ISSN 1897-5577
ONLINE ISSN 2545-0271

Ius Novum

Vol. 17
Number 4
2023

OCTOBER–DECEMBER

ENGLISH EDITION

QUARTERLY OF THE FACULTY OF LAW AND ADMINISTRATION
OF LAZARSKI UNIVERSITY

Ius Novum

Vol. 17
Number 4
2023

october–december

ISSN 1897-5577
ONLINE ISSN 2545-0271

Ius Novum

Vol. 17
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October–December

DOI: 10.26399/iusnovum.v17.4.eng.2023

English edition

Quarterly of the Faculty of Law and Administration
of Lazarski University

Warsaw 2023

The texts of articles in Polish and in English are available on:
https://iusnovum.lazarski.pl/ius-novum-online/archiwum/ and https://sciendo.com/pl/journal/IN

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ADDITIONAL INFORMATION

In 2023 the *Ius Novum* quarterly, following the verification procedure and obtaining a positive parametric grade, was placed on the list of journals scored by the Ministry of Science and Higher Education with **200 points** awarded for a publication in the quarterly (the Communication of the Minister of Science and Higher Education of 3 November 2023 about amending and correcting the announcement concerning the list of scientific journals and reviewed materials from international conferences, item 30019, no. 200245).

Further information on this topic are available at: https://www.gov.pl/web/edukacja-i-nauka/nowy-rozszerzony-wykaz-czasopism-naukowych-i-recenzowanych-materialow-z-konferencji-miedzynarodowych

ISSN 1897-5577, online ISSN 2545-0271

LAZARSKI UNIVERSITY PRESS
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THE CONCEPT OF EVIDENCE OBTAINED FROM ELECTRONIC CORRESPONDENCE

MACIEJ ROGALSKI*

DOI: 10.2478/in-2023-0026

Abstract

This article addresses cross-border cooperation between Polish law enforcement authorities and those of other European Union Member States in obtaining electronic evidence in criminal matters. It discusses provisions such as Article 589g § 1, Article 589l § 1, Article 589w § 4, and Article 589ze § 10 of the Code of Criminal Procedure (CCP), focusing on defining electronic evidence. Currently, there are no legal definitions for these terms. The article posits that the existing definitions of electronic evidence are imprecise and lead to interpretational doubts. Therefore, it is crucial to organise the conceptual framework in the CCP by creating new definitions or clarifying existing ones. The analysis incorporates the provisions of Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and the execution of custodial sentences following criminal proceedings.

Keywords: electronic evidence, correspondence, telephone call lists, information transmissions, data

INTRODUCTION

The international cooperation between Polish law enforcement bodies and those of other European Union Member States in obtaining electronic evidence is governed by Chapters 62a–d of the Act of 6 June 1997: Code of Criminal Procedure.[1] Provisions in Chapters 62a and 62b CCP cover requests to an EU Member State to execute a decision to seize evidence and requests by an EU Member State for execution

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1 Consolidated text, Journal of Laws of 2022, item 1375, as amended, hereinafter 'CCP'.

of a ruling to seize evidence. Chapters 62c and 62d CCP deal with requests to an EU Member State to conduct investigative measures under the European Investigation Order (EIO)[2] and requests by an EU Member State to conduct such measures.

Article 589g § 1 CCP states that if items, correspondence, postal materials, telephone call lists, or other information or data transmissions stored in computer systems or on data carriers, including electronic correspondence, may constitute evidence in criminal matters and are within the territory of an EU Member State, a competent court or prosecutor can directly request a judicial body of that State to execute a decision to seize or preserve them. Article 589l §§ 1–2 CCP sets out a similar regulation for the execution by a competent regional court or prosecutor of a ruling issued by a judicial body of another EU Member State to seize such items.

Article 589w § 4 CCP addresses the provision of electronic evidence at the request of a Polish court or prosecutor under the EIO.[3] This regulation pertains to issuing an EIO to control and record telephone conversations and other conversations or information transmissions, including electronic correspondence, using technical means. Article 589ze § 10 CCP provides analogous provisions for applications from another EU Member State to a Polish court or prosecutor under the EIO.

Articles 589g § 1, 589l § 1, 589w § 4, and 589ze § 10 CCP use terms related to electronic evidence but they lack legal definitions. This article aims to define those terms. It argues that current definitions of electronic evidence are imprecise and raise interpretational doubts; thus, it is necessary to organise the conceptual framework used in the provisions regulating international cooperation in criminal matters between EU Member States. This requires developing definitions that clarify the terms used in the context of evidence obtained from electronic communication. The analysis is taking into account provisions of the newly adopted Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and the execution of custodial sentences following criminal proceedings (hereinafter 'Regulation 2023/1543').[4]

ELECTRONIC EVIDENCE

At the outset, it is important to note that neither the Code of Criminal Procedure nor the Criminal Code[5] contains a legal definition of 'electronic evidence'. In legal doctrine, 'electronic evidence' refers to various types of evidence, particularly data

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[2] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1), hereinafter 'EIO'.

[3] In practice the EIO is used more and more often, see Klimczak, J., Wzorek, D., Zielińska, E., *Europejski nakaz dochodzeniowy w praktyce sądowej i prokuratorskiej – ujawnione problemy i perspektywy rozwoju*, Warszawa, 2022, pp. 100–104.

[4] OJ L 191, 28.7.2023, p. 118.

[5] Act of 6 June 1997: Criminal Code, consolidated text, Journal of Laws of 2022, item 1138, as amended, hereinafter 'CC'.

collected in computer systems or obtained during correspondence interception or through recording information on data carriers. It is also noted that electronic evidence includes information and data in digital form, as well as information stored or transmitted in binary form.[6]

According to the Budapest Convention, electronic evidence refers to evidence of a criminal offence that can be collected electronically.[7] Article 3(8) of Regulation 2023/1543 defines 'electronic evidence' as 'subscriber data, traffic data or content data stored by or on behalf of a service provider, in an electronic form, at the time of the receipt of a European Production Order Certificate (EPOC) or a European Preservation Order Certificate (EPOC-PR)'. This definition includes several terms also defined in Regulation 2023/1543: 'subscriber data' (Article 3(9)), 'traffic data' (Article 3(11)), 'content data' (Article 3(12)), and 'service provider' (Article 3(3)).

The CCP in its provisions on international cooperation between EU Member States in criminal matters, refers to electronic evidence as:

– correspondence, postal items, telephone call lists, or other information or data transmissions stored in computer systems or on data carriers, including electronic correspondence (Article 589g § 1 CCP; Article 589l § 1 CCP);
– controlling and recording the content of telephone conversations and recording other conversations or information transmissions using technical means, including email correspondence (Article 589w § 4 CCP; Article 589l § 1 CCP).

Given the subject and purpose of this article, it is necessary to attempt to define the terms used in these provisions to refer to electronic evidence. Regulation 2023/1543 is particularly helpful in determining the general concept of 'electronic evidence', as it contains such a definition. Adopting the definition of electronic evidence from EU Regulation 2023/1543 highlights its differences and specificity compared to other evidence, and underscores its practical importance. Recitals 6, 8, 9, 27, 31, 40, and 41 of the preamble to Regulation 2023/1543 underline the significance of electronic evidence and international cooperation in obtaining it. Particularly, recital 31 clarifies the scope of data covered by Regulation 2023/1543 and thus forms the basis of the definition of 'electronic evidence' within this Regulation. It categorises data into subscriber data, traffic data, and content data. Next, it explains that: 'Such categorisation is in line with the law of many Member States and Union law, such as Directive 2002/58/EC and the case law of the Court of Justice, as well as international law, in particular the Budapest Convention.'

As Regulation 2023/1543 is a Union Regulation, all Member States are obliged to apply its provisions, including the definition of 'electronic evidence'. Given the

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[6] Lach, A., *Dowody elektroniczne w procesie karnym*, Toruń, 2004, pp. 29–67; Adamski, A., *Prawo karne komputerowe*, Warszawa, 2000, p. 192 et seq.; Oręziak, B., 'Dowody elektroniczne a sprawiedliwość procesu karnego', *Prawo w Działaniu*, 2020, No. 41, p. 191; Cassey, E., *Digital Evidence and Computer Crime: Forensic Science, Computers and the Internet*, Baltimore, 2000, p. 93 et seq.; Lambert, P., 'The Search for Elusive Electrons: Getting a Sense of Electronic Evidence', *Judicial Studies Institute Journal*, 2001, No. 1, pp. 24–27; Taylor, M., Haggerty, J., Gresty, D., Hegarty, R., 'Digital evidence in cloud computing systems', *Computer Law & Security Review*, 2010, No. 3, pp. 306–307.

