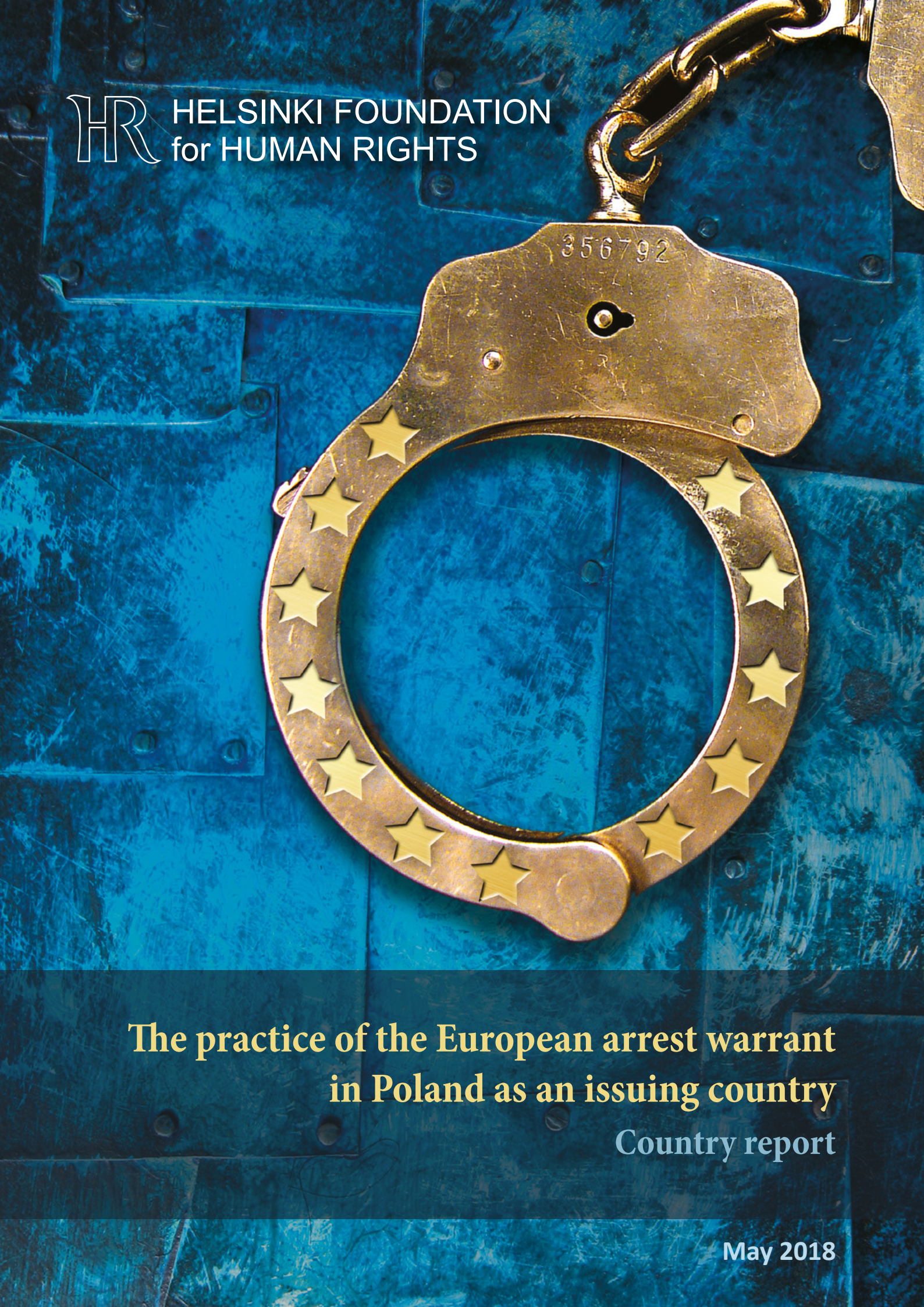

The practice of the European arrest warrant in Poland as an issuing country

Country report

May 2018

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Fair Trials

About the Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society. The main areas of its activity include: domestic education in the field of human rights; international activity: programs promoting democracy and constitutionalism in the countries of the Commonwealth of Independent States and public interest activity aimed to increase standards of human rights' protection in Poland, implemented through monitoring, intervention and strategic litigation. As part of their work, the foundation's experts formulate analyses, opinion statements and recommendations concerning drafts laws in the domain of the right to a fair trial.

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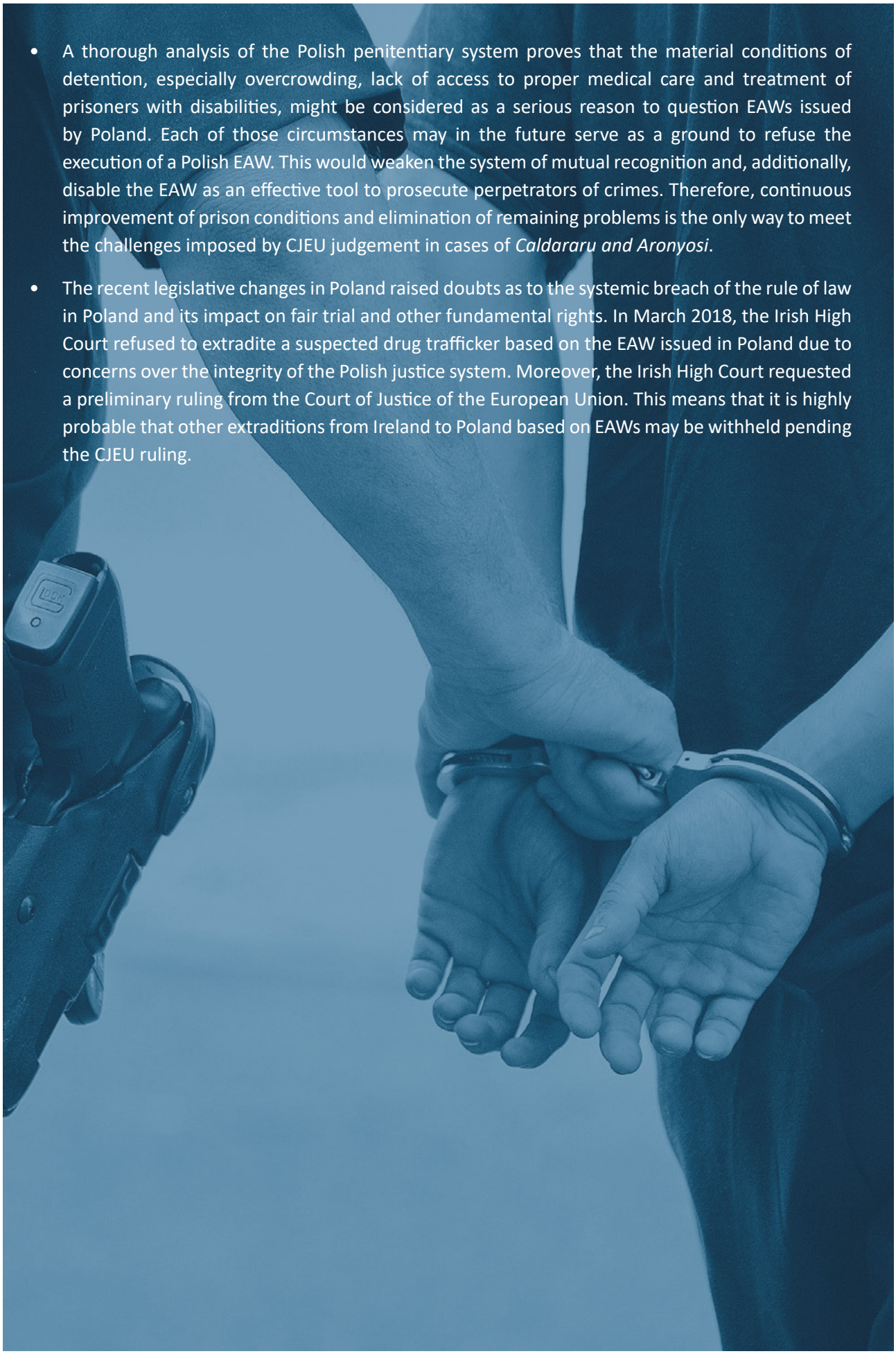
Executive Summary

- The European Arrest Warrant was introduced into the Polish criminal justice system upon the country's entry to the Union, together with other elements of the European legal framework.
- The implementation was carried out in the Act of 18 March 2004, which added chapters 65a and 65b for issuing and executing EAWs respectively and entered into force on 1 May 2005 when Poland joined the EU.
- The data from 2005-2013 show Poland as a "leader" among issuing member states. Some ascribe this "success" to the principle of legality, strongly enshrined in Polish criminal procedural law. On the other hand, Poland is among those countries which are not particularly targeted with EAWs. This reflects the migration trends observed in Poland over the years.
- While the practice in Poland fluctuated, the available statistics show that since 2010 the number of issued EAWs has steadily been decreasing. This may, at least in part, be related to the criticism from various EU actors, including justice systems of other member states.
- Between 2010-2016, the highest number of EAWs issued in Poland was addressed to the United Kingdom (529 in 2016; 498 in 2017), Germany (450 in 2016; 482 in 2017) and the Netherlands (165 in 2016; 256 in 2017). This data corresponds to the main migration destinations among Polish citizens.
- The analysis of data from 2010 onwards (i.e. after the introduction of important legislative changes allowing district courts to motion for EAWs and regional courts to issue warrants ex officio) show a visible, declining trend in the number of prosecutorial motions. The number of motions from courts in executive proceedings has also been decreasing, however, their proportion in the overall number of motions has been increasing. At this point, a vast majority of motions for an EAW come from courts in the executive stage. It is thus highly likely that the majority of EAWs are also issued for execution of the imposed sanction.
- Despite a high number of issued warrants, Poland has a relatively low success rate of EAWs (approx. 20%).
- Practitioners from Poland are concerned that the principle of proportionality is not implemented in practice and, as a result, EAWs are often used for "trivial" cases, such as unpaid invoices, etc.
- HFHR has identified a number of cases when a country refused to execute EAWs issued by Polish courts. The most relevant examples of refusals were offered by British courts which – as visible from statistics – have to deal with a high number of EAWs from Poland. The problems indicated by British courts included, among others, the proportionality of Polish EAWs, the protections afforded to convict's health and life as well as the quality of expert opinions issued in criminal proceedings.

- A thorough analysis of the Polish penitentiary system proves that the material conditions of detention, especially overcrowding, lack of access to proper medical care and treatment of prisoners with disabilities, might be considered as a serious reason to question EAWs issued by Poland. Each of those circumstances may in the future serve as a ground to refuse the execution of a Polish EAW. This would weaken the system of mutual recognition and, additionally, disable the EAW as an effective tool to prosecute perpetrators of crimes. Therefore, continuous improvement of prison conditions and elimination of remaining problems is the only way to meet the challenges imposed by CJEU judgement in cases of *Caldararu and Aronyosi*.
- The recent legislative changes in Poland raised doubts as to the systemic breach of the rule of law in Poland and its impact on fair trial and other fundamental rights. In March 2018, the Irish High Court refused to extradite a suspected drug trafficker based on the EAW issued in Poland due to concerns over the integrity of the Polish justice system. Moreover, the Irish High Court requested a preliminary ruling from the Court of Justice of the European Union. This means that it is highly probable that other extraditions from Ireland to Poland based on EAWs may be withheld pending the CJEU ruling.



Introduction

This report is one of four country reports outlining the findings of the EU-funded research project "Beyond Surrender" which was conducted in four different EU Member States (Poland, Romania, Lithuania and Spain) between 2016 and 2018. Within the project, the researchers looked at the use and abuse of the European arrest warrant, and its impact on the lives of defendants and their families. The project was implemented under the coordination of Fair Trials Europe based in Belgium in cooperation with four non-governmental organisations – Human Rights Monitoring Institute (Lithuania), Apador-CH (Romania), and Rights International Spain (Spain). In Poland, it was conducted by the Helsinki Foundation for Human Rights (hereinafter: "HFHR"). The HFHR decided to join the action, recognising the significance of the subject, which has not yet been tackled by that many publications and debates in Poland.

The Council Framework Decision on the European arrest warrant and the surrender procedures between Member States was adopted on 13 June 2002. The EAW was treated as the first concrete measure in the field of criminal law implementing the principle of mutual recognition. For the European Union "(hereinafter: "EU", "Union"), it was the "cornerstone" of judicial cooperation. The European Commission declared it a success because it quickly replaced the traditional system of extradition with a simpler and quicker mechanism of surrender of requested persons for the purposes of conducting criminal prosecution or executing a custodial sentence or detention order.

In Poland, the EAW was introduced into the criminal justice system upon the country's entry to the Union, together with other elements of the European legal framework. The new provisions entered into force on 1 May 2005 when Poland joined the EU. Europe-wide statistical data show that, thus far, Poland has been issuing the highest number of EAWs in the EU. At the same time, the number of effective surrenders to Poland has been relatively low. However, statistical analysis also points to significant changes in the Polish practice and the number of warrants issued by Polish courts has been steadily decreasing in recent years.

It is obvious that the EAW itself is strictly linked to the essence of human rights – right to a fair trial, right to liberty and the rule of law. After over 15 years since its introduction, it has become essential to assess the human rights impact of the simplified system of surrender from the perspective of the civil society. Our observations prove that the human rights aspects should be treated as an important element in the current worldwide developments in extradition law. The key emphasis in this process should be placed on the jurisprudence of the Court of Justice of the European Union (hereinafter: "CJEU") and the European Court of Human Rights (hereinafter: "ECtHR").

The success of the EAW in the European judicial cooperation is a consequence not only of the Framework Decision, but also other additional instruments introduced by the EU. Special attention should be paid to various acts aiming at strengthening the procedural rights in criminal proceedings (e.g. the Directive of the European Parliament and of the Council 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive of the European Parliament and of the Council 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, as well as the Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings).

Moreover, the functioning of the EAW is strictly connected with the practice of national courts. For this reason, it is so important to analyse extradition law in wider context, including the perspectives of experts from different member states (such as academics and practicing lawyers).

In this report, we would like to answer the fundamental question if and how the obligation to respect fundamental rights affects the rule of mutual recognition. For the benefit of international readers, we – by way of introduction – also present the basic tenets of the Polish legal system in the area of criminal justice (see Annex to the report).

1. Domestic Legal Framework on EAW

1.1. History of implementation[1]

The European arrest warrant was introduced into the Polish criminal justice system with the country's entry to the Union, together with other elements of the European legal framework. The implementation was carried out in the Act of 18 March 2004 amending the Code of criminal procedure (hereinafter: "CCP"), which added chapters 65a and 65b concerning issuance and execution of EAWs respectively.[2] The new provisions entered into force on 1 May 2004, when Poland officially joined the European Union, and significantly changed the extradition system in the country. Since then, the provisions implementing the Framework Decision have undergone important changes.

The first amendments were provoked by the judgment of the Constitutional Tribunal of 27 April 2005 in which the Tribunal ruled on a legal question concerning the surrender of a Polish citizen, lodged by the Regional Court in Gdańsk. The Tribunal's ruling pronounced that:

> *"Article 607t § 1 of the Act dated 6 June 1997 – the Code of Penal Procedure (Journal of Laws - Dz. U. No 89, Item 555 with amendments), within the scope allowing the surrender of a Polish citizen to a Member State of the European Union subject to the European Arrest Warrant, is incompatible with Article 55 Paragraph 1 of the Constitution of the Republic of Poland."*[3]

In its implementation of European law, the Polish legislator did not appropriately consider the need to ensure compliance with the Constitution, but simply copied and pasted European regulations into the CCP. The judgment revealed an urgent need to review the Poland's highest legal act. Such a revision eventually took place on 27 October 2006.[4] At the moment, Article 55 of the Constitution reads as follows:

> *"**Article 55***
> *1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3.*
> *2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that*

1 While working on this chapter, we extensively used, among others, the analysis authored by professor Teresa Gardocka for the Institute of the Justice System. T. Gardocka, *Europejski Nakaz Aresztowania. Analiza polskiej praktyki występowania do innych państw Unii Europejskiej z wnioskiem o wydanie osoby trybem europejskiego nakazu aresztowania*, IWS, Warszawa 2011, available at: www.iws.org.pl/pliki/files/badania/raporty/raporty11/AR_Gardocka%20T_%20ENA%202011.pdf (access: 22 April 2018).

2 Act of 18 March 2004 on the amendments to the Criminal code, Code of criminal procedure and Code of petty offences, Journal of Laws no. Dz.U.2004.69.626.

3 Judgment of the Constitutional Tribunal of 27 April 2005, no. P 1/05, available at: http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf (access: 22 April 2018).

4 Law of 8 September 2006 on the amendments to the Constitution of the Republic of Poland, available at: http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20062001471/T/D20061471L.pdf (access: 22 April 2018).

the act covered by a request for extradition:
1) was committed outside the territory of the Republic of Poland, and
2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.
3. Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.
4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so is an extradition which would violate rights and freedoms of persons and citizens.
5. The courts shall adjudicate on the admissibility of extradition."[5]

Together with changes to the Constitution, the CCP was also amended to distinguish between the legal situation of a Polish and foreign citizen.[6]

In 2009, the Polish legislator decided to introduce important alterations with respect to the issuance of EAWs by Polish courts.[7] It substantially extended the use of warrants to include all cases within the *jurisdiction of Polish courts*. In its previous form, the provision only allowed the court to issue a warrant *when the crime was committed in the Polish territory*. Additionally, the legislator decided to enable regional courts to issue EAWs *ex officio* or upon a motion of a district court, when such a need arises at the stage of court or executive proceedings.

Last but not least, during the recent substantial reform of the criminal procedure,[8] the Polish government – as an initiator of the reform – made an attempt to limit the issuance of EAWs in less serious (if not simply petty) cases. The provision of Article 607b pt. 1 was to state that the court cannot issue a warrant:

"[…]
(1) in connection with criminal proceedings conducted against the requested person for an offence carrying a penalty of imprisonment of up to a year, as well as an offence for which the penalty actually at stake will not exceed 4 months of imprisonment,
(2) […]"[9]

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5 The full text of the Constitution of the Republic of Poland is available at: www.sejm.gov.pl/prawo/konst/angielski/konse.htm (access: 22 April 2018).

6 Act of 27 October 2006 amending the Code of criminal proceedings, Journal of Laws.

7 Act of 5 November 2009 amending the Criminal code, Code of criminal proceedings, Code of petty offences, Criminal fiscal code and some other acts, Journal of Laws of 2009 item 206 pt. 1589.

8 Act of 27 September 2013 amending the Code of criminal proceedings and some other acts, Journal of Laws of 2013 item 1247. More information about the reform might be found in: W. Jasiński, *Polski proces karny po reformie*, available at: http://beta.hfhr.pl/wp-content/uploads/2015/07/hfpc_polski_proces_karny_po_reformie.pdf (access: 22 April 2018). In February 2016, the reform was completely revised by the government of the Law and Justice party.

