodial penalty imposed before 5 December 2011 from a Member State which made such an invalid declaration. Such an authority should exhaust all legal possibilities to consider this request under its own national provisions whilst implementing Framework Decision 2008/909. Whilst, once again, the *Popławski*

34 See e.g. Piotr Mikuli, 'Doktryna konieczności jako uzasadnienie dla rozproszonej kontroli konstytucyjności ustaw w Polsce' (2018) XL Gdańskie Studia Prawnicze 635; Piotr Kardas, 'Rozproszona kontrola konstytucyjności prawa w orzecznictwie Izby Karnej Sądu Najwyższego oraz sądów powszechnych jako wyraz sędziowskiego konstytucyjnego posłuszeństwa' [2019] (4) Czasopismo Prawa Karnego i Nauk Penalnych 7; Paulina Jabłońska, 'Konstytucyjne podstawy rozproszonej kontroli konstytucyjności prawa' [2020] (11-12) Przegląd Sądowy 21.

35 See case-law extensively quoted in the decision of the Supreme Court of 9 October 2020, III CZP 95/19 <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%2095-19.pdf> accessed 26 April 2022.

(II) judgment does not give grounds to simply refuse to apply a direct provision of national law,[36] other ways may be possible to interpret the national provisions in a way which would give effect to Framework Decision 2008/909. One such potential interpretation was suggested by the Dutch Rechtbank Amsterdam in its preliminary referral to the CJEU in the *Popławski (II)* case itself. The Rechtbank considered whether it could treat a framework decision as equivalent to an international convention for the purposes of national law in order to give it fuller effect. Whether such interpretations are valid depends, of course, on the particulars of the legal system of a given Member State.

Another example would be if the request pertains to a combined judgment, i.e. a judgment which links together several previously imposed penalties and imposes a single, aggregate one in their place. It may well happen that every constituent judgment was issued before 5 December 2011 but the combined judgment itself was pronounced after that date. In such an event, when considering the request, the executing authority should use the date of the combined judgment, rather than the partial judgments when deciding whether, under its national law, the request pertains to a penalty imposed before or after 5 December 2011. In this example, this would allow for the use of the Framework Decision 2008/909 system and mitigate the consequence of the invalid declaration.

The above are just a few examples of how the *Popławski (II)* judgment may be implemented in practice. The numerous legal systems in place in EU Member States means that there are undoubtedly many more instances in which different interpretations of legal norms concerning the transfer of sentenced persons are possible. It is important for authorities in all States to remember that they should always choose the interpretation which would give the fullest possible effect to provisions of European Union law.

Conclusions

In conclusion, one must make one final observation that the impact of the *Popławski (II)* case is slowly going to diminish over time. As penalties become fully served, fewer and fewer judgments issued before 5 December 2011 are going to be present in legal circulation. As such, the issue in controversy will eventually naturally fade away.

However, the worst course of action, governments of Member States which made an invalid decision under Article 28(2) of Framework Decision 2008/909 could take, would be to do nothing and just wait for the problem to go away on its own. This would only serve to demonstrate a lack of respect for binding legal instruments of the EU and the case-law of the CJEU. Whilst the European Commission is unlikely to institute any infringement proceedings in this regard, it is still the duty of the Member States to ensure that their national laws are compliant with Framework Decision 2008/909.

36 Such as the aforementioned Section 102 of the German Gesetz über die internationale Rechtshilfe in Strafsachen. See also Antoine Bailleux, 'The Two Faces of European Sovereignty' (2020) 5 European Papers 304 <https://doi.org/10.15166/2499-8249/380>.

The system of transfer of prisoners of the EU is of benefit to the community as a whole. If the goals of social reintegration are met, the offender is less likely to relapse into criminal activity, thus serving to realise the objectives of individual crime prevention. If the goals of reintegration are better served in a different Member State, national authorities should be striving to achieve them rather than looking for loopholes and excuses not to apply binding EU law, whether it has a direct effect or not.

It is therefore imperative that Poland and other Member States, which made invalid declarations under Article 28(2) of Framework Decision 2008/909, introduce urgent amendments to their legal systems with the aim of mitigating the consequences of an invalid declaration. In the case of Poland, as already mentioned, this would take the form of repealing Article 4(1) of the Amending Act. For the reasons mentioned above, awaiting the decision of the Constitutional Tribunal (which may indeed never actually come) is by no means sufficient.

Until the necessary amendments to the law are made, it is the obligation of courts to apply national provisions in a way which, as far as possible, allows for the application of Framework Decision 2008/909, as if the invalid declaration had never been made. It is worth repeating here that whilst EU law devoid of direct effect, as clarified by the CJEU in the *Popławski (II)* judgment, does not require national authorities to refrain from applying national law, it does not prohibit them from doing so either.

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Addressing barriers to victims' rights to recovered assets in the mechanism for mutual recognition of freezing and confiscation orders

Ariadna H. Ochnio

Abstract

This paper deals with the normative barriers to victims' rights to recovered assets and their re-use for social and public purposes. Although the EU legislator has made some efforts to strengthen victims' rights in the new mechanism for the mutual recognition of freezing and confiscation orders, much still needs to be done. The main difficulties are associated with the fact that the changes introduced in the field of mutual recognition were not accompanied by appropriate changes in the field of harmonisation. EU law does not sufficiently prioritise the rights of the victim to recovered assets over the rights of the state. Other areas requiring improvement are transparency and control over the allocation of recovered assets to social and public purposes. Changes to these fields should foster the restorative function of the asset recovery process and increase the added value of EU criminal law. The 'tangibility' of the outcomes of this process can in turn contribute to increasing public confidence in the criminal justice system.

Keywords

Regulation 2018/1805, confiscation and asset recovery, freezing orders, victims' rights, social re-use of assets, mutual recognition, added value of EU criminal law

INTRODUCTION[1]

The process of cross-border asset recovery, like any other organised series of state-led actions, has its own unique social dimension. This dimension still appears to not be fully appreciated in EU policy, in particular as regards the role that the recovery of crime-related assets can play in restoring a social balance disturbed by crime. A disturbance in this respect may take place across different communities, crossing state borders. What distinguishes the process of asset recovery from other institutions belonging to the realm of criminal justice, is the tangibility of the results of its operation, as more recovered assets are transferred to social and public purposes. This tangibility becomes greater, the more transparent the public information about the directions of asset transfer becomes, and the more effective is the ongoing control involving social and public stakeholders. The latter two factors may positively affect the course of the asset recovery process itself, by putting pressure on the state to 'polish' its shortcomings. From an EU perspective, 'public visibility' of the results of the cross-border process of fair redistribution of assets becomes an opportunity to increase public confidence in the criminal justice system, in particular in view of the current crisis of trust in the mutual recognition mechanisms.[2]

One apt observation that has emerged in the literature is that the social re-use of assets is a factor advancing the culture of legality.[3] To this it must be added that this culture is developing in the field of EU criminal law, being 'shared' by the Member States, taking into account to some extent national differences.[4] However, this shift of mindset towards the social significance of confiscation and asset recovery has not yet been embedded in EU policy and law. Defining the term 'asset recovery' must also take place at the policy and normative layer. This requires that the problems of cross-border asset recovery are dealt with in the EU forum, taking into account, first and foremost, the social dimension of the process, including its social role, perception and acceptance. Then appropriate changes at the normative level could lead to an advance in the comprehension of the term 'asset recovery', so that its primary connotations are associated with serving social and public goals.

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1 This paper was written within a research project 'Standards for the confiscation of the proceeds of crime set in European Union law and their impact on Polish, German, French and English criminal law', No 2019/33/B/HS5/01617, founded by the National Science Centre, Poland.

2 Cf interesting comments on the 'risks and disadvantages' of mutual recognition in criminal matters by Helmut Satzger in the article 'Is mutual recognition a viable general path for cooperation?' 2019 (10) New Journal of European Criminal Law 44, 53-54 <https://doi.org/10.1177/2032284419836516>.

3 See Stefano Montaldo, 'Directive 2014/42/EU and Social Reuse of Confiscated Assets in the EU: Advancing a Culture of Legality' (2015) 6 New Journal of European Criminal Law 195 <https://doi.org/10.1177/203228441500600204>.

4 On this issue see the article by Rosaria Sicurella, 'Fostering a European criminal law culture: In trust we trust' (2018) 9 New Journal of European Criminal Law 308, 311 <https://doi.org/10.1177/2032284418801561>.

Strengthening victims' rights to restitution and compensation was supposed to be one of the key elements of the new architecture of the mutual recognition of freezing and confiscation orders in the EU. Guarantees of victims' rights were recognised as an area requiring major change in the EU policy on asset recovery. Among the problems that were addressed when designing the new mutual recognition mechanism was the under-regulation of the rights of victims to restitution and compensation in the broadly understood cross-border process of asset recovery.[5] The Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders identified the problem to be addressed as follows:

> *A major issue is that the current two mutual recognition instruments do not cover many types of freezing and confiscation orders that can be adopted at national level (...). Moreover, the current procedures and certificates are unnecessarily complicated and inefficient. In addition to the above-mentioned problems, the current instruments do not contain any provisions on victims' compensation or restitution.*[6]

Nevertheless, it is not an easy task to strengthen the rights of crime victims to assets recovered in cross-border proceedings. Therefore, the positive self-assessment in this regard, expressed in the Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders should be approached rather carefully. The Proposal states as follows:

> *The victim's right to compensation and restitution has been duly taken into account in the Proposal. It is ensured that in cases where the issuing State confiscates property, the victim's right to compensation and restitution has priority over the executing and issuing States' interest.*[7]

Although some efforts have been made, the inclusion of a limited number of provisions on the priority of victims' rights over states' rights to recovered assets in the mutual recognition instrument cannot be considered to be an adequate response by EU

5 See also Ariadna H. Ochnio, 'The Tangled Path From Identifying Financial Assets to Cross-Border Confiscation. Deficiencies in EU Asset Recovery Policy' (2021) 29 European Journal of Crime, Criminal Law and Criminal Justice 218, 236 <https://doi.org/10.1163/15718174-bja10024>.

6 Commission Staff Working Document. Executive Summary of the Impact Assessment. Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, Brussels, 21 December 2016, SWD(2016) 469 final, 2.

7 Commission 'Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders', Brussels, 21 December 2016, COM(2016) 819 final, 6.

law to the needs of a hitherto neglected area. The problem of victims' access to recovered assets for compensation and restitution purposes is still present under 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 (hereinafter Regulation 2018/1805).[8]

This paper presents the thesis that properly addressing the problem of access to recovered property by crime victims will not only require changes in the field of mutual recognition, but also in the field of harmonisation. The rationale for this is that only these two instruments operating together – the harmonisation instrument and the mutual recognition instrument – have the potential to create a coherent, efficient and socially fair system for cross-border asset recovery, one that takes due account of the rights of crime victims. Furthermore, assuming that the mutual recognition of freezing or confiscation orders is an act secondary to the primary act of issuing the *meriti* order under national law, it is even justified to conclude that the problem mainly lies in the national systems of freezing and confiscating assets, for which the minimum rules are set by the EU harmonisation instruments. Unfortunately, not enough changes have been made in the field of harmonisation towards strengthening the rights of crime victims to recovered assets.

The purpose of this research paper is to identify the normative barriers to the rights of crime victims to recovered assets and propose how to overcome them. To this end, the provisions of EU law on confiscation and asset freezing, the legislative path, and the objectives of the EU's asset recovery policy have been analysed. In addition, some problems with the practical execution of freezing orders have been identified.

1. A PROBLEM WITH THE EXECUTION OF ASSET FREEZING ORDERS OF A RESTORATIVE NATURE

The problem of the limited enforceability of freezing orders issued to return recovered assets to the victim of a crime has been well known in the EU forum since the previous instrument of mutual recognition, i.e. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (hereinafter Framework Decision 2003/577/JHA).[9] This instrument is still applicable in cooperation with Denmark and Ireland.

For example, this problem is a recurring one in Eurojust's casework in the field of cross-border asset recovery. Obstacles to the execution of a freezing order in another Member State have been encountered where the purpose of the order was restitution

8 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 [2018] OJ L 303/1.

9 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L 196/45.

and not confiscation. Such situations have been identified in mutual recognition procedures under Framework Decision 2003/577/JHA. As one of the main difficulties in the process of asset recovery, Eurojust pointed out the 'Legislative issue associated with the purpose of a request for the freezing of monies where the requested Member State is unable to execute such a request if the purpose of the freezing is the return of the frozen monies to the victims, and not confiscation (...).'[10] Some issues were dealt with at the level of agreements reached within Joint Investigation Teams, one of which, for example, was set up with the specific purpose of 'financial compensation for victims'. The sources of compensation were to be assets obtained as a result of freezing, seizure and confiscation.[11]

On April 26–27, 2012, a strategic meeting of Eurojust on trafficking in human beings was held in The Hague. The Outcome Report from this meeting stated that 'Securing civil compensation claims for victims when suspects' illegally obtained assets have been confiscated should be considered at national level.'[12] However, each of the Member States settling this issue separately in national law, without sufficient harmonisation of the minimum rules, seems to go only half-way in solving the problem, as differences in this field will distort the mutual recognition of restorative freezing orders.

The issue of mutual recognition of asset freezing orders is all the more challenging as, depending on the national model, an order to freeze assets may be issued in criminal proceedings for the purpose of restitution or compensation for a crime victim, not only for confiscation. At the same time, restorative measures, the execution of which is the ultimate goal of such an order, may be nominally criminal measures, but in essence of a mixed nature – punitive and compensatory, or may be purely civil measures, if they are adjudicated by a court as a result of a so-called civil action carried out in the course of criminal proceedings (for example in the form of an adhesive claim). Taking into account the sophistication of legal measures having a dual punitive-compensatory character located in national criminal justice systems, the EU's asset recovery policy should clearly set out how such orders should be recognised in cross-border cooperation, whether via the criminal or civil route. Only then will these orders avoid causing problems at the stage of their execution in another Member State.

It has long been recognised that there is a maze of pathways to the recognition of restorative freezing orders in another Member State, and there have been various attempts

10 Eurojust, 'Report on Eurojust's Experience in the field of Asset Recovery, including Freezing and Confiscation', 24 November 2014, 4.

11 Ibid, 13.

12 Eurojust Strategic Meeting on Trafficking in Human Beings. Outcome Report, The Hague, 26–27 April 2012, 13 <https://ec.europa.eu/anti-trafficking/system/files/2016-02/eurojust_strategic_meeting_on_trafficking_in_human_beings_1.pdf> accessed 28 January 2022. See also Eurojust, Strategic project on Enhancing the work of Eurojust in drug trafficking cases. Final results, January 2012, 39-41 < https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/drug-trafficking-report-2012-02-13-EN.pdf> accessed 31 January 2022.

to solve complications in this area. For example, one of the studies for the Commission presented the following scenarios of action.

Firstly, if it was found that a freezing order based on a non-condemnatory judgment was nevertheless of a civil nature, then the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter Regulation 44/2001),[13] was considered.[14] According to Article 5 (4) of Regulation 44/2001 concerning special jurisdiction, there existed a possibility to sue a person domiciled in a Member State, in another Member State, regarding a civil claim for damages or restitution based on an act giving rise to criminal proceedings - in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings. A similar solution is provided for in Article 7 (3) of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[15] (in force).

Secondly, if it was found that a freezing order was based on a non-condemnatory judgment that could have resulted in a confiscation of a criminal nature, the application of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[16] was considered. However, it is necessary to take into account that in such a case it might additionally be necessary to issue a freezing order falling under Framework Decision 2003/577/JHA.[17]

Thirdly, in the case of a freezing order based on a non-condemnatory judgment that may include a payment order, the possibility of applying Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties[18] was considered.[19]

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13 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

14 Commission, Directorate General for Justice. Directorate B. Criminal Justice, 'Handbook for judges, prosecutors and other competent authorities on how to issue and execute a request for enforcement of a freezing order, in accordance with Council Framework Decision 2003/577/JHA of 22 July 2003', Thompson Reuters, Aranzadi, 118-119 <https://e-justice.europa.eu/fileDownload.do?id=523d1bc6-69c3-4d69-895b-4b14221eccde> accessed 28 January 2022.

15 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

16 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59. See also Regulation 2018/1805 in force.

17 Commission, 'Handbook for judges', (n 14) 119.

18 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16.

19 Commission, 'Handbook for judges', (n 14) 119.

2. What legislative efforts have recently been made to implement the EU asset recovery policy goals and strengthen victims' rights?

2.1. Solutions adopted in the field of mutual recognition

The new mechanism for mutual recognition of freezing and confiscation orders introduced by Regulation 2018/1805 contains provisions previously unknown in EU law, strengthening the rights of victims to restitution and compensation.[20] The importance of the EU policy objective to strengthen these rights is reflected in the preamble to Regulation 2018/1805, which states as follows:

> *The victims' rights to compensation and restitution should not be prejudiced in cross-border cases. Rules for the disposal of frozen or confiscated property should give priority to the compensation of, and restitution of property to, victims. The notion of 'victim' is to be interpreted in accordance with the law of the issuing State, which should also be able to provide that a legal person could be a victim for the purpose of this Regulation. This Regulation should be without prejudice to rules on compensation and restitution of property to victims in national proceedings* (Recital 45).[21]

Pursuant to Article 29 of Regulation 2018/1805, where the issuing authority has made a reference in the freezing certificate to the decision to restitute frozen property to the victim, or communicated such later, the executing authority shall take the necessary measures to ensure that, after freezing, the property is directly restituted to the victim as soon as possible. In this regard, the procedural rules of the executing State apply. The issuing State may be involved if necessary. However, such a procedure is subject to the cumulative fulfilment of the following conditions: the victim's title to the property is not contested, the property is not required as evidence in criminal proceedings in the executing State, and the rights of the affected persons are not prejudiced. If one of these conditions is not met, and no solution can be found through consultation, the executing authority may decide not to restitute the frozen property to the victim.

Certain guarantees for victims' rights were also introduced at the stage of disposing of confiscated property or money obtained after its sale (Article 30 of Regulation 2018/1805).

20 See also Ariadna H. Ochnio, 'Between the medium and the minimum options to regulate mutual recognition of confiscation orders' (2018) 9 New Journal of European Criminal Law 432-445 <https://doi.org/10.1177/2032284418806667>; Sofia Mirandola, 'Borderless enforcement of freezing and confiscation orders in the EU: the first regulation on mutual recognition in criminal matters' (2020) 20 ERA Forum 405, 417 <https://doi.org/10.1007/s12027-019-00581-x>.

21 See also Recital 46 of the preamble to Regulation 2018/1805.

Where the issuing authority or another competent authority of the issuing State has duly informed the executing authority of a decision to restitute confiscated property to the victim or to compensate the victim (issued in accordance with national law), the executing authority shall take the necessary measures to ensure that the property is returned to the victim as soon as possible following confiscation. If necessary, the issuing State may be involved. If such a course of action is impossible, but the money was obtained from the execution of a confiscation order in relation to that property, the corresponding sum shall be transferred directly to the victim for the purposes of restitution. Similarly, if necessary, the transfer may take place via the issuing State. Importantly, the executing authority is required to take similar action when notified by the issuing authority of a decision to compensate a victim.