[7] Council of Europe Convention on Cybercrime (ETS No 185), done at Budapest on 23 November 2001, Journal of Laws of 2015, item 728.

absence of a general definition of electronic evidence in Chapters 62a–62d CCP and the need to align them with Regulation 2023/1543, introducing this definition into the national provisions would be justifiable.

CORRESPONDENCE, INCLUDING CORRESPONDENCE SENT BY EMAIL

The provisions of Article 589g § 1 CCP and Article 589l § 1 CCP use the term 'przesyłka' ['post'], which may lead to interpretational doubts, particularly concerning the scope of electronic evidence. The Act: Postal Law[8] does not define '*przesyłka*' but does define '*przesyłka pocztowa*' [literally 'postal post', i.e. an item sent and delivered by post]. Under Article 3(21) PL, *przesyłka pocztowa* is a postal item with an addressee's designation and address, submitted to or received by a postal operator for transport and delivery. Given the traditional physical delivery of post, a postal item in this sense cannot be considered electronic evidence. Despite the imprecise use of the adjective '*pocztowy*', the noun '*przesyłka*' seems to be used in this context in Article 218 § 1 CCP, as the provision mandates post offices and entities providing postal services to distribute postal items. Thus, it should be assumed that the term '*przesyłka*' in Article 589g § 1 CCP and Article 589l § 1 CCP does not pertain to evidence obtained from electronic communication.

The term 'correspondence' raises doubts and requires clarification. It is generally understood to mean the method of communication between people (both natural and legal persons) in any form, particularly in writing, orally, via pictures, or any other means, e.g., through written post, fax, telegraph, telephone (including SMS and MMS), electronic mail (email), etc.[9] In legal doctrine, two concepts are distinguished based on the form of communication: correspondence in the broad sense (*sensu largo*), covering all forms of communication between people, not just in writing but also through other means; and correspondence in the narrow sense (*sensu stricto*), which includes only written communication.[10] For the purposes of this article, the broader meaning of 'correspondence' should be adopted, encompassing all forms of communication, not limited to writing (letters, postal items) but also including other means such as telephone, radio, fax, telegraph, internet, and all modern telecommunication developments.[11]

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[8] Act of 23 November 2012: Postal Law, consolidated text, Journal of Laws of 2022, item 896, as amended, hereinafter 'PL'.

[9] Ferenc-Szydełko, E., *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Legalis 2014, part I, subsection 1 to Article 82.

[10] Cf. Taras, T., 'O dopuszczalności i legalności podsłuchu telefonicznego', *Annales UMCS*, section G, Lublin, 1960, p. 51; Dudka, K., 'Zatrzymanie korespondencji w projekcie kodeksu postępowania karnego z 1995 r. na tle przepisów obowiązujących', *Prokuratura i Prawo*, 1996, No. 4, p. 11; Dudka, K., *Kontrola korespondencji i podsłuch w polskim procesie karnym*, Lublin, 1998, pp. 11–12.

[11] Kunicka-Michalska, B., 'Przestępstwa przeciwko ochronie informacji', in: Wąsek, A. (ed.), *Kodeks karny*, Vol. II, Warszawa, 2010, p. 928; Rogalski, M., *Kontrola korespondencji*, Warszawa, 2016, pp. 19–20. Also see Hofmański, P., 'Komentarz do wybranych przepisów Europejskiej

Defining the term 'correspondence' more precisely with the use of the phrase 'including correspondence sent by electronic mail' does not seem to require additional explanation, as the term 'electronic mail' is commonly used. The specification phrase 'including correspondence sent by electronic mail' used in the provisions is also in conformity with the concept of correspondence *sensu largo*. Even though this kind of specification does not fully clarify whether it pertains to the content of correspondence or merely the fact of its occurrence, such as the action of sending an email. Regulation 2023/1543 categorises data into two primary types: traffic data and content data. To avoid interpretational ambiguities, it is suggested to replace the term 'correspondence' with these two concepts, depending on whether the focus is on the occurrence of correspondence or its content.

LISTS OF TELEPHONE CALLS OR OTHER TRANSMISSIONS OF INFORMATION

The term 'telephone call list' poses the fewest interpretational challenges. It should be understood that 'lists of calls', as used in Article 589g § 1 CCP and Article 589l § 1 CCP, refer to data outlined in Articles 180c and 180d of the Telecommunications Law.[12] Based on Article 180c(2) of this law, the Minister of Infrastructure issued the Regulation of 28 December 2009 on detailed lists of data and types of operators of public telecommunications networks or providers of publicly available telecommunications services obliged to seize and store them was issued.[13] The Regulation in particular details data necessary for: (1) identifying the network end, the telecommunications end device, and the end user who initiates a call; (2) identifying the network end, the telecommunications end device, and the end user receiving the call; (3) establishing the date, time, and duration of a call; (4) categorising call types; (5) determining the location of the telecommunications end device (§ 1 of the Regulation of 28 December 2009).

According to the Regulation of 28 December 2009, for services within the land-line public telecommunications network, the first and second groups of data seized by an entrepreneur include: the number of the network end for both the initiating and receiving subscribers, their first names, surnames or names, and addresses. For mobile network services, data include the MSISDN of the calling and called subscribers,[14] first names, surnames or names, and addresses if available, the user's

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Konwencji o ochronie praw człowieka i podstawowych wolności', in: Zielińska, E. (ed.), *Standardy Prawne Rady Europy. Teksty i komentarze. Tom III, Prawo karne*, Warszawa, 1995, p. 99.

[12] Act of 16 July 2004: Telecommunications Law, consolidated text, Journal of Laws of 2022, item 1648, as amended, hereinafter 'TL'.

[13] Journal of Laws of 2009, No. 226, item 1828, hereinafter 'Regulation of 28 December 2009'.

[14] The abbreviation MSISDN stands for Mobile Station International Subscriber Directory Number. It means a number of a mobile network subscriber, commonly known as a telephone number.

IMSI,[15] the first 14 digits of the IMEI number[16] or the ESN.[17] For pre-paid service users, additional data include the date and time of the first telecommunications log-in of the end device to the mobile network, local time, and the geographical coordinates of the mobile network station (BTS)[18] used for logging in. For internet, email, and internet telephony services, data comprise the user's identification number, dial-up access number, IP address,[19] first name, surname or name, and address of the end user assigned the IP address during the call, as well as the identification number or the Internet telephone service number assigned to them, the identification number of the network end used for internet access, especially the identification number of the digital subscriber line DSL,[20] the network port number used, or the MAC address of the end device. In the case of email and internet telephone services, subscriber data are limited to the internet telephone number, first name, surname or name, and address of the registered end user of the email or internet telephone service, and their identification number (§ 3(1)–(2), § 4(1)–(2), § 6(1), § 7(1) of the Regulation of 28 December 2009).

The third group of data includes the date and time of a call and its duration. For both landline and mobile networks, it is necessary to establish the date and time of a failed attempt to connect or of the connection establishment and termination, according to local time, as well as the call duration with one-second accuracy. For Internet access services, the date and time of every connection and disconnection to the Internet, including the assigned dynamic and static IP addresses used during the connection and the user's identification number, are recorded (§ 3(3), § 4(3), § 6(2) of the Regulation of 28 December 2009).

The fourth type of data pertains to the type of connection. For services provided via both landline and mobile networks, as well as electronic mail and internet telephone services, the type of service used is established, e.g., voice call (§ 3(4), § 4(4), § 6(2), § 7(2) of the Regulation of 28 December 2009).