9 Draft act amending the Code of criminal proceedings, Criminal code and some other acts, File no. 870, available at:

The reasoning behind this addition emphasized the need to introduce an element of proportionality into the Polish practice concerning issuance of EAWs:

> *"This change is justified by the necessity to base the practice of issuing a European arrest warrant on the principle of proportionality. It relies on a presumption that it is not viable (opłacalne) to arrest a person pre-trial and subsequently initiate the procedure of issuing a European warrant in a situation when the circumstances of the case indicate that a non-custodial penalty will be imposed, or possibly a penalty of imprisonment without suspension not exceeding 4 months (similarly as with a warrant issued for the purpose of executing a penalty of imprisonment)."*[10]

Subsequently, the draft act was subject to consideration by the Sejm's (lower chamber of the Polish Parliament) Extraordinary Committee for amendments in codification. The latter proposed a different wording of Article 607b which did not contain elements requiring consideration of the future penalty, but rather "the interest of the justice system."[11] This wording was retained in the final, adopted version of the act. Such an introduction was an implementation, with a certain modification, of a recommendation formulated by representatives of the doctrine.[12] It did, however, receive some criticism for being too vague to the point that it could either stifle the issuance of EAWs altogether or virtually change nothing (since pursuing criminals is always in the interest of the justice system). One of the Polish MPs, who noted precisely this problem in his questions to the Minister of Justice, inquired whether it would not be better to simply raise the sanction thresholds instead.[13] In its response, the Ministry noted that the latter would in fact contravene the provisions of the Framework Decision and, in any event, would not be sufficient to enforce proportionality.[14] For this reason, the Ministry opted for a more flexible general clause which affords courts a margin of appreciation. The Ministry observed that the courts will be able to interpret "the interest of the justice system" within particular circumstances of each case, but they can also rely on the interpretations of this notion developed in the context of other international criminal law instruments. It listed the following element which the courts can take into account while assessing whether issuing an EAW is "in the interest of the justice system":

- "The severity of the crime and expected sanction (an EAW should be used for more serious cases),
- The situation of the accused and his/her personal circumstances (e.g. avoidance of the justice system, hiding),
- Expected lack of effectiveness of other measures based on legal assistance (e.g. summons to voluntarily appear, search in European databases),
- Economic circumstances (the costs of executing an EAW, including the fact that the costs of transport of a surrendered person should be proportionate to the size of the damage caused by a prohibited act;

www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=870 (access: 22 April 2018).

10 Rationale for the governmental draft act amending the Code of criminal proceedings, Criminal code and some other acts, available at: www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=870 (access: 22 April 2018).

11 Report of the Extraordinary Commission of 23 July 2013, File no. 1586, available at: http://orka.sejm.gov.pl/Druki7ka.nsf/0/0CA769606C5D266CC1257BBA002FF4FC/%24File/1586.pdf (access: 22 April 2018).

12 See T. Gardocka, op. cit., pp. 53-54.

13 Lassota J., MP question no. 31291 of 9 February 2015 to the Minister of Justice, available at: www.sejm.gov.pl/Sejm7.nsf/InterpelacjaTresc.xsp?key=4211C361 (access: 22 April 2018).

14 Ministry of Justice, Response to MP question no. 31291 of 19 March 2015, available at: www.sejm.gov.pl/Sejm7.nsf/InterpelacjaTresc.xsp?key=7EBB62DC (access: 22 April 2018).

additionally, procedural effectiveness, i.e. a strife to save time and avoid unnecessary procedural costs, should be respected)."[15]

1.2. Current framework on EAW

As noted above, the provisions of the 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter: "Framework Decision") were transposed to the Polish legal system mainly in the CCP in chapters 65a and 65b. Chapter 65b of CCP concerns circumstances when Poland is the executing country, while chapter 65a deals with instances when it is Poland which issues EAWs. Since the report deals with the practice of issuing countries, the following information will be focused on Chapter 65a of CCP (Articles 607a-607j) and will present the EAW legal framework currently in force in Poland.

According to Article 607a CCP, in Poland the exclusive competence to issue EAWs was vested in regional courts (for more information on the structure of the judiciary see Annex 1). If it is suspected that a person prosecuted for an offence falling under the jurisdiction of Polish criminal courts may be staying in the territory of a Member State of the European Union, a geographically appropriate regional court (*właściwy miejscowo sąd okręgowy*) *may issue* a warrant. In pre-trial proceedings, this is possible upon a motion of a public prosecutor, while in court and executive proceedings, *ex officio* or upon a motion of a geographically appropriate district court.

This provision brings about a couple of additional considerations, including as to: (1) the use of wording "may issue;" (2) the kind of suspicion a prosecutor, district court or regional court should have as to the whereabouts of the perpetrator while motioning for or issuing an EAW and (3) the appropriate geographic jurisdiction of regional courts.[16]

The wording of the provision may give rise to considerations whether the application of an EAW is obligatory or facultative, with the word "may" tipping the balance towards its facultative character. However, the dominant position of the doctrine and jurisprudence seems to be that fulfilment of the legal conditions gives rise to an obligation on the part of the court to issue a warrant. However, there have also been decisions to the contrary.[17]

As already indicated above, Article 607b CCP specifies circumstances when an EAW cannot be issued. As the first sentence of this article provides, it is not permissible to issue an EAW when the interest of the justice system does not require it. This condition was introduced into CCP in 2015 when an extensive reform of the Polish criminal procedure entered into force (see also Sub-chapter 1.1.). The impact of this alteration is not yet fully visible.

Apart from when this is not in the interest of justice, an EAW cannot be issued: (1) in connection with criminal proceedings conducted against the requested person for an offence carrying a penalty of imprisonment of up to a year or (2) for the purpose of executing a penalty of imprisonment of up to four months or any other

15 Ibid.

16 See e.g. Augustyniak, Barbara. "Art. 607(a)" [in:] *Code of criminal proceedings. Vol. II. Commentary*, Internet Legal Database LEX, 2017.

17 See e.g. discussion in T. Gardocka, op.cit., pp.

measure involving deprivation of liberty not exceeding four months. These circumstances reflect the content of Article 2 of the Framework Decision.

The contents of an EAW are detailed in Article 607c CCP and reflect the text of Article 8 of the Framework Decision. The warrant should be translated into the official language of an executing country. The template for an EAW was adopted by the Minister of Justice in a separate regulation.[18]

Articles 9 and 10 of the Framework Decision were transposed to CCP in Article 607d. According to Article 607d § 1, if it is suspected that the requested person may be staying in the territory of a Member State of the European Union but their location is unknown, the public prosecutor and, in court and executive proceedings, the regional court that issued the warrant send a copy thereof to the central Police unit co-operating with Interpol with a request to initiate an international search. Under Article 607d § 2 CCP when the location of the requested person is known or was established as a result of the above-described search, the public prosecutor, and in court and executive proceedings, the regional court which issued the warrant sends it directly to the judicial authority of the executing state. In such a case, a copy of the warrant has to be sent to the Minister of Justice as well.

The Polish legislator also transposed into the CCP the specialty rule provided in Article 27 of the Framework Decision. Thus, according to Article 607e CCP, a surrendered person cannot be prosecuted for offences other than those which formed basis for surrender, nor can the punishment of imprisonment imposed on this person or other custodial measure be executed. The court which passes the final judgement can order execution of punishment only for those offences which have formed the foundation for the person's surrender. The prosecutor and the surrendered person have the right to attend the court hearing.

Article 607e § 3 CCP sets forth the exceptions to the specialty rule, in general following the catalogue provided in the EAW Decision. Although, there are some differences in the way particular exceptions have been worded in the CCP and the Framework Decision. For example, the EAW Decision provides in Article 27 (3) (c) that the specialty rule does not apply when "the criminal proceedings do not give rise to the application of a measure *restricting* personal liberty", whereas the Polish equivalent uses the phrase "the criminal proceedings do not give rise to the application of a measure consisting in *deprivation* of liberty." Additionally, while Article 27 (3) (f) states that the specialty rule does not apply "when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender." The same point contains important safeguards that the "[r]enunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law" and that "[t]he renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel". With an exception of presenting the consent before a competent judicial authority, these exact guarantees have not been included among the provisions of Article 607e. While the general rules of the Polish criminal procedure would in fact ensure that consent is recorded and voluntary, it does not seem equally obvious that a person would have the right to legal counsel by virtue of having been surrendered and asked to renounce the specialty rule.

18 Regulation of the Minister of Justice of 24 February 2012 on the template of the European arrest warrant, Journal of Laws of 2012, item 266.

To transpose Article 26 of the Framework Decision, Article 607f CCP allows for a deduction of the actual period of detention in an executing Member State related to surrender from the imposed or executed penalty of deprivation of liberty.

Article 607g requires an appropriate Polish court, after the proceedings have been finalised or the penalty/ measure executed, to inform the relevant authority of the executing Member State about the final decision or execution of a penalty/measure.

Article 607h CCP, transposing Article 29 of the EAW Decision, determines the framework for handing over property, although its wording is somewhat different than that of the EAW Decision. Thus, a relevant Polish court or prosecutor may motion the judicial authority of the executing Member State to seize and hand over (1) property (in the Polish text: *przedmiotów*) acquired directly as a result of the offence; (1) property (*przedmiotów*) which served or would go towards committing the offence; or (3) property (*rzeczy*), correspondence, parcels, call logs or any other carriers of information (*przekazów informacji*) or data stored in a telecommunication system or on a device, including electronic mail which could constitute evidence in the case. The third element was only introduced to the CCP in 2009. Before the amendment, the scope of the Polish regulation was narrower than that of the EAW Decision.[19] In other aspects, Article 607h closely corresponds to the Framework Decision. A motion to hand over property can accompany the European arrest warrant, for example be included in section G of the EAW form, or can be sent afterwards. In the case of the former, the motion is issued by the relevant regional court, while in the latter – by the prosecutor[20] or the court which presides over the case.

Article 607i CCP concerning subsequent surrenders is a faithful implementation of European provisions, namely Article 28 of the Framework Directive. The final article of the chapter, Article 607j concerns conditional surrenders. In the case of a conditional surrender whereby the executing state reserves execution of the penalty for itself, the executive proceedings are not initiated in Poland. In such a case, the court dealing with the case, immediately after the ruling becomes final, issues a resolution on a surrender to the appropriate Member State to execute the penalty or measure consisting in deprivation of liberty. A copy of the resolution is passed to the relevant judicial authority of the executing state.

Additional relevant regulations concerning the procedure of issuing warrants are included in the Internal rules of the Prosecution Service[21] and the Rules of common courts.[22]

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19 See e.g. discussion in Steinborn S., "Article 607(h)," [in:] *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego [online].*, Internet Legal Information Database LEX, available at: https://sip.lex.pl/#/commentary/587299347/470348 (accessed: 3 December 2017).

20 Paragraph 292 (8) of the Regulation of the Minister of Justice of 7 April 2016 – Internal rules of the common units of the Prosecution Service specifies which prosecutors are entitled to issue such a motion.

21 Regulation of the Minister of Justice of 7 April 2016 – Internal rules of the common units of the Prosecution Service, Journal of Laws of 2017, item 1206, unified text of 23 June 2017.

22 Regulation of the Minister of Justice of 23 December 2015 – Internal rules of common courts, Journal of Laws of 2015, item 2316.

Problem of the law identified in the course of the project seminar with lawyers, September 2016:
Polish legislation does not explicitly provide for an appeal against an EAW. The lack of an appeals procedure was confirmed in the Resolution of the Supreme Court of 20 January 2005 (I KZP 29/04).

The resolution was adopted at the motion of the Appellate Court in L. which asked the Supreme Court whether an appeal could be granted from a decision to issue a EAW. Since the provisions of the CCP do not explicitly provide for such an appeal, the Appellate Court argued that it is necessary to examine the nature of a EAW decision. In its opinion, such a decision resembled and, in fact, amounted to a decision on the imposition of a preventive measure and, as such, should be subject to an appeal.

However, even though the Supreme Court agreed that, for lack of a particular provision, it is necessary to determine the character of the EAW decision, it did not come to the same conclusions as the Appellate Court. The Supreme Court stated that the EAW resembles more a motion to hinder a person's capacity to hide or abscond by apprehending this person and possibly applying pre-trial detention ("wniosku o uniemożliwienie osobie ściganej *ukrywania się (ucieczki) przez jej zatrzymanie i ewentualne aresztowanie"). However, this motion has a separate legal basis, issued prior to the EAW, and which is subject to an appeal. The Supreme Court also recalled that a view that "the EAW is not a separate basis for deprivation of liberty" and there is a need for a prior application of pre-trial detention (unless a conviction or another ruling on a measure consisting in deprivation of liberty has already been delivered) has already been presented in the doctrine.*[23]

During the briefing seminar organized by the Helsinki Foundation for Human Rights as part of the Beyond Surrender project in September 2016, the lawyers shared various concerns about the practice of issuing EAWs. Even though legislation was not considered to be a major source of problems, some noted that it could be improved. One of the main observations was that there is no instrument to question an EAW in Poland after it has been issued, such as an appeal or a complaint against an EAW post surrender, which was considered as a serious drawback.

23 See e.g. P. Hofmański, S. Zabłocki, „Akcja nr 64. Wydanie europejskiego nakazu aresztowania (art. 607a k.p.k.)", [in:] *Elementy metodyki pracy sędziego w sprawach karnych [online]*, Internet Legal Information Database LEX, 10 September 2017, available at: https://sip.lex.pl/#/monograph/369226932/202 (access: 3 December 2017); See also P. Hofmański et al., "14.5.2. Problem zażalenia na postanowienie o wydaniu europejskiego nakazu aresztowania" [in:] *Zwalczanie przestępczości w Unii Europejskiej. Współpraca sądowa i policyjna w sprawach karnych [online]*, Legal Publisher LexisNexis, 30 November 2017, available at: https://sip.lex.pl/#/monograph/369152017/140 (access: 3 December 2017).

2. Monitoring of the EAW practice in Poland

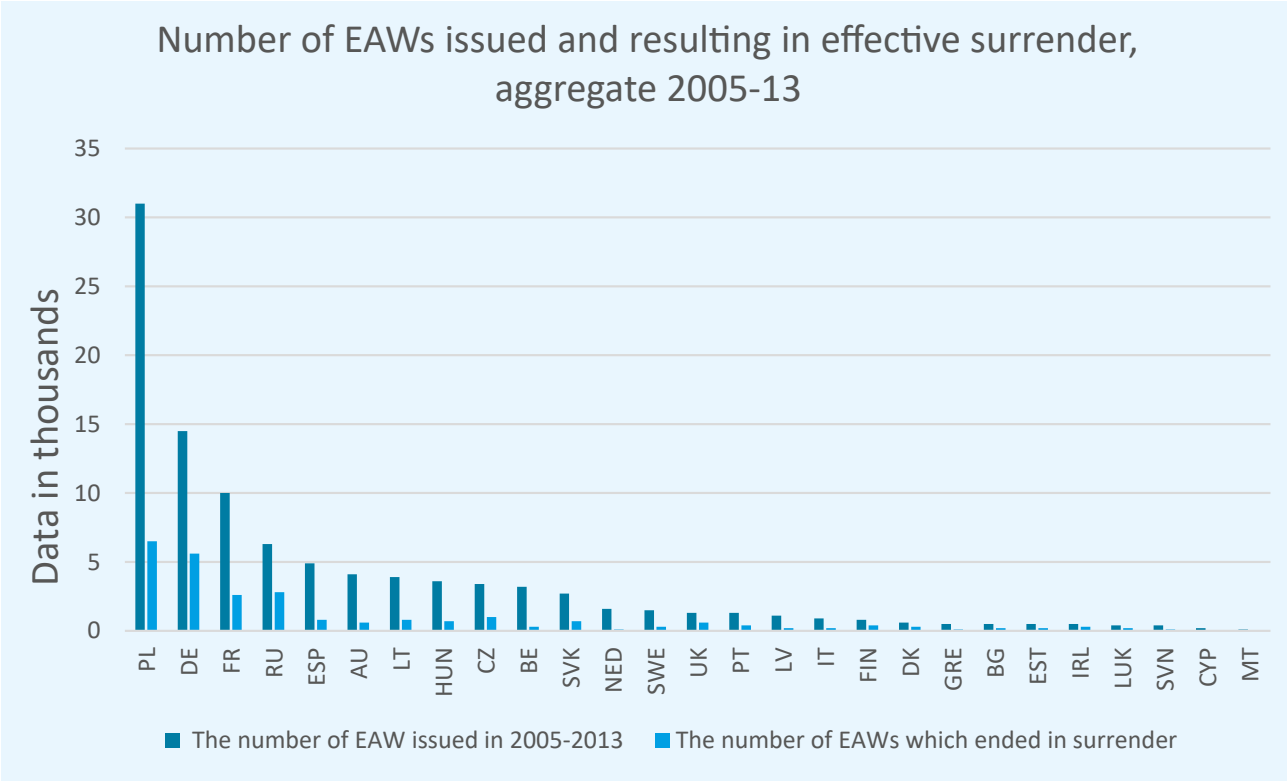
The following chapter presents the practice of issuing EAWs in Poland. The chapter is based on the results of HFHR's monitoring of this issue conducted as part of the project, including analysis of available statistical data, academic publications, media reports, consultations with practicing lawyers and monitoring of individual cases.

2.1. Analysis of statistical data

Europe-wide statistical data show that Poland has so far been issuing the highest number of EAWs in the UE. At the same time, the number of effective surrenders to Poland has been relatively low. However, statistical analysis also points to significant changes in the Polish practice and the number of warrants issued by Polish courts has been steadily decreasing in recent years. It is also important to note that the majority of motions for EAWs concerns executive proceedings, making the warrant largely an instrument of searching for convicts. This pattern somewhat deviates from the provisions of the Framework Decision.

Poland against the background of other EU Member States.

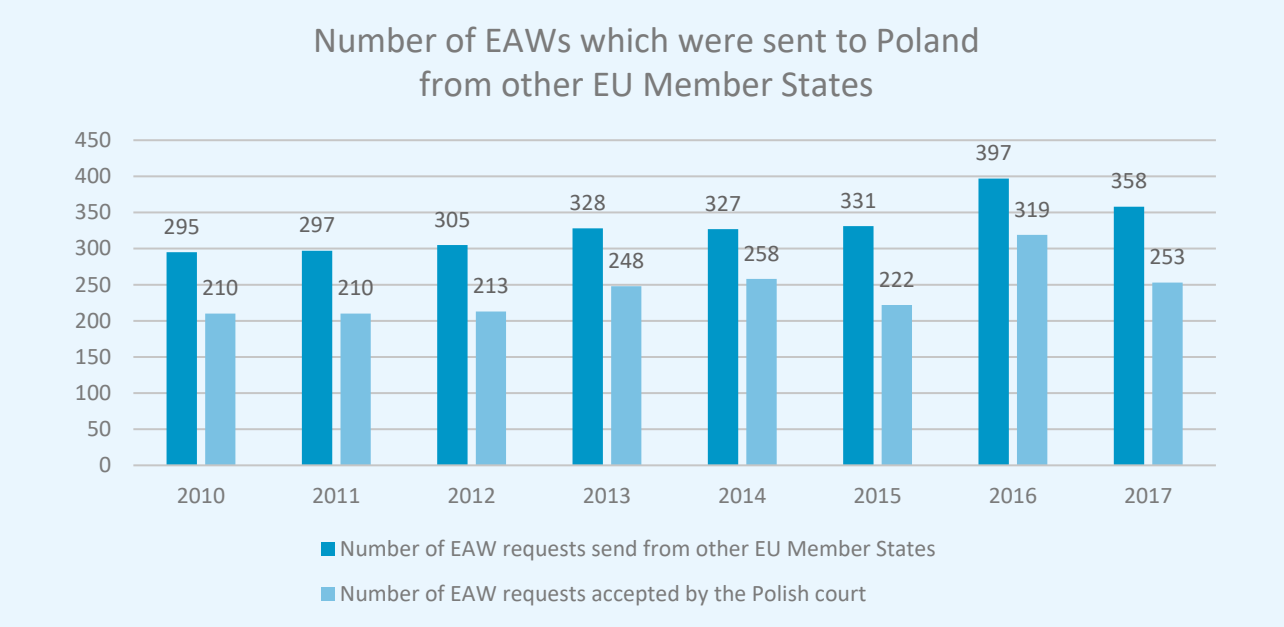
The data from 2005-2013 show Poland as a "leader" among EU member states when it comes to the number of issued EAWs. In that period, Poland issued 31 thousand EAWs, which constituted 31% of all orders issued by member states.[24] A relatively low success rate of Polish EAWs (approx. 20%), i.e. situations when the



24 European Parliamentary Research Service Blog, available at: https://epthinktank.eu/2014/06/26/european-arrest-warrant-eaw/140803rev1-number_of_eaws_issued/ (access: 18 May 2018)

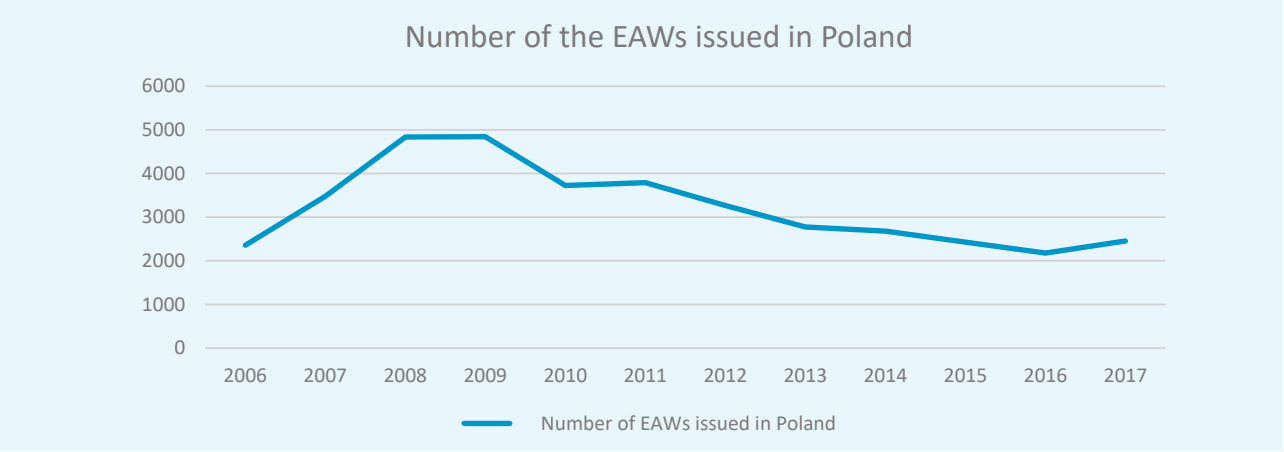
person was eventually surrendered, was also noticeable in those years. Germany, the second most frequently issuing country, had a comparable number of EAWs which resulted in a surrender, while actually having issued less than a half of EAWs issued by Polish courts, reaching a success rate of approx. 38%. The best success rate reaching 62% was boasted by Ireland.