Moreover, as far as the cross-border execution of confiscation orders is concerned, if proceedings for restitution or compensation are pending in the issuing State, the executing authority informed thereof shall refrain from disposing of the confiscated property until the information on the decision to restitute or compensate property to the victim has been communicated to the executing authority, even in the case of confiscation orders that have already been executed (Article 30 (5)).

Another important factor from the perspective of strengthening the rights of victims to recovered property is the obligation of the Member States introduced by Regulation 2018/1805 to report to the Commission each year the number of cases in which a victim has obtained compensation or restitution as a result of the execution of a confiscation order in accordance with this Regulation. Nevertheless, this is subject to the availability of such data at a central level in a given Member State (Article 35 (2) (a)).

It should be recognised that the statistical obligations require some extension. It would be justified to introduce the obligation to collect such data at a central level, as well as to extend the obligation to collect data on the number of cases in which the victim has obtained restitution as a result of the execution of a freezing order in accordance with this Regulation. Moreover, statistics should be prepared in a multifaceted way, be comprehensible and publicly available, in order to encourage social control over the way of re-use of recovered assets in terms of the directions of their allocation to social and public purposes.

2.2. Solutions adopted in the field of harmonisation

Far fewer solutions to strengthen victims' rights in the asset recovery process can be found in the field of harmonisation. The preamble to Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union Directive (hereinafter 2014/42/EU)[22] states: 'In the context of criminal proceedings, property may

22 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39.

also be frozen with a view to its possible subsequent restitution or in order to safeguard compensation for the damage caused by a criminal offence' (Recital 29). However, Directive 2014/42/EU lacks minimum standards obliging Member States to introduce the possibility of freezing assets for restorative confiscation, thus failing to ensure that the confiscated assets can then (at the stage of execution of the confiscation order) be restored or compensated to the victim of the crime.

Reference to the rights of victims is also included in Article 8 (10) of Directive 2014/42/EU, which states:

> *Where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.*

Nevertheless, the solution adopted in this provision should be considered problematic – rather than solving the existing problems with ensuring the access of victims' rights to the recovered property, as it leaves unresolved the question of whether the pursuit of claims is to take place in procedures belonging to the realm of criminal or civil justice. In the latter case, the main consequence is a problem in the application of the instruments of mutual recognition of freezing and confiscation orders in criminal matters.

Finally, EU policy has handled the need to use recovered assets for social and public purposes in a way that is highly inadequate for meeting society's expectations of the restorative function of criminal justice measures. Ultimately, the EU legislator decided only to recommend that Member States use confiscated assets for social purposes or for the public interest. Instead, there should be a firm commitment obliging Member States to reform their national laws with the aim of opening up the use of confiscated assets for social purposes and public interest. Article 10 (3) of Directive 2014/42/EU concerning the management of frozen and confiscated property merely states that 'Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes'.

2.3. What options were on the table?

Looking at the legislative path preceding the adoption of Directive 2014/42/EU, it must be admitted that there were some doubts around the issue of social and public re-use of confiscated assets and various solutions were proposed, including some which, even from today's perspective, would have no realistic chance of being implemented, but which to some extent reflect a promising start to identifying a possible social dimension to the asset recovery process at EU level, and are therefore worth presenting.

The first version of the proposed directive did not even recommend that Member States allocate confiscated assets to social or public interest purposes. As originally proposed,

Article 10 did not address this issue at all.[23] In the working impact assessment accompanying the proposal for a directive on the freezing and confiscation of proceeds of crime, in section 4 (1) regarding the problem definition and insufficient recovery of criminal assets in the EU, the issue of social re-use of confiscated assets was operatively addressed as follows:[24]

> *The aims of asset recovery are realised not only when criminals are deprived of their ill-gotten gains, but when these are redistributed effectively. In particular, the impact of asset confiscation upon public confidence in the criminal justice system may be enhanced through redistribution and restorative justice. [reuse wording. Yes, but not advocating reuse for social nor public purposes.]*[25]

At the same time, 'to raise public confidence in the criminal justice system' was among the general objectives of the policy for the confiscation and recovery of criminal assets, in line with the general objectives of the EU in the Treaty of Lisbon.[26] Thus, the approach to the issue of re-use of assets for social or public purposes already contained discrepancies at the stage of planning new harmonisation solutions.

It is significant that at a further stage of the legislative process the European Economic and Social Committee (the EESC) recommended:

> *If measures to freeze and confiscate the proceeds of crime are to be effective, a holistic approach is needed that governs every dimension of the instrument and, when it comes to the confiscated goods being reused, takes care to give priority to socially beneficial purposes* (1.4).[27]

In addition, the EESC highlighted the advantages of applying recovered assets first to social purposes, as is the case in Italy, and stressed the importance of the social application of the proceeds of crime in the following manner: 'There are various possible approaches, which must involve the central authorities of the Member States and which should be explored and adapted in light of the victims, the public interest and the nature of the frozen assets'.[28]

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23 See Commission, 'Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union', Brussels, 12 March 2012, COM(2012) 85 final, Article 10.

24 Commission Staff Working Paper. Accompanying document to the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union. Impact Assessment, Brussels, 12 March 2012, SWD(2012) 31 final, 14.

25 Original wording.

26 Commission Staff Working Paper (n 24) 24.

27 Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union', COM(2012) 85 final [2012] OJ C 299/128, Section 4.1.

28 Ibid, Sections 4.9.1. and 4.9.2.

Even more far-reaching comments on the issue of the social re-use of recovered assets can be found in the opinion of the Committee of the Regions (the CoR) on the 'Package on protection of the licit economy', which recommended the involvement of local and/or regional authorities in sharing the recovered assets, with the reference to the example of the Italian practice of re-using real estate.[29] As arguments for introducing the possibility of returning recovered assets in this direction, the CoR indicated that criminal organisations disrupt the social order at the local level and local and/or regional authorities 'are best placed to take local-level measures to eradicate the deep-rooted causes of crime'.[30] The wide scale of activities of the Italian National Agency for the administration and destination of assets seized and confiscated from organised crime [*L'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*] in the field of reusing recovered assets is reflected, for example, in the report on its activities in 2020, which presents, *inter alia,* the destination of the immovable property.[31]

Following consultations, the Commission adopted a proposal for a directive on the freezing and confiscation of proceeds of crime in the EU, recommending that Member States consider introducing measures to enable confiscated property to be used for social purposes or in the public interest.[32] Finally, Article 10 of the Proposal in question was amended (to the wording as it stands now), and Recital 35 of its preamble relating to this issue emphasised the importance of public and social directions for the re-use of recovered assets.[33]

The interest in strengthening the social allocation of recovered assets is also reflected in the subsequent amendments tabled by the Committee on Civil Liberties, Justice and

29 Opinion of the Committee of the Regions on the 'Package on protection of the licit economy' [2012] OJ C 391/134, Section 46. See also Michele Panzavolta 'Confiscating Dirty Assets: The Italian Experience' in Colin King, Clive Walker, Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan 2018) 491-514; Michele Panzavolta and Roberto Flor 'A Necessary Evil? The Italian «Non-Criminal System» of Asset Forfeiture' in Jon Petter Rui and Ulrich Sieber (eds), *Non-Conviction-Based Confiscation in Europe* (Duncker & Humblot, Max-Planck-Institut für ausländisches und internationales Strafrecht 2015) 111-149.

30 Opinion of the Committee of the Regions (n 29).

31 L'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata 'Relazione sull'attività svolta Anno 2020' (Articolo 112, comma 1, D.Lgs. n. 159/2011) 14-18 <https://www.benisequestraticonfiscati.it/wp-content/uploads/2021/08/ANBSC_RELAZIONE_ANNO_2020_WEB_2.pdf> accessed 24 March 2022. The scope of the social re-use of recovered assets in the Italian legal system is also presented in the study: Libera. Associazioni, nomi e numeri contro le mafie. Settore Beni Confiscati 'Social re-use of confiscated assets in Italy. Numbers, practices and proposals' (2021) 29-41 https://delegazioneosce.esteri.it/delegazione_osce/resource/doc/2021/12/libera_fatti_per_bene_en.pdf> accessed 31 January 2022.

32 See Council, Council adopts directive on the freezing and confiscation of proceeds of crime, Press Release 7643/14, Brussels, 14 March 2014 <https://www.consilium.europa.eu/media/28747/141493.pdf> accessed 31 January 2022.

33 Legislative acts and other instruments. Subject: Directive of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Brussels, 5 March 2014, 2012/0036 (COD), PE-CONS 121/13 <https://data.consilium.europa.eu/doc/document/PE-121-2013-INIT/en/pdf> accessed 31 January 2022.

Home Affairs. The proposed amendment to Recital 16 of the preamble related to the creation of an EU fund from a part of the assets confiscated in the Member States, which was to be used, inter alia, for 'pilot projects by the citizens of the Union, associations, coalitions of NGOs and any other civil society organisation, to encourage the effective social reuse of the confiscated assets and to expand the democratic functions of the Union'.[34] However, this direction was ultimately not taken. It seems that rather more effective action in this field could be taken at the national and cross-border level, and the idea of EU-wide centralised management of recovered assets does not have a convincing justification.

Another interesting initiative, raised by the Committee on Civil Liberties, Justice and Home Affairs, was the proposal to include Recital 16b in the draft directive (which was also not finally adopted), which stated:

> *The practice of using confiscated assets for social purposes fosters and sustains the dissemination of a culture of legality, assistance to crime victims and action against organised crime, hence creating «virtuous» mechanisms, which may also be implemented through non-governmental organisations, that benefit society and the socio-economic development of an area, using objective criteria.*[35]

The final position adopted by the European Parliament at the first reading was to include the issue of the social re-use of recovered assets, but only in the form of a recommendation to the Member States to take a certain course of action. This issue was limited to Recital 35 and Article 10 of the proposed directive (in the form of the current recommendation to the Member States to use assets for public interest or social purposes).[36]

3. Existing normative barriers weakening victim' rights to cross-border recovered assets – areas for improvement

When trying to determine what the normative barriers weakening victims' rights to cross-border recovered assets are, the following preliminary assumptions should be made.

34 Amendments 001-059 by the Committee on Civil Liberties, Justice and Home Affairs. Report Monica Luisa Macovei A7-0178/2013. Freezing and confiscation of proceeds of crime. Proposal for a directive (COM(2012)0085 – C7-0075/2012 – 2012/0036(COD)), A7-0178/ 001-059, 19 February 2014, 9 < https://www.europarl.europa.eu/doceo/document/A-7-2013-0178-AM-001-059_EN.pdf> accessed 31 January 2022.

35 Ibid, 10.

36 Position of the European Parliament adopted at first reading on 25 February 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, (EP-PE_TC1-COD(2012)0036), 25 February 2014 < https://www.europarl.europa.eu/doceo/document/TC1-COD-2012-0036_EN.pdf> accessed 31 January 2022.

The first assumption is that all freezing orders, irrespective of their compensatory or restitution purpose, if issued by criminal courts in connection (understood broadly) with an offence, belong to the realm of criminal justice and therefore should be enforced cross-border via the framework of cooperation in criminal matters, on the basis of a single EU instrument of mutual recognition (with relevant exceptions for non-participating Member States) governing cooperation in criminal matters, not civil.

The second assumption is that the rights of crime victims to restitution and compensation exercised on recovered assets should take precedence over the rights of states, and the institution of confiscation should facilitate, and not hinder, the exercise of these rights by victims, therefore 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.

In order to strengthen the rights of victims to the recovered assets, actions should be taken at two normative layers: harmonisation and mutual recognition. Even though the autonomous concept of 'proceedings in criminal matters' was adopted in Regulation 2018/1805, this does not solve the problems in the field of harmonisation.[37] Despite the adoption of a broad concept of 'proceedings in criminal matters' in Regulation 2018/1805, the aim of which was to include all freezing and confiscation orders issued following proceedings in relation to a criminal offence in the mutual recognition mechanism, including those not covered by Directive 2014/42/EU, the current situation is that only freezing orders issued for subsequent confiscation can be recognised via this mechanism. Freezing orders aimed at restitution or compensation are excluded from this mechanism if, according to national law, confiscated assets cannot be used for the purposes of restitution or compensation. This is the case when the national legal order makes the state the beneficiary of the assets recovered through confiscation, not the crime victims. This limitation to the cross-border recognition of freezing orders is reflected in the definitions of 'freezing' in Directive 2014/42/EU and 'freezing order' adopted in Regulation 2018/1805, which clearly indicate the purpose of these actions, which is the subsequent confiscation. The key problem is that confiscation in national law may not have a restorative function, so the access of victims to the cross-border recovered assets is limited. This reason, justifies obliging Member States to open up access for victims to confiscated assets for the purpose of restitution and compensation.

According to Article 2 (1) of Regulation 2018/1805 the term 'freezing order' means 'a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof'. The interpretation of this provision in the context of the subject matter of Regulation 2018/1805 is of key importance, as it established the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of 'proceedings in criminal matters'. The

37 See Recital 13 of the preamble to Regulation 2018/1805.

goal of the concept of 'proceedings in criminal matters' (broader than 'criminal proceedings') adopted in Regulation 2018/1805, was to increase the scope of the enforceability of the orders.[38] Nevertheless, to increase the enforceability of such orders, changes should be made to the harmonisation layer with regard to the minimum rules on the freezing of property with a view to possible subsequent confiscation and the minimum rules on the confiscation of property, including the management of frozen and confiscated property. First of all, this should be done by introducing a strict obligation for Member States to introduce in their national legal orders the possibility of using confiscated assets for the purposes of restitution and compensation for crime victims, given priority over the states' rights to confiscated assets. The rationale behind this is that the restorative capacity of confiscation is still underused. In addition, confiscation procedures are simplified by applying legal presumptions or assumptions (depending on the national system) about the origin of assets from criminal activity allowing for an increase in the recovered assets to which victims of crime should have access. It would also be helpful to modify the definition of 'freezing' in Directive 2014/42/EU, as well as the definition of 'freezing order' in Regulation 2018/1805. The definition of 'freezing' should cover freezing for the purpose of restitution and/or compensation for the victim of a crime from frozen or confiscated assets. The definition of 'freezing order' should also cover a decision issued for the purpose of restitution and/or compensation to the victim of a crime from frozen or confiscated assets. Thus, freezing orders issued for the purpose of restitution and/or compensation from confiscated assets may be simultaneously recognised as freezing orders issued with a view to confiscation, and may be subject to the mutual recognition mechanism established by Regulation 2018/1805.

Considering that it is not always possible to identify specific victims of a crime, while at the same time a crime always carries some social harm, it should be expected that the minimum rules of EU law would oblige the Member States (a step further than a soft recommendation) to provide in national law the possibility of the destination of confiscated assets or the temporary use of frozen assets for social and public purposes at the frozen or confiscated asset management stage. This would require appropriate changes within Article 10 of Directive 2014/42/EU on the management of frozen and confiscated property. Consideration could be given to allowing Member States to choose between direct or indirect asset allocation to social and public purposes. In the event of an indirect allocation, for example by creating a state special purpose fund (controlled with the participation of a certain social factor), the resources could come from confiscated assets.[39]

38 The concept of 'proceedings in criminal matters' is broader than that of 'criminal proceedings' adopted in Framework Decision 2003/577/JHA for the purpose of executing freezing orders. Cf Article 1 of Framework Decision 2003/577/JHA. See also Eurojust, Note on the Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders. A new legal framework for judicial cooperation in the field of asset recovery, 2 <https://www.eurojust.europa.eu/sites/default/files/assets/20201207_note_on_regulation_eu_2018_1805.pdf> accessed 31 January 2022.

39 Cf Barbara Vettori, 'The Disposal of Confiscated Assets in the EU Member States: What Works, What Does Not Work and What Is Promising', in Colin King, Clive Walker, Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan 2018) 724-730.

There is also room for improvement in Member States' statistical obligations in relation to confiscated assets. The establishment of social control over the allocation of confiscated assets largely depends on the existence of statistical obligations on the Member States, resulting from EU law, to collect multi-faceted data at a central level reflecting the social and public re-use of confiscated assets. This obligation should also cover the collection of data at a central level on the number of cases in which confiscated assets were used for the purposes of restitution or compensation for crime victims. Furthermore, information should be provided about the number of cases in which the victim obtained restitution as a result of the domestic execution of freezing orders, as well as via the cross-border execution of freezing orders in accordance with Regulation 2018/1805. These datasets should be publicly available and comprehensible so that social control can be truly exercised. This would require changes to both instruments – harmonisation and mutual recognition, specifically within Article 11 of Directive 2014/42/EU and Article 35 of Regulation 2018/1805. Transparency of the social and public re-use of confiscated and frozen assets should foster confidence in the legitimacy of asset recovery measures forming part of the criminal justice system at the national level, and at the level of cross-border cooperation in the EU.

It is worth mentioning that the conclusions of the Report from the Commission to the European Parliament and the Council 'Asset recovery and confiscation: Ensuring that crime does not pay' included the need for greater precision as regards the management of frozen assets, as well as the introduction of provisions on the disposal of assets, including the social re-use of confiscated assets and establishing the rules on the compensation of victims of crime.[40]

4. The perspective of Poland and Germany

An example of a Member State where it is not legally possible to exercise the rights of crime victims to restitution and compensation directly from confiscated assets is Poland. Consequently, national freezing orders issued under Article 291 para 1 point 4 or 5 of the Polish Code of Criminal Procedure (1997) [*Kodeks postępowania karnego*][41] for the purpose of restitution or confiscation cannot be regarded as issued with a view of subsequent confiscation ('forfeiture' according to the nomenclature used in Polish criminal law). This means that these freezing orders do not meet the definition of 'freezing order' adopted in Regulation 2018/1805, and are therefore excluded from the mutual recognition mechanism of freezing orders introduced by that Regulation.

40 Commission, Report from the Commission to the European Parliament and the Council 'Asset recovery and confiscation: Ensuring that crime does not pay', Brussels, 2 June 2020, COM(2020) 217 final, 17-18 <https://ec.europa.eu/home-affairs/system/files/2020-06/20200602_com-2020-217-commission-report_en.pdf> accessed 31 January 2022.

41 Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments.

The national solutions concerning the execution stage of forfeiture do not allow for the direct allocation of the forfeited assets for the purposes of restitution or compensation. On the contrary, pursuant to Article 44 (5) and Article 45 (1) of the Polish Penal Code (1997) [*Kodeks karny*][42] restitution of the aggrieved party or another entity excludes ordering the forfeiture of objects, material benefits or their equivalent. Therefore, restitution does not take place at the stage of forfeiture enforcement, when all aggrieved persons and their claims can be established. The beneficiary of the forfeited assets is the state, therefore its rights to forfeited assets are given priority, not those of the victims.