The last group of data concerns the positioning of the end device. In landline networks, the address of the location of the telecommunication end device is established. In mobile networks, for devices within the territory of Poland, the identification number of the BTS antenna during the connection or the start of reception, geographical coordinates of the BTS in the area where

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15 The abbreviation IMSI stands for International Mobile Subscriber Identity and means a unique number of every SIM card in the cellular telecommunication network and identifying it. In turn, the SIM card (Subscriber Identity Module) means a module identifying a subscriber, in the form of a plastic chip card with embedded memory and a microprocessor.

16 IMEI (International Mobile Equipment Identity) means an individual numeric identifier of a mobile phone, which may be displayed on screen on every phone by entering the code *#06#.

17 The abbreviation ESN means Electronic Serial Number, which is a unique 32-bit identification number assigned to mobile phones by their producers. The ESN is embedded in the telephone microprocessor.

18 The abbreviation BTS (Base Transceiver Station) means a transceiver station in the wireless communication systems.

19 IP (Internet Protocol) means the basic protocol used on the Internet.

20 DSL (Digital Subscriber Line) means a digital subscriber line/loop, a digital technology for wide-band access to the Internet.

the telecommunications end device was located, and the azimuth, beam and working range of the BTS antenna are recorded. For devices outside the territory of Poland, the MCC identification (country number) and the mobile network code (MNC) of the initiating and receiving call are established.

Apart from lists of telecommunications connections, regulations also provide for lists of other information transmissions. These refer to data transmissions other than telecommunications connections and concern the transmission of information, e.g., lists of sent short messages or the transmission of a particular amount of data. More information on this can be found in the part of the article devoted to 'Content of other conversations or transmissions of information'.

The content of 'a list of telephone calls' and 'other transmissions of information' aligns with the concept of 'traffic data' as defined in Article 3(11) of Regulation 2023/1543. This means

> 'data related to the provision of a service offered by a service provider which serve to provide context or additional information about such service and are generated or processed by an information system of the service provider, such as the source and destination of a message or another type of interaction, the location of the device, date, time, duration, size, route, format, the protocol used, the type of compression, and other communications metadata and data, other than subscriber data, relating to the commencement and termination of a user access session to a service, such as the date and time of use, the log-in and log-off from the service.'

To avoid terminological discrepancies and practical difficulties in applying different terms, it will be necessary to standardise concepts. In this case it will be necessary to replace the terms 'list of telephone calls' and 'other transmissions of information' with 'traffic data'.

It should also be noted that Articles 180c to 180d of the Telecommunications Law result from implementing Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.[21] The provisions of this Directive were implemented to Polish law through an amendment to the Telecommunications Law of 24 April 2009.[22] However, in the *Digital Rights Ireland* case, the Court of Justice of the EU (hereinafter CJEU) declared this Directive invalid.[23] The judgement of the CJEU binds all courts and bodies of EU Member States.[24] The Polish Constitutional Tribunal, in its judgement of 30 July

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[21] OJ L 105, 13.4.2006, p. 54, hereinafter 'Directive 2006/24/EC'.

[22] Act amending Act: Telecommunications Law and some other acts, Journal of Laws of 2009, No. 85, item 716.

[23] *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others* and *Kärntner Landesregierung and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[24] Cf. Szpunar, M., in: Kornobis-Romanowska, D., Łacny, J., Wróbel, A. (eds), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, Vol. III, Warszawa, 2012, commentary on Article 267 TFEU, subsection 267.9.2.

2014, also stated that the CJEU's judgement binds not only EU institutions and bodies but also all authorities of EU Member States, including courts.[25]

Although Directive 2006/24 was declared invalid, there were legal grounds for the retention of data laid down in Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).[26] However the CJEU issued successive judgements, which concerned this Directive as grounds for creating national provisions in the field of communications data retention. The CJEU stated in its judgement of 21 December 2016 in the *Tele2 Sverige AB v Post-och telestyrelsen* case that Article 15 of the Directive 2002/58/EC puts obstacles in the way of national regulations, 'which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.'[27] The CJEU expressed a similar view in its judgement of 5 April 2022 in the *G.D. v The Commissioner of the Garda Síochána and Others* case.[28]

Despite the aforementioned judgements, Articles 180c to 180d TL have remained largely unchanged. Doubts have been raised about the appropriateness of the regulation concerning telecommunications data retention.[29] The current provisions of Articles 180c and 180d TL are general and do not differentiate in terms of the scope and type of collected data. They permit storing all traffic and location data of all subscribers and registered users of electronic communication means and do not restrict data access solely to serious crime fighting purposes. Consequently, these provisions may be in conflict with Articles 7, 8, and 52(1) of the Charter of Fundamental Rights of the European Union.[30] In legal doctrine, it is noted that the legislator's inaction in amending data retention regulations in Poland may have legal repercussions, affecting not only ongoing criminal proceedings but also concluded ones. This concern pertains to domestic criminal cases adjudicated in recent years where data retained under national provisions served as the basis for conviction.[31]

The implementation of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code[32] into Polish law necessitated drafting of a new legal act:

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[25] See the judgement of the Constitutional Tribunal of 30 July 2014, K 23/11, *Orzecznictwo Trybunału Konstytucyjnego*, A 2014, No. 7, item 80, subsection 10.4.4. of the justification.

[26] OJ L 201, 31.7.2002, p. 37, hereinafter 'Directive 2002/58/EC'.

[27] Case C-203/15, ECLI:EU:C:2016:970.

[28] Case C-140/20, ECLI:EU:C:2022:258.

[29] See Brzeziński, P., 'Glosa do wyroku Trybunału Sprawiedliwości z dnia 21 grudnia 2016 roku w sprawach połączonych C-203/15 I C-698/15', in: Opaliński, B. and Rogalski, M. (eds), *Kontrola korespondencji. Zagadnienia wybrane*, Warszawa, 2018, pp. 76–84; Rogalski, M., 'Are the Regulations with Respect to the Retention and Provision of Communications Data Appropriate in Poland? A Proposal for Changes', *Ius Novum*, 2015, No. 2, pp. 229–231.

[30] Consolidated text, OJ C 202, 7.6.2016, hereinafter 'CFR'.

[31] For more, see Rojszczyk, M., 'Wadliwe dowody z retencji danych telekomunikacyjnych a polska procedura karna', *Państwo i Prawo*, 2023, No. 2, pp. 46–55.

[32] OJ L 321, 17.12.2018, p. 36.

the Electronic Communications Law ('ECL').[33] Although initially scheduled to come into force in the first half of 2024, the bill was subsequently withdrawn from the Sejm's proceedings. The bill provisions concerned not only telecommunications entrepreneurs and the provision of telecommunications services but also electronic communication companies and the provision of electronic communication and interpersonal communication services. However, the type, scope, and method of collecting telecommunications data remained unchanged. The new provision of Article 49(1) ECL, concerning telecommunications data, essentially mirrored Article 180c(1) TL. Hence, the regulation of telecommunications data subject to retention and available to authorised entities remains a current issue. The provisions of Articles 180c and 180d of the existing Telecommunications Law are, in light of Union judgments, in conflict with the Charter of Fundamental Rights of the European Union. The ECL, in its current form, fails to address this issue, as the content of the new regulations (Article 49(1) ECL) merely replicates the old, currently binding ones (Articles 180c and 180d TL). The only solution seems to lie in revising Article 49 to align with the guidelines laid down in the CJEU judgements. This would entail a more nuanced approach to data retention conditions not generic in nature. Instead of uniformly applying the same criteria to all data types, the approach and conditions for retention should vary according to the specific type of data subject to retention.

DATA STORED IN COMPUTER SYSTEMS OR ON DATA CARRIERS

The term 'data' in Polish criminal law has various meanings. Article 218 § 1 CCP refers to 'the data mentioned in Articles 180c and 180d' TL.[34] Meanwhile, Article 20c (1)(1) of the Act of 6 April 1990 on the Police[35] refers to these as 'telecommunications data'. Articles 218a § 1 and 236a of the CCP use the term 'computer data', as does Article 268a § 1 CC.[36] According to Article 1(b) of the Council of Europe Convention on Cybercrime (Budapest Convention, 23 November 2001), 'computer data' means 'any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function'.[37]

Article 236a of the CCP mentions 'data stored in a computer system or on a carrier', referring to computer data in the possession of the system holder or user.