Poland, with a result of 2,430 EAWs is among those countries which are not particularly targeted with EAWs. In comparison, between 2005-2013, Germany was the most frequent executing state in the EU, with almost 90,000 EAWs directed to this country. In 2017, only 358 EAW requests were sent from other EU member states to Poland, in particular to prosecutors who later transferred them to courts. Eventually in 2017, only 253 EAWs requests were accepted by Polish courts and resulted in decisions on the acceptance of the transfer.



The number of issued EAWs

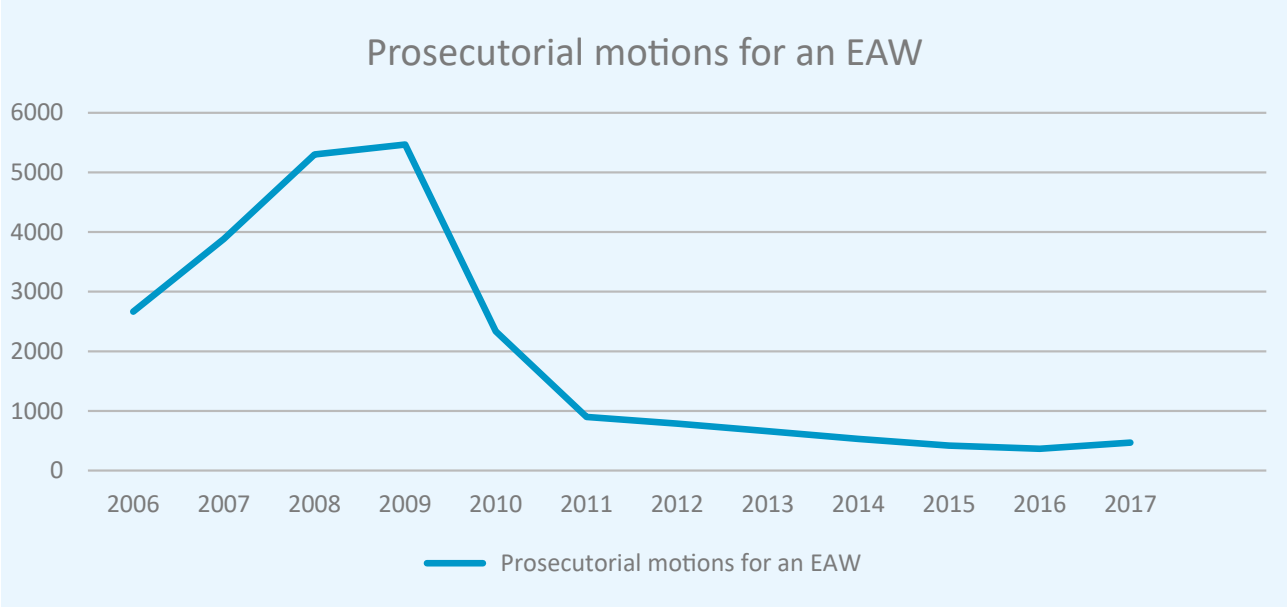
While the practice in Poland fluctuated, the available statistics show that since 2009 the number of issued EAWs has been decreasing.[25]



25 Ministry of Justice, Statistics tables, available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,7.html (access: 18 May 2018)

Between 2006 and 2009, Polish courts reached for this instrument more eagerly every given year, issuing a record number of 4,844 EAWs in 2009. This trend was, however, reversed in 2010 when the number of issued EAWs rapidly fell by more than a thousand warrants.[26] In 2017, Polish courts issued 2,455 EAWs.

A similar, but even more striking pattern could be observed in relation to prosecutorial motions to issue a warrant. In 2009, prosecutors filed a record number of 5,468 EAW motions with regional courts, while the next year this number fell to 2,334 motions. It again rapidly decreased in 2011 to 900 requests for a warrant. Since 2011, a steady yet slower decrease could be noted.[27]



The visible decrease in the number of prosecutorial motions can be in part attributed to the changes in the legislative framework introduced at that time (see Sub-chapter 1.1.). Since June 2010, regional courts can issue EAWs on the basis of prosecutorial motions in pre-trial proceedings, while in court or executive proceedings – *ex officio* or upon a motion of a district court. This explains why the decline in prosecutorial motions was sharper than the decrease in the number of issued EAWs. However, the 2009 amendments of the CCP cannot equally account for a continuation of the declining trend in the number of issued EAWs. The decrease followed the first wave of criticism from abroad related to the high number of EAWs issued by Poland. Some experts note that it may have resulted, among others, from actions of the Polish Ministry of Justice which distributed the manual on issuance of EAWs more broadly and from meetings between practitioners from Poland and different EU countries for the purpose of exchanging experiences.[28] For example, in November 2010, a working meeting was organised in the headquarters of EUROJUST with Polish prosecutors to talk about the problems that the Dutch party had had in executing Polish EAWs.[29]

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26 Ministry of Justice, Statistical tables, available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,7.html (access: 18 May 2018).

27 Ibid.

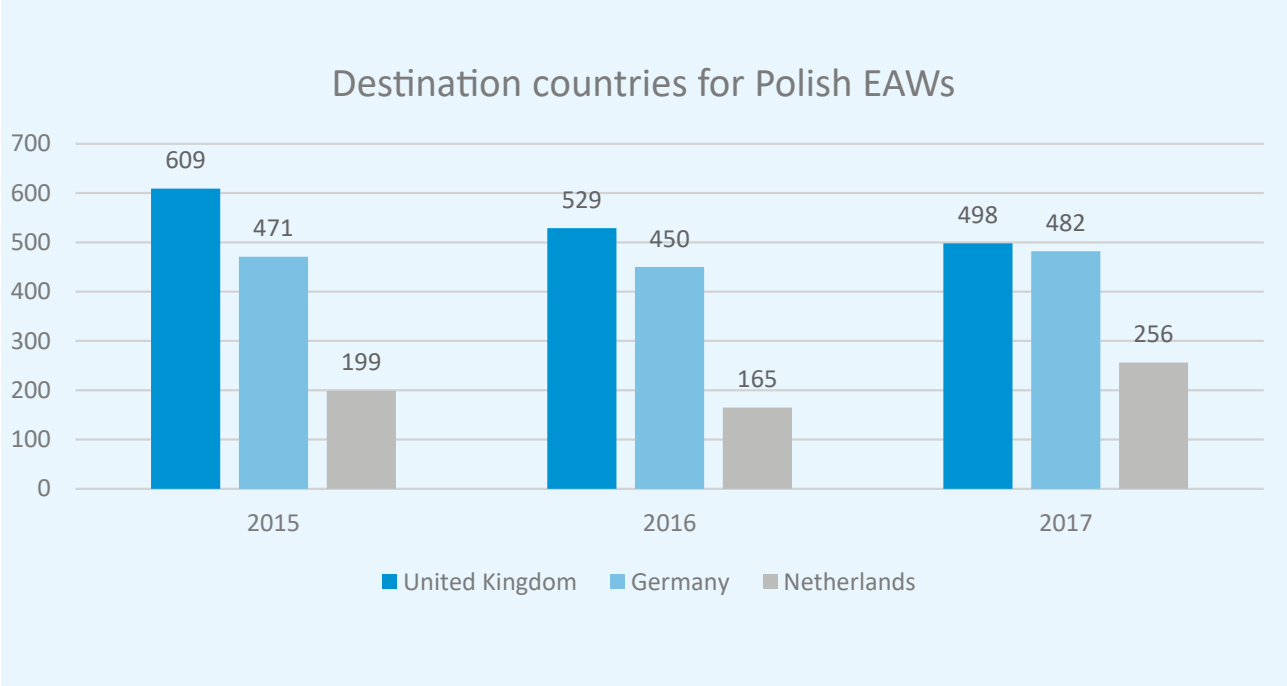
28 See e.g. Ostropolski T., „Zasada proporcjonalności a europejski nakaz aresztowania," *Europejski Przegląd Sądowy,* March 2013.

29 Prosecutor General, *Sprawozdanie Prokuratora Generalnego z rocznej działalności prokuratury w 2010 r.*, available at: https://pk.gov.pl/wp-content/uploads/2013/12/62fa641d81609938394f027f77a4a814.pdf (access: 16 April 2018).

Target countries

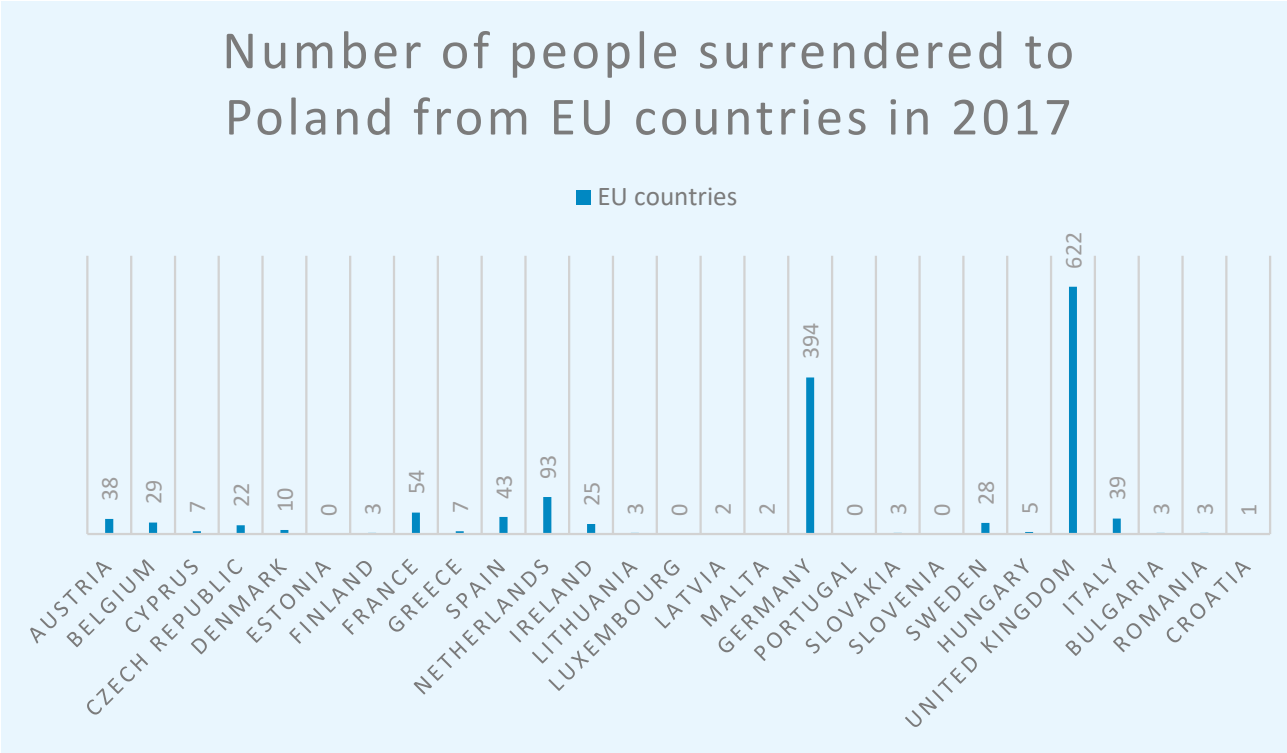
Between 2010-2017, the highest number of EAWs issued in Poland was addressed to the United Kingdom (529 in 2016; 498 in 2017) and Germany (450 in 2016; 482 in 2017), later the Netherlands (165 in 2016; 256 in 2017). This data corresponds to the main migration destinations among Polish citizens. According to the Central Statistical Office, the highest number of Poles migrated to the United Kingdom (720,000 in 2015; 788,000 in 2016), Germany (655,000 in 2015; 687,000 in 2016) and the Netherlands (112,000 in 2015; 116,000 in 2016).[30] It is worth noting that although the migration rate among Poles has been increasing, this

trend has not corresponded to the number of issued EAWs, which has been systematically decreasing until 2016, with a small increase in 2017 – in 2015 1,611 EAWs were issued in Poland, in 2016 – 1,426 and 1,568 in 2017.



In 2017, similarly as in previous years, the highest number of people were surrendered to Poland from United Kingdom, Germany and the Netherlands. No one was transferred from such states as Portugal, Estonia, Slovenia or Luxemburg. The total number of people surrendered to Poland from other EU countries was 1,436.

30 Central Statistical Office, *Informacja o rozmiarach i kierunkach czasowej emigracji z Polski w latach 2004 – 2016*, October 2017, available at: http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5471/2/10/1/informacja_o_rozmiarach_i_kierunkach_emigracji_z_polski_w_latach_20042016.pdf (access: 18 May 2018)

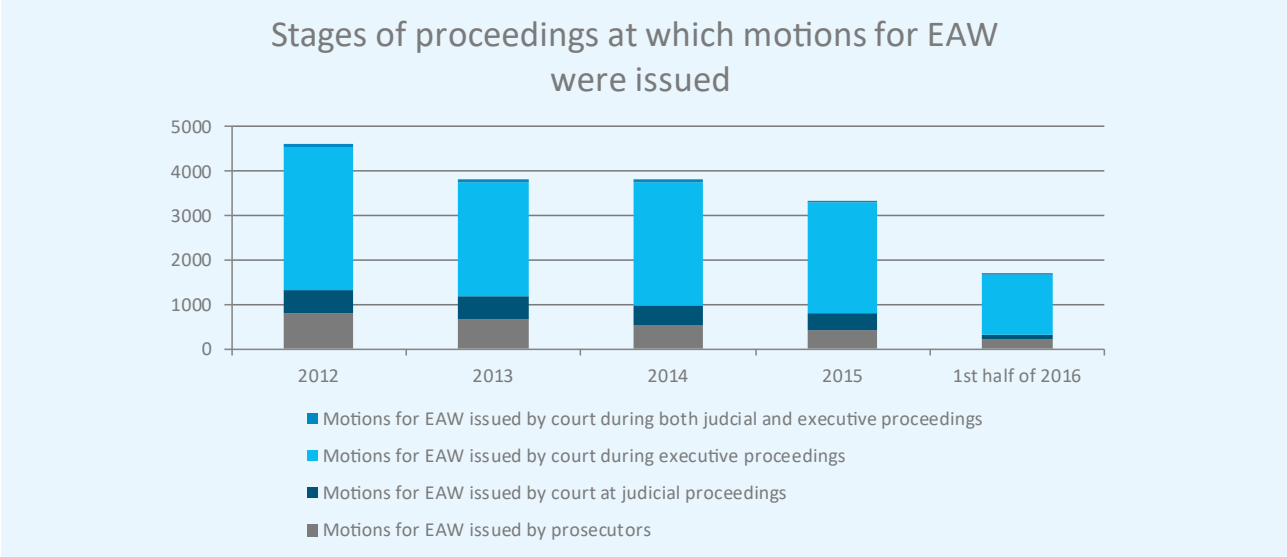


Purpose of EAW – stage of proceedings

As noted above, EAWs can be issued in pre-trial or court proceedings for the purpose of an ongoing criminal procedure, but also in executive proceedings in order to enforce punishment. HFHR has not managed to obtain statistics which show the number of EAWs issued at particular stages of proceedings. However, the statistics concerning motions for issuance of EAWs constitute an indication of a trend. The analysis of data from 2010 onwards (i.e. after the introduction of important legislative changes allowing district courts to motion for EAWs and regional courts to issue warrants ex officio) show a visible, declining trend in the number of prosecutorial motions. The number of motions from courts in executive proceedings has also been decreasing, however, their proportion in the overall number of motions has in fact been increasing. At this point, a vast majority of motions for an EAW come from courts in the executive stage. For example, in 2010 prosecutors filed 2,334 motions for EAWs, courts in court proceedings - 483 and courts in executive proceedings - 2,124 motions. While in 2015, this was e.g. - 417, 393 and 2,491 motions respectively (see also the graph below). It is thus highly likely that the majority of EAWs are also issued for execution of the imposed sanction.

Moreover, the analysis of the Polish practice with respect to EAWs conducted in 2011 by the Institute of the Justice System (*Instytut Wymiaru Sprawiedliwości*) on a sample of 444 EAWs (from 2008 and 2011) showed that the number of EAWs issued during pre-trial and court proceedings amounted to 119 altogether, while the number of EAWs issued during the executive stage of proceedings reached 204.[31] It can thus be concluded that EAWs in Poland are largely issued as a judicial surrender tool for executing custodial sentences.

31 T. Gardocka, *Europejski Nakaz Aresztowania. Analiza polskiej praktyki występowania do innych państw Unii Europejskiej z wnioskiem o wydanie osoby trybem europejskiego nakazu aresztowania*, IWS, Warszawa 2011, available at: www.iws.org.pl/pliki/files/badania/raporty/raporty11/AR_Gardocka%20T_%20ENA%202011.pdf (access: 18 May 2018)



Persons pursued for surrender

Further statistical information, albeit partial, concerning e.g. the nationality and gender of pursued perpetrators, can be glimpsed from available studies. The above-mentioned IJS analysis showed that among the 444 examined cases of EAW, 426 concerned Polish citizens. This means that only 4% of sampled cases concerned foreigners.[32] At the same time, in the years 2004-2012 only 0,46%[33] of suspects in Poland were foreigners. This suggests that foreigners are more common in the sample of suspects pursued with EAWs than among suspects in general.