For comparison, more advanced solutions were adopted in the German criminal law, which solved the problem of the appropriate stage of settling the claims of crime victims from confiscated assets. Previously (before the amendments of April 13, 2017), according to Section 73 (1) sentence 2 of *Strafgesetzbuch* (StGB),[43] forfeiture was excluded where there was a victim's claim arising from the act committed which justified the forfeiture. As a result of the solutions adopted in the Act on the reform of criminal asset confiscation [*Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung*] of April 13, 2017,[44] the aforementioned exclusion of the forfeiture order has been removed from Section 73 (1) of StGB.[45] It is worth mentioning that as a result of the aforementioned act reforming the German system of depriving property related to crime, the term 'confiscation' was also uniformly applied, corresponding to EU law. A key change in this reform in terms of victims' rights to restitution and compensation is that the issue of these claims was moved to the execution stage of confiscation.[46]

These two different national legal solutions show that there is a need to secure the rights of crime victims to restitution and compensation under the confiscation mechanism at the level of EU law. The introduction of minimum harmonisation standards to Directive 2014/42/EU and amendments to Regulation 2018/1805 would allow, at least partially, a reduction in the discrepancies between the position of crime victims across the EU, both in the domestic and cross-border asset recovery processes, with the former having a significant impact on the latter.

42 Kodeks karny (1997) [Penal Code], Dz.U. (1997), No 88, item 553 with subsequent amendments.

43 Strafgesetzbuch (StGB) (1871), [Penal Code], in the version published on November 13, 1998, Bundesgesetzblatt [Federal Law Gazette of the Federal Republic of Germany], BGBl. I, 3322 with subsequent amendments (until 13 April 2017).

44 BGBl. 2017 I, 872. See also David Ullenboom, *Praxisleitfaden Vermögensabschöpfung* (C.F. Müller 2019) 1-4.

45 See also Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung, Drucksache 18/9525, 5 September 2016, 1-2; Wilhelm Schmidt, *Vermögensabschöpfung. Handbuch für das Straf- und Ordnungswidrigkeitenverfahren* (2nd edn, C.H. Beck 2019) 7-9; Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen,* (68th edn, C.H. Beck 2021) 736-737.

46 See Section 459g et seq of Strafprozeßordnung (StPO) (1877, revised in 1950) [Code of Criminal Procedure], in the version published on 7 April 1987, BGBl. I, 1074, 1319 with subsequent amendments. See also justification for the draft of a law to reform the criminal asset confiscation [*Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung*], Bundesrat Drucksache 418/16, 12 August 2016, 105-111.

Conclusions

The operational capacity of the mechanism for mutual recognition of freezing and confiscation orders introduced by Regulation 2018/1805 largely depends on national freezing and confiscation rules that are influenced by EU minimal harmonising standards. The analysis of EU law regarding the asset recovery process allows the identification of certain normative barriers weakening the victims' rights to restitution and compensation and the re-use of assets for public and social purposes. These barriers result from the fact that the EU legislator has not yet decided to introduce minimum standards obliging Member States to ensure asset allocation for restitution and compensation for victims, nor for social and public purposes (directly or indirectly). Being forced to operate in such a legal environment hampers developments away from the traditional meaning of the term 'asset recovery', which in many European jurisdictions is still associated with the connotation of primarily meeting state goals, and not social or public ones.

The asset recovery system across the EU should perform its restorative function according to its potential in both national and cross-border dimensions. To this end, the development of EU policy should be expected to oblige Member States to ensure the priority of victims' rights to restitution and compensation over states' rights to recovered assets. The relevant obligations in this regard should be integrated into the current legal framework harmonising asset recovery in the EU. Changes in this field would open the way for victims to seek restitution and compensation under the asset recovery mechanism, without discrepancies in their treatment between EU jurisdictions.

Among the areas for improvement at the EU law level, there are also the minimum rules on the freezing of property, which should be modified to ensure victims' rights to restitution and compensation. The rationale for this is the variety of forms of restitution and compensation in criminal justice systems, where it may not be possible to use for these purposes the assets obtained from confiscation or from freezing for subsequent confiscation. To this end, the definition of 'freezing' in Directive 2014/42/EU should be amended to cover freezing for the purpose of restitution and/or compensation for the victim from frozen or confiscated assets. Additionally, the definition of 'freezing order' in Regulation 2018/1805 should be amended to additionally cover a decision issued for the purpose of restitution and/or compensation for the victim from frozen or confiscated assets.

From the perspective of triggering the restorative potential of the asset recovery process, the phase of managing and disposing of the frozen and confiscated assets is no less important. It does not seem possible to fully exploit this potential without the commitment of Member States to ensure that the recovered assets can be allocated (through direct or indirect transfer) to social and public purposes.

Finally, in order to ensure social control over the asset recovery process, it would be desirable to extend the statistical obligations of Member States to collect data on the allocation of assets for restitution and compensation for victims, as well as for social

and public purposes. Transparency in this regard would foster public confidence in the criminal justice system across the EU, of which the cross-border asset recovery process has become an indispensable part. Social control over the asset recovery process would also contribute to an improvement in terms of the coherency, efficiency and fairness of this process. These factors could in turn increase the added value of EU criminal law.

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In rem confiscation in EU law after the *Agro in 2001* judgement. The Polish perspective

Gniewomir Wycichowski-Kuchta

Abstract

In the scientific discourse on depriving illicit assets there have been disputes about the admissibility of solutions assuming the possibility of confiscating property without the prior conviction of the owner (so-called *in rem* confiscation) from the European law perspective. This issue was raised in the judgment of the CJEU in the case C-234/18 *Agro in 2001.* In this case, the CJEU found that the Bulgarian provisions on civil confiscation are in line with EU law on confiscation. This paper discusses the circumstances and consequences of the ruling of the CJEU and, in particular, the context of Bulgarian provisions on the confiscation of property, the margin of Member States appreciation in creating a non-penal (i.e. detached from the requirement of conviction) procedure for the confiscation of property in domestic law. The procedural consequences are examined from the Polish perspective, i.e. the impact of the judgment on the interpretation of provisions which govern the execution of confiscation orders issued by courts of other Member States.

Keywords

non-conviction based confiscation, cooperation in criminal matters, EU criminal law, organised crime, forfeiture

INTRODUCTION[1]

One of the most dynamically developing areas of EU criminal law, which is understood as common procedural and material standards in the area of freedom, security and justice, in addition to judicial and police cooperation, is the issue of dealing with assets derived from crime (or those suspected of it), in particular in cross-border cases. The most common and fundamental way to deal with property involved in illicit activity (as the instrumentalities, proceeds or property the value of which corresponds to the instrumentalities or proceeds) is confiscation, ordered in a criminal proceeding, following or simultaneously with the conviction judgement. It is directed against a particular defendant and, as a result, should be considered *actio in personam*, conviction-based. However, a further type of confiscation has emerged in many jurisdictions which is confiscation directed, not against a particular person, but against the property, *actio in rem,* which does not require the formal, criminal conviction of the owner. Given the above, and taking into account EU regulations,[2] three basic types of confiscation can be derived:[3] criminal confiscation of traditional scope, criminal confiscation of extended scope, and non-criminal confiscation of civil or administrative nature.

From the Polish perspective, the instrument that has recently gained the most attention is the last of the three regulations mentioned above: the so-called '*in rem* confiscation', i.e. the confiscation of property derived in connection with a crime but executed without the prior conviction of the perpetrator of the crime in non-criminal proceedings. It became the centre of attention after the announcement that such a legal

1 This research was funded by the Polish Ministry of Science and Higher Education budget for science in 2019–2023 as a research project under the 'Diamentowy Grant' ['Diamond Grant'] programme (Decision No 0125/DIA/2019/48).

2 The three main acts establishing the framework for the confiscation and introducing different types of confiscation in the EU are: Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [2005] OJ L 68/49 (hereinafter Framework Decision 2005/212/JHA); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39 (hereinafter Directive 2014/42/EU); 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 [2018] OJ L 303/1 (hereinafter Regulation 2018/1805).

3 For the overview of state of the art regarding the confiscation see Michaël Fernandez-Bertier, 'The confiscation and recovery of criminal property: a European Union state of the art' (2016) 17 ERA Forum 323, 328; Michele Simonato, 'Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery?' (2015) 6 New Journal of European Criminal Law 213. For the deep down analysis of extended confiscation see Ariadna H. Ochnio, 'The problematic scope of extended confiscation in comparative perspective' (2019) 52 Nowa Kodyfikacja Prawa Karnego 119; Johan Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing 2017) 27-93.

solution is currently under legislative work at the governmental level.[4] However, there has been a scientific debate about the admissibility of, and the minimum standards required by European law, for this mechanism.[5] The answer to this was provided by the judgment of the CJEU of 19 March 2020 in the Case C-234/18 *Agro in 2001*.[6] Although this seems to have resolved the question of *in rem* confiscation in EU law (for the time being at least), the arguments raised by the CJEU are debatable and the consequences for the Member States, especially in respecting and executing confiscation orders from the other Member States that were issued in non-conviction based proceedings, remain unclear. Therefore, it should be analysed how the CJEU handled the case and how the judgment may influence the cooperation of Member States in criminal matters.

1. THE BACKGROUND OF THE CASE

In July 2014, the prosecutor of Sofia city informed the Commission for the combatting of corruption and for the confiscation of illegally obtained assets (Bulgaria) (hereinafter the Commission for confiscation) that criminal proceedings had been initiated against the chairman of the supervisory board of a Bulgarian bank for deliberately inducing other persons into misappropriating funds belonging to that bank with a total value exceeding 205 million Bulgarian leva (approximately 105 million Euros).

The Commission for confiscation carried out an investigation, which showed that the chairman and his family members held large-value bank deposits that did not correspond to their legal income, had carried out banking transactions using means of undetermined origin, and had acquired movable and immovable goods of significant value. In addition, the chairman received remuneration based on various fictitious contracts. Therefore, in the decision of 14 May 2015, the Commission for confiscation initiated proceedings before the Sofia City Court, which is the referring court in *Agro in 2001*, to confiscate property belonging to the chairman and his family members, in addition to third parties related to or controlled by the chairman.

In the proceedings brought before the Sofia City Court, the defendants argued that the request for confiscation of the property, made by the Commission for confiscation, was contrary to Directive 2014/42/EU. This directive requires that the confiscation of property be based solely on a final judgment, which did not occur in their criminal case. Moreover, in the opinion of the defendants, no provisions govern civil confiscation at

4 See Governmental information, Serwis Rzeczypospolitej Polskiej, 'Konfiskata in rem – nowoczesna metoda zwalczania przestępczości zorganizowanej' <https://www.gov.pl/web/sprawiedliwosc/konfiskata-in-rem--nowoczesna-metoda-zwalczania-przestepczosci-zorganizowanej> accessed 20 January 2022.

5 See Jon Petter Rui and Ulrich Sieber (eds), *Non-Conviction-Based Confiscation in Europe* (Duncker & Humblot, Max-Planck-Institut für ausländisches und internationales Strafrecht 2015); Frederico Alagna, 'Non-conviction Based Confiscation: Why the EU Directive is a Missed Opportunity' (2015) 21 European Journal on Criminal Policy and Research 447; Michele Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains' (2017) 18 ERA Forum 365.

6 Case C-234/18 *Agro in 2001*, EU:C:2020: 221.

the EU level. Therefore, according to the defendants, confiscation of property can only be carried out based on a conviction. Concurrently, the defendants submitted that they were treated as if they had already been tried and convicted.

Regarding the allegations raised by the defendants, the Sofia City Court specified that the Bulgarian Law on combating corruption and confiscating illegally obtained assets (hereinafter the Law on confiscation)[7] shows that confiscation proceedings initiated before the civil court are independent of the criminal proceedings. The referring court stated as follows:

> *it is expressly stated in the Law on Confiscation that confiscation proceedings brought before the civil court are independent of criminal proceedings brought against the person under investigation and/or the persons associated with or controlled by him or her. The existence of criminal charges in itself suffices for civil proceedings for confiscation to be commenced* (39).

However, the Sofia City Court noted that it was clear, from the wording of Directive 2014/42, that a link between criminal proceedings and civil confiscation proceedings should not be ruled out. Having a number of doubts on the issue in question, the Sofia City Court referred questions to the CJEU for a preliminary ruling, which amounted to answering the question of whether the legal solutions, adopted in a given country, allow for the confiscation of property obtained from illegal sources, regardless of the finding of an offence in a final judgement or conviction.

2. The Bulgarian legal context

In order to properly understand the nature of these confiscation proceedings, it is necessary to place them in the broader context of Bulgarian confiscation regulations. Bulgaria has established a relatively strict confiscation regime within Europe, allowing for civil confiscation mechanisms since 1990.[8] That legal framework established civil proceedings that made it easier for prosecutors to seize a property, especially by redirecting the burden of proof in the procedure onto the owner. It was, however, still considered to be a post-conviction mechanism that was simply an alternative to criminal confiscation.[9] Those mechanisms were under the scrutiny of the ECtHR in *Dimitrovi*

7 Zakon za protivodeystvie na korupsiata i za otnemane na nezakonno pridobitoto imushestvo (2018) [Law on combating corruption and confiscating illegally obtained assets], Darzhaven vestnik: ofitsialno izdanie na Republika Bulgaria [State Gazette – the Official Journal of the Republic of Bulgaria], DV No 7, 19 January 2018.

8 Todor Kolarov, 'Historic analogs of civil confiscation of unexplained wealth – the case of Bulgaria' (2020) 27 Journal of Financial Crime 561, 565.

9 Rositsa Dzhekova 'Civil Forfeiture of Criminal Assets in Bulgaria' in Colin King, Clive Walker (eds), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate 2014) 91, 95-96.

v Bulgaria,[10] where they were assessed as inconsistent with Article 1 of Protocol No 1 to the ECHR. The ECtHR stated that the Bulgarian regulations of civil confiscation, before 2005, failed to comply with the requirements of lawfulness: any interference by a public authority with the peaceful enjoyment of possessions should be lawful, which also means compatible with the rule of law (para 44). Due to that fact, domestic law that deals with private property, such as confiscation regulations, must be sufficiently precise and foreseeable (para 45). As the ECtHR stated, this was not the case with the Bulgarian confiscation regulations (paras 46-50). These regulations referred to a vague, undefined notion of 'unlawfulness', as *conditio sine qua non* to confiscate property, which caused domestic courts to interpret this requirement differently (para 47). The ECtHR also emphasised the fact that Bulgarian law did not provide any reasonable time limitations for the authorities to invoke the confiscation proceedings, which put the owners of the questioned property in a challenging position, given that they had to prove the legality of property acquired decades ago (para 47). A similar outcome, regarding the Bulgarian confiscation regime after 2005, was recently observed in *Todorov and others v Bulgaria*.[11]

In response, to a certain degree, to that judgement but also under pressure from European institutions to introduce robust regulations against organised crime and corruption[12] and the rule of law issues,[13] Bulgaria reformed the confiscation regulation. The non-conviction based confiscation regime, which was the subject of the analysis by the CJEU, was introduced in 2012[14] and then amended in 2018, currently constituting the current legal regime. Under the current Bulgarian Law on confiscation, the mere initiation of criminal proceedings in the *in personam* phase enables the Confiscation Commission, a specialised body established in the Law on confiscation, to initiate confiscation proceedings. According to Article 108 of the Law on confiscation, the Commission for confiscation may initiate proceedings only if the person is charged of the offences listed in the Law on confiscation. Confiscation proceedings cannot be carried out without criminal charges. The Commission for confiscation conducts proceedings in which it checks the origin of the property and submits an application for freezing to a civil court (Article 116 of the Law on confiscation). The Commission then calls on the suspect to provide written explanations as to the origin of the property (Article 136 of the Law on confiscation). Moreover, the act stipulates that the Commission for confiscation cooperates, among others, with the Public Prosecutor's Office and the Police to perform its duties (Article 27 of the Law on confiscation). The Public Prosecutor's Office is obliged to inform the Commission for confiscation of all decisions issued in an investigation

10 *Dimitrovi v Bulgaria* App no 12655/09 (ECtHR, 3 March 2015).

11 *Todorov and others v Bulgaria* Apps nos 50705/11 and others (ECtHR, 13 July 2021).

12 Dzhekova (n 9) 95.

13 See Commission, Commission Staff Working Document. 2020 Rule of Law Report. Country Chapter on the rule of law situation in Bulgaria. Accompanying the document 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', Brussels, 30 September 2020, SWD(2020) 301 final.

14 Zakon za otnemane v polza na darzhavata na nezakono pridobito imushtestvo (2012) [Law on confiscation of illegally obtained assets in favour of the State], DV No 38, 18 May 2012.

concerning property subject to the Commission's investigation (Article 25 of the Law on confiscation). Specifically, the Commission uses material from the criminal investigation for its investigation but the person that the information relates to is deprived of the procedural rights that generally apply in criminal proceedings, such as the burden of proof being placed on the authorities, the presumption of innocence, and the right to a fair trial.

3. The Advocate General's opinion and the CJEU's judgement

In an attempt to fully understand the consequences of the judgment of the CJEU, it is necessary to conduct an in-depth examination of the judgment itself and compare it with the opinion of Advocate General Sharpston. It will then be clear to what extent the CJEU agreed with the Advocate and what consequences for *in rem* confiscation arise from the discussed judgement.

The opinion of the Advocate General in *Agro in 2001*[15] concentrated on three main legal issues. First, she considered that Directive 2014/42/EU is not applicable *ratione temporis* as its implementation deadline expired on 4 October 2016, and the case was referred to the national court before that date. Advocate Sharpston based her arguments on the case law, stating that the directive had direct effect only after the expiry of transposition.[16] The second issue that was examined was whether the proceedings before the referring court were of a criminal or civil nature.[17] She argued that, although the offence that the chairman was accused of in the criminal proceeding (embezzlement) fell *prima facie* within the scope of the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[18] (hereinafter Framework Decision 2005/212/JHA) , this act could not apply to the case due to the fact that proceedings before the Sofia City Court, regarding the confiscation of property, are not proceedings relating to an offence within the meaning of Article 1 of Framework Decision 2005. The opinion states:

> *Criminal proceedings are those initiated when the person concerned is made aware that he or she is suspected or accused of having committed a criminal offence and continue until final determination of the question whether that person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.* (65)
> *It is apparent that the proceedings in question before the national court are not «criminal proceedings».* (66)

15 Case C-234/18 *Agro in 2001*, EU:C:2019:920, Opinion of AG Sharpston.

16 Ibid, para 54.

17 Ibid, para 67.

18 Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [2005] OJ L 68/49.

Ultimately, Advocate Sharpston argued that proceedings regarding the confiscation of property under the Bulgarian legal regime are civil in nature. As a consequence, the fundamental rights and safeguards derived from the Charter, would not apply as the case failed to comply with the scope of EU law in cases where it was 'civil'. This results from the limitation clause of Article 51 of the Charter.[19] She also stated that 'there is nothing in that framework decision (as distinct from Directive 2014/42) which makes confiscation dependent upon a final criminal conviction'.[20] The main argument of the cited opinion is the definition of confiscation in the Framework Decision 2005/212/JHA. Thus, Advocate General Sharpston concluded that *in rem* confiscation, which is ordered in court in non-criminal proceedings, failed to comply with the scope of EU regulations about standards of confiscation, especially not within the scope of the Framework Decision 2005/212/JHA, which was the applicable law in that particular case.