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[33] The Sejm print No. 2861 of 9 December 2022, hereinafter 'ECL', https://orka.sejm.gov.pl/Druki9ka.nsf/0/24242EFE9A7B0D08C12589170036022D/%24File/2861.pdf, accessed on 4 May 2023.

[34] The present content of Article 218 CCP is the consequence of the amendment to CCP introduced several years ago resulting from the implementation of Directive 2006/24/EC (Act of 24 April 2009 amending Act: Telecommunications Law and some other acts, Journal of Laws of 2009, No. 85, item 716).

[35] Consolidated text, Journal of Laws of 2023, item 171, as amended, hereinafter 'AP'.

[36] Act of 6 June 1997: Criminal Code, consolidated text, Journal of Laws of 2022, item 1138, as amended, hereinafter 'CC'.

[37] Journal of Laws of 2015, item 728, hereinafter 'the Budapest Convention'.

This term employs the concept of a computer system, which, as per Article 1(a) of the Budapest Convention, is 'any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data'.

It is important to note that the Budapest Convention identifies three categories of data: the aforementioned 'computer data'; 'traffic data', defined as any computer data relating to a communication by means of a computer system, generated by a system that forms part of the communication chain, indicating the communication origin, destination, route, time, date, size, duration, or type of underlying service (Article 1(d) of the Budapest Convention); and 'intercepted content data', subject to transmission using technical means (Article 21 of the Budapest Convention).

Besides the aforementioned concepts, the term 'Internet data' is also used in Polish law. The Act of 18 July 2002 on the provision of electronic services,[38] allows for the collection of data necessary to provide electronic services (Article 18(1)–(5) of this Act). According to Article 18(5) of the Act on the Provision of Electronic Services (APES), a service provider may process the following exploitation data characterising the use of electronic services by a user: identifiers of the service user (Article 18(1) APES); identifiers of the telecommunications network end or the information and communication technology system used by the service user; information about the commencement, termination, and scope of each use of the service provided electronically. Article 20c(1)(3) of the Act calls these data 'Internet data'. Additionally, the term 'postal data' refers to data mentioned in Article 82(1)(1) PL, as per Article 20c(1)(2) of the AP. However, these data are not electronic in nature.

Articles 589g § 1 and 589l § 1 of the Code of Criminal Procedure (CCP) refer to data stored in a computer system or on a carrier. The term 'data in a computer system', as defined in the Budapest Convention, is used. However, there is no mention of storing data in devices, thus the provisions do not refer to data stored in information system devices. Data can be stored on carriers such as external discs or pen drives. There are various methods for data retention.[39]

The concept of 'data stored in a computer system or on a carrier' aligns with the definition of 'content data' in Article 3(12) of Regulation 2023/1543 and the term 'information system' defined in Article 3(13). 'Content data' refers to 'any data in digital format, such as text, voice, videos, images, and sound, other than subscriber data or traffic data'. 'Information system' refers to an information system as defined in Article 2(a), of Directive 2013/40/EU of the European Parliament and of the Council.[40] Similarly, in the case of these terms, due to the fact that Regulation 2023/1543 is binding, in order to avoid terminological discrepancies, it will be necessary to replace the term 'data stored in a computer system or on a carrier' with the term 'content data'.

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[38] Consolidated text, Journal of Laws of 2020, item 344, as amended, hereinafter 'APES'.

[39] See Szumiło-Kulczycka, D., in: Skorupka, J. (ed.), *System prawa karnego procesowego. Dowody*, Vol. VIII, part 3, Warszawa, 2019, pp. 3255, 3257.

[40] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218, 14.8.2013, p. 8.

CONTENT OF OTHER CONVERSATIONS OR TRANSMISSIONS OF INFORMATION

Articles 589w § 4 and 589l § 1 of the CCP provide for 'controlling and recording the content of telephone conversations and recording the content of other conversations or transmissions of information using technical means'. The term 'telephone conversations' is self-explanatory. However, the phrase 'the content of other conversations or transmissions of information' raises interpretational doubts.[41]

It should be assumed that 'the content of other telephone conversations and transmissions of information', as defined in Article 2(42) of the Telecommunications Law (TL), covers all transmissions of information in telecommunications, regardless of their type, using cables, radio, optical waves, or other means employing electromagnetic energy, e.g., on the Internet.[42] The concept of information transmission encompasses a transfer that involves information shared by users of telecommunications services. As per Article 2(27a) TL, telecommunications transmission means the content of telephone conversations and other information transmitted using telecommunications networks, e.g., emails or text messages.

This definition of telecommunications transmission was added in the amendment to the Telecommunications Law of 24 April 2009, pertaining to the powers of courts, prosecutors, or authorised entities to access and record the content of information transmitted in telecommunications networks. It is correctly emphasised that the phrase referring to information transmitted using telecommunications networks is a fundamental element defining telecommunications transmission. A telephone conversation is merely an example of possible transmission content. As a result of this definition, telecommunications transmission encompasses all information transmitted in telecommunications networks.[43]

It should be assumed that other conversations or information transmissions also include conversations or transmissions of information outside telecommunications networks[44] within the meaning of Article 2(35) TL. Other conversations refer to those not conducted using telecommunications devices, as defined in Article 2(46) TL. Therefore, these include conversations occurring indoors or outdoors, conducted

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41 See Rogalski, M., *Kontrola korespondencji*, Warszawa, 2016, pp. 101–114; the Supreme Court resolution of 21 March 2000, I KZP 60/99, *OSNKW*, 2000, No. 3–4, item 26; Kurzępa, B., 'Glosa do uchwały SN z 21 marca 2000 r., I KZP 60/99', *Prokuratura i Prawo*, 2000, No. 11, p. 95; Hoc, S., 'Glosa do uchwały SN z 21 marca 2000 r., I KZP 60/99', *Orzecznictwo Sądów Polskich*, 2000, No. 11, p. 563; Wawron, M., 'Glosa do uchwały SN z 21 marca 2000 r., I KZP 60/99', *Państwo i Prawo*, 2000, No. 12, p. 110; Dudka, K., 'Glosa do uchwały SN z 21 marca 2000 r., I KZP 60/99', *Państwo i Prawo*, 2000, No. 12, p. 106; Rogalski, M., 'Uwagi dotyczące techniki kontroli rozmów w sieci telekomunikacyjnej', *Państwo i Prawo*, 2004, No. 6, p. 77 et seq.

42 See Nita, B., 'Przedmiotowy zakres podsłuchu procesowego', *Prokuratura i Prawo*, 2005, No. 9, pp. 60–69; Rogalski, M., *Kontrola korespondencji*…, op. cit., pp. 101–102; Hofmański, P., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 2011, pp. 1319–1320 and the literature referred to therein.

43 Piątek, S., *Prawo telekomunikacyjne. Komentarz*, Warszawa, 2019, p. 81.

44 Sakowicz, A. (ed.), *Kodeks postępowania karnego. Komentarz*, Legalis, 2023, thesis 1 to Article 241.

by one person or multiple people.[45] Meanwhile, the transmission of information other than telecommunications encompasses other forms of information transmission than those defined in Article 2(27a) TL, such as electromagnetic waves emitted by monitors and other devices.[46]

Regarding the subjective scope, 'the content of other conversations and transmissions of information' aligns with 'content data' as defined in Article 3(12) of Regulation 2023/1543. The phrase 'content of other conversations or transmissions of information' pertains to voice, image, and sound data, all of which fall under the term 'content data'. This scope also corresponds to the term 'data stored in computer systems or on carriers' used in the provisions of the CCP). Consequently, the CCP contains different terms for the same category of data, namely content data. This has undoubtedly complicated the practical application of CCP provisions that use varied terms for identical data categories and has led to numerous interpretational doubts in legal doctrine (see footnote 41). Replacing the aforementioned terms with a single term, 'content data', should resolve these issues.

CONCLUSIONS

The terms used in Article 589g § 1 CCP, Article 589l § 1 CCP, Article 589w § 4 CCP, and Article 589l § 1 CCP, such as telephone call lists, other transmissions of information, data stored in computer systems or on carriers, and content of other conversations or transmissions of information, lack legal definitions. This absence hinders their practical application. These terms are employed not only in the provisions of the Code of Criminal Procedure concerning international cooperation in criminal matters but also in other CCP provisions. Moreover, the CCP references terms and provisions from other acts, particularly the Telecommunications Law and its implementation acts.