Under the same IJS analysis, 415 EAWs were issued towards men, while 29 towards women, which constitutes only 6% of the examined sample.[34] To put this data into perspective: in 2011, 980 women were suspected of causing damage to health as compared to 9,450 men; 1,652 women and 16,946 men were suspected of participating in a brawl or beating; theft and burglary – 7,976 women and 72,228 men; robbery and similar crimes – 837 women and 12,230 men.[35] These data indicate that the percentage of EAWs issued towards women is lower than the percentage of women among suspects in Poland (which is usually around 10%).

32 Ibid., pp. 30.

33 Klaus W., Laskowska K., Rzeplińska I., Przestępczość cudzoziemców. Aspekty prawne, kryminologiczne i praktyczne, Warsaw 2017, s. 21.

34 Ibid.

35 Police, Statistics on female crime, available at: www.statystyka.policja.pl/st/wybrane-statystyki/przestepczosc-kobiet/50869,Przestepczosc-kobiet.html (access: 22 April 2018)

Types of crimes encompassed by EAWs

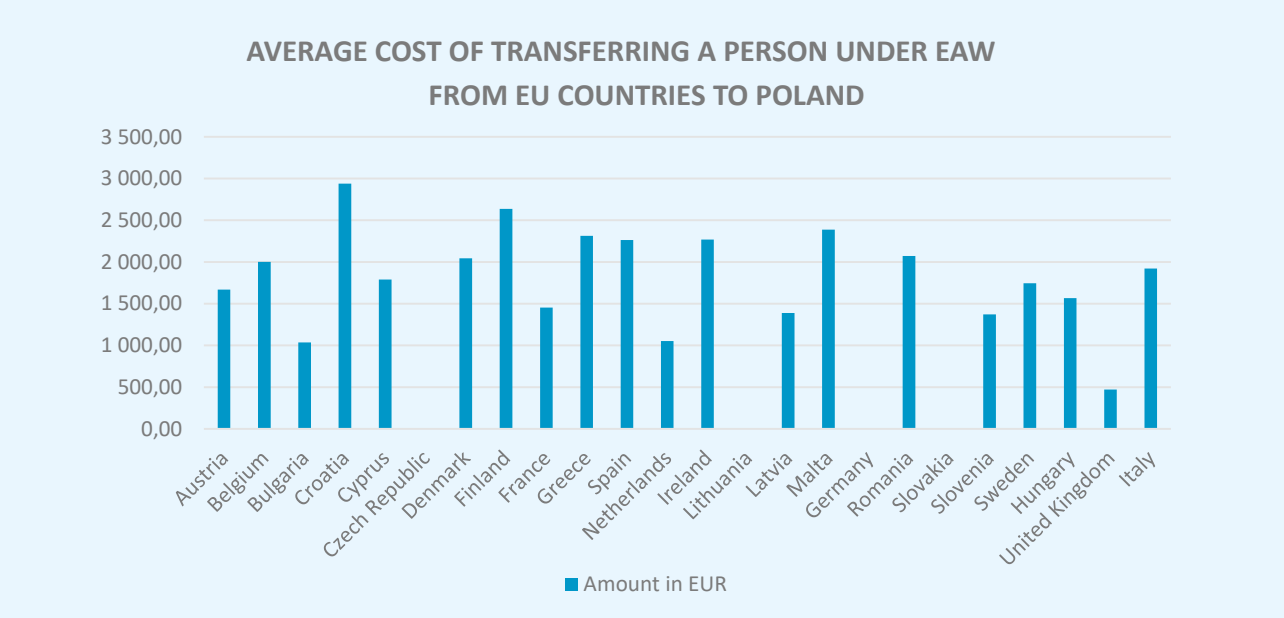
The Polish Ministry of Justice, nor any other entity, collects statistical data on the types of cases in which EAWs are issued. Data from the United Kingdom can constitute an indication as to the array of cases. More than 30% of EAWs issued by Poland between 2010-2015 concerned this country, which constituted 23% of all EAWs received by the United Kingdom. The data from the United Kingdom suggest that EAWs most frequently relate to theft, fraud, battery, severe bodily harm and drug trafficking. These statistics cannot, however, be used directly to formulate clear conclusions on the Polish practice. The case file research conducted as part of this study offers more insight as to the type of crime pursued with the use of EAWs.

The costs of EAW procedures

According to the data obtained from the Police, the average cost of transferring a person under an EAW from EU countries to Poland amounted to 630 EUR.[36] However, this sum does not provide a full perspective on EAW costs, as no institution collects data referring to the costs of surrendering a person from countries bordering Poland such as Lithuania, Germany, the Czech Republic and Slovakia. Their presence in the ranking significantly reduces the average cost of transfer (by almost 300 EUR).

Moreover, the average cost of surrender does not take into account the costs other than transportation, e.g. translation of EAWs and other necessary documents. According to HFHR's case file study in some of the cases such costs even amounted to several hundred euros.

Understandably, the highest transfer costs per person were recorded for of countries from which transfers were rarely made. In such cases, the cost of transfer was not divided into a large number of people. As a result, the costs of transfer from countries such as Croatia, Finland and Belgium in 2017 amounted to nearly 2,500 EUR for each person. On the other end of the spectrum, there were countries such as Great Britain, which saw the highest number of surrendered Poles in 2017. The average cost of transferring each person remained below 500 EUR.



36 Information obtained through a freedom of information request.

2.2. Review of EAW case files

Methodology

In its initial form, the project foresaw monitoring of 20 cases in which persons have been surrendered to Poland on the basis of EAWs. Each case, to the extent possible, was to be comprehensively monitored using a number of methods – individual interviews with surrendered persons, members of their family and lawyers, case file reviews, as well as monitoring of hearings in the course of criminal proceedings.

As per the project's design, for the purpose of seeking EAW cases, in September 2016 HFHR organised a briefing seminar for lawyers which gathered twenty-two legal professionals, including first and foremost practicing barristers, but also scholars specialising in international criminal law. The purpose of the seminar was to lay foundations for cooperation with individual lawyers on monitoring EAW cases post-surrender. Additional source of information concerning EAW cases included, among others, individual complaints addressed to HFHR (as part of the organization's legal aid programme) and monitoring of the media.

Identification of EAW cases proved to be the main challenge in the course of the monitoring. The above-listed sources of information on EAW cases did not yield a sufficient number of cases, not to mention those which would be illustrative of various human rights challenges that the use of EAW entails. Eventually, one case was identified as a result of cooperation with a lawyer who participated in the briefing seminar. Further 9 cases involving surrendered persons were selected from among correspondence sent to HFHR as part of its legal aid programmes. No relevant cases have been identified through media monitoring.

These difficulties engendered the need to shift the methodological focus, without in fact changing the initially planned and broadly-drawn project methodology. The decision was made to concentrate on case file reviews which are both easier to carry out in the Polish institutional and legal environment, but – thanks to the richness of data contained in procedural documentation – also offer a possibility to glimpse the human stories behind an EAW surrender. The case file research was to be composed of two stages – analysis of EAW case files in regional courts and analysis of main case files in courts which considered the case *in merito*.

Due to time-constraints which became apparent at that point in the project, the geographical scope of the case file research was limited to the Warsaw area. Apart from the convenience factor, centring the research on the capital meant that a fairly high number of EAW cases would be available for review. In order to identify cases, motions were sent to two Warsaw regional courts. The researchers asked for access to all case files from proceedings concerning EAW motions filed in 2012-2016 which were closed in 2016 (closure of the case was understood as a transfer of a person to Poland). HFHR received positive responses from both courts.

Eventually, the HFHR team conducted case file reviews of 42 cases concerning motions to issue an EAW in the Regional Court for Warsaw and the Regional Court for Warsaw-Praga. HFHR developed special questionnaires for this purpose concerning surrenders for criminal proceedings and surrenders for execution of punishment, shorter and longer versions. Whenever a case presented a potential human rights violation or a particularly evocative human story, HFHR asked for access to main files of the case. Such motions regarding several cases were sent to district courts: Warszawa-Mokotów, Warszawa-Żoliborz, Warszawa-Śródmieście,

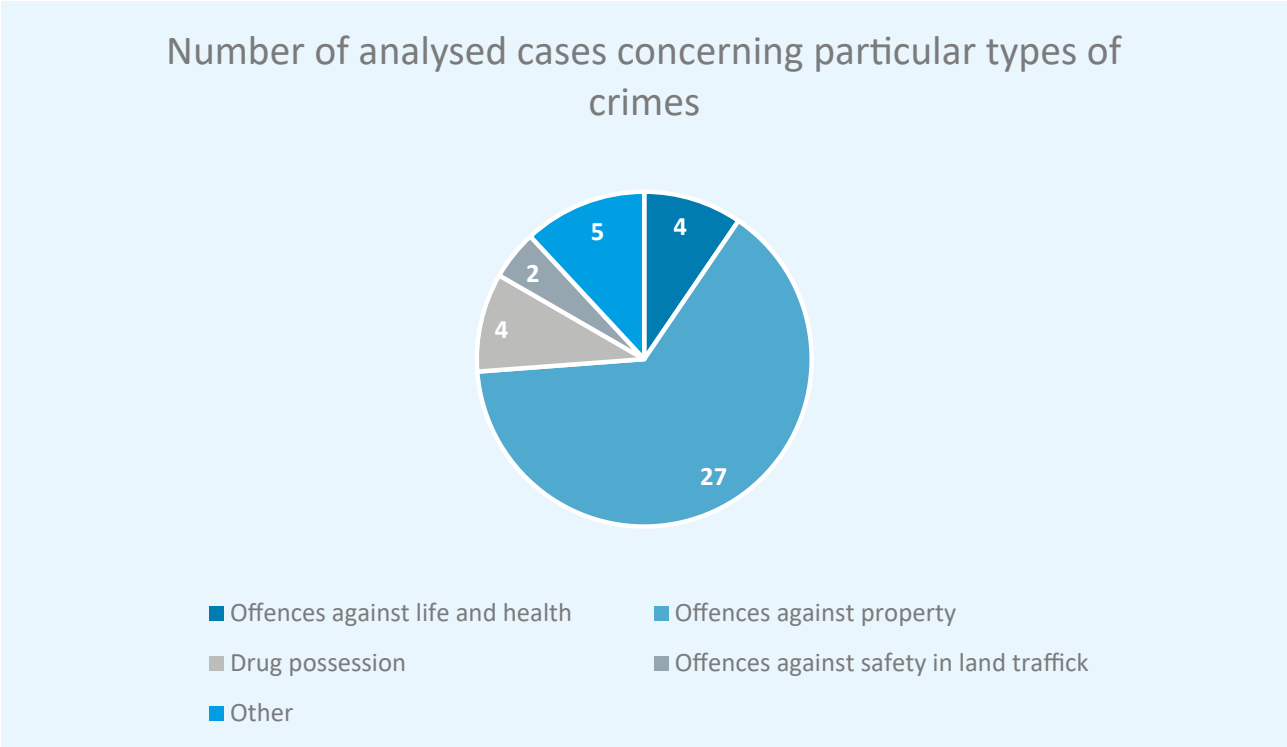
Warszawa-Miasto Stołeczne and Piaseczno. After receiving a suitable consent, HFHR researchers thoroughly investigated full case files of 6 proceedings. Particular focus was placed on the disproportionate use of EAWs, violations of the specialty rule, *in absentia* trials or violations of the right to defence.

Results of case file research

The results of HFHR' case file reviews correspond to the results of statistical analysis presented above (see chapter 2.1.). Only around 7% of EAWs (3 cases) under the study were issued towards women and only one EAW concerned a foreigner. The average age of the persons towards whom EAWs were issued was 38 years.

Types of crimes

The vast majority of EAWs were issued in proceedings concerning offences against property. Robbery was the most frequent crime among the analysed cases (21% of the overall number of cases). There were only four cases concerning offences against life and health. In 11 out of 42 cases, the EAW concerned a crime that has not been indicated in the Framework Decision.



Stage of proceedings

The majority of reviewed EAWs were issued during the executive stage of proceedings (around 70% of all analysed cases - 28). In most of those cases the courts have adjudicated deprivation of liberty and suspended its execution. The imposed imprisonment sanctions varied from 8 to 60 months. The average imposed imprisonment sentence was 30 months (18 months whenever the execution of a sentence was suspended). Therefore, in the light of the Framework Decision, all of the examined cases concerned sentences justifying issuance of EAW. Only in one analysed case did the court decide not to issue an EAW due to a relatively low sentence (5 months).

Importantly, the case file reviews showed that more than 92% of EAWs (26 out of 28) issued at the executive stage of criminal proceedings concerned convictions to penalties not exceeding three years of imprisonment (including penalties with suspension of execution) and almost 80% (22) of convictions to penalties not exceeding two years of imprisonment (including penalties with suspension of execution). This data may raise doubts as to whether the proportionality principle is properly implemented in Poland.

Polish courts have only some discretion in deciding when a suspended sentence should be executed. According to Article 75 CC, the court has to order the execution of a sentence if, during the probation period, the convicted person commits another similar, intentional crime for which he or she has received a final sentence of imprisonment without conditional suspension. The court also has to order the execution of a sentence, if a person who has been convicted of a crime with the use of violence or a threat against a close person (domestic violence), commits another crime with the use of violence or threat against a close person.

On the other hand, the court may order the execution of a sentence if the convict grossly violates the legal order, in particular when he or she commits a crime or avoids payment of a fine, police supervision, performance of imposed obligations or imposed criminal measures, compensatory measures or forfeiture. However, the court might be obliged to execute the suspended sentence if the aforementioned circumstances occur. It could happen when the convicted person has previously been warned in writing by a guardian for not obeying their duties and when there are no special reasons not to execute the sentence. The court may also execute the sentence, whenever the convicted person, between the day the judgement was issued and the day it becomes final, grossly violates legal order, especially commits another crime. When ruling to execute the sentence the court may decide, taking into account the performance of imposed obligation by the convict, to shorten the imposed sentence, but not more than by a half. The penalty might not be ordered later than within 6 months from the end of the probation period.

Thus, the catalogue of situations in which the sentence may be executed is quite wide. A suspended sentence might be executed due to a relatively minor crime, such as driving under the influence of alcohol, drug possession or even in case of a petty offence, e.g. small theft. It might be executed even if the convicted person fulfils the duties imposed by the judgement, does not avoid police supervision, finds a job and pays the fine.

Frequently, convicts may not even know that their sentence has been executed. Particularly if they have changed their location and forgot to inform the court about their new address or are living abroad and did not establish an agent for delivery of court mail in Poland. One of the cases examined in the course of our research illustrates precisely this problem.

Case no. 1:

Ms J. comes to the attention of the justice system when her partner, who faces a difficult financial situation and constant refusals from banks to provide him with financing, asks an acquaintance to take a loan from a bank. Ms J.'s partner promises that he will pay back the loan and provides his acquaintance with a falsified certificate of employment. He asks Ms J. to issue this certificate.

The situation repeats on a couple of occasions. Ms J. herself also takes one loan. Despite new loans, financial problems of Ms J.'s partner do not disappear. Eventually, one of the bank employees becomes suspicious and calls the police. The police arrests Ms. J.'s partner on 27 August 2007 when he comes to the bank to take another loan. The man states that employment certificates were issued by Ms. J.

The police hear Ms. J. as a witness in the case. Without the lawyer present, she admits that at the request of her partner she issued a couple of certificates and took a loan. Subsequently, Ms. J. hears the charges. She is informed about the rights and duties in a standard form. A piece of paper that she receives is full of articles which mean nothing to her.

Ms. J.'s trial proceeds very efficiently. She files a guilty plea and wants to serve the sanction voluntarily. The sentence is not high – 2 years of imprisonment suspended for 5 years. She also has to pay a fine of 2000 PLN.

She pays the fine with some difficulties. The court nevertheless begins the procedure to execute her suspended sentence. It turns out that a couple of months earlier Joanna was sentenced for drunk driving to limitation of liberty.

The court sent a notice of the initiation of proceedings concerning execution of the sanction to the address previously provided by Ms. J. However, the postman does not encounter anyone at home. The notice that he leaves is found by Ms. J.'s father, an elderly man. He forgets about the notice and tells nothing to Ms. J. After two weeks, the notice is deemed delivered.

During the hearing concerning the execution of the sanctions, the court contends that Ms. J. blatantly violated the legal order. The court, however, sends the decision to Ms. J.'s old address.
Ms. J. files a motions to restore the deadline for filing an appeal against the decision. She explains to the court that she had to leave Poland and was not aware that she had to inform the court about long-term departures abroad. Her father forgot to tell her about the notice he received. When she learned about the decision, it was already too late. However, Ms. J. fails to attach her appeal to the motion for restoration of the deadline, so the motion is never considered.

Ms. J., thus, has to serve 2 years in prison. She appeals to the court. She explains that she will serve the sentence, but she would like to have some time to prepare financially. In Poland, she did not have a job and any means to get by. Now, in England, she is doing well. She explains that in two years she will return to Poland and asks the court to postpone the execution of the sentence until this date.

The court considers her arguments as convincing. It postpones execution of punishment for 6 months. It sends information about its decision to the address indicated by Ms. J. When the time passes, Ms. J. sends another motion to postpone execution of punishment. She explains that she lives in England, has a permanent job, an apartment, and pays the loan she took for her partner.

However, she fails to pay for the motion. The 80 PLN that she is supposed to pay for this motion and which is missing in the court's bank account forces the court to ask Ms. J. to mitigate this formal deficiency. The courts sends a notice to Ms. J.'s father. After two weeks, Ms. J. asks the court to send her all

correspondence to the address in England. She argues that this will facilitate communication. The court does not react to this letter. It does not inform Ms. J. that Polish law requires that she establish a proxy in the country for the purpose of delivery of court correspondence.

So, the wheels of the justice system, temporarily suspended, begin turning again. Appropriate orders are issued for Ms. J. to appear in prison, to be admitted and, eventually, to be brought by the police to the penitentiary unit. Correspondence is sent to all addresses provided by Ms. J. instead of the address where she actually lives. The police in the whole country begin to look for Ms. J., despite the fact that the court knows that she lives abroad.

Eventually, after six and a half years since the judgement in her case became final, the Regional Court issues a European arrest warrant. At that time, Ms. J. has a job, an apartment and a family, a husband and a 2-year-old child. After a year, the British police find Ms. J. She is arrested and placed in detention pending a decision on surrender. For a year, the correspondence is circulating between Poland and the UK. The latter wants to know whether Ms. J. had sufficient information about the proceedings. The Polish side asserts that everything was perfectly fine.

Ms. J. is surrendered in August 2016, more than a year after arrest. She stays in a Polish prison for 164 days and then is conditionally released. In its decision, the court notes that the attitude of the convicted woman and her behaviour while serving the sentence suggest that the rehabilitation during the period in prison has reached its positive goals.

Another significant issue which may be responsible for a high number of EAWs issued by Polish courts after the final judgement is a relatively long waiting period for the judgement to become final. Despite several reforms of the criminal procedure, Poland still violates convicts' rights to receive the final judgement in reasonable time. The results of case file reviews conducted by HFHR, in 20 cases where such information was available, show that the median when it comes to time between the commitment of the act and the judgement in the first instances amounts to 97 months. The record time when a person had to wait for the judgement in the first instance was 267 months. It is, perhaps, justified to say that since the time between the commitment of the act and the final judgement is so extended, the accused is more likely to make life-altering decisions, e.g. to move abroad.