The judgment of the CJEU is generally consistent with the Advocate's opinion, especially as to the conclusions. Nevertheless, the judgement is, to certain degree, narrower than the Advocate's opinion, especially in the explicit statements about its consequences. In its considerations, the CJEU omitted the intertemporal arguments raised by the Advocate but followed her sidenote arguments regarding the substantive aspect of the potentially applicable laws. In that aspect, the CJEU noted that Directive 2014/42/EU was not applicable *ratione materiae*. The reason for this is the fact that embezzlement, which the defendant was accused of in the domestic procedure, does not constitute one of the offences covered by the legal instruments exhaustively listed in Article 3 of Directive 2014/42/EU.[21] Instead, the CJEU based its assessment on the Framework Decision 2005/212/JHA. The reasoning of the CJEU is based on the fact that Directive 2014/42/EU only amended specific provisions of the Framework Decision2005/212/JHA and, therefore, the remaining parts continue to apply.[22] Furthermore, in the light of Article2 (1) of Framework Decision 2005/212/JHA, national law should allow for the confiscation of instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property of the value of which corresponds to such proceeds. Due to the fact that, under Bulgarian law, embezzlement is punishable by ten to twenty years imprisonment, the offence in question meets the requirements of the scope of this framework decision.[23]

19 Article 51 of the Charter: 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

20 Opinion of AG Sharpston (n 15) para 70.

21 *Agro in 2001* (n 6) para 47.

22 Ibid, para 48.

23 Ibid, para 49.

Having established the proper, applicable law in this case, the CJEU had to make a reservation about Article 2 (2) of Framework Decision 2005/212/JHA, which states that: 'in relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence', for this reason it can be interpreted *a contrario*, that for offences other than tax offences, no confiscation may be carried out based on any proceedings. Therefore, the CJEU held that the adoption of such an interpretation would go beyond the minimum standards stipulated in the Framework Decision 2005/212/JHA.[24] Furthermore, the CJEU noted that, under Bulgarian law, civil confiscation proceedings coexist with a regime for confiscation under criminal law. The former regime is focused on illegally acquired property; independent of any criminal proceedings against the perpetrator of the crime, and most importantly, irrespective of the outcome of these proceedings.[25]

For this reason, the CJEU concluded that the Framework Decision 2005/212/JHA does not preclude legislation of a Member State which:

> *provides that the confiscation of illegally obtained assets is ordered by a national court following proceedings which are not subject either to a finding of a criminal offence or, a fortiori, the conviction of the persons accused of committing such an offence.*

It is therefore apparent, from the CJEU judgment *in Agro in 2001,* that EU law does not prevent domestic legislation from providing for civil confiscation proceedings that do not depend on the finding of a criminal offence or a conviction.[26]

4. COMMENTARY ON THE JUDGEMENT

The analysis conducted by the CJEU in *Agro in 2001* shows that the nature of the confiscation proceedings is decisive in determining whether EU law impacts a given regulation. Traditional confiscation is closely related to criminal proceedings; it is a criminal measure or a *sui generis* criminal law institution directed against a particular defendant and so inevitably related at least to the *in personam* phase of the criminal proceedings. Conversely, civil confiscation is focused on property, not person, so it can potentially take place even in the *in rem* phase of criminal proceedings. The need for a final conviction is therefore not, in itself, required. More precisely, civil confiscation, even if linked to a prohibited act, is not understood to be a criminal law institution.

However, it should be noted that the reasoning of the CJEU, presented in the discussed case, is reductive. It ignored the well-established and extensive jurisprudence

24 Ibid, paras 58-59.

25 Ibid, para 60.

26 Ibid, paras 61-62.

of the ECtHR that could have clarified the interpretation of national confiscation laws on confiscation in the context of a criminal penalty and the requirements for confiscation without a conviction. In this regard, one of the most important ECtHR rulings is the judgment in the *Engel* case.[27] The ECtHR introduced three principal criteria for distinguishing the nature of given domestic proceedings: as a starting point, it is essential to verify how the state classifies the proceedings. This is not a determinative factor and a simple classification of the proceedings as civil proceedings in the domestic legal system is not sufficient. There is always a need to examine the true nature of the proceedings, to ensure that the proceeding is then examined objectively, regardless of the domestic classification, given its factual nature and purpose; and in conclusion, the severity of any possible penalty that results from given proceedings is considered.[28]

This case law was developed and continued, among others, in *Philips*[29] and *Walsh*,[30] which related to the confiscation regime in the United Kingdom (respectively, criminal extended confiscation and non-conviction confiscation) and in which the confiscation regulations of the UK were found to be compliant with the ECHR. In addition, the ECtHR had, on a number of occasions, dealt with the nature of confiscation proceedings regarding Italian anti-mafia regulations, which include non-criminal confiscation related measures that can be applied to persons suspected of belonging to a mafia-type organisation without formal conviction, finding them compliant with the ECHR.[31] There were also crucial cases in which the ECtHR found the confiscation regulations in breach of the convention. For example, in *Varvara*,[32] the ECtHR addressed the administrative confiscation order, which was executed despite the discontinuation of the criminal proceedings, in this case the ECtHR found that situation in breach of Article 7 of the ECHR, since the confiscation, despite being ordered in separate administrative proceedings, was closely linked to a crime and consisted of a penalty that when applied to the person that was not sentenced, shall be considered illegal and arbitrary.[33] Similarly, in *G.I.E.M.*, in which Italian confiscation of land instruments applied even if the criminal proceedings had been discontinued or there were no charges against the owners, breached Articles 6 and 7 of the ECHR and Article 1 of its Protocol No 1.[34]

As previously mentioned, the ECtHR assesses each situation *a casu ad casum* and often finds that the non-conviction confiscation procedure is in line with the ECHR. Nevertheless, regardless of the final outcome in such cases, the ECtHR does not limit itself

27 *Engel and others v the Netherlands* Apps nos 5100/71 and others (ECtHR, 8 June 1976).
28 Ibid, paras 80-83.
29 *Phillips v The United Kingdom* App no 41087/98 (ECtHR, 5 July 2001).
30 *Walsh v The United Kingdom* App no 43384/05 (ECtHR, 21 November 2006).
31 *Arcuri and others v Italy* App no 52024/99 (ECtHR, 5 July 2001); *Riela and others v Italy* App no 52439/99, (ECtHR, 4 September 2001). See also a judgement on Lithaunian non-conviction regualtions *Silickienė v Lithuania* App no 20496/02 (ECtHR, 10 April 2012).
32 *Varvara v Italy* App no 17475/09 (ECtHR, 29 October 2013).
33 Ibid, paras 65-73.
34 *G.I.E.M. S.R.L. and others v. Italy* Apps nos 1828/06 and others (ECtHR, 28 June 2018).

simply to citing national provisions. It considers the entire legal situation and circumstances regarding the confiscation. This is done both from an institutional perspective, which includes the purpose of the confiscation regulations in the legal system and the interplay between the confiscation provisions and penal ones in the domestic system. This is in addition to the perspective from that of the individual, including especially the severity and the predictability of confiscation and the procedural situation of the property owner.

As is demonstrated in *Agro in 2001*, the CJEU did not apply a similar standard. The procedural situation of the property owner in the Bulgarian regime was not appropriately considered. Although the Bulgarian Commission for confiscation closely cooperates with the public prosecutor and has a number of powers they can use to be severe concerning the property owner, regarding the submission of a security application, conducting proceedings to determine the size and origin of the property and call upon the owner of the property to submit written explanations, the CJEU did not even address tackle those issues. Another issue, not considered by the CJEU, is the position of the state in non-criminal confiscation proceedings. For example, if the state is considered a party in such proceedings (as in the Bulgarian Law on confiscation)[35] regarding the enforcement of a public power over the individual and his property, the nature of these proceedings is more complex than simply a civil one and becomes more analogous to a criminal or administrative one. The CJEU did not consider that factor at all and, moreover, this fact is needed to indicate that the argument of the CJEU that Article 2 (2) of Framework Decision 2005/212/JHA, which allows the utilisation of non-criminal confiscation in regards to tax offences, cannot be interpreted *a contrario* makes this provision futile, a *nudum ius.* In such an interpretation as this, there is no normative value due to the fact that Member States would be entitled to establish non-criminal confiscation, even without such a regulation, with the result that interpretation of this provision, as a prohibition on using such procedures outside tax crimes, should not be as easily rejected as in the judgement of the CJEU. As clarified earlier, the CJEU presented very reductive argumentation regarding the nature of the Bulgarian confiscation regime and raised some questionable arguments as to the provisions of the Framework Decision 2005/212/JHA.

The interim arguments should also briefly be referred to, those raised by Advocate Sharpston (paras 43-46), of which the CJEU did not follow. As a matter of principle, Directives cannot be applied before their implementation date. However, the Bulgarian regulations have already implemented this Directive and the referring court tried to determine whether it was a defective implementation.[36] In this regard, it should also be emphasised that the principle of sincere cooperation implies the obligation not to adopt legal acts or take other actions that would be contrary to the given directive, as stated by the CJEU, for example in *Milev*:

35 See Kolarov (n 8) 566.

36 See Blaga Thavard, 'Bulgaria's Aggressive Confiscation Regime and the Opinion of the Advocate General in Case C-234/18' <https://verfassungsblog.de/carte-blanche-for-political-abuse/> accessed 20 January 2022.

> *The fact remains that the Member States must refrain, during the period prescribed for transposition of a directive, from taking any measures liable seriously to compromise the result prescribed by that directive [...]. In this connection it is immaterial whether or not such provisions of domestic law, adopted after the directive entered into force, are concerned with the transposition of the directive.*[37]

5. Impact on the Member States' law. Poland's example

Taking into consideration the consequences of the *Agro in 2001* judgement, the first, and most obvious conclusion, is that the current EU legal framework does not oppose civil, non-conviction based confiscation regimes. Nevertheless, this leaves unanswered the questions of how orders of non-conviction based confiscation can be addressed in the field of mutual recognition of confiscation orders and how, if at all, they limit the fundamental rights of the EU recognised in the Charter. Unfortunately, the CJEU did not provide straightforward answers to those inquiries, partly as a consequence of the scope of the preliminary questions.

Regarding the latter issue, concerning the protection of the fundamental rights of an individual whose property was confiscated in non-conviction proceedings, the issue may be perplexing. *Prima facie,* since the CJEU ruled that *in rem* confiscation is not covered by EU law and due to the fact that Article 51 of the Charter states that the Charter applies to the Member States only when implementing EU law, the fundamental rights guaranteed in the Charter (like the right to property, and Article 17) would not apply.[38] However, this would mean that European citizens would be deprived of protection in the area of non-criminal confiscation from the perspective of the Charter. Moreover, it would be contrary to the practice of the ECtHR, which is indicated in *Gogitidze and others v Georgia*:

> *where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (...) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No 1.* (94)[39]

It should also be noted that the CJEU did not state that directly, contrary to AG Sharpston (para 74). What is more, in *Plovdiv*,[40] the CJEU found the Bulgarian regula-

37 C-439/16 PPU, *Milev,* EU:C:2016:818, para 31.

38 See also Opinion of AG Sharpston (n 15) paras 69-74.

39 *Gogitidze and others v Georgia* App no 36862/05 (ECtHR, 12 May 2015) para 94.

40 Case C393/19 *Plovdiv*, EU:C:2021:8.

tions on extended criminal confiscation incompatible with Article 17 (1) of the Charter in situations in which confiscated property belongs to a third party, not accused nor convicted of smuggling, and acting in good faith. The CJEU argued as follows:

> *the definitive deprivation of the right of ownership in respect of that property, substantially affects the rights of persons, it must be noted that as regards a third party acting in good faith, who did not know and could not have known that his or her property was used to commit an offence, such confiscation constitutes, in the light of the objective pursued, a disproportionate and intolerable interference impairing the very substance of his or her right to property.* (55)[41]

It should be noted that analogous situations can occur on the grounds of *in rem* confiscation when property obtained in good faith turned out to be, for example, the proceeds of crime. However, it still does not resolve the problem of on what grounds the Charter would be applicable to the *in rem* confiscation regime, unless the CJEU explicitly states that the legal situation of the owner deprived of property in a non-criminal proceeding is covered by the EU law.

The position of the CJEU that EU law does not preclude national provisions allowing for the confiscation of the property after the conclusion of proceedings which are not subject either to a finding of a criminal offence or, *a fortiori*, the conviction of the persons accused of committing such an offence, may be problematic in the light of mutual judicial cooperation when it comes to recognising and executing orders issued by the courts of other Member States in such proceedings *in rem*. In the case of Poland, the *Agro in 2001* judgement relates directly to Article 611fu para 1 of the Polish Code of Criminal Procedure (1997)[42] [*Kodeks postępowania karnego*] (hereinafter the CCP), which indicates that, in the event of a request by a Member State to enforce a final forfeiture (confiscation) judgment, this judgment is enforceable by a district court in the district in which the perpetrator has property or earns income, or has a permanent or temporary residence. Article 611fu was introduced to the CCP as part of the implementation of the Council Framework Decision 2006/783/JHA of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders.[43] If the position of the CJEU in *Agro in 2001* is to be considered decisive, it should be stated that the national regulations on non-criminal confiscation are not only not covered by the provisions of directives, regulations or framework decisions on judicial cooperation but also by the Charter. Therefore, it would appear that, at least in the context of *Agro in 2001*, if the issue of non-criminal confiscation orders is not developed in EU law or case law, there are no grounds to apply Article 611fu para 1 of the CCP to orders of confiscation issued in

41 Ibid, para 55.

42 Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments.

43 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59. See also Regulation 2018/1805.

a non-criminal procedure, such as Bulgarian *in rem* confiscation proceedings. Furthermore, the legal situation of such orders is further complicated as Regulation 2018/1805 is limited to the orders issued by another Member State within the framework of proceedings in criminal matters, which means it excludes civil and administrative confiscation orders from its scope.

Final remarks

As presented above, the judgement in *Agro in 2001* contains a number of flaws. Firstly, the CJEU analysed the nature of the Bulgarian *in rem* confiscation quite cursorily, especially by not considering the property owner's situation and the competencies of the Commission for confiscation, in addition to its strong ties to the public prosecutor's office. Secondly, its interpretation of the Framework Decision 2005/212/JHA, raises a number of doubts for the reasons that it would lead to the interpretation that it contains at least one provision that does not have any normative content. Thirdly, the decision that *in rem* confiscation transgresses the scope of EU law leaves European citizens without the protection of fundamental rights guaranteed by the Charter. Finally, it seems that *in rem* confiscation orders are not in agreement with the system of mutual judicial cooperation, which may cause upheaval when domestic courts start refusing to recognise and execute them.

Conversely, it is indisputable that the Member States have gained a great deal of freedom to shape their domestic non-criminal confiscation regimes, as it would seem that, at least currently, EU law, potentially, does not cover this area in any case. As a result, if domestic legislators decide to utilise non-penal proceedings and not to require prior conviction, there will be no requirement to create regulations in line with the detailed provisions of EU law and the Charter. However, the readiness of Member States to recognise and execute such judgments remains an unanswered question.

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Attempts to harmonise the definition of the crime of rape in the European Union through the scope of German, Spanish and Swedish legislation

Klaudia Jakubowicz

Abstract

Firstly, the aim of this paper is to discuss the measures taken by the European Union to combat gender-based violence, including attempts to ratify the Istanbul Convention. Secondly, the regulations concerning the definition of the crime of rape in three European Union states: Germany, Spain and Sweden are analysed. The main focus is on the adaptation of the definition of rape in line with the standard established by the Istanbul Convention. The analysis conducted shows that, although Sweden and Germany adopted different legal definitions of rape, where Sweden adopted the 'only yes means yes' model and Germany adopted the 'no means no' model, their regulations are in line with the standards of the Istanbul Convention. The same cannot be said of the Spanish regulation, since coercion or intimidation are still required for the existence of elements of the crime of rape.

Keywords

criminal law, European Union, rape, crime against sexual freedom, Istanbul Convention

Introduction

The principle aim of this paper is to examine whether the provisions regarding the crime of rape in Sweden, Spain, and Germany are consistent with the standards established by the Council of Europe Convention on preventing and combating violence against women

and domestic violence (hereinafter the Istanbul Convention).[1] The legal systems of the aforementioned countries will be used to illustrate the possible ways of defining the crime of rape. The first model requires that parties give affirmative consent so that the elements of the crime are not fulfilled. The second model requires the perpetrator to use coercive means such as threat or deceit (coercion model).[2] The legal systems of the selected states will serve as practical examples illustrating the three most common models of defining the crime of rape. Swedish law will be used to illustrate the model of affirmative consent, 'only yes means yes', the German law to illustrate the 'no means no' model, which emphasises sexual autonomy and subjectivity, giving choice and control over one's own body through the ability to say 'no' and the Spanish law to model coercion. It should be noted that changes in the presented legislations have taken place in recent years. For example, in Germany, until 2016, there was a coercion model. A thesis is presented in an article written by this author stating that the legislations of the EU Member States that have signed and ratified the Istanbul Convention are approaching the model developed in the Convention.

1. Measures taken by European Union to combat gender-based violence against women

The issue of gender-based violence did not go unnoticed by the European Community. Among the measures taken by the European Union to counter gender-based violence against women is the adoption, by the European Parliament and the European Council, of the Directive 2012/29/EU of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter Directive 2012/29/EU). Recital 17 of this Directive provides that:

> *Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. Gender--based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment).*[3]

1 Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS 210.

2 Poland is an example of this model. However, due to the frame of the article, the problem of definition of crime of rape in the Polish legal system will not be discussed. As an example of coercion model the current Spanish legislation will be presented.

3 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

The invoked Directive aims to improve the situation of victims of crime through protection, support, information and access to justice, regardless of their nationality or place of residence. It pays particular attention to the support and protection of victims at risk of secondary victimisation, intimidation and retaliation by the perpetrator, especially victims of gender-based violence or victims of rape.

It has been proposed, on numerous occasions, that the possibility of the ascent to the Istanbul Convention by the European Union should be considered. It can be said that, currently, it is the most comprehensive regional instrument addressing violence that targets women. Currently, all Member States of the European Union are signatories of the Istanbul Convention. However, Hungary, Latvia, Lithuania, The Slovak Republic, The Czech Republic and Bulgaria have yet to ratify it.[4]

On 4 March 2016, the Commission submitted to the Council both its proposal for a Council decision on the signing of, on behalf of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence ('the proposal for a signature decision').[5] Additionally, the EC submitted its proposal for a Council decision on the conclusion of, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence ('the proposal for a conclusion decision').[6]

The next step for the adoption of the Istanbul Convention was the adoption of the Council Decision 2017/865 on the signing of, on behalf of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters[7] and the Council Decision 2017/866 on the signing of, on behalf of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement.[8] Two decisions had to be made due to the fact that Ireland is not bound by Directives 2011/95[9]

4 Council of Europe, 'Chart of signatures and ratifications of Treaty 210' <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210> accessed 28 January 2022.

5 Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence', Brussels, 4 March 2016, COM (2016) 111 final.

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9 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of

and 2013/32.[10] On 13 June 2017, the European Union signed the Act of Accession to the Istanbul Convention.[11] Although the Istanbul Convention was signed on behalf of the European Union on 13 June 2017, the Council has not yet taken any decision on the conclusion of that convention by the European Union, due to the fact that, according to the Parliament, the Council seems to want to make the adoption of such a decision contingent on securing the prior 'common accord' of all the Member States.