There is a need for terminological organisation within these provisions. First, ensuring terminological coherence when applying concepts related to electronic evidence in the CCP and other acts, such as the Telecommunications Law, is essential. Second, the used terms should either be legally defined or specified in a way that minimises interpretational doubts. Regulation 2023/1543 will be instrumental in this process, as it provides a general definition of 'electronic evidence'. To organise the terms used in Chapters 62a–62d CCP, it is advisable to replace 'list of telephone calls' and 'other transmissions of information' with 'traffic data' (Article 3(11) Regulation 2023/1543). Similarly, 'data stored in a computer system or on a carrier' and 'content of other conversations or transmissions of information' should be replaced with 'content data' (Article 3(12) Regulation 2023/1543). Such terminological simplification concerning evidence obtained from electronic communication will ensure that the provisions of Chapters 62a–62d

[45] Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Legalis, 2021, thesis 3 to Article 241.

[46] Lach, A., 'Gromadzenie dowodów elektronicznych po nowelizacji kodeksu postępowania karnego', *Prokuratura i Prawo*, 2003, No. 10, p. 18.

CCP concerning international cooperation align with the content of Regulation 2023/1543, thereby facilitating the practical application of these CCP chapters and the said Regulation.

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Cite as:

Rogalski M. (2023) *'The concept of evidence obtained from electronic correspondence'*, Ius Novum (Vol. 17) 4, 1–14. DOI 10.2478/in-2023-0026

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Ius Novum

2023, vol. 17, no. 4, pp. 15–39

COOPERATION WITH THIRD COUNTRIES IN COMBATING MONEY LAUNDERING IN THE FACE OF MODERN CHALLENGES

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DOI: 10.2478/in-2023-0027

Abstract

The study is devoted to the issue of international cooperation in combating money laundering as a transnational crime. It is an original scientific article, the purpose of which is to highlight the difficulties that, in the current global situation, are posed by cooperation with third countries, i.e., those that are not members of the European Union. The analysis covers several thematic areas that are of key importance in this regard (using the formal dogmatic method). The specificity of the regulations in force in other countries was also indicated, particularly in the context of modern technologies and threats of cyber-laundering (incorporating elements of the legal and comparative method). As a result, conclusions were drawn regarding the challenges that the fight against laundering raises on the international arena, extending beyond the structures of the EU. The conclusion suggests directions for actions that would be desirable to undertake in order to ensure effective international cooperation with third countries in the field of combating money laundering.

Keywords: money laundering, cryptocurrencies, high-risk countries, financial haven, migrant smuggling, war in Ukraine

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INTRODUCTION

Money laundering is one of the most serious economic crimes, both in terms of economic effects and its global scale.[1] Combating this practice includes not only penalising the crime referred to in Article 299 of the Polish Criminal Code,[2] but also anti-money laundering activities.[3] In the Polish legal system, the basic legal act regulating this matter is the Act of 1 March 2018 on Counteracting Money Laundering and Terrorist Financing (AML/CTF Act (*Anti-Money Laundering/Counter Terrorist Financing*)).[4] Due to the cross-border nature of money laundering, which is often associated with its complex nature,[5] the fight against money laundering at a transnational level is of particular importance. In this regard, the activities undertaken for years by EU institutions, which monitor the areas and scale of threats related to this phenomenon, are invaluable. In addition to preventive activities, the core of which, in the case of European Union Member States,[6] is undoubtedly determined by EU AML regulations, specific activities related to strategic and operational efforts are crucial. Currently, threats in this regard primarily arise from the political situation in the world, including ongoing armed conflicts, economic problems (significantly influenced by the Covid-19 pandemic), and the widespread digitisation of social and economic life. These issues were the incentive to consider the implications of modern challenges for international cooperation in the fight against money laundering. This issue is of particular importance in relation to the relationship with so-called third countries.[7]

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[1] It is estimated that the world economy loses about 2 to 5% of the world's GDP annually due to money laundering, i.e. about EUR 1.87 trillion – cf. European Union Agency for Criminal Justice Cooperation (Eurojust), *Money laundering cases registered at Agency doubled in the last 6 years according to Eurojust's new report* of 20.10.2022, at: https://www.eurojust.europa.eu/news/money-laundering-cases-registered-agency-doubled-last-6-years-according-eurojusts-new-report [accessed on 7 March 2023].

[2] Criminal Code of 6 June 1997 (consolidated text Journal of Laws of 2022, item 1138, as amended).

[3] It should be noted that national and international regulations on anti-money laundering also cover anti-terrorist financing (AML/CFT). In this study, issues related to combating the financing of terrorism will be omitted.

[4] AML/CFT Act of 1 March 2018 (consolidated text Journal of Laws of 2022, item 593, as amended).

[5] It is most often assumed that money laundering in the 'model' approach proposed by the Financial Action Task Force (FATF) proceeds in three stages, i.e.: placement, layering and legitimisation (integration) – cf. Golonka, A., *Prawnokarne zagadnienia przeciwdziałania wprowadzania do obrotu wartości majątkowych pochodzących z nielegalnych lub nieujawnionych źródeł*, Rzeszów, 2008, pp. 28–44: https://www.iaml.com.pl/wiedza/etapy-prania-pieniedzy/ [accessed on 15 February 2023]. Sometimes, an additional phase preceding the above-mentioned is also indicated – cf. e.g.: Guberow, P., 'Techniki prania brudnych pieniędzy', in: Grzywacz, J. (ed.), *Pranie brudnych pieniędzy*, Warszawa, 2005, p. 24.

[6] On the draft EU amendment and the 'AML package' – cf. https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en [accessed on 19 February 2023]. This issue is so extensive that its exhaustive discussion in the present article is not possible and it is analysed in a separate study *Unijny projekt 'pakietu AML' – reforma czy rewolucja w zakresie przeciwdziałania praniu pieniędzy.*

[7] Accordingly Article 2(18) of the draft of /Regulation AML/CFT: 'third country means any jurisdiction, independent state or autonomous territory that is not part of the European Union but that has its own AML/CFT legislation or enforcement regime.'

This term includes both countries which, for various reasons, are considered conducive to the discussed practice (the so-called high-risk countries[8]), as well as others that remain outside the EU structures. In this case, the context of the current political, economic, and social situation in the world is also significant. It seems equally important to take into account the fact that in the era of widespread digitisation, the perpetrators of crimes often limit their activities to cyberspace only.[9] A separate issue is the need to ensure security in cyberspace. Combating money laundering in cyberspace has become one of the priority objectives of the European Union and organisations established to combat money laundering.[10] Significant difficulties arise at both the level of applying the law and its implementation. This study will be devoted to discussing these issues.

LEGAL BASES FOR INTERNATIONAL COOPERATION WITH THIRD COUNTRIES IN THE FIELD OF COMBATING THE MONEY LAUNDERING CRIME

In the vast majority of cases money laundering has a supranational character; therefore, its effective combat is possible only with efficient and well-coordinated cooperation between states. International cooperation in criminal matters regardless of the category of criminal acts to which it refers, inherently includes 'procedures developed in contacts between states in connection with their administration of justice in criminal matters'.[11] As such, it is based on rules that ensure these procedures are respected. The most important are the principle of reciprocity and

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[8] Under Article 9 of Directive 2015/849, the term 'high-risk third countries' means: 'third-country jurisdictions which have strategic deficiencies in their national AML/CFT regimes'. In turn, the Act of 1 March 2018, AML/CFT, requires this term to include: each country identified 'based on information from reliable sources, including reports on the evaluation of national systems for counteracting money laundering and financing of terrorism carried out by the Special Group for Counteracting Money Laundering Money Laundering (FATF) and bodies or organisations related to it, as not having an effective anti-money laundering or countering the financing of terrorism system or having significant deficiencies in the anti-money laundering or countering the financing of terrorism system', recognising that it is 'in particular a third country identified by the European Commission in a delegated act adopted under Article 9 of Directive 2015/849' (Article 2(2)(13) of the AML/CFT Act).