Finally, there is still a problem of a relatively long waiting period between the delivery of the final judgement and its execution. There is no official data on the number of people who are waiting for their sentence to be executed. However, few years ago, there were cases of persons who had been waiting for 10 and 14 years to start serving a sentence.[37] Such situations are contrary to the principle of a trial without undue delay. As one of the Polish courts observed: "[p]ostponing the punishment means that after many years it becomes an abstract aliment, felt by the convict and his relatives more as damage than fair response to the evil done."[38]

37 M. Adamski, „Ile w Polsce czeka się na więzienną celę," *rp.pl*, available at: www.rp.pl/artykul/892630-Ile-w-Polsce-czeka-sie-na-wiezienna-cele.html (access: 18 May 2018).

38 Appellate Court in Cracow, Judgement of 29 October 2004, no. II AKzw 688/04, LEX no. 143037.

Convicts' failure to appear to serve the sentence might be concerned among the most important reasons for a delay in execution of punishment. According to the Prison Service statistics in January 2018, prison administration has been provided with 54,922 judgements concerning 43,911 persons convicted to imprisonment. Of those, 39,091 did not show up in prisons to serve their sentence.[39] On the other hand, many convicts successfully defer execution of their sentence due to health reasons and the risk that prison authorities will not be able to provide the convict with sufficient healthcare. All of this, combined with an ineffective system of searching for convicts who have failed to appear to serve their sentence and extremely long statute of limitations contributes to the large number of convicts who are still waiting for execution of their sentence.

Case no. 2:

Mr X. was transferred to Poland on the basis of an EAW after 19 years since he had committed the crimes. According to his statements in the case file, although he is a Polish citizen, he lived in Poland for only a few years and spent most of his life in France. He came to Poland as a teenager and during these several years of staying in Poland, he committed crimes of burglary. After committing these crimes in 1996 and 1997, he went back to France where he lived for more than a dozen years. Most of his family and friends live in France. He was convicted for minor crimes, but the statute of limitations on execution of these sentences is very long. The analysed case can raise doubts as to whether the transfer under this EAW did not constitute a violation of human rights (e.g. Article 8 ECHR).

As a result, there are long delays between the date of the final judgement and the day in which the execution of punishment begins. One of the cases recognized during HFHR case file research illustrates such issues well.

Case no. 3:

Mr. Y. is a drug addict. He has had problems with abusing heroin for years. A couple of times, these problems have resulted in his appearance before the Polish justice system. These were minor theft cases, burglaries. The same was this time.

While working for a courier company, Mr. Y. stole several laptops and mobile phones. The damage amounted to several thousand zlotys. After his arrest, Mr. Y. began treatment. He came to the trial with a guardian from an association which helps addicts.

However, the court which heard his case was merciless. It convicted Mr. Y. to 4 years of imprisonment. It explained that his addiction cannot justify his behaviour; that he is an adult able to make decisions and direct his life. The fact that he started treatment cannot influence the assessment of his acts. According to the court, placing Mr. Y. in a penitentiary unit will not nullify the results of treatment obtained to date. In its opinion, if the court had to take subsequent treatment as a mitigating circumstance, the majority of accused persons would take it up, hoping to avoid of decrease their liability.

39 Prison service statistics, available at: www.sw.gov.pl/dzial/statystyka (access: 18 May 2018)

Mr. Y.'s judgment became final a year later. The court of the second instance shared the arguments of defence and lowered the sanction to two years of imprisonment.

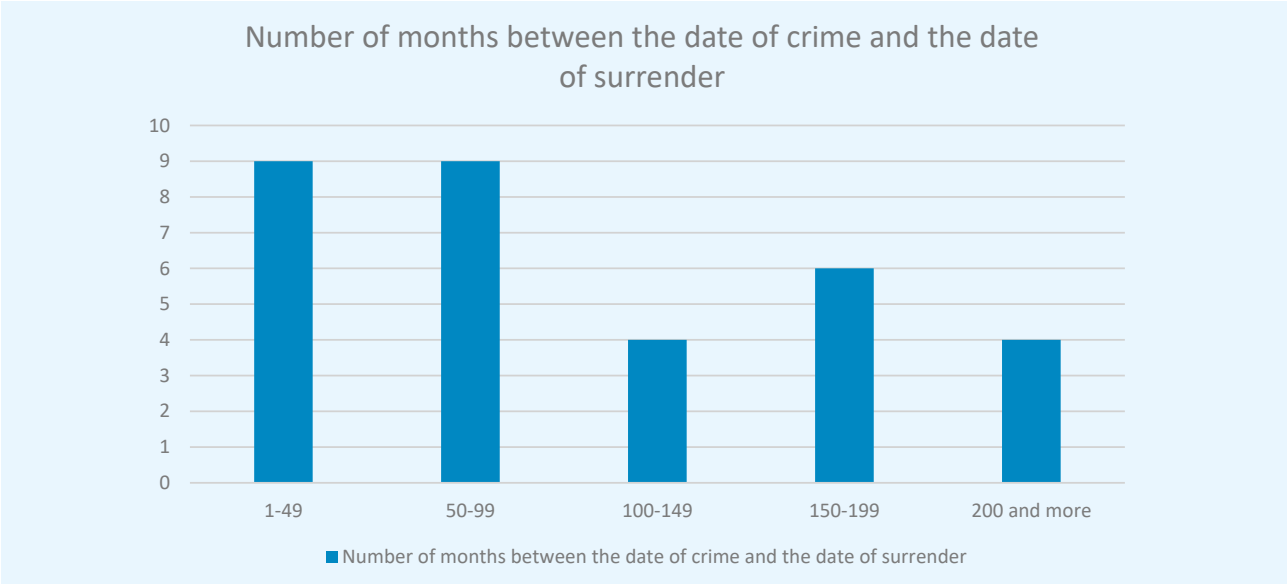
After the treatment was over, Mr. Y. went to work in the UK. At the same time, in Poland, a search was initiated due to the fact that he had not appeared to serve his sentence. After four more years, an EAW was issued. Then, after another year, Mr. Y. was arrested by the British police. After 5 months spent in England, he returned to Poland. He did not resign from the specialty rule, even though the prosecutor really wanted to get such a declaration. After Mr Y. serves his sentence, he will be able to leave Poland. In order to execute other sentences in his cases, another EAW will be necessary.

Time of the crime and judgement, and time of the EAW

Most of the analysed EAW cases (22) concerned crimes committed during the years 2008 – 2015. However, there were three cases in which the crime was committed before the date of the Criminal Code's entry into force (1997). In the longest running proceedings, the murder and robbery were committed in 1993.

The average time between commission of a crime and the transfer to Poland based on an EAW amounted to almost 9 years, while the average time between the criminal conviction, which constituted the ground for issuing an EAW, and the transfer to Poland reached almost 7 years.

That indicates that EAWs are used not only for 'less serious' cases, but also cases which are relatively old. Much of the delay between the crime and the EAW seems to be located at the stage of executive proceedings in Poland, i.e. after the final judgement. What exactly constitutes the problems cannot be answered based on the results of the current research. Some of the cases, e.g. the case of Ms. J. described above, may suggest possible areas of interest (possibly e.g. ineffectiveness of police searches, lack of communication between organs, outdated or ineffective procedures for delivery of correspondence etc.). This delay in executions is important because in such a long period of time, persons surrendered based on an EAW, can easily develop their private and family life abroad, in other EU Member States, and their transfer under EAW may result in a violation of these rights and for this reason become disproportionate.



On the other hand, the data on the implementation of EAWs proves that it is an effective mechanism to search for suspects staying abroad. On average, it took only 11 months from the date of the EAW's issuance to successfully surrender a perpetrator of a crime to Poland. HFHR has come across cases in which the detainee was surrendered only two months after an EAW was issued. On the other hand, there were also cases in which it took more than 2 years to transfer the suspect to Poland.

In only one case under review the District Court's request for an EAW was not accepted by the Regional Court which indicated, among others, that while Poland searches for perpetrators of small crimes, the services of Member States involved in searching for these people cannot effectively seek perpetrators of more serious crimes (Regional Court in Warsaw, VIII Kop 222/14).

Proportionality of EAWs

Apart from the cases described above, which in our view also testify to the persisting problem of proportionality of Polish EAWs, HFHR's case file review also indicates that addicts and persons carrying so-called light psychoactive substances in smaller quantities (in Poland, however, recognized by the courts as significant) are often targeted by EAWs. Two cases merit more description to illustrate the problems.

Mr. Z., a convict, was a drug-addict. He admitted to his addiction and undertook therapy. Altogether, three European arrest warrants wasissued in his cases, but the analyzed case file were directly related to possession of several dozen grams of marijuana. It seems that over many years Mr. Z. had attempted treatment, but without success. As he declared, he had bought marijuana from a person he met at the "March of the Liberation of the Cannabis" organized each year in Warsaw. It is important to note that in Poland, the provisions on drug possession, even the so-called 'light' substances, are severe in comparison with regulations in force in other EU Member States, including the UK from which the man was eventually surrendered. In Poland, the crime of drug possession is subject to absolute imprisonment. The analyzed case file does not contain information whether the man was able to continue therapy post-surrender in a Polish prison. In the circumstances of this case, Mr. Z.'s surrender raises justified doubts as to the proper application of the principle of proportionality.

Mr. S., a young man born in 1994, was transferred to Poland for criminal proceedings from the UK in June 2016. The EAW was issued in 2014 and was related to an accusation from 2013. During the proceedings post-surrender, the accused testified that in 2013, at the time of committing criminal acts, he had been addicted to heroin and he had not remembered the details of the crimes committed. He fled Poland to join his family in the UK and, thanks to his mother's help, he went to rehab. He was addicted to drugs since he was 18.

Only after voluntary rehab in the UK and application of the methadone treatment, was he able to recover from his addition. He found legal employment in the UK, in the construction industry. The transfer to Poland based on the EAW destabilized his life, as he said during the trial in 2016, but he pleaded guilty. His lawyer requested a voluntary joint sentence of two years of imprisonment conditionally suspended to five years and an obligation to repair the damage.

In December 2016, the accused was convicted to a requested sentence. During the HFHR's study, the man was in the process of repairing the damage done to the victims. Mr. S. provided the court with his lawyer's address as his correspondence address, which is why it is highly possible that he is not present in Poland.

Once again the EAW's transfer of the person - here a suspect - raises doubts as to whether it did not violate human rights (e.g. Article 8 ECHR) and whether it was, in fact, proportionate.

HFHR case file research provided several other minor cases in which persons were surrendered and forced to leave their families in another EU state. The research indicates a particular need to improve EU mechanism enabling transferring convicts between EU member states with the view to the right to family life.

In February 2013, a young man acting with his colleagues was accused of stealing a box of local beer and using violence to keep it (he was treated as a repeated offender), namely he pushed the store employee after his friends left the liquor store with the beer. A preventive measure in the form of police supervision was applied towards him, but he did not appear at the main hearing at the district court. Failure to appear resulted in the initiation of an international search and issuing an EAW. The accused fled to the UK where, years after, his daughter was born. He was in an informal relationship with a UK citizen. After his surrender in May 2016, in October the same year, he was sentenced in Poland for 1 year and 1 month of imprisonment. His family remained in the UK. In this case, the EAW transfer once again raises doubts as to its proportionality.

3. Debates and controversies around Polish EAW

3.1. National debates among legal professionals and politicians

In Polish academic literature, the European arrest warrant appears as part of discussions concerning developments in EU criminal law and in particular, quite understandably, concerning the principle of mutual recognition.[40] But among various issues and controversies which surround the implementation and use of EAWs in Poland, proportionality of Polish EAWs, or lack thereof, is probably among the most frequently discussed or noted.[41] During the seminar organised as part of the "Beyond Surrender" project, practicing lawyers also largely focused on the fact that Polish EAWs are often issued in relatively minor cases.

Results of the briefing seminar with lawyers in Warsaw, 8 September 2016

During the seminar, participating lawyers focused on compliance with the proportionality principle. Practitioners were concerned that the principle is not implemented in practice and, as a result, EAWs are often used for "trivial" cases, such as unpaid invoices, etc. One of the participants estimated that such trivial cases constitute approx. 80-90%.

In Polish law, sources of the proportionality principle can be traced to the provision of the Polish Code of criminal procedure (CCP). CCP states that issuance of an EAW is not possible if this is not required by the interests of the justice system. Additionally, it provides a sanction threshold for issuing an EAW. As the professionals noted, the first condition is not entirely clear, while the second establishes such a low threshold that EAWs can effectively be issued in almost all crimes.

At the same time, one lawyer noted that the proportionality principle is, to an extent, in conflict with the principle of legality which governs Polish criminal proceedings (Article 10 CCP). Thus, law enforcement organs are obliged to initiate and conduct pre-trial proceedings, while public prosecutors also have to present and support indictment in court in the case of publicly prosecuted crimes. And no one can be relieved of criminal liability unless such an exception is provided in national and international law.

The study invoked above, conducted by the Institute of the Justice System, contains multiple examples of EAW's issued in less serious cases, e.g.:[42]

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40 See e.g. Buczma S., „Zasada wzajemnego uznawania orzeczeń między państwami członkowskimi Unii Europejskiej," *Ius Novum*, Vol. 2/2009, pp. 64-93; Staszczyk P., „Zasada wzajemnego uznawania orzeczeń zagranicznych w sprawach karnych – teoria i praktyka," *Przegląd Sądowy*, Vol. 7-8/2014, pp. 145-158.

41 See e.g. Ostropolski T., „Zasada proporcjonalności a europejski nakaz aresztowania," *Europejski Przegląd Sądowy,* March 2013; Staszczyk P., op.cit., p. 12-13.

42 Gardocka T., op. cit., pp. 34-38.

- The Regional Court in Zielona Góra (case no. II Kop 45/11) issued an EAW in pre-trial proceeding with the following description of the crime: "On 3 June 2003, in Wschowa, X.Y. took 850 PLN from an open living room, taking advantage of the inattention of household members."
- The Regional Court in Kielce (case no. III Kop 261/10) issued an EAW during the executive stage of proceedings in the case of a person who in 1997 was convicted to one year of imprisonment with conditional suspension of the punishment's execution. In 1999, the court ordered the execution of the imprisonment sentence. The criminal act consisted in intending to steal items from a car. The perpetrator of the act opened the door with a jerk, but he did not steal anything because there was nothing in the car.
- The Regional Court in Koszalin issued an EAW during the executive stage of proceedings in the case of a person who was convicted to 10 months of imprisonment with conditional suspension of its execution for punching the advertisement of a local restaurant (damage worth 951 PLN) and 6 months imprisonment with conditional suspension of execution for possession of marihuana.

The problem of overuse of this instrument was also noticed by politicians. One of the MPs noted that:

> ***„the statistics of EAWs issued in Poland are alarming. We are a country [whose EAW practice] significantly deviates from EAWs issued in other countries. Unfortunately, Polish courts have become leaders in issuing EAWs and, in great many instances, those do not concerns bosses of organized crime or dangerous criminals, but oftentimes such cases as stealing a mobile phone or several chickens."*** [43]

The same MP mentioned an EAW issued in 2012 in the case of theft of 10 ball pens worth 700 PLN or warrants from 2013: (1) concerning offences committed in 2003 consisting in disrespecting a police officers and possessing 0,083 g of amphetamine; and (2) concerning two offences of riding a bike while drunk in 2010 and 2012. The quoted MP also expressed concern at the financial cost of enforcing such frivolous EAWs, asking the Minister about the money involved in the surrender process.

Some scholars suggest that the reasons for such frequent use of EAWs in Poland lie in the country's enforcement of the principle of legality described above. Ostropolski notes, for example, that "the legal doctrine notices not only that the Polish criminal law system traditionally respects the principle of legality, but also that it protects it even stronger than other countries traditionally abiding by this principle (such as e.g. Germany). This is reflected, among others, in a small number of exceptions in favour of the principle of opportunity, which concern institutions of marginal practical significance, and in the lack of the so-called actual opportunism (*opotrunizm faktyczny*). It is also emphasised that the principle of legality has a global character, namely it concerns all stages of proceedings, and binds not only law enforcement bodies, but also courts."[44] But the same author also asserts that it is impossible to concentrate solely on legal questions, while disregarding the socio-economic factors that play into the use of EAWs, e.g. a wave of migration to various EU countries.

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43 Lassota J., Question of 26 June 2014 no. 27175 to the Minister of Justice, available at: www.sejm.gov.pl/Sejm7.nsf/InterpelacjaTresc.xsp?key=42F01BDF (access: 18 May 2018)

44 Ostropolski T., op. cit., p. 22.

3.2. Criticism of Polish EAWs by foreign courts

Concerns over Polish EAWs as reflected in jurisprudence of British courts

While analysing the Polish practice, HFHR has identified a number of cases when a country refused to execute EAWs issued by Polish courts or where the judiciary had to carefully consider their justifiability. The most relevant examples of judicial decisions or debates were offered by British courts which – as visible from statistics – have to deal with a high number of EAWs from Poland. The problems noted by British courts included, among others, the proportionality of Polish EAWs, but also the protections afforded to convict's health and life or quality of expert opinions issued in criminal proceedings.

The first of the identified cases concerns the lack of guarantees of protection of the convict's health and life in Poland (in Polish prison) as well as the quality of criminal proceedings, particularly the work standards of Polish court-appointed experts. In one of the cases, a EAW was issued by the Polish court for the purpose of executing a penalty of imprisonment. The convicted citizen of Poland Marek K. left Poland after the conviction and went to the United Kingdom. During his stay in the UK, the Polish court issued a EAW. Marek K. was later detained in the UK due to the Polish EWA, but shortly after the hearing he was released by the Westminster Court due to his mental problems – Marek K. had been undergoing psychiatric treatment for many years. At the same time, the Westminster Court was not sure if adequate conditions for his further treatment would be provided after the transfer to Poland and whether such a transfer and later imprisonment would not threaten his life or health. Mr. K.'s counsel in Poland applied to the Polish court for the postponement of imprisonment due to his client's poor mental health. The Polish lawyer submitted medical documentation from the UK which showed that Mr. K.'s imprisonment posed a threat to his health and, even, life. The Polish court appointed its own experts who issued an opinion, based only on the British documents, in which they maintained that Mr. K. could still be imprisoned in Poland, but in a therapeutic system. Mr. K.'s Polish counsel sent this opinion to his British colleague who had been representing Mr. K. on the other side. As a result, the court in the UK dismissed the EAW issued by the Polish court and did not agree to transfer Marek K. to Poland. The British judge decided that the opinion of British doctors who had direct contact with the patient was reliable, and Poland did not guarantee compliance with the rights of the convict, which was clearly proven by the opinion of Polish psychiatrists prepared without examining the patient and against the content of the documentation they had from the UK.[45]

In another case which sparked controversy in the UK, an EAW was issued after a man convicted seven years earlier for riding a bicycle while drunk. Mr. Arkadiusz Celiński, who had been in Britain since 2009 and was settled with a partner and a job, was arrested by the police in north-west London in October and spent two months in detention, after the Polish authorities issued an EAW demanding he serve the remainder of a 12-month prison term. Mr Celiński's solicitor argued in the British Court of Appeals that the Polish authorities had imposed a grossly disproportionate sentence on a man for an offence which in Britain could only be punished by a fine and that Mr. Celinski's case exemplifies an urgent need for extradition reform. She also pointed out that EAWs should not be issued in respect of those sought for minor offences. However, the judge sitting at the Royal Court of Justice in central London rejected the claims that Mr. Celinski's sentence was unfair, noting that it was a matter for the Polish courts to decide what sentence to impose on those who break its strict traffic laws.[46] In 2015, in the case of Polish Judicial Authorities v. Celinski and others, the UK's

45 http://europejskinakazaresztowania.eu/adwokat-w-polsce-czy-za-granica/ (access: 18 May 2018).