In the absence of ratification, the European Parliament adopted a resolution of 28 November 2019 on the accession of the EU to the Istanbul Convention and other measures to combat gender-based violence.[12] In this resolution, the Parliament calls on the Council to urgently conclude the EU ratification of the Istanbul Convention and recalls that EU accession to the Istanbul Convention does not exempt Member States from national ratification of the Convention. In point three, the Parliament condemns the attempts by some Member States to revoke measures aimed at implementing the Istanbul Convention and combating violence against women (para 2).[13] The measures taken illustrate how important it is for the European Union to protect women against gender-based violence. It should also be mentioned that, a few months earlier, the European Parliament adopted a resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession.[14]

In the Opinion 1/19 of the Court of Justice (Grand Chamber) issued on 6 October 2021 (hereinafter the Opinion), the Court provided that the Istanbul Convention, assuming it is concluded, should be regarded as a mixed agreement, concluded between the third parties and the European Union in one respect, and the third parties and the Member States on the other.[15] Each party must act within the scope of its own competences and also respect the competences of any other contracting party. It requires two separate acts, one of which entails a consensus of the representatives of the Member

international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

10 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

11 Press release, 'EU signs Council of Europe convention to stop violence against women' <https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680724be9> accessed 16 January 2022.

12 European Parliament resolution of 28 November 2019 on the EU's accession to the Istanbul Convention and other measures to combat gender-based violence [2021] OJ C 232/48.

13 Ibid.

14 European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession [2021] OJ C 116/7.

15 CJEU, Opinion 1/19, *Convention d'Istanbul*, 6 October 2021, para 239. See also Opinion procedure 1/19, *Convention d'Istanbul*, EU:C:2021:198, Opinion of AG Hogan.

States, whereas the other must be adopted by the Council (by a qualified majority in accordance with Article 218(8) TFEU). The Court expressly provides that those acts cannot be adopted in one procedure or in the form of one 'hybrid act'. In this regard it should also be noted that, in accordance with the paragraph 259 of the Opinion, when concluding mixed agreements, the Member States and the European Union shall not encroach upon the competences of each other.

The Treaties do not require the Council, before concluding the Istanbul Convention on behalf of the European Union, to await a common agreement of the Member States to be bound by that Convention in the areas of their competence. They do, however, prohibit it from making the opening of the procedure for the conclusion of that Convention, presented in Article 218(2), (6) and (8) TFEU, subject to the prior establishment of such a 'common agreement'.[16] The conclusion of an international agreement by the EU itself depends on whether the Council is able to gather the required majority.[17]

The Treaties do not prevent the Council, acting in accordance with its Rules of Procedure, from waiting for a common agreement of the Member States to be bound by the Convention before adopting a decision on its conclusion on behalf of the EU (if the requirements set out in Article 218(2), (6) and (8) TFEU are fulfilled). However, the Treaties prohibit the Council from adding a further step to the procedure for the conclusion of the Convention provided for in that Article by making the adoption of the decision on the conclusion of that Convention subject to the prior establishment of such a 'common agreement'.[18]

It is logical then, insofar as the Council acts in accordance with its Rules of Procedure and the effectiveness of Article 218(2), (6) and (8) TFEU is guaranteed, there is nothing to prevent the Council from extending its deliberations in order to achieve, in particular, the largest possible majority for the conclusion of an international agreement. This is in addition to the majority required for the wider exercise of the European Union's external competences or, in the case of mixed agreements, closer cooperation between the Member States and the institutions of the Union in the process of concluding that agreement, which may require waiting for the 'common agreement' of the Member States.[19]

In summary, the Treaties do not require the Council, before concluding the Istanbul Convention on behalf of the European Union, to await a common agreement of the Member States to be bound by that Convention in the areas of their competence but they do prohibit it from making the opening of the procedure for the conclusion of that Convention, presented in Article 218(2), (6) and (8) TFEU, subject to the prior establishment of such

16 Ibid, para 249.
17 Ibid, 250.
18 Ibid, 274.
19 Ibid, 253.

a 'common agreement'.[20] The conclusion of an international agreement by the EU itself depends on whether the Council is able to gather the required majority (para 250 of the Opinion). Additionally, the Treaties do not prevent the Council, acting in accordance with its Rules of Procedure, from waiting for a common agreement of the Member States to be bound by the Convention before adopting a decision on its conclusion on behalf of the EU (if the requirements set out in Article 218(2), (6) and (8) TFEU are fulfilled). The decision of the Union to conclude the Istanbul Convention would be compatible with the Treaties if it were adopted in the absence of a common agreement of all Member States on their consent to be bound by that Convention. In addition, however, it would also be compatible with the Treaties if it were adopted only after such common agreement had been established. It is exclusively for the Council to decide which of those two solutions is preferable.[21]

In Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commissions 'Work Programme 2021: A Union of vitality in a world of fragility', the Commission remains committed to the EU accession to the Istanbul Convention but pledges to bring forward a new proposal to combat gender-based violence.[22] Point 39 of the 'Annex I: New initiatives', presents a proposal to prevent and combat specific forms of gender-based violence and point 41 announces the fitness check of EU legislation on violence against women and domestic violence, which would cover each piece of legislation in all EU Member States until 2020. This aims to identify regulatory gaps and analyse whether further action is required.[23] It should also be noted that the current President of the Commission, Ursula von der Leyen, said, in her opening statement delivered on 16 July 2019, that the EU should ratify the Istanbul Convention.[24] According to the Gender Equality Strategy published on 5 of March 2020, concluding an agreement on the accession of the EU to the Istanbul Convention is a key priority for the Commission for the years 2020–2025.[25]

2. Definition of the crime of rape in Article 36 of the Istanbul Convention

Article 36 of the Istanbul Convention defines sexual violence, including rape. The definition of rape includes the intentional engaging in non-consensual, vaginal, anal or oral

20 Ibid, 249.

21 Ibid, 274.

22 Commission, Communication, 'Commission Work Programme 2021. A Union of vitality in a world of fragility', Brussels, 19 October 2020, COM (2020) 690 final.

23 Ibid.

24 Ursula von der Leyen, Candidate for President of the European Commission 'Opening Statement in the European Parliament Plenary Session', Strasbourg, 16 July 2019 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_4230> accessed 16 January 2022.

25 Commission, 'A Union of Equality: Gender Equality Strategy 2020–2025', Brussels, 5 March 2020, COM (2020) 152 final.

penetration of a sexual nature of the body of another person with any bodily part or object, engaging in other non-consensual acts of a sexual nature with a person or causing another person to engage in non-consensual acts of a sexual nature with a third person. Consent must be given voluntarily. In assessing the voluntariness of consent, the context and circumstances of the event must be taken into account. Letter b. covers all acts of a sexual nature without the freely given consent of one of the parties involved which do not include penetration. Lastly, letter c. covers situations in which the victim is caused, without consent, to perform or comply with acts of a sexual nature with or by a person other than the perpetrator. What is important, is the 'Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence' in paragraph 179 points out that 'The interpretation of the word «intentional» is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence'.[26] According to paragraph 3 of this Article, the requirement to take the necessary legislative action rests with the state party to the Convention.

Referring to the subject literature, two noteworthy views are quoted: Stephen J. Schulhofer expressed the view that 'Sexual autonomy is a basic constituent of personal freedom deserving recognition and protection in its own right'.[27] Article 36 of the Istanbul Convention is built around the concept of sexual autonomy. In addition, Monika Płatek stated that:

> *Sexual Autonomy sensitizes the relationship between the sexual relationship and the power relationship. Violence, threat, deception, and coercion into a sexual relationship are demonstrations of power, but also of authority. A law that denies the possibility of positive self-determination, merely consenting to an attempted refusal, indirectly fosters processes that reproduce enslavement.*[28]

In 2021, a report on gender equality in the EU was released by the Commission, which indicated the activities of the Members of the European Union in terms of the implementation of the Istanbul Convention.[29] The Convention inspired change of the definition of rape in the Croatian Penal Code, which came into force on 1 January 2020.[30] Moreover, the Danish Parliament changed Article 216 of the Danish Penal Code to define rape as intercourse without consent, thereby bringing Denmark in line with the

26 Council of Europe, 'Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence' 2011, CETS 210, 32.

27 Stephen J. Schulhofer, 'Taking sexual autonomy seriously: Rape Law and beyond' (1992) 11 Law and Philosophy 94 <https://doi.org/10.1007/BF01000918>.

28 Monika Płatek, 'Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki' (2018) XL Archiwum Kryminologii 266 <https://doi.org/10.7420/AK2018F>.

29 Commission, Directorate-General for Justice and Consumers, 'Report on gender equality in the EU' (Publications Office 2021).

30 The definition of rape since 1 January 2021 covers any non-consensual sexual intercourse or a sexual activity, making the law's approach to consent broader.

Istanbul Convention. Croatia and Denmark are not the only states that have adopted the definition of rape based on the provisions of the Convention. Slovenia is the 13th state in Europe that based the definition of the crime of rape on the premise of lack of consent. Previously, the Slovenian Penal Code required evidence of force or threat in order to classify an act as rape. Consultations on similar laws are currently underway in Spain and the Netherlands.

3. German regulation

In Germany, before 2016, the definition of rape was based on the 'coercion model'. There was no regulation that would provide that the lack of consent of the victim is sufficient to consider that a sexual crime has been committed. In 2016, a reform took place, according to which the 'no means no' model was adopted and a new crime designated as sexual assault [*sexueller Übergriff*] was introduced in Section 177 of the *Strafgesetzbuch* (StGB).[31] The changes to the StGB were dictated by pressure from non-governmental organisations and women's organisations, as well as the desire to bring the legal regulations in line with the Istanbul Convention.[32] The new Section, 177 StGB, is quite extensive and attempts to cover various factual situations.

Section 177(1) StGB, contains the basic type of the crime of rape. It protects victims of both sexes from forced sexual contact with the perpetrator or third parties. It introduces five types of punishable activities: sexual activities of the perpetrator with the victim, sexual activities of the victim with the perpetrator, sexual activities of the victim without physical contact with another person, sexual activities of a third person with the victim or of the victim with a third person. The legal quality, protected by Section 177 StGB, is sexual self-determination.[33] The StGB has adopted a 'no means no' veto model. The claims of Tatjana Hörnle, on this subject, must be agreed with as she stated that the adoption of this model implies a communication obligation on the part of the victim and any rationale for refusal is sufficient.[34]

Section 177(1) StGB prohibits sexual intercourse without the expression of will.[35] In the German literature, it is argued that the refusal must either be explicitly declared or

31 German Penal Code [*Strafgesetzbuch*] in the version published on November 13, 1998, BGBl. I, 3322 with subsequent amendments.

32 Cf Tatjana Hörnle, 'The New German Law on Sexual Assault and Sexual Harassment' (2017) 18 German Law Journal 1319 <https://doi.org/10.1017/S2071832200022355>.

33 Joachim Renzikowski, 'StGB §177' in Jürgen Schäfer, Volker Erb (eds), *Münchener Kommentar zum StGB* Band 3 §80-184k (4th edn C. H. Beck 2021).

34 Hörnle (n 32) 1314.

35 Section 177(1) Whoever, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs a penalty of imprisonment for a term of between six months and five years.

must be unambiguously apparent. The assessment of consent depends on the context. It is also noted that arousal is not a substitute for consent. It is undisputed that the legal standard also covers 'stealthing', i.e. unprotected sexual intercourse, while the other party has consented to protected sexual intercourse. *Amtsgericht* [AG] Berlin-Tiergarten [District Court Tiergarten in Berlin] rightly assessed such a case as sexual assault, which is punishable under Section 177(1).[36] Since the partners had explicitly agreed to protected sexual intercourse beforehand, continuing intercourse without protection did not correspond with expressed will.

The German legislator rightly assumed that the victim, in certain circumstances, does not have the opportunity to express 'no', whether by words, gestures or behavior. The law cannot be based on the veto model in this case. The incapacity of the victim to express his or her will is casuistically covered in section 177(2) StGB, according to which whoever performs sexual acts on another person or has that person perform sexual acts, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs the same penalty if the offender exploits the fact that the person is not able to form or express a contrary will. This is in addition to whether the offender exploits the fact that the person is significantly impaired in respect of the ability to form or express a will due to said person's physical or mental condition, unless the offender has obtained the consent of that person, the offender exploits an element of surprise, the offender exploits a situation in which the victim is threatened with serious harm in case of offering resistance or the offender has coerced the person to perform or acquiesce to the sexual acts by threatening serious harm.[37]

What distinguishes sections 177(1) and 177(2) StGB is the fact that the first refers to the incapacity to form or express an opposite will and there is no reference to what this incapacity or inability may be due to. It is a premise of a more objectified nature. Section 177(2) StGB refers to a characteristic of a particular person which affects the capacity to express the will, i.e. a physical or mental state. However, the legislative materials clearly state that psychological discords are not sufficient and that only pathological states identifiable in a clinical way are covered.[38] Section 177(2) StGB indicates that sexual contact with a person with the characteristics listed in the disposition of the provision will, however, be possible when consent has been obtained (the concept of affirmative consent). Consent therefore excludes the criminalisation of the act. The element of surprise, referred to in Section 177(3) StGB, is the sudden performance of the sexual act, without the person concerned expecting sexual contact. In this situation, the expression of will by the victim is impossible. Section 177(4) StGB para 4 states that the victim is not obliged to refuse if there exists a threat of serious evil by the perpetrator without

36 Quoted in Renzikowski (n 33) (as cited in AG Berlin-Tiergarten, 278 Ls, 284 Js 118/18 (14/18)), 11 December 2018, Rn. 46-53.

37 German Penal Code [*Strafgesetzbuch*] in the version published on 13 November 1998, BGBl. I, 3322 with subsequent amendments, Section 177(2).

38 Parlamentsarchiv [Parliamentary Documents], Deutscher Bundestag, Drucksachen [BT] 18/8210.

the perpetrator uttering a threat.[39] This is an implicit threat, in contrast to the explicit threat regulated in para 5. It should be noted that there is a view in doctrine, according to which, it is part of positive sexual freedom to use sexuality for pleasure, love but also, instrumentally, as a means to avoid an expected inconvenience.[40] According to Section 177(3) StGB attempted rape is also punishable.

The 2016 reform introduced two new crimes. Section 184i StGB stipulates that whoever touches another person in a sexual manner, and, thereby, harasses that person (184(1) StGB).

Section 184j StGB introduces the offences committed by groups [*Straftaten aus Gruppen*]. It concerns people who promote an offence by participating in a group of persons who exert pressure on another person to commit an offence against that person. According to Tatjana Hörnle 'The aider must have seen and accepted the likelihood of a crime and any type of criminal offense will do'[41] and 'It is not necessary to prove an act or contribution other than the participation in a group that cornered the later victim, and it is not necessary to prove intent concerning the sexual nature of the ensuing crime'.[42]

According to German police statistics, 1,356 people were punished for crimes under Section 177 StGB in 2017, while in 2016, under previous law, 1016 people. However, in 2018, the police recorded 15,525 crimes, in 2017 14,260 crimes, in 2016 13,838 crimes, and in 2015 11,808 crimes. 'The increase in the number of crimes recorded by the police is probably mainly due to the expansion of the paragraph'.[43]

4. Spanish regulation

Spanish legal regulations, regarding offences against sexual freedom, are included in the Organic act 10/1995 of 23 November 1995, *Código Penal*[44] hereinafter referred to as the Spanish Penal Code. Tittle VIII of the Spanish Penal Code is devoted to criminal offences against sexual freedom and indemnity. The Spanish legislator in Penal Code has made a distinction between 'sexual abuse' and 'sexual aggression'. In this context Patricia Faraldo-Cabana highlighted:

> *both sexual aggression and sexual abuse include penetrative and non-penetrative offenses. The difference between sexual aggression and sexual abuse is centered only in the use of violence or intimidation. Spain, like other EU member states, legally recognizes an assault as rape – also called aggravated*

39 Hörnle (n 32) 1323.
40 Ibid.
41 Ibid 1328.
42 Ibid.
43 Renzikowski (n 33) Rn. 13-15.
44 Spanish Penal Code (1995) [*Código Penal*], *Ley Orgánica 10/1995* with subsequent amendments.

> *sexual aggression – only when unwanted oral, anal, or vaginal penetration is achieved through violence or intimidation.*[45]

Sexual assault is regulated in Articles 178, 179 and 180 of the Spanish Penal Code. As with the German regulation, the protected aspect is the sexual freedom of the individual. According to Article 178 of the Spanish Penal Code, it follows from this provision that for sexual assault to occur under this legislation, one of the two elements of the prohibited act, namely the use of violence or intimidation of the victim of the offence, must be met. As correctly noted by Patricia Faraldo-Cabana:

> *Violence and intimidation correspond with each other as they both contain elements of coercion, injury, and threats. It must be clear that these elements are effective and sufficient to overcome the will of the victim. It is necessary that, but for the violence or intimidation caused by the accused, the victim would not have been assaulted.*[46]

Violence involves the use of physical force. It must be immediate, intense, severe and with sufficient force to break the victim's resistance. For this violence to be typical as an element of the crime of sexual assault, a causal link between the violence used and the sexual contact achieved is decisive.[47] Intimidation has been defined by case law as 'a verbal threat or threat of unjust harm that instils fear in the victim'.[48]

Article 179 of the Spanish Penal Code determines an aggravated type and introduces a higher penalty if the sexual assault consists of vaginal, anal or oral penetration, or inserting body parts or objects into either of the former two orifices, the offender shall be convicted of rape. Article 180 of the Spanish Penal Code provides for special circumstances which, if they occur, increase the penalties under Articles 178 and 179 of the Spanish Penal Code. The higher penalty will be imposed if the violence or intimidation are of a particularly degrading or humiliating nature; if the deeds are committed by joint action of two or more persons; if the victim is especially vulnerable due to age, illness, handicap or circumstances; if, in order to execute the criminal offence, the offender has availed himself of superiority or relationship, due to being an ascendant, descendent or brother or sister, biological or adopted or in-law of the victim; if the doer uses weapons or other equally dangerous means which may cause death or the bodily harm foreseen.

Article 181 of the Spanish Penal Code protects the sexual freedom and indemnity of another person. It is not necessary to use violence and intimidation in order to fulfil the

45 Patricia Faraldo-Cabana, 'The Wolf-Pack Case and the Reform of Sex Crimes in Spain' (2021) 22 German Law Journal 847, 850 <https://doi.org/10.1017/glj.2021.38>.

46 Ibid, 849.

47 Cf Antonia Monge Fernández, 'Los delitos de agresiones y abusos sexuales a la luz del caso "la Manada" ("sólo sí es sí")' in Antonia Monge Fernández and Javier Parrilla Vergara (eds), *Mujer y derecho penal ¿Necesidad de una reforma desde una perspectiva de género?* (Bosch Editor 2019) 341.

48 Ibid, 345.

elements of the crime set out in this article but only to act against the will of the victim. In addition, Article 181 paragraph 2 of the Spanish Penal Code states that non-consensual, sexual abuse is deemed to be that perpetrated on persons who are unconscious, or whose mental disorder is taken advantage of, as well as those committed by overcoming the will of the victim using narcotics, drugs or any other natural or chemical substance that is appropriate for such a purpose. According to Article 181 paragraph 3 of the Spanish Penal Code, the same punishment shall be imposed if consent is obtained by the offender availing himself of a situation by manifesting superiority that deprives the victim of liberty. If the sexual abuse involves penetration, the legislator has chosen to increase the penalty.