[9] Cyberspace is: 'the space of human activity with the use of electronic devices for the production, storage, transmission, processing of and access to information' – cf. Dela, P., *Teoria walki w cyberprzestrzeni*, Warszawa, 2020, p. 35.

[10] Rojszczak, M., 'Cyberbezpieczeństwo 2.0: w poszukiwaniu nowych ram ochrony cyberprzestrzeni', in: Banasiński, C., Rojszczak, M., (eds), *Cyberbezpieczeństwo*, Warszawa, 2020, pp. 323–339; Aleksandrowicz, T.R., 'Bezpieczeństwo w cyberprzestrzeni ze stanowiska prawa międzynarodowego', *Przegląd Bezpieczeństwa Wewnętrznego*. On the topic of the national 'cybersecurity' strategy – see *Strategia Cyberbezpieczeństwa RP na lata 2019–2024*, at: https://www.gov.pl/web/cyfryzacja/strategia-cyberbezpieczenstwa-rzeczypospolitej-polskiej-na-lata-2019-2024 [accessed on 1 March 2023]; *The Central Bureau for Combating Cybercrime will be established*; at: https://www.gov.pl/web/mswia/powstanie-centralne-biuro-zwalczania-cyberprzestepczosci as well as at: https://cbzc.policja.gov.pl/bzc/aktualnosci/92,Ruszyl-proces-doboru-do-Centralnego-Biura-Zwalczania-Cyberprzestepczosci.html [accessed on 3 January 2023].

[11] Barwina, Z., *Zasada wzajemnego uznawania w sprawach karnych*, Warszawa, 2012, p. 85.

the principle of double criminality.[12] The literature also indicates the validity of other principles, including those constituting a kind of development of the former, i.e. the principle of reciprocity.[13] Much has been written about the difficulties that may arise with respect to the principles of reciprocity and double criminality. In the pages of many scientific studies, they have been presented both in a broader aspect, i.e., regarding international cooperation in criminal matters in general,[14] and in a narrower aspect – covering the fight against economic crime.[15] Some of the dilemmas already described in the literature, when related to money laundering, take on a new dimension. All the more so because it often involves 'the need for joint action of the judicial authorities of three or four countries, each of which belongs to a different circle and is entangled in networks of different obligations and agreements.'[16]

Bi- and multilateral agreements between states (that are international Conventions) create the legal foundations of international cooperation in combating organised crime, in particular related to money laundering.[17] From the perspective of the subject discussed, the most important conventions, to which Poland is also a party, are undoubtedly: the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on 8 November 1990,[18] and the Council of Europe Convention on Laundering, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, made in Warsaw on 16 May 2005 (hereinafter referred to as the 'Warsaw Convention'),[19] and in a broader

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[12] Ibidem, pp. 43–84; Płachta, M., 'Uznawanie i wykonywanie zagranicznych orzeczeń karnych. Zagadnienia podstawowe', *Państwo i Prawo*, 1985, No. 3, pp. 88–89; Banach-Gutierrez, J., *Europejski wymiar sprawiedliwości w sprawach karnych. W kierunku ponadnarodowego systemu sui generis?*, Warszawa, 2011, pp. 156–208; Krysztofiuk, G., 'Zasada wzajemnego uznawania orzeczeń w sprawach karnych w Traktacie Lizbońskim', *Prokuratura i Prawo*, 2011, No. 7, p. 11; Szwarc, A.J., Długosz, J., 'Unijne instrumenty współdziałania państw w sprawach karnych', *Edukacja Prawnicza*, 2011, No. 3, pp. 31–34; Brodowski, L., 'Zasada podwójnej karalności czynu w kontekście ekstradycji', *Studia Prawnicze KUL*, 2015, No. 1, pp. 31–58.

[13] Steinborn, S., in: Grzelak, A., Królikowski, M., Sakowicz, A. (eds), *Europejskie prawo karne*, 1st ed., Warszawa, 2012, pp. 51–90.

[14] Krysztofiuk, G., 'Perspektywy współpracy sądowej w sprawach karnych w Unii Europejskiej', *Prokuratura i Prawo*, 2015, No. 7–8, pp. 186–205; Hofmański, P., 'Przyszłość ścigania karnego w Europie', *Europejski Przegląd Sądowy*, 2006, No. 12, pp. 4–11.

[15] Hofmański, P., 'Przyszłość ścigania…', op. cit., p. 5; Szumski, A., 'Współpraca międzynarodowa w zwalczaniu przestępczości zorganizowanej na obszarach dawnych konfliktów etnicznych na przykładzie misji EULEX Kosowo', *Wschodnioznawstwo*, 2016, No. 10, pp. 93–100; Gawłowicz, I., Wasilewska, M.A., *Międzynarodowa współpraca w walce z przestępczością (międzynarodowe trybunały, Interpol)*, Szczecin, 2004, pp. 27–36.

[16] Hofmański, P., 'Przyszłość ścigania…', op. cit., p. 5.

[17] Wyrozumska, A., *Umowy międzynarodowe. Teoria i praktyka*, Warszawa, 2007, pp. 21–30, 57–68.

[18] Journal of Laws of 2003, No. 46, item 394. Marek, A., 'Komentarz do Konwencji w sprawie prania dochodów pochodzących z przestępstwa, ich ujawniania, zajmowania i konfiskaty', in: Zielińska, E. (ed.), *Standardy prawne Rady Europy. Teksty i komentarz. Tom III – Prawo karne*, Warszawa, 1997, pp. 561–568.

[19] Journal of Laws of 2008, No. 165, item 1028 with the Amendment to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, made in Warsaw on 16 May 2005, adopted in Strasbourg on 22 October 2014 (Polish edition: Journal of Laws of 2018, item 1328).

aspect: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988,[20] European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters[21] (as amended by the Second Additional Protocol[22]), Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983[23] together with the Additional Protocol of 18 December 1997[24] or the Schengen Agreement of 19 June 1990 with the Implementing Convention (SIS II),[25] extending the scope of legal aid.[26] At this point, they can only be mentioned, as the essence of this part of the study is mainly to show the real difficulties in international cooperation with third countries in the context of the current threats of 'laundering'. Similarly, it is appropriate to recall the initiatives taken for many years by international organisations established to combat it, of which our country is also a member. These include in particular: the Financial Action Task Force (FATF),[27] the Egmont Group,[28] and the Moneyval Committee.[29] Their role in this regard cannot be overestimated, as well as the fact that their documents, which contain analyses of trends in 'laundering' methods, indicate the areas and institutions most exposed to participation in practice and thus set out the directions of cooperation between countries that are members of these organisations. Currently, which should not come as a surprise, threats in this respect primarily result from the political situation prevailing in the world, including ongoing armed conflicts, economic problems (also caused by the Covid-19 pandemic), and finally from the widespread digitisation of social and economic life. The activities of these institutions are of key importance from the perspective of international dialogue, the result of which is the

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[20] Journal of Laws of 1995, No. 15, item 69.

[21] Journal of Laws of 1999, No. 76, item 854.

[22] Journal of Laws of 2004, No. 139, item 1476.

[23] Journal of Laws of 1995, No. 51, item 279.

[24] Journal of Laws of 2000, No. 43, item 490.

[25] Act of 24 August 2007, on the participation of the Republic of Poland in the Schengen Information System and the Visa Information System (Journal of Laws of 2021, item 1041, as amended) and changes in force as of 1 January 2023. (Journal of Laws of 2022, item 2642).

[26] Aksamitowska-Kobos, M., 'Wnioski sądów polskich o wykonanie orzeczeń w sprawach karnych dotyczących kar o charakterze pieniężnym kierowane za granicę', *Iustitia*, 2015, No. 1, p. 29.

[27] The Financial Action Task Force (FATF) was established during the G-7 summit in Paris in 1989. Currently, 39 countries are members (including the Russian Federation, suspended from 24 February 2023). Since 2007, the FATF has covered 125 countries with the AML/CFT verification procedure. More (including 40 FATF Recommendations) at: https://www.fatf-gafi.org/en/home.html [accessed on 22 February 2023].

[28] Information about the organisation, its goals, and current reports as well as the strategy for 2022–2027 on the official website of the Egmont Group: https://egmontgroup.org/ [accessed on 22 February 2023]. See also: Grzywacz, J., *Pranie pieniędzy. Metody, raje podatkowe, zwalczanie*, Warszawa, 2010, pp. 160–161.