46 Milmo C., "Polish man held in Wandsworth Prison for two months on European Arrest Warrant seeking extradition

High Court clarified the correct approach to Article 8 of ECHR in extradition cases in the UK's Magistrates' Court and gave guidance as to how district judges should make the assessment. Article 8 requires a district judge to conduct a balancing exercise between the rights of the individual and the public interest in ordering extradition. The High Court stressed that it was important to conduct a balancing exercise of the factors present in each case. After finding the facts, the judge should ordinarily set out the "pros" and "cons" in what has been described as a "balance sheet". The judge should then set out his reasoned conclusions as to why extradition should be ordered or the defendant discharged.[47] The controversy in the present case concerned the proportionality of the Polish EAW.

A recent example of a case that came again before the UK's High Court illustrates the difficulties in assessment of proportionality with respect to private and family life in EAW cases. *On 24 June 2016, in the case of Poland v. Kulig, [the High Court] overturned the discharge of an individual facing extradition to Poland. Mr. Kulig committed two assaults in Poland and received suspended sentences of imprisonment. He then committed another offence which caused the suspended sentences to be activated. He subsequently moved to the UK with his partner and family while still having 1 year and 9 months left to serve. An EAW was issued some time later. The UK's High Court noted that the district judge made adverse findings of fact against Mr. Kulig, not believing the aspects of his account to be credible or truthful. Nevertheless, the judge held that although he was a fugitive and had committed violent offences, there were strong counter-balancing factors that made extradition disproportionate, namely the offences were committed more than 10 years ago, the business that he had set up with his partner would fold if he was extradited, and it would be unrealistic to expect his family to move to Poland.*[48] Mr. Kulig's attorney maintained that the district judge had made an incorrect assessment of proportionality in respect of Article 8 of ECHR. Nevertheless the discharge of Mr. Kulig was overturned by the UK's High Court and his transfer to Poland was ordered. This case shows, as was confirmed by Mr. Kulig's attorney, that the courts *will always look for strong and unusual factors to outweigh the strong public interest in […] upholding […] obligations with […] extradition partners.* What is significant, Mr. Kulgi's attorney concluded that his case *was not unusual and the factors referred to as outweighing the public interest in extradition were far from strong counter-balancing factors* […].*The difficulties that Mr Kulig and his family would face were significant but sadly not unusual or grave enough to outweigh the public interest in favour of extradition.*[49] The violation of the Article 8 of ECHR is often raised in the EAW cases, but *Poland v. Kulig* judgement showed that examples which are not extraordinary enough will – most probably – not lead to the recognition of an infringement of the proportionality principle in this regard within the UK.

The rule of law crisis in Poland and its influence on the EAW practice – the Celmer case[50]

In March 2018, the Irish High Court refused to extradite to Poland – based on an EAWs – a suspected Polish drug trafficker Mr. Artur Celmer, due to concerns about the integrity of the Polish justice system.

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for seven-year-old drunk-cycling conviction," *The Independent*, 19 December 2012, available at: www.independent.co.uk/news/uk/home-news/polish-man-held-in-wandsworth-prison-for-two-months-on-european-arrest-warrant-seeking-extradition-8426095.html (access: 18 May 2018).

47 "Poland v. Kulig: High Court Overturns Article 8 Discharge", 5 July 2016, available at: www.gherson.com/blog/poland-v-kulig-high-court-overturns-article-8-discharge (access: 18 May 2018).

48 Ibid.

49 Ibid.

50 The judgment is available at: www.courts.ie/Judgments.nsf/0/578DD3A9A33247A38025824F0057E747 (access: 18 May 2018).

Artur Celmer has been living in Ireland for 10 years. He was in custody for nine months before the High Court judgement, pending three separate EAW requests from Poland. His legal counsel argued before the Irish High Court that the EAW should not be complied with as, given Poland's ongoing judicial problems, there is no chance he could be granted a fair trial in the country. A representatives from the Embassy of the Republic of Poland in Dublin was also present in the High Court.

In the Irish High Court's judgement, Poland's judicial reforms introduced by the government since 2015 were described as *"a shocking indictment of the status of the rule of law in a European country in the second decade of the 21st century.*" The Irish High Court concluded in the justification of the judgement that "*based upon the information before it, that the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years*". It noted that the Irish European Arrest Warrant Act of 2003, which implemented the Framework Decision, had provided expressly for protection of fundamental rights. Its Section 37 provides that: "*A person shall not be surrendered under this Act if(a) his or her surrender would be incompatible with the State's obligations under (i) the Convention, or (ii) the Protocols to the Convention, (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38 (1)(b) applies)".* The High Court stated that his duty and responsibility, pursuant to this provision is to refuse the surrender of the respondent, if surrender would be incompatible with the State's obligations under the ECHR and its protocols, or contravene any provision of the Constitution, or the duty and obligation under the Framework Decision to secure fundamental rights when determining surrender cases.

Furthermore, the High Court concluded that *"the effect of the legislative changes in Poland, and the impact on fair trial rights, raise issues with respect to the interpretation of the Framework Decision in the context of a finding by an executing judicial authority that a member state has breached the common values of rule of law and democracy as set out in Article 2 of the Treaty on European Union".* For this reason, the Irish High Court decided to request a preliminary ruling from the Court of Justice of the European Union.

The consequences of this judgement may be significant for the EAW cases pending before various courts at the moment. It is possible that other EAW transfers to Poland from Ireland – and possibly other EU countries – will be suspended until the ruling from the Court of Justice of the European Union. But, perhaps more importantly, the request for a preliminary ruling in this particular case and the CJEU's decision may also generally impact the institution of the EAW and the principle of mutual recognition which underpins it.

4. Threats to the rights of individuals post-surrender

The current project aimed at the analysis of cases post-surrender. However, due to methodological constraints it was not possible to comprehensively analyse the consequences of surrender in a sufficient number of cases. For this reason, the chapter below presents potential risks to the surrendered person resulting from more systemic deficiencies of the human rights protection in Poland. We have decided to concentrate on two areas most relevant from the perspective of surrendered persons, namely the conditions of detention and implementation of procedural rights as foreseen in various EU instruments in the field of criminal justice.

4.1. Detention conditions in Poland as a reason to question EAWs

The Court of Justice of the European Union (hereinafter: "CJEU") judgment in *Caldararau and Aronyosi*[51] case created a new ground to question EAWs issued by EU Member States. In its judgment, the CJEU stated that the prohibition of torture is one of the fundamental values of the European Union. Thus, the judicial authority of the executing Member State is bound to assess whether an individual will be exposed to inhuman or degrading treatment after being surrendered to a Member State, that has issued an EAW. The CJEU noted:

> ***"Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State."***[52]

If the existence of the risk of inhuman or degrading treatment cannot be excluded, the judicial authority executing the EAW must decide about bringing the surrender procedure to an end.

Because of the aforementioned CJEU judgement it is necessary to pay special attention to the issue of inhuman and degrading treatment in Polish penitentiary units. A thorough analysis of the Polish penitentiary system proves that the material conditions of detention, especially overcrowding, lack of access to proper medical care and treatment of prisoners with disabilities, might be considered as a serious reason to question EAWs issued by Poland.

In 2009, the European Court of Human Rights (hereinafter: "ECtHR") in its judgement in the case of *Orchowski and Sikorski v. Poland* found the overcrowding of Polish penitentiary units to be a systemic problem.[53] In the discussed period, penitentiary units with a population exceeding 120% of their capacity were a common

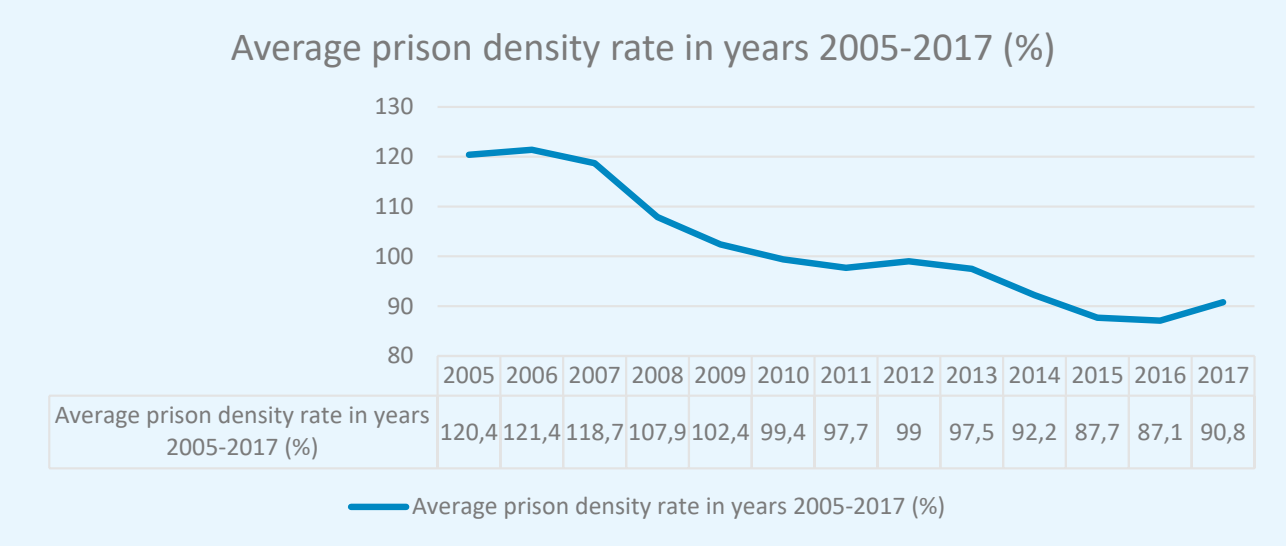
51 Court of Justice of the European Union judgement of 5 April 2016 in joined cases of Pál Aranyosi (C404/15) and Robert Căldăraru (C659/15 PPU), available at: http://curia.europa.eu/juris/document/document.jsf (access: 18 May 2018)

52 Ibid.

53 ECHR judgement in case Orchowski v. Poland of 22 October 2009, Application no. 17885/04, available at: http://hudoc.echr.coe.int/eng?i=001-95314 (access: 18 May 2018)

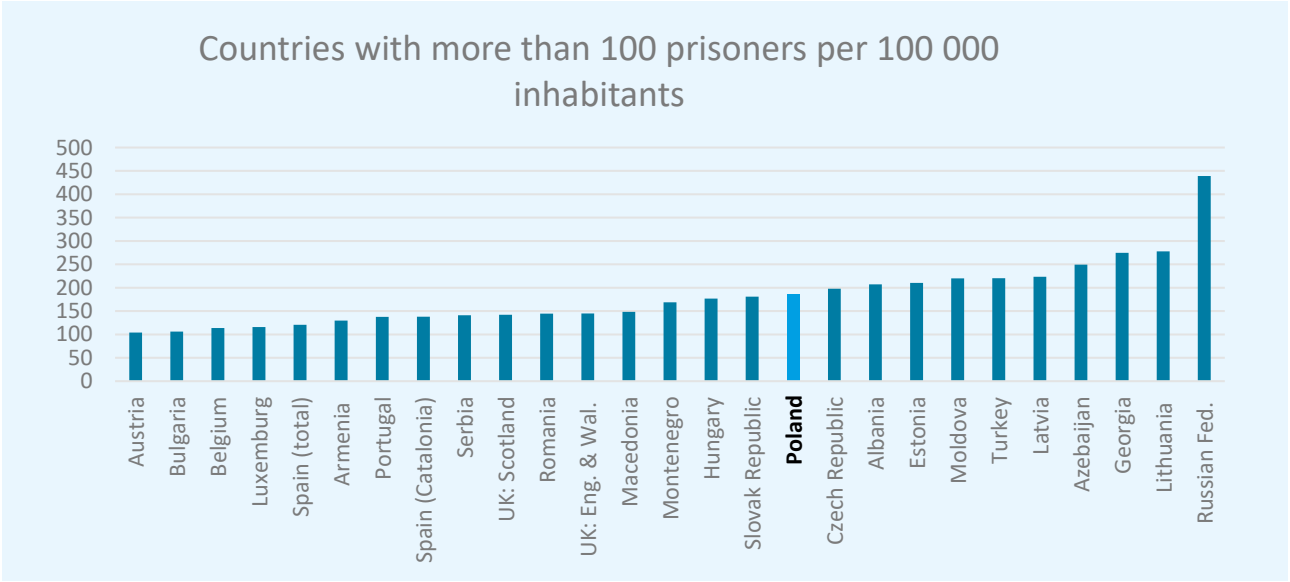
phenomenon. Based on our experience, due to time lapse the judgement in the aforementioned case might not be found as a sufficient ground to refuse execution of EAW issued by Poland.

Moreover, since the adoption of this ruling, positive changes have been observed within the Polish penitentiary system. As of 15 December 2017, no penitentiary unit was overcrowded. The prison population amounted to 72,545 detainees, while the overall capacity of units reaches 80,273 places. This means that the prison density rate does not exceed 90.4%. But, Poland still ranks high in the list of countries with the highest prison population rate.[54] Details might be found in the graphs below.



	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Average prison density rate in years 2005-2017 (%)	120,4	121,4	118,7	107,9	102,4	99,4	97,7	99	97,5	92,2	87,7	87,1	90,8

Source: Official Statistics of Polish Prison Service[55]



Source: Council of Europe Annual Penal Statistics, SPACE I – Prison Populations, Survey 2015, updated April 2017[56]

54 Number of prisoners per 100 000 inhabitants.

55 Available at: www.sw.gov.pl/dzial/statystyka (access: 18 May 2018)

56 Available at: wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf (access: 18 May 2018)

The long period since the *Orchowski and Sikorski v. Poland* judgments and a decrease in density rate do not, however, mean that the problem of overcrowding has been eliminated entirely. According to the Polish Executive Criminal Code,[57] every prisoner should be offered cell space of at least 3 m^2. Not only is this among the lowest standards in Europe,[58] but it is also contrary to the recommendations of the Council of Europe and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: "CPT"), which indicate that every prisoner should be offered at least 4 m^2 ($6m^2$ in case of individual cells). The recommendation on this particular matter has been reiterated by CPT in each report regarding Poland since CPT's first visits to the country in 1996.[59] In the most recent report, CPT urged Poland to amend the provisions of the Executive Criminal Code in order to implement a proper standard.[60] Similar recommendation was also made by the Committee Against Torture (hereinafter: "CAT") which was considering the 5th and 6th Polish interim reports on the implementation of the Convention on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[61] It indicated that Polish solutions on cell space per prisoner are not compatible with the European standard. Consequently, CAT indicated that the problem of overcrowding in prisons in Poland had not yet been solved and called on Poland to take the necessary measures to ensure that conditions in prisons met at least the minimum standards. However, despite a large number of declarations from Polish authorities nothing has been done in this respect. Moreover, in 2016 the Polish Ombudsman urged the Minister of Justice to adjust the legal criteria of living space per prisoner to international standards. The Deputy Minister of Justice refused to take any actions in response to the Ombudsman's appeal.[62]

Insufficient living space per prisoner directly jeopardizes prisoners' rights. It results in a low number of showers per week (2), insufficient contacts with prison tutors or inappropriate number of cultural and educational activities.[63] Last but not least, lack of adequate medical care might also be considered as one of its consequences.

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57 Executive Penal Code regulates inter alia the enforcement of criminal courts judgements and the rights and duties of persons who are imprisoned.

58 According to the Council of Europe Annual Penal Statistics, SPACE I – Prison Populations only Hungary (2,8 m^2) and FYRO Macedonia (2,9 m2) have lower standard than Poland of living space per prisoner.

59 Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 June to 12 July 1996, available at: http://rm.coe.int/doc/0900001680697913 (access: 18 May 2018).

60 Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 June to 17 June 2013, available at: https://rm.coe.int/1680697928 (access: 18 May 2018).

61 Committee Against Torture, Concluding observations on the combined fifth and sixth periodic reports of Poland, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/POL/CO/5-6&Lang=En (access: 18 May 2018).

62 Deputy Minister of Justice response of 12 October 2016, document no: DWOiP-I-072-21/16.

63 The implications of overcrowding for prisoners' rights have been described in the HFHR's amicus curiae regarding Constitutional Tribunal's judgment in the case SK 25/07 concerning the issue of overcrowding and the Executive Criminal Code provisions enabling prison directors to place a prisoner in a cell not meeting the legal criteria of living space per prisoner. The Amicus Curiae brief might be found on HFHR's website: www.hfhrpol.waw.pl/precedens/images/stories/amicus_przeludnienie_fin.pdf (access: 18 May 2018).

The conditions of the prison healthcare system might be recognized as another threat to prisoners' human rights.[64] The HFHR has recently been involved in two cases that illustrate one of the main problems of the prison healthcare system, namely the lack of trust between prisoners and medical staff.[65]

The first case concerned a man suffering from paranoid schizophrenia. Upon his admission to prison, he started complaining about material conditions of his detention and treatment in the facility. Despite the fact that the man had previously been hospitalized due to mental problems, the prison physician who examined his case concluded that the man was simulating schizophrenia. However, it did not stop the physician from prolonging the prisoner's pharmacological therapy. In the doctor's opinion, the prisoner should prophylactically carry on taking medicines. Later on the prisoner started a hunger strike which resulted in his transfer to the prison hospital. Even though properly diagnosed in the hospital, the detainee was not offered comprehensive treatment apart from pharmacological therapy.[66]

The other case concerned a female prisoner who was detained pre-trial. The woman did not received appropriate medical care despite numerous complaints as to her health. According to a prison physician, the woman was "faking" her condition. As a result of this denial of essential healthcare, the woman died in a prison hospital.[67] Her case can thus be compared to that of *Dzieciak v. Poland*[68] in which the ECtHR found that Poland, for the first time, violated Article 2 of ECHR, concerning the right to life.[69]

Finally, maladjustment of the penitentiary units to the needs of disabled prisoners might be recognized as another systemic problem of the Polish prison system. Unfortunately, a vast majority of Polish penitentiary units do not meet the needs of prisoners with disabilities. Moreover, the study conducted by the National Preventive Mechanism indicated that none of the prisons which, according to Polish authorities, adjusted their conditions to the needs of prisoners with disabilities, actually allowed such detainees to independently function in prison. As a result, persons with disabilities have problems with independent access to baths, walking fields or visiting rooms, which violates their human rights. A good example of such a situation

64 More information on the Polish prison healthcare system might be found in HFHR's publication on the prison healthcare system (PL) : Więzienna Służba Zdrowia, Obecny Stan Dyskusji. www.hfhrpol.waw.pl/zdrowiewwiezieniu/images/stories/file/OpiekaZdrowotna.pdf (access: 18 May 2018); Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 17 June 2013, available at: https://ms.gov.pl/Data/Files/_public/aktual/2014/cpt-report.pdf (access: 18 May 2018); National Torture Prevention Mechanism reports (PL) , available at: https://www.rpo.gov.pl/pl/content/raport-rpo-z-dzia%C5%82alno%C5%9Bci-w-polsce-kmp-w-roku-2015

65 More information on the Polish penitentiary system might be found in HFHR's Report on Human Rights of Persons Deprived of Liberty, available at: http://www.hfhr.pl/wp-content/uploads/2017/05/Report-CPT-FIN.pdf (access: 18 May 2018) and HFHR's Report on Implementation of judgements of European Court of Human Rights in Poland, available at: http://www.hfhr.pl/wp-content/uploads/2017/03/Raport-implementacja-ETPC-10-03-2017.pdf (access: 18 May 2018).

66 More information about the case might be found on HFHR's webpage: http://www.hfhr.pl/en/application-to-ecthr-on-behalf-of-incarcerated-schizophrenia-patient/ (access: 18 May 2018).

67 More information about the case might be found on HFHR's webpage: http://www.hfhr.pl/en/detainee-dies-in-custody-hfhr-intervenes-in-agnieszka-pysz-case/ (access: 18 May 2018).