The need for change in Spanish criminal law was indicated by the case, known as *La Manda* or *The Wolf-Pack*. In brief, it was the controversial trial of five men who were accused of the gang rape of a young woman during the *San Fermín* [Running-with-the-Bulls] festivities in July 2016 in Pamplona. This case demonstrated the inadequacies of Spanish criminal regulations regarding the definition of sexual offences, especially the existence of the requirement of violence and intimidation.[49] As the reaction to this situation, the draft of Organic Law on the Comprehensive Guarantee of Sexual Freedom [*El proyecto de Ley Orgánica de Garantía Integral de la Libertad Sexual*] was approved by the Spanish Council of Ministers [*el Consejo de Ministros de España*] on 6 July 2021 at the request of the Ministries of Equality and Justice, which aims to comprehensively protect the right to sexual freedom and eradicate all sexual violence.[50]

The draft introduced the 'only yes means yes' affirmative, consent model inspired by the Istanbul Convention. Importantly, the silence or passivity of the victim under this regulation will not constitute consent. It also abolishes the criticised distinction between sexual abuse and sexual aggression, emphasising consent and not the manner in which the attack takes place. It also abandons the premise of intimidation and violence for the crime of rape.[51]

5. Swedish regulation

Sweden established The Sexual Offences Committee, which presented a report titled 'Enhanced protection of sexual integrity' to the Minister for Justice and Migration, Morgan Johansson, in 2016.[52] In the report, the Committee recommended changes to

49 For more on the *La Manda* case see the article: Faraldo-Cabana (n 45) 847-859.

50 La Moncloa, 'Proyecto de Ley Orgánica de garantía integral de la libertad sexual' <https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/060721-enlace-libertad-sexual.aspx?fbclid=IwAR3YbJUhY83WOgtlvS4Ys_gh9FRR74v7c3wUyIidGedWGMy0JJTvI-cZOsA> accessed 16 January 2022.

51 Ibid.

52 Regeringskansliet, 'Ett starkare skydd för den sexuella integriteten. Betänkande av 2014 års sexualbrottskommitté', SOU 2016:60 accessed <https://www.regeringen.se/contentassets/8216d40ecc814613bccb394b4b1dfa38/ett-starkare-skydd-for-den-sexuella-integriteten-sou-2016-60.pdf> accessed 28 January 2022.

the Swedish Penal Code[53] in relation to the offence of rape. The most significant change proposed that 'Sexual offences legislation shall be amended to ensure that the dividing line between punishable acts and acts exempt from punishment is determined by whether participation in a sexual act was voluntary or not'.[54] Thus, the Committee proposed that:

> *criminal responsibility is borne by a person who performs sexual intercourse or another sexual act that, with regard to the seriousness of the violation, is comparable to sexual intercourse, with a person who is not participating voluntarily.*[55]

The Swedish Government accepted the recommendations of the Committee and, on 23 May 2018, the Swedish Parliament passed the law.[56] The new legislation came into effect on 1 July 2018. Ultimately, Sweden has introduced an affirmative consent model 'only yes means yes'. The crime of rape is regulated in chapter 6 'On sexual offences' of the *Brottsbalken* (hereinafter the Swedish Penal Code). Section 1 of chapter 6 contains a definition of rape which is based on voluntariness and the assumption that, for the crime of rape, it is irrelevant what behaviour precedes or accompanies the sexual intercourse (although not only), only whether the sexual intercourse is accompanied by the aforementioned voluntariness, passivity will not be considered as consent. In order to assess voluntariness, the Swedish courts take into consideration, as a starting point, whether the voluntariness was expressed in words, deeds or in any other manner (Section 1 of the Swedish Criminal Code). Special circumstances are also indicated in which consent cannot be assumed not to have been given voluntarily. It is a criminal offence to have sexual intercourse without consent in addition to, or, another sexual act that in view of the seriousness of the violation is comparable to sexual intercourse.

Additionally, Section 1 of chapter 6 of the Swedish Penal Code describes the aggravated type of offence. An offence is classified as such when it is considered to be gross. In this assessment particularly, the use of violence or threats of a high degree of severity, assault by a greater number of persons on the victim, in addition to the victim's young age, ruthlessness and brutality should be considered. Section 2 of chapter 6, penalises sexual assault. This offence is committed by a person who performs a sexual act other than those referred to in Section 1 with a person who is not participating voluntarily. In addition to the basic type, there is also an 'aggravated type', gross sexual assault. Two new offences of 'negligent rape' and 'negligent sexual assault' have also been introduced. Negligent rape has been regulated in Section 1a the Swedish Penal Code. In order to

53 Swedish Penal Code (1962) [*Brottsbalken*], SFS 1962:700, with subsequent amendments.

54 Press release, 'Enhanced protection of sexual integrity' <https://www.government.se/press-releases/2016/10/enhanced-protection-of-sexual-integrity/> accessed 28 January 2022.

55 Regeringskansliet, 'Ett starkare skydd för den sexuella integriteten' (n 52) 43.

56 Regeringskansliet, Proposition från Justitiedepartementet 'En ny sexualbrottslagstiftning byggd på frivillighet', Govt. Bill 2017/18:177 <https://www.regeringen.se/rattsliga-dokument/proposition/2018/03/prop.-201718177/> accessed 28 January 2022.

commit this offence, the elements of Section 1 must be fulfilled and there must be gross negligence with regard to the fact that the other person does not participate voluntarily. This means that a person should be aware of the risk that the other person may not voluntarily engage in sexual intercourse and yet engage in a sexual act with that person. In conjunction with additional factors, it may be that the perpetrator should have taken steps to ensure that the other person participated voluntarily, for example by asking a direct question.

Additionally, in the discussion regarding criminal offences that threaten sexual freedom, the voices of Lisa Wallin, Sara Uhnoo, Åsa Wettergren and Moa Bladini, should be invoked, who, in their article, state:

> *the legal operationalization of the concepts voluntariness and negligence, central to the new Swedish rape legislation, and found that they tie in closely with the evaluation of credibility. Credibility as we have seen is the «matter» on which evaluations actualizing voluntariness and credibility are based. Our analysis shows that the evaluation of voluntariness and negligence differs between judgements in roughly similar cases, and that credibility depends at least in part on background emotions of sympathy/antipathy, doubt, scepticism and trust, which in turn intertwine with gendered stereotypes. In so far as rape myths remain unreflected, they are comfortable roads to reach conclusions when legal decisions must rely on contrasting accounts.*[57]

Conclusion

To date, the Istanbul Convention has yet to be ratified by the European Union. Despite this, EU institutions are taking action to protect victims of crimes against sexual freedom. Moreover, in at least some of the EU Member States we can observe a tendency to harmonise the definition of the crime of rape to the *de minimis* standards put forth by the Istanbul Convention.

However, not all Member States have ratified the Istanbul Convention and, among those that have done so, not all have adjusted their regulations to the standard established by it. In practice, it is apparent that Member States choose different models of the victim's behavior. The 'no means no' model has been adopted in German law, with the exception of affirmative consent in the event that the victim is unable to object to his or her characteristics, and Swedish law adopted the 'consent' model according to which 'any intercourse without voluntary given consent' amounts to being a crime. The examples of Germany and Sweden illustrate that the state legislators may take different approaches to implement the standard

57 Lisa Wallin, Sara Uhnoo, Åsa Wettergren and Moa Bladini, 'Capricious credibility – legal assessments of voluntariness in Swedish negligent rape judgements' (2021) 22 Nordic Journal of Criminology 18 <https://doi.org/10.1080/2578983X.2021.1898128>.

specified in the Istanbul Convention. The Spanish regulation is an example of a regulation that has not yet been adapted to the standards specified in the Istanbul Convention, although, interestingly, it distinguishes two types of crimes, sexual aggression and sexual abuse. In these cases, in order to fulfill the characteristics of sexual aggression, the perpetrator must use violence or intimidation (the use of violence, intimidation or threats are typical for the regulation of European countries that have not adjusted their definition of the crime of rape in accordance with standard set forth in the Istanbul Convention). Currently in Spain, work is in progress on the introduction of the 'only yes means yes' model, in which the premise of the use of violence or intimidation is no longer required. States that have ratified the Istanbul Convention should implement the definition of the crime of rape, provided in this convention, into their legal systems, as they have committed to do so. In practice, many countries have not yet done so. If the European Union does not ratify the Istanbul Convention, the Member States will still have autonomy in defining the crime of rape in any way they see appropriate. Then there will be no possibility of unification and this means that the model based on consensual consent will prevail in the EU.

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Pharmaceutical crime in the European Union – selected issues

Aleksandra Komar-Nalepa

Abstract

The aim of the study is to analyse the main directions of the dynamically developing pharmaceutical crime that the European Union and all its Member States have to deal with, as well as to attempt to indicate further necessary systemic solutions to prevent this type of crime. The author presents the most common types of pharmaceutical crimes in the European Union, analyses the normative activity of its organs aimed at preventing this type of crime and the harmonisation of the laws of the Member States in this area. She also tries to identify the causes of the current problems with effectiveness in the fight against this type of crime in the European Union. In conclusion, the author presents proposals for considering the introduction of further pan-European legal regulations and formulates appropriate *de lege ferenda* conclusions in this regard.

Keywords

pharmaceutical crime, counterfeit medications, falsification of medicines, misconduct involving active substances, misconduct involving excipients, Directive 2001/83/EC, Directive 2011/62/EU

Introduction

Pharmaceutical crime includes the production, trafficking and distribution of counterfeit, stolen or illegal medicinal and medical products. Thus, pharmaceutical crime can

take many different forms. Undoubtedly, the biggest problems are counterfeit medicines and medical devices as these are the greatest threats to human life and health. For this reason, the European Union bodies are taking action to counteract this type of crime. In the normative aspect, the most important step in this direction so far has been the adoption of Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011,[1] amending Directive 2001/83/EC on the Community code relating to medicinal products for human use,[2] as regards the prevention of the entry into the legal supply chain of falsified medicinal products (hereinafter Directive 2011/62/EU). Its main aim was to harmonise the laws of the Member States in the field of appropriate counteracting pharmaceutical crime involving the counterfeiting of drugs and placing them on the market, and to oblige Member States to introduce regulations aimed at establishing appropriate penalties for violating the provisions in this area. Pursuant to Article 118a of the Directive, penalties must be effective, proportionate and dissuasive. According to the report of the European Commission of January 26, 2018, a total of 26 Member States (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FR, HR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK) have introduced changes to their legislation in relation to penalties for the falsification of medicines, active substances and excipients in order to transpose Article 118a of the Directive. Hungary made changes to its Criminal Code as a result of the Council of Europe 'Medicrime Convention'.[3] Finland has not changed its legislation, as penalties were already in place before the entry into force of Article 118a of the Directive.[4] A detailed analysis of changes introduced in the regulations of individual Member States, however, indicates what European Union bodies should strive to do to further harmonise the law in this area. The current, existing differences between the laws of individual Member States, primarily in terms of the nature and amount of penalties for the counterfeiting of drugs and the introduction of counterfeit drugs to the market, imply a real risk of appropriate migration of criminal groups dealing with this practice and conducting activities in these countries, in which penalties for such acts are the lowest.

1 Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products [2011] OJ L 174/74.

2 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67, as amended.

3 Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health ('The Medicrime Convention') (2011), CETS 211.

4 Report from the Commission to the European Parliament and the Council on the Member States' transposition of Article 118a of Directive 2001/83/EC of the European Parliament and the Council of 6 November 2001 on the Community code relating to medicinal products for human use as amended by Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011, Brussels, 26 January 2018, COM(2018) 49 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0049> accessed 22 March 2022.

1. THE PHENOMENON OF FALSIFICATION OF MEDICINAL AND MEDICAL PRODUCTS

The practice of counterfeiting medicinal products, medical devices and dietary supplements and their illegal trade is a global problem. It applies to both highly developed and developing countries.[5]

In accordance with Article 1(33) of revised Directive 2001/83/EC a 'falsified medicinal product' is any medicinal product with a false representation of:

a) its identity, including its packaging and labelling, its name or its composition, as regards any of the ingredients including excipients and the strength of those ingredients;
b) its source, including its manufacturer, its country of manufacture, its country of origin or its marketing authorisation holder;
c) its history, including the records and documents relating to the distribution channels used.

However, it should be noted that the definition of a 'falsified medicinal product' does not include unintentional quality defects and is without prejudice to infringements of intellectual property rights.[6]

Therefore, a medicinal product, of which the content has been wholly or partially counterfeited or altered, and a medicinal product, of which the content is original but has been repackaged or subject to any interference in the sales process, including the documentation attached to it, is fake. Also, a full-value product, manufactured after working hours by factory employees who want to earn extra money to which illegally produced documentation is attached, is considered a counterfeit.

5 Zbigniew Fijałek, Katarzyna Sarna, 'Wybrane aspekty jakości produktów leczniczych i suplementów diety – produkty substandardowe, nielegalne i sfałszowane' (2009) 65 Rynek Farmaceutyczny 468-475; Jacek Dworzecki, Izabela Nowicka, 'Organized crime in the production and distribution of falsified medicines in Poland: outline the problem' (2019) 6 Entrepreneurship and Sustainability Issues 1762-1770 <https://doi.org/10.9770/jesi.2019.6.4(15)>; Vitalii Pashkov, Aleksey Soloviov, Andrii Olefir, 'Legal aspects of counteracting the trafficking of falsified medicines in the European Union' (2017) 70 Wiadomości Lekarskie 843-849; Robert C. Bird, *Counterfeit drugs: a global consumer perspective* (2007–2008) 8 Intellectual Property Law Journal 378-406; Rubie Mages, Thomas T. Kubic, 'Counterfeit medicines: Threat to patient health and safety' (2016) 18 Pharmaceuticals, Policy and Law 163-177 <https://doi.org/10.3233/PPL-160441>.

6 The Polish law is fully harmonised in this area with EU legislation. According to the Article 2(38a) of the Pharmaceutical Law (2001), Dz.U. (2001), No 126, item 1381 with subsequent amendments: a counterfeit medical product is a medicine that has been misrepresented in terms of: a) the identity of the product, including its packaging, label, name or composition in relation to any ingredients, including excipients, and the strength of these ingredients, b) its origin, including its manufacturer, country of manufacture, country of origin or responsible entity, or c) its history, including data and documents on the distribution channels used.

In comparison, it is worth pointing out that a much broader definition in this subject was developed by the American Food and Drug Administration (FDA), which considers a counterfeit product to be a medicine, container or label that without authorisation bears a trademark, brand name, other identifying mark, imprint or the slogan, or any similarity, to that drug manufacturer, process, packaging or distributor, other than a legal entity or persons who actually produced, processed, packaged, or distributed such a drug and that has, as a result, been misrepresented or misrepresented that product, or has been packaged or distributed by another drug manufacturer, packer, or distributor.[7]

Most often, counterfeit products are sold over the Internet. Undoubtedly, therefore, in the era of the Coronavirus, pharmaceutical crime has gained a new and, unfortunately, even worse reputation all over the world, including the European Union and all its Member States. According to the report of the European Union Intellectual Property Office from November 2020, in as many as five EU Member State the percentage of producer losses in the sale of medicinal products compared to total sales (this is an indicator that allows you to assess the number of counterfeit products, the higher the percentage, the worse the situation) was above 10 percent. This is an unprecedented aspect. Poland is in the middle of this statistic. It is much better than in Bulgaria, Romania and Hungary, but also much worse than in Germany, France or the Netherlands.[8] Counterfeit drugs pose a threat to patients and the general public, primarily because patients believe they are receiving authentic treatment, but are, instead, given potentially unsafe products that can increase resistance to the actual treatment and cause further illness, disability, and even death. The presence of these counterfeit drugs also undermines confidence in the healthcare system and results in huge financial losses. It is therefore important to raise awareness of the dangers of counterfeit medicines.[9]

Unfortunately, the phenomenon of drug counterfeiting has been gaining momentum in recent years due to the high profitability of this type of illegal activity. According to estimates by the European Commission, around 183 million packages of falsified drugs were on the market by 2020. Estimates from the WHO and the Food and Drug Administration (FDA) show that up to 1% of drugs sold in developed countries may be counterfeit. The World Medicines Organization is concerned about the rapid increase in counterfeit medicinal products purchased from the Internet. They constitute about 50% of the products offered there.[10] According to the WHO, the global market for counterfeit

7 Zbigniew Fijałek, Katarzyna Sarna, 'Fałszowanie leków i inne przestępstwa farmaceutyczne' (2009) 263 Problemy Kryminalistyki [Issues of Forensic Sciences].

8 Patryk Słowik, Jakub Styczyński, 'Nasze zdrowie w rękach bandytów', Dziennik Gazeta Prawna, 22 January 2021 <https://www.gazetaprawna.pl/magazyn-na-weekend/artykuly/8074698,przestepczosc-farmaceutyczna-koronawirus-falszywe-leki-wyroby-medyczne.html > accessed 22 March 2022.

9 Warszawski Uniwersytet Medyczny (WUM), Wywiad z profesorem Zbigniewem Fijałkiem na temat fałszowanych leków [Interview with professor Zbigniew Fijałek about counterfeit medicines] <https://www.wum.edu.pl/node/13622> accessed 29 April 2022.

10 Magdalena Młynarek, *Zjawiska patologiczne na rynku farmaceutycznym* (Instytut Wymiaru Sprawiedliwości 2019) 28.

drugs is worth 200 billion USD annually. In turn, according to the experts of the European Union, around 850 million Euro per year is spent on falsified medicinal products throughout Europe, and the size of the Polish market for such products was estimated by the European Commission at 62 million Euro.[11]

2. Regulatory activity of EU bodies and Member States in order to prevent the phenomenon of counterfeiting of medicinal and medical products

The necessity to fight against the constantly growing number of identified counterfeit drugs in the legal supply chain has become the basis for the introduction of the Directive 2011/62/EU. As part of the above-mentioned amendment, a delegation for the European Commission was introduced in order to develop a regulation applicable directly on the territory of all Member States. As part of the aforementioned delegation, the European Commission developed and published the Commission Delegated Regulation (EU) 2016/161 of 2 October 2015, supplementing Directive 2001/83/EC of the European Parliament and of the Council (hereinafter Commission Delegated Regulation or Regulation).[12]

According to Article 50 of the Commission Delegated Regulation, it entered into force on 9 February 2019. Article 1 of the Regulation states that it refers to:

a) the characteristics and technical specifications of the unique identifier that enables the authenticity of medicinal products to be verified and individual packs to be identified;
b) the modalities for the verification of the safety features;
c) the provisions on the establishment, management and accessibility of the repositories system where the information on the safety features shall be contained;
d) the list of medicinal products and product categories subject to prescription which shall not bear the safety features;
e) the list of medicinal products and product categories not subject to prescription which shall bear the safety features;
f) the procedures for the notification to the Commission by national competent authorities of non-prescription medicinal products judged at risk of falsification and prescription medicinal products not deemed at risk of falsification in accordance with the criteria set out in Article 54a(2)(b) of Directive 2001/83/EC;

11 Ibid, 28-29; Stowarzyszenie Leki Tylko z Apteki, raport 'Pozaapteczny obrót lekami OTC bezpieczeństwo, ekonomia i oczekiwania pacjentów' (2018) 43-44 <https://lekitylkozapteki.pl/uploads/raport.pdf> accessed 26 April 2022.