[29] The Committee of Experts for the Evaluation of Anti-Money Laundering and Terrorist Financing Systems (Moneyval) was established in 1997, and is a permanent monitoring body of the Council of Europe, tasked with assessing compliance with the core international AML/CFT standards and the effectiveness of their implementation, and making recommendations to national authorities on necessary improvements to their systems. More at: https://www.coe.int/en/web/moneyval [accessed on 22 February 2023]. See also: Wójcik, J.W., *Pranie pieniędzy. Kryminologiczna i kryminalistyczna ocena transakcji podejrzanych*, Warszawa, 2002, p. 133.

development of coherent legal solutions in the field of money laundering. However, there are still many areas that, from the perspective of the discussed practice, require specific actions or the development of such solutions at the international level that will contribute to improving the effectiveness of prosecuting the perpetrators of this cross-border crime. To a large extent, this is due to the participation of high-risk countries in it. It should also be pointed out that difficulties in international cooperation with third countries in the field of combating money laundering are caused not so much by the crime, which, as a *delictum iuris gentium* (a crime under the law of nations), is usually covered by relevant bilateral or multilateral agreements, as by its predicate acts.

THE PROBLEM OF PREDICATE ACTS IN THE CONTEXT OF DIFFICULTIES IN COOPERATION WITH THIRD COUNTRIES IN COMBATING MONEY LAUNDERING

The predicate crimes, also called basic or primary acts of money laundering,[30] are, in fact, offences or misdemeanours from which financial benefits are derived, which are then introduced into legal circulation.[31] Predicate offences present many difficulties from both a dogmatic and a practical point of view. The reason for this is not only the need to demonstrate the connection of such acts with the dealings of 'laundering', but sometimes also these acts *per se*. This applies, for example, to issues related to determining the place and manner of their commission, their status in the legal order of a given country, the characteristics of the causative act, or even the circumstances of their commission. They become particularly debatable in the face of current threats and their presentation through the prism of the principle of double criminality already mentioned in this study. Therefore, although this issue itself is certainly not a novelty, having been subject to in-depth scientific research almost a century ago,[32] it deserves special attention in the context of basic acts of money laundering. At the same time, it is worth pointing out, as aptly stated in the literature, that:

> 'The concept of double criminality should be understood broadly, which means that when examining the fulfilment of the condition of double criminality, one should not only refer to the content of the provision of the Polish criminal act, which could correspond to the law of a foreign state, but also to the applicable interpretation relating to the scope of application of this provision in the Polish legal system. It is necessary to assess the whole factual situation (…).'[33]

As a result, it was also concluded that:

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[30] Wójcik, J.W., *Przeciwdziałanie praniu pieniędzy*, Zakamycze, Kraków, 2004, pp. 73–82.

[31] Golonka, A., *Prawnokarne zagadnienia przeciwdziałaniu…*, op. cit., pp. 11–14.

[32] Cf. e.g. Pszczółkowski, S., *Zagadnienie podwójnego opodatkowania w stosunkach międzynarodowych*, (doctoral dissertation adopted by the Council of the Faculty of Law of the University of Warsaw by a resolution of 1 May 1925), Warszawa, 1928.

[33] Cf. decisions of the Supreme Court of 22 November 2011, IV KK 267/11, OSNKW, 2012, No. 3, item 24.

> 'the concept of double criminality should have different meanings depending on whether we are talking about meeting this condition in an abstract situation – i.e., when a given behaviour is a behaviour prohibited by law in both countries (the so-called double criminality *in abstracto*) or we are investigating the possibility of charging the perpetrator with a given crime in a specific factual situation, which can only take place after transferring a specific behaviour to Polish law (double criminality *in concreto*).'[34]

In the first scope, i.e. in relation to the problem of the punishability of an act in a given legal order, fiscal crimes, including tax crimes, are particularly problematic. This is because the criminalisation of such acts is primarily justified by the need to protect the financial interest of a given state against the depletion of public law liabilities or exposure to them (using the nomenclature adopted in the Polish Fiscal Penal Code[35]). The tax law even mentions the phenomenon of international tax competition. It has been stated that:

> 'It is at the root of the behaviour of some countries that, by modifying existing legislation, try to reduce the financial burden imposed in their country on foreign investors, which is to cause greater flow of capital and thus increase the investment rate.'[36]

Issues related to international cooperation in the field of tax law, including the exchange of information between countries,[37] supported by relevant regulations[38] or aspects of the legality of tax avoidance,[39] have already been the subject of separate studies. At this point, it is worth noting that the particularly problematic aspect in this respect is international cooperation with countries considered the so-called 'tax havens'. A financial haven, also known as a tax oasis, asylum, or *offshore* jurisdiction,[40] is considered to be: 'an area where there is a legal system that allows foreign entities to reduce the tax burden in their home countries.'[41] Cooperation with such countries raises difficulties resulting from, among others, the lack of tax transparency towards other countries and relevant state institutions, the lack of willingness to undertake it regarding national, restrictive regulations regarding the protection of secrets (e.g.,

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[34] Ibidem, and Kuczyńska, H., 'Glosa do postanowienia Sądu Najwyższego z dnia 22 listopada 2011 r., sygn. IV KK 267/11', *Prokuratura i Prawo*, 2013, No. 3, p. 171, as well as: Gardocki, L., 'Podwójna przestępność czynu w prawie ekstradycyjnym', in: *Problemy nauk karnych. Prace przekazane Profesorowi Oktawii Górniok*, Katowice, 1996, pp. 70–72.

[35] Article 53 §§ 26 and 26a of the Fiscal Penal Code, as consolidated text Journal of Laws of 2022, item 859 as amended.

[36] Grzywacz, J., *Pranie pieniędzy. Metody…*, op. cit., p. 57.

[37] Kuźniacki, B., 'Wymiana informacji podatkowych z innymi krajami. Nowa era stosowania prawa podatkowego w wymiarze międzynarodowym. Wymiana informacji o rachunkach finansowych, interpretacjach podatkowych oraz informacjach o podmiotach grupy kapitałowej (część 2)', *Przegląd Podatkowy*, 2017, No. 6, pp. 17–30.

[38] Act of 9 March 2017 on the exchange of tax information with other countries (consolidated text, Journal of Laws of 2023, item 241).

[39] Jankowski, J., *Klauzula przeciwko unikaniu opodatkowania (GAAR). Przepisy materialnoprawne*, Warszawa, 2022, pp. 21–22; on 'international tax planning' (i.e. the use of legal mechanisms to reduce or eliminate taxation of income or wealth, the accumulation of income through the appropriate use of tax havens' – cf. Grzywacz, J., *Pranie pieniędzy. Metody…*, op. cit., p. 57.

[40] Grzywacz, J., *Pranie pieniędzy. Metody…*, op. cit., p. 51.

[41] Ibidem, p. 52.

Hong Kong, Cayman Islands), the use of low tax rates, liberal regulations defining the principles of doing business, etc.[42] Countries-financial havens, although they are most often parties to international conventions – in particular those mentioned above, due to reservations made to them,[43] often make cooperation undertaken on their basis practically impossible. It is also worth recalling that those countries that are not considered tax havens, in the light of either FATF lists or documents issued by other domestic[44] and foreign institutions,[45] also introduce restrictive regulations, e.g., regarding protection of banking secrecy or the rules for transferring certain information (e.g., the United States, Switzerland). Therefore, they make it difficult for other countries to cooperate with them in cases involving suspected money laundering.

CYBER-LAUNDERING AS A CHALLENGE FOR INTERNATIONAL COOPERATION IN THE FIGHT AGAINST THIS PHENOMENON

When analysing aspects related to current threats and considering them in the context of double criminality, it would be impossible not to mention cyber-laundering, as well as other crimes committed in cyberspace, which may also be the predicate acts of 'laundering'. They take the form of *cybercrimes* or *cyber-enabled crimes*,[46] i.e., crimes committed using electronic means of communication (headed by the

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[42] Mika, J.F., Mika, M., 'Istota rajów podatkowych', in: Mika, J.F. (ed.), *Raje podatkowe. Procedura należytej staranności, obowiązki w cenach transferowych*, Warszawa, 2023, pp. 3, 13–15.