68 ECtHR judgement in case Dzieciak v. Poland, application no. 77766/01.

69 Poor condition of Polish prison system has prompted the Polish authorities to adopt a prison system modernization program. In years 2017 – 2026 slightly more than 700 million euros will be allocated to modernize prison building and equipment of Prison Service. Part of the designated money will be available for modernization of prison healthcare system.

might be found in the case *D.G. v. Poland*.[70] In this case, the ECHR found a violation of Article 3 of ECHR due to the Polish authorities' failure to provide adequate detention conditions to a prisoner who was using a wheelchair.[71] However, in 2016 the Committee of Ministers of the Council of Europe welcomed measures adopted to execute the case *D.G. v. Poland* and seven other cases concerning inappropriate healthcare for prisoners or detention conditions for prisoners with disabilities and decided to close the execution of all those cases.

ECtHR judgments in cases *Piechowicz*[72] *v. Poland* and *Horych v. Poland*[73] also concern what might be considered as another barrier against execution of EAWs issued by Poland, especially in case of the most serious crimes. The afore-mentioned cases concerned the so-called regime of "dangerous detainees." The regime involves, among others, full isolation from the rest of the prisoners' community, the use of strengthened supervision, as well as routine, daily strip searches. According to Article 88a of the Executive Criminal Code, such regime might be justified e.g. by the type of crime (e.g. crimes including special cruelty or taking a hostage) or committing it as part of an organized group. Therefore, there is a significant risk that the "dangerous detainee" status might be applied routinely, without examining the immediate danger posed by the prisoner to the safety of the prison, which is confirmed by over a dozen ECtHR's judgements concerning this regime. In one of the last cases, the ECtHR found a violation of Article 3 of ECHR.[74] The applicant in that case was subjected to several strict surveillance measures, e.g. strip searches were carried out routinely and were not linked to any specific security needs, nor to any specific suspicion concerning his conduct. According to the ECtHR, the prison authorities did not rely on any specific or convincing security requirements. They did not provide sufficient and relevant reasons justifying the "severity of the measures taken in their entirety in order to attain the legitimate aim of ensuring prison security."[75] ECtHR concluded that the measures applied to the applicant were not necessary to maintain prison security and violated Article 3 of ECHR.

Transport conditions are another important issue while talking about EAWs. The ECtHR assessed such problem in the case *Wolkowicz v. Poland.*[76] The applicant in that case was using a wheelchair during his surrender from UK to Poland. According to the applicant, Polish officers were not prepared for the transfer of a disabled person. Due to the fact that they did not push his wheelchair into the aircraft properly he fell out of his wheelchair. Furthermore, he was told to crawl to the back of the aircraft. When the applicant refused to follow this order, he was pulled out of the wheelchair by three police officers and was hit in the ribs by one of them. The applicant also complained that on arrival to Warsaw he was transported to Warsaw prison in a police van that was not equipped for transporting disabled people. However, the ECtHR found the case of Mr. Wolkowicz as inadmissible. In its opinion, the applicant's transport on board the aircraft was in accordance with the recommendations indicated in medical certificate and that the conditions of his transfer took the applicant's special needs into account. Furthermore, it concluded that Mr. Wolkowicz failed to provide any *prima facie* evidence that he was a victim of ill-treatment.

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70 ECtHR judgement in case D.G. v. Poland, application no. 45705/07.

71 More information about the case and its execution might be found in HFHR's Communication to ECtHR concerning the execution of ECtHR judgement in case D.G. v. Poland, available at: http://www.hfhr.pl/wp-content/uploads/2016/09/20160901_CM_DG-v-Poland.pdf (access: 18 May 2018).

72 ECtHR judgement in case Piechowicz v. Poland, application no. 20071/07.

73 ECtHR judgement in case Piechowicz v. Poland, application no. 3621/08.

74 ECtHR judgement in case Korgul v. Poland, case no. 36140/11.

75 ECtHR judgement in case Korgul v. Poland, case no. 36140/11, § 45.

76 ECtHR decision in case Mariusz Wolkowicz v. Poland, case no. 34739/13.

Each of the above-mentioned circumstances may serve as a ground to refuse the execution of an EAW issued by Poland. Some of them have already been used to delay or avoid detainee's surrender to Poland. The defendants in *Krolik and others v. Several Polish Judicial Authorities*[77] argued that due to severe prison conditions in Poland they cannot be extradited, as it will put them at risk of inhuman and degrading treatment. The Divisional Court ruled that such claim is not sufficient as Poland is subjected to ECHR. Therefore, the defendant should provide the court with clear, cogent and compelling evidence proving that such risk may occur.[78]

It might be a problem to provide such evidence since, according to the Polish Executive Criminal Code, it is not possible to foresee in which prison the detainees shall serve their sentence. The criteria for placing the convict in an appropriate prison are described in Article 100 of the Executive Criminal Code. In its previous wording the provisions of Article 100 provided that the convict shall serve his sentence in the penitentiary unit located closest to his place of residence, if possible. The transfer of a convict to another prison can be made only due to justified reasons. When amending this provision, the legislator resigned from the criterion of proximity of the prison to the place of residence of the convict. In the current wording, the article reads that "the convict shall serve their sentence in the penitentiary appropriate when it comes to the kind, type, system for serving the sentence or protection in the prison." Therefore, it is extremely difficult to predict in which prison a detainee is going to serve their sentence. While particular prisons differ significantly in detention conditions it might not be possible to provide the court deciding about surrender with sufficient evidence, proving that the decision on surrender will result in a human rights violation.

Irrespective of the problems connected with proving the risk of ill-treatment, the issue of Article 3 violations by transporting detainees to Poland or placing them in Polish prisons will be recurring. For this reason, it is extremely important to continue to improve the conditions of detention. It is the only way to meet the challenges imposed by CJEU judgement in cases of *Caldararu and Aronyosi*. Otherwise, it will not only result in weakening of the system of mutual recognition, but will also disable the EAW as an effective tool to prosecute perpetrators of crimes.

4.2 Respect for procedural rights

4.2.1. Constitutional guarantees

The 1997 Constitution of Poland extensively refers to the issue of individuals' freedoms and rights. Chapter two, dedicated to those matters, begins with two fundamental provisions.

Pursuant to Article 30 of the Constitution the inherent, inalienable and inviolable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. The respect and protection thereof shall be the obligation of public authorities. Article 31 point 3 of the Constitution contains a rule limiting permissible limitations of freedoms and rights. According to its meaning, any limitation on the exercise of constitutional freedoms and rights may be imposed only by a statute and only when necessary in a democratic state for

77 Krolik and others v Several Judicial Authorities of Poland [2012] EWHC 2357 (Admin), [2012] All ER (D) 107 (Aug).

78 www.newlawjournal.co.uk/content/extradition%E2%80%94convention-rights%E2%80%94polish-extradition (access: 18 May 2018).

the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Furthermore, the Constitution in Article 41 guarantees to everyone personal inviolability and security. According to this article any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by the statute. Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Every detained person shall be informed, immediately and in a manner comprehensible to them, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. Those who have been unlawfully deprived of liberty shall have the right to compensation.

Pursuant to Article 42 point 2 anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. They may, in particular, choose counsel or avail themselves – in accordance with principles specified by statute – of counsel appointed by the court. It further states that everyone shall be presumed innocent of a charge until their guilt is determined by the final judgment of the court.

Article 45 of the Constitution states that everyone has the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. According to Article 77, everyone shall have the right to compensation for any harm done to them by any action of an organ of public authority contrary to law.

4.2.2. Right to information

The right to information is one of the most important guarantees of an effective right to defence. Although the principle to inform the suspect is not expressed directly in the Code of Criminal Proceedings, a number of provisions in CCP refer to the issue of suspect's instruction.

Article 16 of CCP is one of the most important provisions concerning the parties' right to information. According to paragraph 1 of this provision, if the authority conducting the proceedings is obliged to instruct the parties about their duties and rights, the lack of such instruction or incorrect instruction cannot result in any adverse consequences either to the participant or any other person concerned with the proceedings. On the basis of that provision, the Supreme Court has ruled that a court's failure to inform the party about their right, deadline or the manner to file an appeal, has to be considered as a valid justification for the party's failure to meet the formal requirements of an appeal. Thus, it justifies the restoration of the deadline for submitting an appeal.[79]

Moreover, according to Article 16 § 2 CCP the authority conducting the proceedings, when the need occurs, informs the parties of their rights and duties, even if it is not explicitly required by the law. If, in view of such circumstances, the instruction was indispensable and the authority failed to give such an instruction or gave incorrect instruction it cannot result in any adverse consequences either to the participant or any other person concerned with the proceedings. According to the Supreme Court, while assessing whether there is

79 Poland, Supreme Court judgement of 1 June 2010, IV KZ 31/10, OSNwSK 2010/1/1143.

a need to instruct a party, the court or any other body has to rely on objective criteria, first and foremost the probability that the party is unaware of their rights.[80]

According to Article 300 of CCP prior to the first interrogation the suspect should be instructed about their rights: to give or to refuse explanations or to decline to answer questions, to submit requests for procedural acts to be undertaken in the investigation or inquiry, to be assisted by a defence counsel and to be acquainted at the end of the proceedings with case files. Apart from that, the suspect has to be informed about their obligations, such as a duty to undergo an external examination of the body, psychological and psychiatric tests, collection of buccal mucosa smear. They have to also be informed about the duty to appear whenever they are summoned and inform the court or the prosecution about every change in their place of residence. Additionally, persons subjected to EAW procedure have to be informed about specific rights and obligations related to an EAW.

In 2016 HFHR has conducted an analysis[81] of the letter of rights handed out to suspects in criminal proceedings[82]. According to its results, instructions prepared by the legislator cannot be considered as an effective way to familiarize suspects with their rights. It is mainly due to the fact the instructions are repeating and paraphrasing particular provisions of CCP. Such language and form hinder their understanding by suspects. What is more, there has been no format of the letter of rights for suspects which would be adjusted to the special needs of elderly persons or those with disabilities. As a result, such persons have more difficulties with effective understanding of the instruction. At the same time, HFHR's research shows that there is no tendency among suspects to ask the court, the police or the prosecution for any clarification of the instruction's content.

For these reasons, the HFHR has recommend that the authorities prepare simplified versions of these instructions, with the use of language that would be commonly understandable. It noted that there is a need to simplify the instruction and present it in a less formal way. According to HFHR, there was also a need to prepare the leaflet summarizing suspects' right and obligations.[83] Such a leaflet was created by the Ombudsman's Office and HFHR in 2017.[84]

4.2.3. Right of access to a lawyer

According to Article 6 CCP the accused has the right to defend himself, including to use the services of a defence counsel. They have to be advised of this right.

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80 Supreme Court ruling of 17 March 1993, II KRN 36/93, OSNKW 1993, no. 506, pos. 32

81 The multidimensional analysis included comparison of the Polish law and provisions of the EU Directive on the right to information, conducting a survey among criminal defenders and interviewing policemen, lawyers and prosecutors.

82 M. Kopczyński, K.Wiśniewska, *„Jak informować w postępowaniu karnym? Polskie prawo i praktyka a standardy europejskie*, Warsaw 2016, available at: www.hfhr.pl/wp-content/uploads/2016/04/dyrektywa_ca%C5%82o%C5%9B%C4%871.pdf (access: 18 May 2018).

83 Ibid.

84 Leaflet is available at: www.hfhr.pl/jestes-swiadkiem-podejrzanym-lub-pokrzywdzonym-poznaj-swoje-prawa/ (access: 18 May 2018).

CCP indicates several cases in which the accused *has to* be assisted by a lawyer, namely whenever:

- they are under 18 years old
- they are "deaf, mute or blind"
- there is a reasonable doubt whether their ability to recognize the meaning of an act or their conduct was not excluded or substantially reduced at the time of the commission of the act;
- there is reasonable doubt whether the state of their mental health allows them to participate in criminal proceedings or conducting defence in an independent and reasonable manner.

However, whenever an expert psychiatrist declares that the sanity of the accused, both at that moment of committing the offence and at the time of the proceedings, is not subject to doubt, further participation of a defence counsel in the proceedings does not have to be considered as obligatory. In such circumstances, the president of the court and the court (at the trial) may cancel the appointment of the defence counsel.

Additionally the accused has to be assisted by a lawyer whenever their case is proceeded before the regional court as the court of the first instance and they are charged with an indictable offence. In such cases the attendance of the counsel at the main trial is obligatory. Also the counsel has to be present at the appeal and cassation hearings only if the president of the court deems it necessary.

The accused has to be assisted by a lawyer also if the court deems it necessary due to the circumstances impeding their defence, e.g. whenever they are helpless,[85] uneducated or of poor health.[86] In such cases, the assistance of a defence counsel is obligatory at the trial and at those hearings, where the participation of the accused is obligatory. According to the Supreme Court, a duty to appoint a state-funded lawyer is established whenever the need to appoint a defence counsel arises.[87]

Generally, the defence counsel is appointed by the accused. However, whenever the accused is detained on remand (and did not appoint a counsel of their own choice) the counsel might be appointed by any other person. The accused should be informed about that fact immediately.

The accused cannot have more than three defence counsels at one time. The defence counsel may defend more than one accused, only if their interests do not collide. They can undertake actions only in favour of the accused. Only a person licensed to defend in accordance with the provisions regulating the system of the Bar may act as a defence counsel.

If the accused does not have a defence counsel of their own choice, they may request the appointment of a state-funded defence counsel (art. 78 CCP). In such a situation, they have to duly prove that they are unable to bear the costs of defence without prejudice to the necessary maintenance of themselves or their families. If the court finds that reasons for the appointment of such a counsel are not valid, it may cancel the appointment at any time. The state-funded counsel may also be appointed to assist the accused only in particular acts in court proceedings.

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85 Sławomir Steinborn, „Article 79" [in:]: *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, Legal Information Database LEX, 2016.

86 Supreme Court judgement of 22 September, 2003 r., IV KK 286/03.

87 Supreme Court judgement of 19 September 2007, III KK 130/07.

Whenever, in the above-mentioned situations, the accused does not have a counsel of their own choice, the president of the court or the division official appoints defence counsel for him *ex officio*. The accused has a possibility to challenge the decision denying appointment of a state-funded lawyer. A motion to appoint a state-funded defence counsel based on the same circumstance might be left unrecognized. Upon a justified request of the accused or their counsel, the president of the court may appoint a new defence counsel to replace the former.

Although defence counsels established *ex officio* have the right to act in the entire proceedings, they are obliged to undertake actions only until the final judgement.

According to Article 439 CCP, the lack of a defence counsel in judicial proceedings shall be considered as a serious violation of the accused's rights resulting in the need for reconsideration of the case. The lack of legal assistance in pre-trial proceedings can be considered as a human rights violation only when it significantly affects the outcome of the proceedings.[88]

The right to defence was one of the core elements of the European Union's policy in the area of justice, freedom and security. Adopted as part of the Stockholm Programme, 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[89] enforces adoption of minimum procedural safeguards in relation to the right to defence.

According to its provision suspects and accused persons have the right of access to a lawyer in such time and manner so as to allow the persons concerned to exercise their rights of defence practically and effectively. They shall have access to a lawyer without undue delay, *inter alia* before being questioned by the police or any other law enforcement or judicial authority and also after deprivation of liberty. The right of access to a lawyer shall entail the right to meet in private with the lawyer, lawyers to be present and participate in suspects interrogation and to attend evidence gathering acts such as identity parades, confrontations, reconstructions of the scene of crime. What is more, Article 10 of the Directive 2013/48/EU guarantees every person subjected to the EAW procedure the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant.

Thorough analysis of CCP provisions indicates that Directive 2013/48/EU has not been implemented to Polish law properly. Currently the CCP does not include effective solutions guaranteeing every arrested person full access to a lawyer before being questioned. Furthermore, none of the provisions of the CCP obliges the hearing authority to postpone the hearing to establish a lawyer and to notify him of the date of the hearing. Even the justified absence of a defender does not stop the interrogation.

Faulty transposition of Directive 2013/48/EU has major consequences. It will results in a systematic violation of the rights of detainees, who will be interviewed without the presence of a lawyer despite being arrested.

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88 L. Paprzycki, *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego*, Internet Legal Information Database LEX.

89 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; available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0048 (access: 18 May 2018).

As a consequence, in the near future an issue of a direct effect of the Directive may arise, as its provisions might be recognized as unconditional, precise and clear enough.

These doubts encouraged the HFHR to ask for a meeting with the Minister of Justice on the implementation of Directive 2013/48/EU to Polish law. The deputy Minister replied that, according to his opinion, there is no need for any legislative action in that area. He indicated that Directive 2013/48/EU has been implemented without adaptation of CCP.

Most importantly, the CCP does not guarantee that the surrendered persons should be represented both in issuing and executing state.

4.2.4. Right to translation and interpretation

According to Article 72 CCP, an accused who does not have a sufficient command of Polish is entitled to state-funded help of an interpreter. According to the Supreme Court, this entitlement is not restricted to persons who do not know Polish completely, but it should also include the situation in which an interrogated persons does not sufficiently understand questions asked to them or is unable, due to poor language skills, to testify in Polish.[90] According to S. Steinborn that provision applies also to all situations in which the accused knows Polish to some extent, but their knowledge of this language is not sufficient to defend themselves independently.[91]

The interpreter should be summoned to assist in all activities with the participation of the accused. The accused who does not have a sufficient command of Polish has to be provided with the translation of a decision presenting, supplementing or changing charges, an indictment, as well as any judgement which might be subject to an appeal or which ends the proceedings. With the consent of the accused, it is sufficient to announce the translated judgment concluding the proceedings, if any appeal is not admissible.

Currently, there is no provision directly indicating that the accused who does not have a sufficient command of Polish has to be granted state-funded legal aid. However, according to S. Steinborn, such a situation may justify granting the accused a state-funded legal defence counsel based on Article 79 § 2 of CCP.[92] According to that provision the accused must have a defence counsel if the court deems it necessary due to the circumstances impeding the defence.

For this reasons, it should be recognized that the current provisions of CCP correspond to the requirements of the 2010/64/EU Directive of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

4.2.5. Presumption of innocence

Presumption of innocence is one of the main principles of the Polish criminal procedure. According to Article 5 CCP, the accused is presumed innocent until their guilt is proven and affirmed by the final judgement of the

90 Supreme Court judgement of 22 April 1970, case no. III KR 45/70.

91 S. Steinborn, op.cit.

92 S. Steinborn, op.cit.

court. Therefore, it is mainly directed towards courts, the police and prosecutions. However, it might also be applied to journalists. Pursuant to Article 13 of the Act on Press Law, journalists are not allowed to express opinions in the press as to the outcome of court proceedings before the judgment in the first instance. Personal data and images of persons against whom pre-trial or court proceedings are pending, shall not be published in the press unless the persons agree.

One of the consequences of the presumption of innocence is that the accused does not have to prove that they are innocent. As a result, the burden of proof lies on the state, namely the prosecution. They bear the risk of failure in proving that the accused is guilty.

The *in dubio pro reo* rule (described in Article 5 § 2 CCP) might be recognized as another consequence of the presumption of innocence. According to that rule, irresolvable doubts (legal or factual) are decided exclusively in favour of the accused. The rule is only applicable to doubts which could not be clarified during evidentiary proceedings. As a result, whenever the court is not able to determine as true one of at least two versions of the case, despite comprehensive assessment of evidence, the court is obligated to choose the version which is most the favourable for the accused.