12 Commission delegated regulation (EU) 2016/161 of 2 October 2015 supplementing Directive 2001/83/EC of the European Parliament and of the Council by laying down detailed rules for the safety features appearing on the packaging of medicinal products for human use [2016] OJ L 32/1.

g) the procedures for the rapid evaluation of, and decision on, the notifications referred to in point (f) of this Article.

It is worth saying that this Regulation introduced the European Medicines Authenticity System into the territory of the European Union, which serves to verify the authenticity of potentially counterfeit medical products by comparing the data on unique identifiers entered into the system with the data applied to individual drug packages.

The data on unique identifiers are applied to the packaging in a form encoded in 2D Data Matrix ECC 200 format and in a format that can be read by the human eye. Only positive verification of the packaging in the system, and confirmation by authorised persons to deliver medicinal products to patients, that the protection against opening (the so-called ATD) has not been violated, allows, in the light of the Regulation, the issue of the medicine to the patient.

All the above-mentioned legal acts of EU bodies require coordinated international actions to prevent the presence of counterfeit medicinal products on the market and play a huge role in increasing the safety of treatment for all patients in the European Union. By being able to detect counterfeit medicinal products before administering them to patients, they strengthen the European pharmacovigilance system. The introduction of the Directive 2011/62/EU obligated all entities involved in the distribution of medicinal products, from manufacturers, to wholesalers, parallel importers, to public and hospital pharmacies, to modify the methods of distributing drugs in order to seal them.[13]

In result of introduction of the Directive 2001/83/EC amended by Directive 2011/62/EU, the Member States were also faced with the need to implement into their laws solutions aimed at determining proportionate, effective and dissuasive penalties for those involved in the production and distribution of falsified medicines. Article 118a(1) of Directive 2001/83/EC requires that the Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that those penalties are implemented. The penalties must be effective, proportionate and dissuasive but shall not be inferior to those applicable to infringements of national law of similar nature and importance. Article 118a(2) provides that these rules referred to Article 118a(1) shall address, inter alia:

a) the manufacturing, distribution, brokering, import and export of falsified medicinal products, as well as the sale of falsified medicinal products at a distance to the public by means of information society services;
b) non-compliance with the provisions laid down in this Directive on manufacturing, distribution, import and export of active substances;
c) non-compliance with the provisions laid down in this Directive on the use of excipients.

13 Krajowa Organizacja Weryfikacji Autentyczności Leków (KOWAL), 'Serializacja i Dyrektywa Antyfałszywkowa', 11 February 2019 <https://www.nmvo.pl/pl/aktualnosci/serializacja-i-dyrektywa-antyfalszywkowa/> accessed 22 March 2022.

Every year, Interpol coordinates the PANGEA operation, which is aimed at controlling the trade in drugs outside the legal distribution chain. PANGEA covers pharmaceutical markets in 153 countries. The last such operation took place in March 2020 and also included drugs for COVID-19.[14]

It should also be pointed out that several global organisations are involved in the fight against the threats caused by counterfeiting drugs, such as: the World Health Organization (WHO), or the World Customs Organization and the Working Groups of the Heads of Medicines Agencies (HMA). All these entities coordinate their activities and share information in order to stop the supply of falsified drugs.[15]

3. Analysis of changes in the law of individual Member States in connection with the obligation under Article 118a of Directive 2001/83/EC amended by Directive 2011/62/EU

An overview of the transposition of Article 118a in the Member States indicates that in all Member States at least some activities relating to the falsification of medicinal products are a criminal offence. According to the Report from the Commission to the European Parliament and the Council of January 26, 2018, in 21 UE Member States (AT, BE, CY, CZ, DE, DK, EE, GR, ES, FR, HR, HU, IE, IT, LU, MT, NL, PT, SI, SK, GB), the manufacturing, distribution, brokering, import, export and sale at a distance of falsified medicines are subject to criminal sanctions. In the remaining seven States, however, certain activities are subject to civil penalties (such as fines) rather than criminal penalties. In Bulgaria, criminal penalties apply only to the import or export of falsified medicinal products. The remaining activities are covered only by civil penalties. In Finland, there are no criminal penalties for brokering or export, but these are covered by more general provisions. In Latvia, criminal penalties cover manufacturing, distribution and brokering. Export and import are covered by civil penalties. Additionally, in Romania export and import are covered by civil penalties. In Poland and Sweden, criminal penalties do not cover export, but this is covered by civil penalties. Import covered by civil penalties also occurs in Lithuania.[16]

All 28 Member States apply criminal penalties in the form of imprisonment for the falsification of medicines. Only one Member State (LV) penalises falsification that causes physical harm or death (harm crimes). Two Member States (ES, PT) penalise falsification that causes a risk or danger to the health of a person or public health (con-

14 Interpol, 'Operation Pangea – shining a light on pharmaceutical crime', 21 November 2019 <https://www.interpol.int/News-and-Events/News/2019/Operation-Pangea-shining-a-light-on-pharmaceutical-crime> accessed 22 March 2022.

15 Europejska Akademia Pacjentów, Sfałszowane leki <https://www.eupati.eu/pl/bezpieczenstwo-stosowania-lekow/sfalszowane-leki/> accessed 22 March 2022.

16 Report (n 4) 2.

crete endangerment). Four Member States (EL, LT, RO, SI) penalise falsification that is shown to be generally dangerous, i.e. the falsified medicine contains insufficient active ingredients or harmful substances (concrete-abstract endangerment). In the remaining 21 Member States, falsification *per se* is penalised, without the need to prove that the product is dangerous to health at all. For active substances (the main component of the medicine), 23 Member States apply criminal penalties and, for excipients (auxiliary component of the medicine) only 14 Member States apply criminal penalties. Where criminal penalties apply for the falsification of medicines, the maximum prison sentence is at least three years in 20 Member States (AT, GB, CY, DE, EE, ES, FR, HR, HU, IE, IT, LT, LU, LV, NL, PL, PT, RO, SI, SK). As outlined above, all Member States apply fines for the falsification of medicines. For active substances, 26 Member States apply fines. For excipients, 20 Member States apply fines. Fines may take the form of criminal or civil penalties, although maximum levels vary across Member States. All Member States except Finland, Luxembourg and Malta have introduced additional administrative sanctions for the falsification of medicines, active substances and/or excipients.[17]

The European Commission report on compliance with the requirement to introduce proportionate, effective and dissuasive penalties for those involved in the production and distribution of falsified medicines shows that the penalties vary considerably across the EU.[18] For example, the maximum prison terms for drug counterfeiting range from one year (SE, FI and GR) to fifteen years (AT, SI and SK). The maximum fines vary from 4,300 Euro (LT) to 1 million Euro (ES).[19] In Poland, pursuant to Article 124b of the Pharmaceutical Law, anyone who produces a falsified medicinal product, or a falsified active substance, is subject to a fine, restriction of liberty or imprisonment for up to five years (Section 1). The same penalty is also imposed on a person who supplies or makes available, against payment or free of charge, a falsified medicinal product or a falsified active substance, or stores, for this purpose, a falsified medicinal product or a falsified active substance (Section 2).[20]

Final remarks

Undoubtedly, the phenomenon of medicinal and medical products counterfeiting poses a significant challenge to public health. Fighting this phenomenon is a task and a challenge for the international community.

An extremely important step, aimed at minimizing the risk associated with falsified medicinal products, is the unification of the European Union's policy against falsified

17 Report (n 4) 6.

18 Polityka Zdrowotna, 'Komisja Europejska chce skuteczniejszej walki z fałszowaniem leków', 3 April 2018 <http://www.politykazdrowotna.com/30298,komisja-europejska-chce-skuteczniejszej-walki--z-falszowaniem-lekow> accessed 22 March 2022.

19 Report (n 4) 3-5.

20 Article 124b of the Pharmaceutical Law.

medicines and the harmonisation of the regulations of the Member States. However, it should be considered whether the margin of discretion currently left to the Member States in terms of establishing applicable penalties for the falsification of medicinal products is not too great. While the differences between the laws of individual Member States are not significant in terms of defining the very features of prohibited acts related to counterfeiting drugs and placing them on the market, these differences are enormous in terms of the penalties that may be imposed in particular Member States. Therefore, taking into account that the element to be protected is human health and life, the differences in the laws of individual EU Member States with regard to determining the severity of penalties for persons involved in the production and distribution of falsified drugs seem too significant. It is impossible not to pay attention to the fact that, at present, in view of the freedom of movement of people and services within the territory of the EU, there is a high risk that well-organised criminal groups dealing with drug counterfeiting will select these states in its territory, in which the sanctions for this offence are the lowest. For this reason it is necessary to further harmonise the laws of the Member States in this area, especially by proposing the introduction of uniform penalties in this respect throughout the European Union. It seems that this could be the most effective step in preventing the migration of crime from this area within the EU.[21]

There can be no doubt that the fundamental issue in the fight against counterfeiting drugs is also to raise patients' awareness of the risks that such activities pose. One should agree with Magdalena Młynarek that the fundamental role in this process is played by pharmacists working in pharmacies, who, thanks to close contact with patients and professional knowledge, can protect the health and even lives of said patients. It is important, above all, to teach patients to recognise trusted sources of drug marketing.[22] From the point of view of scientific reflection, the position that it would be desirable to conduct research in a qualitative approach, e.g. interviews with patients would broaden the knowledge of patients' perception of falsified medicinal products.[23]

It is also important to change the approach to counteracting medicinal and medical products counterfeiting itself. Perpetrators involved in this process are characterised by a high sense of impunity, due to the fact that the courts most often impose a fine or imprisonment with a conditional suspension of their execution for this type of crime, without taking into account the threat to life and health of patients resulting from counterfeiting drugs. This approach should be significantly changed so that general prevention can fulfill its function.

21 Vishv Priya Kohli, *Combatting Falsification and Counterfeiting of Medicinal Products in the European Union – A Legal Analysis* (Copenhagen Business School 2018) 282-301.

22 Młynarek (n 10) 37.

23 Damian Świeczkowski, Szymon Zdanowski, Piotr Merks, Miłosz Jarosław Jaguszewski, 'Leki sfałszowane jako wyzwanie dla zdrowia publicznego – próba definicji pojęcia i skali zjawiska na świecie oraz ujęcie prawne i socjologiczne' (2019) 75 Farmacja Polska 621 <https://doi.org/10.32383/farmpol/115755>.

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Alternatives to imprisonment in the light of Polish and EU provisions of law

Jolanta Jakubowska-Hara

Abstract

In this paper, the author undertakes to answer the question of whether, in light of international standards and the Polish Penal Code, the idea of applying the deprivation of liberty as a last resort (*ultima ratio*) has been sufficiently implemented in the last several years, i.e. are the alternatives to deprivation of liberty effectively employed? An analysis of the statistical data emphasises the new directions in criminal policy which, in accordance with the principles of the criminal law reform of 2015, were designed with the aim of increasing the prominence of non-custodial penalties and, as a result, decreasing the number of persons detained. In the concluding remarks the author finds that the prison population in Poland has not decreased significantly in recent years and the prisonisation factor remains among the highest in Europe. The legislative instruments which could potentially limit the number of detained persons are not being effectively used in practice. The overcrowding of detention facilities and a large number of persons waiting to serve their sentences remain a significant issue.

Keywords

alternatives to imprisonment, criminal policy, state of prisonisation

Introductory remarks

The question of alternatives to imprisonment is certainly one of the most significant issues in modern criminal law and criminal policy. It pertains to both the optimal use of already existing legal instruments employed in lieu of incarceration and the development of new, effective measures serving this purpose. The trend of redirection from short-term deprivation of liberty and replacing it with non-custodial measures has been expressed in a number of international documents pertaining to criminal policy. It is also visible in the provisions of criminal law at the national level.

The present text presents the conclusions of the Council of the European Union of 2019 on alternative measures to detention.[1] It also reviews the most important documents addressing alternatives to imprisonment, adopted at the European level, predating said conclusions. The second part focuses on the solutions employed in the Polish Penal Code[2] (hereinafter the PC) introducing the *ultima ratio* status of deprivation of liberty, with particular emphasis on the 2015 reform of the PC which had the objective of amending criminal policy in order to promote the use of non-custodial measures in lieu of deprivation of liberty. A presentation of the statistical landscape of the structure of penalties imposed, after 2015, aims to examine whether incarceration is indeed more often being replaced with non-custodial measures and whether, as a consequence, the prison population has decreased.

1. European criminal law on alternatives to deprivation of liberty

The idea of replacing, as far as possible, the penalty of deprivation of liberty with non-custodial measures has been a driving force in the activities of the European communities authorities for nearly half a century. Early documents with a wider European outreach include the resolution of the Council of Europe Committee of Ministers of 9 March 1976 on certain alternative penal measures to imprisonment, which urged member states to employ sanctions that did not involve the deprivation of liberty and to reserve imprisonment only for the most serious of crimes.[3] Similarly, the Recommendation 914 (1981) of the Council of Europe Parliamentary Assembly of 29 January 1981, indicates

1 Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice [2019] OJ C 422/9.

2 Kodeks karny (1997) [Penal Code], Dz.U. (1997), No 88, item 553 with subsequent amendments.

3 Council of Europe, Committee of Ministers, Resolution 76 (10) on certain alternative penal measures to imprisonment (1976) <https://rm.coe.int/16804feb80> accessed 13 February 2022. See Council of Europe, European Committee on Crime Problems, *Council of Europe activities in the field of crime problems 1956-1976* (Council of Europe 1977) 52.

that 'it is desirable to encourage the current tendency in Council of Europe member countries to replace as far as possible short-term prison sentences by other measures which have the same effectiveness without drawbacks' (8.1.1.).[4]

One prominent document, adopted in 1992 as a recommendation of the Committee of Ministers of the Council of Europe, was the European Rules on Community Sanctions and Measures, adopted by the Committee of Ministers on 19 October 1992 (Recommendation R(92)16).[5] It contained 90 Rules on the development and application of alternative measures in addition to providing definitions for alternative sanctions and measures. One should also mention Recommendation R(96)8 of the Committee of Ministers of the Council of Europe of 5 September 1996, on Crime Policy in Europe at a Time of Change which also addresses the above considerations.[6]

Subsequent European documents have consistently referenced the idea of replacing, where possible, detention with non-custodial measures. In this context it is important to mention the Council of Europe Committee of Ministers Recommendation R(99)22 concerning prison overcrowding and prison population inflation, adopted on 30 September 1999, which encouraged Member States to introduce a wide spectrum of alternative sanctions and measures. Combining the unconditional deprivation of liberty with community service was proposed, together with the extension of the catalogue of probationary measures (criminal sanctions based on parole, also monitored electronically) and the effective enforcement of non-custodial measures.[7]

An additional important document is the Council of Europe Committee of Ministers Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures adopted on 29 November 2000. This rec-

4 Council of Europe, Parliamentary Assembly, Recommendation 914 (1981) 'Social situation of prisoners' <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14948&lang=en> accessed 13 February 2022. See also Maria Szewczyk, 'Jaka alternatywa dla krótkoterminowej kary pozbawienia wolności' in Krzysztof Krajewski (ed), *Nauki penalne wobec problemów współczesnej przestępczości* (Wolters Kluwer 2007) 104-105.

5 Council of Europe, Committee of Ministers, Recommendation NoR (92) 16 of the Committee of Ministers to member states on the European rules on community sanctions and measures (1992) <https://rm.coe.int/16804d5ec6> accessed 13 February 2022. The European Rules were inspired by the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990), UNGA Res 45/110, which recommended that member states reduce the application of deprivation of liberty as penalty as well as rationalise criminal policy *inter alia* by employing alternatives to incarceration <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf> accessed 1 March 2022.

6 Council of Europe, Committee of Ministers, Recommendation No R (96) 8 of the Committee of Ministers to member states on crime policy in Europe in a time of change (1996) <https://rm.coe.int/16804f836b> accessed 13 February 2022. See also Grażyna B. Szczygieł, 'Środki alternatywne wobec kary pozbawienia wolności' in Tomasz Kalisz (ed), (2014) 33 Nowa Kodyfikacja Prawa Karnego 48-49.

7 Council of Europe, Committee of Ministers, Recommendation No R (99) 22 concerning prison overcrowding and prison population inflation <https://rm.coe.int/168070c8ad> accessed 13 February 2022.

ommended an extensive catalogue of alternative penalties and measures, encompassing supervision and control of the convicted person.[8]

Newer documents include the Green Paper on the application of EU criminal justice legislation in the field of detention[9] proposed by the European Commission, which expressly promotes the use of alternatives to imprisonment and the European Parliament resolution of 5 October 2017 on prison systems and conditions, in which the EP called for a broader use of non-custodial measures in order to prevent the overcrowding of detention facilities.[10]

2. Council Conclusions on alternative measures to detention (2019)

In the light of the above, notice should be taken of the Council Conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice adopted by the Council of the European Union in 2019 (hereinafter the Conclusions).[11] The authors of the Conclusions do concede that, in the case of serious crimes, the deprivation of liberty is a necessary instrument in the criminal sanctions system but, nevertheless, as is broadly acknowledged, it should only be employed as a last resort (*ultima ratio*). The Conclusions additionally indicate the obvious benefits of the greater use of non-custodial measures, *inter alia* the reduction of prison populations and, as a result, an improvement of conditions in overcrowded detention facilities which, in turn, contributes to limiting radicalisation among prisoners and improving the effective resocialisation and reintegration of offenders. This document also stresses that, in addition to the alternatives to imprisonment already in existence in all Member States, the technological development and the progression of digitalisation can form the foundations for a more efficient system of non-custodial penalties and measures. It should also be noted that the recommendations of the Council, aimed at reducing the

8 Council of Europe, Committee of Ministers, Recommendation Rec (2000) 22 of the Committee of Ministers to member states on improving the implementation of the European rules on community sanctions and measures <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e8c38> accessed13 February 2022; Szczygieł (n 6) 50-51.

9 European Commission, Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Brussels, 14 June 2011, COM(2011) 327 final.

10 European Parliament resolution of 5 October 2017 on prison systems and conditions [2018] OJ C 346/94.

11 Council conclusions (n 1). The Introduction to this document states that 'According to the new Strategic Agenda 2019–2024, adopted by the European Council on 20 June 2019, protection of citizens and freedoms is a key priority for the next institutional cycle. Effective systems of criminal sanctions play an important role in protecting the citizens and ensuring security'.

number of persons deprived of liberty also apply to measures employed at the pre-trial stage of proceedings.

Developed on the basis of the strategic agenda of the EU for the years 2019 to 2024, the Conclusions contain the recommendations of the Council which should be implemented by Member States at the national level. These include:

1) exploring the opportunities to enhance, where appropriate, the use of non-custodial sanctions and measures, such as a suspended prison sentence, community service, financial penalties and electronic monitoring and similar measures based on emerging technologies;
2) considering enabling the use of different forms of early or conditional release;
3) broader use of non-custodial measures also in the pre-trial stage of criminal proceedings;
4) improving the collection of data on the use of non-custodial sanctions and measures, and on the application of the Framework Decisions on probation and alternative sanctions (2008/947/JHA)[12] and on the European supervision order (2009/829/JHA);[13]
5) improving capacity for probation services, including the supervision of non-custodial sanctions.