Nevertheless, CCP provisions on presumption of innocence should also be assessed from the perspective of Directive 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, as it sets one of the most important guarantees of fair trial. The 2016/343 Directive deals with certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings for suspects or accused persons, in order to facilitate the mutual recognition of judgments and judicial decisions, as well as police cooperation and criminal justice with a cross-border dimension. Its text has been the subject of an opinion of the Commission on Codification of Criminal Law. According to this opinion, the draft of the Directive, in reference to the presumption of innocence, does not propose any procedural standards that would exceed those already guaranteed in Polish criminal proceedings under applicable law.[93]

A significant part of the above-presented observations remains valid to this day. The problem remains in Article 168a which was introduced to CCP in 2017. It permits, contrary to existing rulings of the Supreme Court, the admission of evidence obtained by a public official through an offense, different than murder, deliberate damage to health or unlawful deprivation of liberty. As a consequence, it allows the possibility of legalizing evidence, e.g. obtained by psychological torture. This is clearly in conflict with the principle of *nemo se ipsum accusare tenetur* and the axiology of the 2016/343 Directive. Similarly, the content of Article 233 § 1a of the Criminal Code, which criminalizes the situation in which a witness commits perjury to avoid confessing to a crime or testifying about a crime committed by his or her family, cannot be considered compatible with basic assumptions of Directive 2016/343.

93 Opinion of 20 March 2014 of the Commission on Codification of Criminal Law on projects: of the European Parliament and Council Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings (COM (2013) 821); European Parliament and Council directives on temporary legal aid for suspects or accused persons who have been deprived of liberty and on legal aid in the framework of the European arrest warrant proceedings (COM (2013) 824); European Parliament and Council directives on procedural guarantees for children suspected or accused in criminal proceedings (COM (2013) 822); available on: http://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/opinie-komisji-kodyfikacyjnej-prawa-karnego/download,2663,4.html (access: 18 May 2018).

4.2.6. The right to a fair trial in Poland in recent ECHR judgements

According to official ECtHR statistics in nearly half of its judgments against Poland the ECtHR found a violation of Article 6 of ECHR (48%). A vast majority of cases concerned the length of proceedings.[94].

In one of the latest ECtHR judgements in case *Rutkowski and others v. Poland*,[95] ECtHR examined applicants' complaints on the excessive length of proceedings before Polish courts. In their opinion at the national level, the operation of a remedy for excessive length of court proceedings was defective. The amounts of compensations they received were far below the average sum awarded by ECtHR in analogous cases. The Court found such situation to be a breach of Article 6 and Article 13 of ECHR. Since more than 650 similar cases were pending at that time, it decided to apply the pilot judgment procedure and communicate all new applications in that matter to the Polish government, giving it a two-year limit for processing those cases and affording redress to all victims of ECHR violations.

In December 2016, the Parliament adopted an amendment to the 2004 Act on the complaint about a breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay. In theory, it was aimed at implementation of the judgement in case *Rutkowski and Others v. Poland*. However, according to the HFHR, the amendment did not ensure that "Polish law finally satisfies the ECHR standards." The HFHR recommended that the Polish Parliament abolish maximum level of compensation and substantively increase the amount of compensation for each year of prolongation of proceedings.

4.3. Independence of the Polish justice system and the rule of law in Poland

Over the last two years, Polish authorities have adopted several laws affecting the justice system in Poland, especially the Constitutional Tribunal[96], Supreme Court, ordinary courts and the National Council of the Judiciary[97] – a constitutional body established to protect the independence of justice. The executive has been given enormous powers to interfere in the composition, powers and functioning of the courts. The ongoing changes in the justice system have led to a situation in which the judiciary system fell under political control of the ruling majority. Even if not politicised, the judiciary is vulnerable to political pressures, and much depends on individual judges and their choices.

That situation has led the European Commission (hereinafter: "EC") to a conclusion that there is a risk of a serious breach by Poland of the values referred to in Article 2 of the Treaty on the European Union. As a result, the EC issued several recommendations to Polish authorities including to refrain from any actions or statements which "could further undermine the legitimacy of the judiciary." However, they did not bring

94 Violation by articles and by states, available at: www.echr.coe.int/Documents/Stats_violation_1959_2016_ENG.pdf (access: 18 May 2018).

95 ECtHR judgement in case Rutkowski and Others v. Poland of 7 July 2015, application nos. 72287/10, 13927/11, 46187/11.

96 M. Szuleka et al., *The Constitutional Crisis in Poland. 2015 – 2016*, available at: www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf (access: 18 May 2018).

97 Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e (access: 18 May 2018).

any expected results. Therefore, the EC was forced to trigger Article 7 of the Treaty on the European Union against Poland.

As already indicated above, this situation poses a serious threat for the European system of mutual recognition. Triggering Article 7 undermines trust towards decisions issued by Polish courts and it may lead to non-execution of EAWs from Poland. In fact, the situation has already provoked judicial decisions in EAW cases, questioning the independence of the judiciary in Poland and inquiring for a solution from the Court of Justice of the European Union (see Sub-chapter 3.2.).[98]

98 The Minister of Justice and Equality v. Celmer, [2018] IEHC 119.

Conclusions

Firstly, the project conducted by the HFHR has proven that the practice of applying EAWs requires regular analysis from the national and European perspective. These evaluations should include the opinions of judges, prosecutors and defence lawyers. Moreover, it would be important to compare and contrast the judgments and decisions from the different countries. Proposed methodology is the consequence of the position of this instrument in the European system of cooperation in criminal cases and its importance for the effective implementation of the principle of mutual trust. The necessity of such research is also justified by the statistical data which prove that it is an instrument often used by national authorities.

However, it must be underlined that the most important element of the judicial cooperation in criminal matters is a human story. That is why during extradition procedures each case should be assessed comprehensively – not only from the perspective of the committed act, the punishment or measure that should be executed. As a consequence, the main element of debates on the national and international level should be, on the one hand, the impact of using the EAW on individual rights and freedoms and, on the other, the impact of human rights on the possibility to execute the EAW. The conducted research has proven that human rights issues should be taken into account by all bodies involved in the procedure of transferring persons in connection with criminal proceedings – both judicial authorities, prosecution office and defenders in issuing and executing states.

Moreover, the procedure connected with the EAW is the best example of the co-existence of two legal systems and two systems of protection of human rights, the European Union and the Council of Europe. From this perspective, the special roles are played by the prohibitions and orders defined in Article 3 and Article 8 of the ECHR. This conclusion is fully justified by the ruling of the CJEU in the case of *Aranyosi and Căldăraru*.

Finally, it should also be mentioned that the changes observed in the European Union in legal, political and social sphere have an impact on the discussions on the future of the EAW. Experts and practitioners point out that there is still a question whether the doubts about the independence of the Polish justice system will not undermine the principle of mutual trust in the EAW procedure and consequently will not prevent other member states from using it.

If we are to call for further development of detailed rules on the EAW, the following proposals are worth considering:

Practical recommendations for European authorities

- It is necessary to increase the awareness of judges and lawyers about the possibility of asking preliminary questions to the CJEU in matters relating to the EAW because it can effectively eliminate doubts that the parties of these proceedings must face. Moreover, the jurisprudence of the CJEU may lead to a more harmonized and proportionate practice within the EU.

- It would be important to organize regular meetings for defence lawyers from various EU countries. They could be treated as a platform for exchanging their experience regarding the functioning of the EAW and other forms of cooperation in criminal proceedings.

- It is necessary to prepare a database of the judgments of non-execution of EAWs because of a possible violation of fundamental rights.

Practical recommendations for Polish authorities

- The Ministry of Justice, the National School of Judiciary and the National Bar Association should develop a special training programme about the standards of the EAW. In Poland, there is no top-down and formal system of specialisations within the professions of an attorney and a legal counsellor. There is also no separate category of attorneys handling EAW cases. That is why professionals should do their best to be prepared for their role as well as possible. Therefore, training activities are of particular importance. Their program should include not only the provisions of the criminal procedure concerning the EAW. Special attention should also be paid to the possibility of cooperation between an attorney representing a client in Poland and a defence lawyer in the issuing or executing state. For this purpose, it would be essential to familiarize lawyers with the practice of courts of other countries to which Polish EAWs are sent most often.
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- In connection with the growing role of EU law concerning criminal proceedings, it would be advisable to extend the training programme in this area for attorneys, legal counsellors and prosecutors.

National law

- One of the aims of the last reforms of the Polish criminal procedure was to limit the issuance of EAWs in less serious cases. However, the principle of proportionality is still not fully implemented in practice. That is why it is still justified to call for further change of the current practice.

- The manner of deliveries in criminal proceedings has an influence on the application of the EAW. It is worth to consider the introduction of an electronic system of notification for people living abroad.

Annex 1. Polish criminal justice system

A.1. Relevant law

For an international reader, a thorough assessment of the Polish practice regarding EAW may require a certain level of familiarity with the basics principles enshrined in the Polish criminal justice system. For this reason below, we present the most important characteristic of the Polish justice system, procedural safeguards, rules governing pre-trial detention and prison conditions. Some of the information regulating those issues might be found in the following legal acts:

- Constitution of the Republic of Poland[99] (hereinafter: "Constitution");
- Code of Criminal Proceedings[100] (hereinafter: "CCP");
- Criminal Code[101] (hereinafter: "CC");
- Minister of Justice Regulation of 22 December 2016 on the organizational and procedural regulations regarding pre-trial detention[102];
- Minister of Justice Regulation of 22 December 2016 on the organizational and procedural regulations regarding the execution of the penalty of deprivation of liberty.[103]

A.2. Criminal liability

As a rule, under Polish law only a person who has reached the age of 17 and has committed a prohibited act may be held responsible in accordance with the rules laid down in the Criminal Code. There is one exception to this rule. A juvenile who, after reaching 15 years of age, has committed a crime listed in Article 10 § 2 CC may be held responsible pursuant to the rules laid down in CC, if the circumstances of the case and the level of the juvenile's developmental maturity, his features and personal conditions so allow and in particular where the educational or corrective measures previously taken have proven not to be effective. The crimes listed in the quoted article are:

- Article 134 (assault at the President's life),
- Article 148 (1)-(3) (manslaughter and murder),
- Article 156 (1) or (3) (severe bodily harm),
- Article 163 (1) or (3) (causing a dangerous event and its aggravated form),
- Article 166 (seizing control of a vessel or aircraft),
- Article 173 (1) or (3) (catastrophe in communication),
- Article 197 (3) or (4) (aggravated rape),
- Article 223 (2) (assault on a public official),

99 Journal of Laws 1997, no. 78, item 483.

100 Journal of Laws 2017, item 1904.

101 Journal of Laws 2017, item 2204.

102 Journal of Laws 2016, item 2290.

103 Journal of Laws 2016, item 2231.

- Article 252 (1) or (2) (taking someone hostage) or
- Article 280 (battery).

A.3. Structure of the judiciary

The judiciary in Poland is composed of common courts, military courts, administrative courts and the Supreme Court. The Constitutional Court is responsible for controlling the constitutionality of laws.

There are three levels of common courts: district, regional and appellate courts. In certain cases specified in the law, the parties to the proceedings and entities such as the Ombudsman, the Attorney General who is also the Minister of Justice have the right to initiate proceedings before the Supreme Court.

In the first instance, cases are recognized by district (321 courts) and regional courts (45 courts). The division of cases between these two types of courts depends primarily on the gravity of a given offense. For most cases, district courts will be the courts of the first instance. The exceptions include e.g. felonies which belong under the first instance jurisdiction of regional courts.

Regional courts are also competent under art. 607a CCP to issue a European arrest warrant (hereinafter: "EAW"). They also decide on a transfer of a surrendered person based on the European arrest warrant to the issuing country. A person who is subject to an EAW has the right to file an appeal with an appellate court against the decision of the regional court to surrender a person.

It is also worth to note at this point that one of the last amendments to the Act on the organisation of common courts[104] has imposed a duty on the presidents of regional courts to indicate judges who will be responsible for coordinating issues connected with human rights and international cooperation.

A.4. Types of penalties in Polish criminal law

Pursuant to Article 32 CC, there are five types of penalties: fine, restriction of liberty, imprisonment, 25 years of imprisonment and life imprisonment. The court may conditionally suspend the imposition of a fine, restriction of liberty and deprivation of liberty.

According to the data from the Ministry of Justice, deprivation of liberty is the most common punishment used in the Polish justice system. In the years 2008 – 2015 more than 2 000 000 cases out of 3 009 058 ended with the imposition of such a penalty. However, nearly 84% of those sentences (i.e. approx. 1.6 million) were conditionally suspended. As has already been indicated above frequent suspension of prison sentences and subsequent execution of those sentences following specific circumstances plays a part in the Polish EAW practice. What is even more important, the usual length of such a penalty did not exceed 2 years.

A.5. Types of crimes in Polish criminal law

The Criminal Code distinguishes two types of crimes: offences and felonies. An offense is punishable by a fine of more than 30 daily rates or over 5,000 PLN, restriction of liberty or deprivation of liberty exceeding 30 days.

104 Journal of Laws 2018, item 23. Amendments: Journal of Laws 2018, items 3, 5, 106 and 138.

A felony is an act punishable by imprisonment not shorter than 3 years or a more severe punishment.
It is also important to note that most crimes, including all felonies, are prosecuted *ex officio*. However, the Criminal code foresees that certain offences are publically-prosecuted upon a motion of the victim (e.g. stalking – art. 190a), while others are entirely privately-prosecuted (e.g. defamation – art. 212 CC, insult – art. 216 CC, etc.).

The crime rate in Poland has been systematically decreasing for several years. While in 2003 it reached nearly 1.5 million recorded crimes, by 2016 it dropped by a half to 750,000. The most common crimes in Poland are crimes against property and communication safety. In 2015, the number of the former slightly exceeded 83,000 convictions out of a total of 260,000. In the same year, nearly 61,000 people were convicted for committing a crime against communication safety.

In 2016, Polish criminal courts considered cases of 322,000 people (while in 2004, this statistic amounted to 564,000).[105] Only 2.63% of these persons were acquitted. In the same year, the penalty of deprivation of liberty was the most commonly used among the sanctions available to Polish courts.[106] It was imposed in nearly 43% of cases that ended up with a conviction. However, in 65% of such cases the execution of the sentence was conditionally suspended.[107]

A.6. Principle of legality

Polish criminal proceedings are governed, among others, by the principle of legality as opposed to the principle of opportunity. As noted above, this may, to an extent, account for a high number of EAWs issued by Polish courts. Thus, according to Article 10 CCP, with respect to an offence prosecuted *ex officio*, the prosecution has a duty to initiate and conduct pre-trail proceedings, as well as bring and support charges. In addition, the CCP indicates that, except for cases described in domestic law or international law, no one might be discharged from liability for a committed crime. Therefore, unlike in systems espousing the principle of opportunity, prosecutors in Poland have no discretion to abandon prosecution of a given crime. What is more, an unreasonable decision to cancel the prosecution might itself be recognized as a crime. As a result, the prosecutors have a duty to take all available measures to bring the offender to justice, no matter how minor the crimes, and use measures adopted by the international law, e.g. EAWs. Similarly, as in the decision to cancel the proceedings, unreasonable decision not to issue a motion for a EAW may also itself be recognized as a crime.

A.7. Pre-trial detention

Pursuant to Article 41 of the Constitution: *"Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute."* Paragraph 3 of this article provides inter alia that:

105 Ministry of Justice, Statistics tables, available at: https://isws.ms.gov.pl/pl/baza-statystyczna/

106 Ibid.

107 Ibid.

"Within 48 hours of detention, the persons shall be given over to court for consideration of the case. The detained persons shall be set free unless an order of pre-trial detention is issued by a court, along with specification of the charges laid, has been served on them within 24 hours of the time of being given over to the court's disposal."

The Code of criminal procedure describes more specific grounds for application of pre-trial detention and other preventive measures. Pursuant to its provisions, preventive measures can be applied only where the collected evidence indicates a high probability (nearing certainty) that the defendant has committed an offence and there is a need to secure a proper course of proceedings, or a need to prevent the defendant from committing a new, serious offence.

Moreover, CCP specifies other conditions governing the application of preventive measures. They may be ordered only if there is a justified concern: (1) that the defendant will abscond or go into hiding, in particular where their identity cannot be established or when they have no country of permanent residence, or (2) that the defendant will attempt to induce others to give false testimony or explanations or obstruct the proper course of the proceedings by any other unlawful mean.

According to Article 258 § 2 CCP, in case of a defendant who is charged with committing a felony or a misdemeanour punishable with imprisonment with an upper limit of at least eight years or whom the first-instance court sentenced to imprisonment exceeding three years, the need to apply pre-trial detention may be justified by the severity of a penalty that may be imposed on a suspect.

Pursuant to Article 257 CCP, pre-trial detention should be treated as a measure of last resort. Consequently, it cannot be applied where another preventive measure might be sufficient. Moreover, pre-trial detention *must not* be applied if it would cause serious danger to the defendant's life or health, or would have extremely heavy consequences for the defendant or their immediate family.

The number of cases in which pre-trial detention was applied has been decreasing since 2005 (which is the oldest statistical record on PTD published by the Minister of Justice). While in 2005 district courts applied pre-trial detention with respect to 32,574 persons, in 2016 such a measure was employed in the case of 6,081 defendants.[108] However, the number of detainees may increase in 2017. According to the statistics of the Ministry of Justice, in the first half of 2017 nearly 3,500 defendants were detained pending trial.[109]

According to Prosecutor General's data for the period between 2009-2014, the number of prosecutorial motions for pre-trial detention decreased by ca. 30% (from 27,693 to 18,835). A slightly smaller decrease could be observed with respect to pre-trial detention ordered by courts based on those motions. At the same time, the success rate of prosecutorial motions between 2009-2014 slightly increased reaching 91.48% in 2014.[110] Therefore, the progressive decrease in the number of pre-trial detention orders might be recognized as a result of decreasing number of prosecutor's motions for pre-trial detention.

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108 Ministry of Justice, Statistics tables. Preventive measures in years 2005-1st half of 2017, available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,51.html (Accessed: 18 May 2018).

109 Ibid.

110 See Kladoczny P., Smętek J., Wiśniewska K., *Practice of pre-trial detention in Poland. Research report*, Helsinki Foundation for Human Rights, March 2016, available at: www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf (Accessed: 18 May 2018).

The average length of pre-trial detention in 2016 was 13.6 months (in case of regional courts) and 6.3 months in case of district courts.

A.8. Safe conduct (*list* żelazny)

The regional court may issue safe conduct whenever the accused sojourning abroad declares that they are willing to appear in court or before the prosecutor (in preparatory proceedings) on a designated day. The issuance of safe conduct may be conditional on the posting of bail.

The safe conduct grants the accused a right to remain at liberty until the proceedings have been validly concluded, only if they appear at the time designated by the court or prosecution (in pre-trial proceedings), do not leave their place of stay unless being permitted to do so by the court, and do not induce witnesses to give false testimony or explanations or attempt in any other manner to obstruct the proceedings.

Whenever the accused violates the conditions of safe conduct (e.g. inducing witness to give false testimony or leaving their place of stay without a permit), it might be revoked by the court. The orders of the court not to issue a safe conduct or to revoke safe conduct might be subjected to an appeal.

Unfortunately, some case law of Polish courts indicates that it is impossible to simultaneously apply safe conduct and search for the same accused person through an EAW. Thus, the issuance of an EAW might be assumed to constitute an obstacle, albeit not directly indicated in the CCP, to grant safe conduct.[111] However, there is also case law indicating that as long as the EAW is not implemented, it cannot be recognized as a negative condition for issuing safe conduct:

> ***"If the court finds that in a case, the safe conduct would be a sufficient measure against the suspect, actions would have to be taken to repeal the EAW. When considering the issuance of safe conduct, the court cannot focus solely on the performance of the suspect. It is also important to secure the interests of justice and the conducted proceedings."[112]***

For this reason, safe conduct might be recognized mainly as a useful tool to avoid issuing an EAW by Polish courts, not to guarantee that a person wanted under an EAW will remain at liberty until the conclusion of proceedings.

111 Appellate Court in Katowice, Judgement of 30 April 2014, case no. II AKz 253/14.

112 Appellate Court in Katowice, Judgement of 26 October 2016, case no. II AKz 566/16.

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