3. The priority of non-custodial penalties in the Polish Penal Code

The idea of the application of the deprivation of liberty only as a last resort (*ultima ratio*) was firmly ingrained in the thinking behind the Polish Penal Code of 1997.[14] This is expressed, in particular, in Article 58 para 1 of the PC, which states that if a given offence carries a penalty of up to five years of deprivation of liberty, the court may impose a custodial penalty only if no other penalty or penal measure is capable of achieving the objectives of the penalty. This introduces a preference for non-custodial penalties, which compels the court to first ascertain whether a limitation of liberty (community penalty) or a fine should be imposed. The priority of non-custodial penalties is also indicated by the order in which the penalties are listed in the penalties system (fine, limitation of liberty, deprivation of liberty) and in the order of alternative sanctions. An extensive system of probationary measures has also been introduced with a view to limiting the

12 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/102.

13 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L 294/20.

14 Andrzej Zoll, 'Założenia polityczno-kryminalne kodeksu karnego w świetle wyzwań współczesności' [1998] (9-10) Państwo i Prawo 40, 47.

application of the unconditional deprivation of liberty. Over time, lawmakers have also added the possibility of serving such a penalty using a system of electronic monitoring. In practice, however, the solutions provided by the PC with regard to alternative measures applicable to criminal activity of light-to-medium seriousness have not been employed by the courts to the extent expected by the lawmakers. This has taken the form of a faulty structure of penalties imposed. This has seen the unjustified prevalence of a deprivation of liberty penalty imposed with conditional suspension of its execution. The inefficient use of this measure eventually led to an increase in the prison population, further exacerbating the problem of overcrowding in detention facilities.[15]

This negative view of criminal policy prompted the lawmakers to introduce radical changes in 2015, with the aim of redefining the system of response to crime and to increase the prominence of non-custodial measures in order for them to become a real and effective alternative to incarceration.[16] Analyses of the case-law in the period of time prior to the 2015 law reform indicated that limitation of liberty (community service) and fines had failed to fulfil their role in criminal policy.[17] The Limitation of liberty did not live up to its total capability, with annual utilisation remaining around 11–12% of all penalties and fines were also imposed in only approximately 9–20% of cases. Both these penalties had been largely supplanted by the deprivation of liberty with a conditional suspension penalty (55–60% of all convictions) imposed in a cumbersome, probationary system, most frequently in the form of a reputed 'simple suspension' (without any restrictions or obligations for the sentenced person) and with inefficient supervision. In reality, rather than serving its function as an alternative to unconditional deprivation of liberty, this measure paradoxically became one of the principle, if not the principle, reason for the significant increase in the prison population in Poland.[18] This not only resulted in the overcrowding of detention facilities but also created a sizable group of persons awaiting the possibility of serving their deprivation of liberty penalty (in the final years before 2015 this was ca. 40,000 persons every year).[19]

15 Despite a relatively low crime level in Poland, the imprisonment factor in the years 2003–2014 was among the highest in Europe.

16 Act of 20 February 2015 on the amendment of the Act – Penal Code and certain other Acts, Dz.U. (2015), item 396.

17 See especially Mirosława Melezini, 'Represyjność polityki karnej w okresie obowiązywania nowej kodyfikacji karnej' in Krzysztof Krajewski (ed), *Nauki penalne* (n 4) 491 and following; Jolanta Jakubowska-Hara, Celina Nowak (eds), *Problemy aktualnej polityki karnej w Polsce (na tle przeludnienia zakładów karnych)* (Wydawnictwo Naukowe Scholar 2010); Szczygieł (n 6) 52-70.

18 The justification for the government's draft of the Act of 20 February 2015 (Sejm document No 2393, 4-5) indicated that nearly one half of detainees in prison facilities remained there as a result of an order to execute a deprivation of liberty penalty which had originally been conditionally suspended.

19 For extensive research demonstrating the practice of applying alternative measures to deprivation of liberty, see Jolanta Jakubowska-Hara, Jan Skupiński (eds) *Alternatywy pozbawienia wolności w polskiej polityce karnej* (Wydawnictwo Naukowe Scholar 2009).

4. The Penal Code reform of 20 February 2015, the increased significance of non-custodial penalties

The amendments introduced to the Penal Code in February 2015[20] were intended to radically increase the use of the two non-custodial penalties, the limitation of liberty (in its new, more acute form) to 20% and fines, to 60% of the convicting sentences. This was also intended to rationalise the employment of the probationary measure of conditionally suspending the execution of a deprivation of liberty penalty. The changes consisted of, *inter alia*, the modification of the penalty of limitation of liberty in order to make it more severe. This was done by extending its duration to up to two years, broadening the catalogue of accompanying probationary obligations and creating the possibility of serving it via an electronically monitored system. The limitation of liberty penalty as such became a multi-faceted measure, expected to become an actual alternative to the short-term deprivation of liberty.[21] The grounds for imposing non-custodial penalties (limitation of liberty and fines) were also significantly expanded by providing for the possibility of imposing them, instead of the deprivation of liberty, if a given offence carries a penalty of no more than eight years. One novel solution was the introduction of a composite (mixed) penalty, i.e. simultaneously imposing the short-term deprivation of liberty and a fine. The aforementioned, ineffective practice of the over-application of conditionally suspended deprivation of liberty compelled the lawmakers to drastically limit the possibility of imposing such measures.

This paper attempts to demonstrate the role of non-custodial penalties in the case-law of the common courts after the 2015 reform of the Penal Code, highlighting any specific identifiable tendencies, whilst considering the international recommendations relating to the broadest possible use of measures constituting an alternative to deprivation of liberty. This situation will be supplemented by information on the prison population in Poland, which is naturally influenced by the character of penalties imposed by the courts.

The statistical data presented pertains to the final and binding convictions of adult persons, categorised into individual types of penalty and covers the years 2010 to 2018.[22] For comparative purposes, the five-year period prior to 20 February 2015, reforms was included. The data pertaining to the number of detained persons covers the years 2010 to 2020.[23]

20 See Włodzimierz Wróbel (ed), *Nowelizacja prawa karnego 2015. Komentarz* (Krakowski Instytut Prawa Karnego Fundacja 2015).

21 However, this model only lasted for 10 months. The Act of 11 March 2016, Dz.U. (2016), item 428, removed the possibility for electronic monitoring and the more onerous obligations.

22 2018 is the latest year for which statistical data provided by the Ministry of Justice is available. See Informator Statystyczny Wymiaru Sprawiedliwości, 'Skazania prawomocne w latach 2009–2018' <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> accessed 16 February 2022.

23 The presented data was published on the website of the Central Authority for the Prison Service, 'Statystyka roczna' <https://www.sw.gov.pl/strona/statystyka-roczna> accessed 16 February 2022.

Finally, the data illustrates convicted adult persons by the type of penalty imposed:

Year	Convicted persons (aggregate) %	Standalone fine	Limitation of liberty	Deprivation of liberty		Composite penalty
				unconditional	conditionally suspended	
2010	432,891 100	92,329 21.3	49,692 11.5	39,582 9.1	251,087 58.8	X
2011	423,464 100	93,571 22.1	49,611 11.7	40,947 9.7	239,076 56.5	X
2012	408,107 100	91,296 22.4	50,730 12.4	41,691 10.2	224,185 54.9	X
2013	353,208 100	76,759 21.7	41,287 11.7	39,684 11.2	195,348 55.3	X
2014	295,353 100	63,078 21.4	33,009 11.2	35,633 12.1	163,534 55.4	X
2015	260,034 100	61,161 23.5	31,096 11.9	33,952 13.1	133,076 51.2	370 0.1
2016	289,512 100	98,776 34.1	61,720 21.3	63,695 15.1	81,673 28.2	3544 1.9
2017	241,436 100	84,721 35.1	53,854 22.3	44,527 18.4	54,819 22.7	2829 1.0
2018	275,768 100	90,491 32.8	78,172 28.3	49,512 18.0	54,302 19.7	3212 1.1

Even a cursory examination of the above table reveals the reestablishment of the structure of penalties imposed after 2015 and a increasing tendency to avoid the use of a conditionally suspended deprivation of liberty penalty. As the authors of the reform intended, there has been a marked increase in the number of the two non-custodial penalties (fines and the limitation of liberty). In the years 2016 to 2018, these two penalties together constituted 56,4%, 57,4% and 61,1% of all penalties (compared with 2010, when this number was 32,8%). The lack of statistical data for the last three years to date makes it impossible to state with total certainty that this trend has been sustained. It can, however, be assumed that courts would not revert to a broad use of conditional suspension with regard to the deprivation of liberty penalty. This measure, as already mentioned, could potentially serve as an alternative to the short-term deprivation of liberty, on the condition that it is applied as an actual probationary measure. However, in practice its employment demonstrated that, from the outset, it had very little in connection with the instrument it was supposed to become. It was most frequently imposed as an element of a plea bargain and, as such, did not require the formulation of a positive criminological prognosis, which is a general prerequisite for employing probationary measures. Judgments, which included the supervision of the sentenced person, or that imposed obligations on them, were uncommon. In 2010, supervision was employed only with respect to 27.5% of those persons sentenced to a conditionally suspended deprivation of liberty penalty (69,108 cases). In 2014, this increased to 29%

and in 2016 to 56%, only to decrease again in 2018 to 31% (17,109 cases). Factoring in the raw numbers, one can determine that the probationary supervision system was engaged four times less in 2018 than it was in 2010.

The significant increase in the application of alternatives to imprisonment is to be lauded. In the structure of penalties, the share of standalone fines increased from 33 to 35%, i.e. 12–14% more when compared with 2010. Whilst the frequency of this penalty being imposed did not reach the level of 60%, foreseen in the justification to the changes, its more widespread use is certainly a positive development.

The practical impact of the limitation of liberty penalty, in turn, increased by two-and-a-half times (being nearly 30% of all penalties as of 2018). The most frequent lengths of this penalty were between six months and one year and between one year and two years (in 2018: 53% and 28%, respectively) and it was almost exclusively imposed in its community service form. It seems that the increased severity of this penalty provided for by law, including an extension of its maximum length, has significantly influenced the scale of its use, even though the lawmakers quickly waived some of its more stringent aspects. There is no doubt that, in its new form, the limitation of liberty penalty provides more real and practical 'competition' for the short-term deprivation of liberty, particularly in its unconditional aspect. Nevertheless, as the aforementioned statistical analysis revealed, the limitation of liberty penalty, in addition to fines, have, paradoxically, also emerged as alternatives to a technically non-custodial measure, in the form of the conditional suspension of a deprivation of liberty penalty, of which the functions include, as already mentioned, the effective countering of the overuse of the unconditional deprivation of liberty. As it transpired, however, the significant drop in the number of conditionally suspended deprivation of liberty penalties has contributed to the increased use of not only the two previously mentioned non-custodial penalties, but also (at least to some degree) of unconditional deprivation of liberty, which, naturally, cannot be seen as a positive development in criminal policy.[24]

The years 2016 to 2018 represent a stark increase in the use of the unconditional deprivation of liberty. The usage share of this penalty increased from 12.1% in 2014 to 18.4% in 2017 and 18.0% in 2018. These were the maximum, highest percentages since the 1997 Criminal Code came into force. In raw numbers, 2018 saw an increase in the number of such convictions by 15,560, compared with 2014. This disturbing tendency pertains not only to the sheer number of the deprivation of liberty sentences, but also to their length (especially in the two to ten years bracket).[25]

The question then remains whether the changes made to criminal policy, emphasising the increased role of non-custodial penalties, have significantly contributed to

24 See Mirosława Melezini, 'Implementation of the principle treating deprivation of liberty as *ultima ratio* in the practice of applying criminal law' [2019] (2) Ius Novum 51, 70.

25 See Mirosława Melezini,'Tendencje w polityce karnej po reformie prawa karnego z 2015 r.' in Piotr Góralski and Anna Muszyńska (eds), *Racjonalna sankcja karna w systemie prawa* (Instytut Wydawniczy EuroPrawo 2019) 132-133.

a reduction in the numbers of the prison population. Consideration should be given to the fact that, according to the statistical data, in the last four years of the analysed period, the number of persons finally convicted saw a significant decrease, which is the result of a lower, reputed, discovered crime rate. Compared to 2010, the number of final convictions were reduced by 44% in 2017 and by 37% in 2018 (in raw numbers this represents drop of 191,455 and 157,123).

5. The state of the prison population following the 2015 law reform

The data provided by the Central Authority for the Prison Service indicates that, despite a definite decrease in the number of persons serving a deprivation of liberty penalty (which is no doubt connected with the aforementioned drop in the general number of convictions), the prison population is still high. This is, in part, influenced by the steady rise, since 2017, of the number of persons in pre-trial detention. In 2019, the number of persons remanded in pre-trial detention was 8,346, whilst in 2020, this number increased to 8,878. These are increases of 39% and 42%, respectively, compared to 2015. The general number of persons deprived of liberty, as of 31 December in each year, was, in the years 2015 to 2020 (the number in brackets indicates the average for the given year): 77,371 (78,987); 71,528 (71,456); 73,822 (73,807); 72,204 (74,077); 74,130 (74,564); and 67,894 (70,716), respectively. When assessing the scale of this phenomenon, one must also consider those persons who were sentenced to deprivation of liberty but are still yet to serve their sentences as this group will further increase the number of people actually deprived of liberty. In the last five years, the number of such persons has been estimated at around 35,000 to 39,000. Placing all such persons in detention facilities would no doubt serve to significantly increase the already elevated prisonisation factor in Poland.

In 2020, the prison population factor was 195.3 which places Poland among the states with a 'very high' factor, i.e. at least 25% higher than the average for European countries.[26] In the years 2010 to 2020 (with a gap in the data for 2017), the prisonisation factor in Poland was 212.3; 213.8; 221.1; 207.5; 203.5; 186.4; 188.4; 194.4; 190.1; and 195.3, respectively. Compared to the 2000 to 2012 period, one can observe a decrease in the number of inmates per 100,000 citizens. Nevertheless, this is still a cause for concern, particularly taking into consideration the fact that one of the objectives of the 2015 law reform was to significantly reduce the number of persons deprived of liberty.

The system of electronic monitoring should contribute to a reduction of the prison population. Under the 2015 law reform, provisions for electronic monitoring were incorporated into the Penalty Execution Code with the legitimate expectation that this

26 Council of Europe, Annual Statistics – SPACE 2020, Annual Penal Statistics: Prison Populations, Final Report SPACE I 2020 <https://wp.unil.ch/space/files/2021/04/210330_FinalReport_SPACE_I_2020.pdf> accessed 17 February 2022.

form of serving a penalty would provide a further alternative to the deprivation of liberty with the conditional suspension of its execution. According to data from the Central Authority for the Prison Service, the number of persons serving a deprivation of liberty penalty via the electronic monitoring system in the last several years oscillated around 5,000 (2016 – 4,466; 2017 – 4,350 ; 2018 – 4,709; 2019 – 5,006; 2020 – 5,010), with the maximum capacity of the system capped at 6,000. As such, in relation to the maximum capacity of the system, the use of electronic monitoring is approximately 87%. However, considering the use of this measure as an alternative to short-term imprisonment, its impact is not particularly significant. In 2018, an unconditional deprivation of liberty penalty was imposed on 45,103 persons, whereas electronic monitoring was applied with respect to 4,709 persons, i.e. on approximately one in ten of those convicted. The Act of 31 March 2020,[27] extended the grounds for employing electronic monitoring by increasing the maximum length of the deprivation of liberty penalty capable of being enforced in this manner to one year six months, which could potentially lead to a more widespread use of this measure, especially given that the Ministry of Justice has announced an increase in the system's capacity to 8,000 persons. In the light of the increasing significance of electronic monitoring as an alternative to deprivation of liberty, and as an instrument serving to reduce the prison population, the decision to apply this manner of serving the deprivation of liberty sentence should be made by the court considering the case at a trial (*meriti*), not, as is currently the case, a penitentiary court.

Conclusions

In conclusion, one must state that the 'deprivation of liberty as a last resort' (*ultima ratio*) directive is not being effectively applied in the case-law of Polish courts. Even though the 2015 law reform did, in fact, result in the changing of the structure of imposed penalties, in particular with the increased application of the two non-custodial penalties (fines and limitation of liberty), other measures which could potentially serve as alternatives to the deprivation of liberty are still not being effectively used. The conditional suspension of a deprivation of liberty penalty continues to fail to perform its function as an alternative, due to an ineffective probationary system which requires thorough reforms. Furthermore, excessively strict restrictions, limiting the imposition of this measure, have resulted in situations where a court is unable to impose a fine or limitation of liberty and thus is, instead, forced to apply a short-term unconditional deprivation of liberty. Electronic monitoring is still being utilised for only around 10% of those persons sentenced to short-term imprisonment and, as a modern solution used in lieu of actual time served in a detention facility, should see more widespread application. A consistently high prison population is a cause for concern. Even though fines and limitation of liberty amounted to over 60%

27 Act of 31 March 2020 amending the Act on specific measures concerning the prevention, counteracting and combatting of COVID-19, other infectious diseases and resulting crises, Dz.U. (2020), item 568.

of the penalties imposed in the examined period of time, simultaneously, the number of sentences of unconditional deprivation of liberty also saw a significant rise, which was the result, as the doctrine of law had predicted, of a consequential decrease in the use of conditional suspension of the deprivation of liberty penalty. Consequently, from the point of view of persons serving time in a detention facility, the situation did not significantly change (the prisonisation factor is still very high). Apart from the insufficient use of alternatives to imprisonment, this is also caused by the increasing number of persons deprived of liberty under pre-trial detention. The above determinations lead to the conclusion that criminal policy in Poland currently fails to comply with the recommendations and standards introduced by European Union bodies, which place cogent emphasis on reducing the deprivation of liberty and have consistently promoted the widespread use of sanctions and measures as an alternative to imprisonment.

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The book presents a picture of selected current problems of EU criminal law drawn from various perspectives. The issues discussed include: judicial dialogue between national courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR); the adequate protection of the rights of participants in criminal proceedings in the EU Member States; relations of the European Public Prosecutor's Office (EPPO) with States not participating in the enhanced cooperation; mutual trust in the context of obtaining electronic evidence; CJEU jurisprudence relevant for cooperation in criminal matters; the deprivation of illicit assets in the context of the rights of victims and confiscation *in rem*; the harmonisation of substantive criminal law relating to the definition of the crime of rape and pharmaceutical crime; insufficient use of alternatives to imprisonment. The Authors indicate the existing issues that need to be solved at the EU and national level and outline the future directions of the development of EU criminal law.

The research issues discussed in the publication are significant from a legal point of view and very current. In their studies, the Authors raise issues that are actively discussed in the doctrine of criminal and European law, especially foreign doctrine, resulting equally from new EU secondary legislation, in addition to the case law of the Court of Justice of the European Union. In particular, it should be emphasised that the Authors also address the issues related to the mutual relations between the achievements of the Council of Europe and the acquis of the European Union.

From the review of Professor dr. habil. Monika Szwarc

The Editors of the book:
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