[43] For example, the Strasbourg Convention of 1990 on laundering, disclosure, seizure, and confiscation of the proceeds of crime on refusal to execute requests in the absence of dual criminality for predicate offenses for money laundering (Andorra, Netherlands Antilles, Aruba, Monaco); limiting the use of information to the proceeding in which the request was made (Andorra, Netherlands Antilles, Aruba, Liechtenstein, Monaco); execution of the request only following the national law of a given country – 'with respect for constitutional principles' and 'basic legal concepts' (Andorra, Netherlands Antilles, Aruba, Liechtenstein, Monaco, Isle of Man, Guernsey); refusal to execute the request if it is possible to classify the crime underlying the request as a tax or customs act (Netherlands Antilles, Aruba), cf. Michalczuk, C., 'Współpraca prawna w sprawach karnych z »rajami podatkowymi«', *Prokuratura i Prawo*, 2010, No. 9, pp. 138–139.

[44] Notice of the Minister of Finance on the announcement of the list of countries and territories indicated in the EU list of non-cooperative jurisdictions for tax purposes adopted by the Council of the European Union, which have not been included in the list of countries and territories applying harmful tax competition issued based on the provisions on personal income tax and regulations on corporate income tax, and the date of adoption of this list by the Council of the European Union of 10 March 2022, MP item 341, and also: Mika, J.F., Mika, M., 'Istota rajów podatkowych…', op. cit., pp. 13–14.

[45] Cf. documents from the meeting of the Economic and Financial Affairs Council on the EU list of non-cooperative jurisdictions of 14 February 2023, at: https://www.consilium.europa.eu/pl/press/press-releases/2023/02/14/taxation-british-virgin-islands-costa-rica-marshall-islands-and-russia-added-to-eu-list-of-non-cooperative-jurisdictions-for-tax-purposes/ [accessed on 14 March 2023].

[46] On the subject of a narrow and broad approach to cybercrime – see: INTERPOL, *Online African Organized Crime from Surface to Darkweb. Analytical Report*, 2020, p. 12.

Nigerian scam[47]). In practice, they may include several very diverse acts in terms of nature and course. However, various forms and methods of online fraud (*fraud, scam, phishing, spoofing, pharming, etc.*)[48] remain the most frequently committed cybercrimes, from which the benefits are derived and subsequently introduced into legal circulation. This is confirmed in the reports of institutions established to combat money laundering, both domestic[49] and foreign.[50] There should be no doubt that the global situation related to the Covid-19 pandemic,[51] has contributed to a significant increase in the number of scams or frauds[52] on the Internet.[53] Suffice it to say that in the first months of 2020, Interpol sent an Urgent Safety Alert to the Police of all (then-194) member countries, containing a warning about the increased risk of *ransomware attacks*,[54] new techniques, and ways of cybercriminals' operation.[55] Under the auspices of Interpol, 'Operation Pangea XIII' was also carried out in 2020, involving the state services of 90 countries.[56] It was aimed at organised

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[47] A Nigerian scam (also known as an African scam, *Nigerian scam*, or '419 scam') is: 'a type of fraud involving persuading the victim to transfer money to one of the African countries (originally Nigeria) to obtain a large benefit' – cf.: Balkowski, R., *Bezpieczeństwo systemów teleinformatycznych – zmiany, trendy i zasady*, Warszawa, 2018, p. 9, as well as an example of 'laundering' with the use of '419 scam' – Hartikainen, E.I., *The Nigerian Scam: easy money on the Internet, but for whom?*, Michigan, 2006, pp. 1–2, 4–5.

[48] *Scams & Swindles: Phishing, Spoofing, ID Theft, Nigerian Advance Schemes, Investment Frauds, False Sweethearts: How to Recognize and Avoid Financial Rip-offs in the Internet Age*, 1st ed., Los Angeles, 2006, pp. 43–244, and also: Kosiński, J., *Paradygmaty cyberprzestępczości*, Warszawa, 2015, pp. 126–131.

[49] *Report of the General Inspector of Financial Information on the implementation of the Act of 1 March 2018 on counteracting money laundering and financing terrorism in 2021*, Warsaw, March 2022. The document can be downloaded at: https://www.gov.pl/web/finanse/sprawozdania-roczne-z-dzialalnosci-generalnego-inspektora-informacji-finansowej [accessed on 26 September 2023].

[50] See IEWG, *FIU-FinTech Cooperation and Associated Cybercrime Typologies and Risks*, Ottawa, July 2022, pp. 35–37. The document can be downloaded from the Egmont website: https://egmontgroup.org/ [accessed on 3 March 2023]; European Union Agency for Criminal Justice Cooperation (Eurojust), *Money laundering cases registered at Agency doubled in the last 6 years according to Eurojust's new report* of 20 October 2022, pp. 6, 39.

[51] KWP w Białymstoku, 'Jak przestępcy wykorzystują pandemię', *Policja997*, 2020, No. 182, pp. 47–48.

[52] On the differences between *fraud* and *scam* – cf. Golonka, A., 'Scamming', in: Łabuz, P., Malinowska, I., Michalski, M. (eds), *Przestępczość zorganizowana. Aspekty prawne kryminalno-kryminalistyczne*, Warszawa, 2022, pp. 290–303.

[53] Weerth, C., 'INTERPOL on COVID-19: COVID-19 Crime and Fraud Alert', *Technical Report*, April 2020, pp. 1–4. DOI: 10.13140/RG.2.2.33650.25282.

[54] Current *Ransomware* Threat – cf. SonicWall, *2022 SonicWall Cyber Threat Report*, intro. by Conner, B., pp. 12–20, available at: https://www.sonicwall.com/medialibrary/en/white-paper/mid-year-2022-cyber-threat-report.pdf. [accessed on 24 November 2023].

[55] Terminology concerning the perpetrators of cybercrimes (hackers and crackers) – cf. Zaród, M., 'Hakerzy i kolektywy hakerskie w Polsce. Od operacjonalizacji do laboratoriów i stref wymiany', *Studia Socjologiczne*, 2017, Vol. 1, No. 224, pp. 227–228, as well as: idem, *Aktorzy-sieci w kolektywach hakerskich*, pp. 50, 54 (PhD dissertation – Institute Sociologii UW, Warszawa, 2018. To be downloaded from the repository at: https://depotuw.ceon.pl/handle/it e m/2909 [accessed on 26 February 2023].

[56] Weerth, C., 'INTERPOL on COVID-19: Urgent Safety alert – Results of the 2020 fake medicine and medicine products operation PANGEA XIII', *Technical Report*, March 2020, pp. 1–4. DOI: 10.13140/RG.2.2.13950.95040.

criminal groups conducting illegal activity in the field of online trading in drugs and *para-pharmaceuticals*. As a result, 121 people were arrested around the world and actions were taken to secure property worth a total of over 14 million dollars.[57]

The money of laundered benefits also comes from sexual cybercrime (e.g., *sextortion*),[58] various forms of human trafficking on the Internet,[59] trafficking in drugs and other intoxicants on the *darknet*,[60] trafficking in organs, etc.[61] This is just a snippet of the many crimes that take place in *cyberspace* – from those committed using online and mobile financial services (including online and mobile banking) or through crowdfunding platforms, to crimes increasingly committed using virtual assets (VA).[62] It is even indicated in the literature that the use of virtual currencies to support illegal activity, including money laundering, is currently one of the most dangerous phenomena for the financial systems of individual countries[63] and for the entire global community.[64]

CRYPTO-ASSETS AS A SOURCE OF PARTICULAR RISK OF MONEY LAUNDERING IN RELATIONS WITH THIRD COUNTRIES

Actions in the field of combating money laundering, carried out by international organisations and institutions, therefore, boil down primarily to the development of mechanisms to protect financial systems against this practice. For obvious reasons, cooperation based on standards developed on the international forum is desirable (and expected). The role of the global 'guarantor' in the field of preventing and combating money laundering is undoubtedly played by the Financial Action Task Force (FATF). On 28 October 2021, the FATF presented an updated *Risk-Based Approach Guide*.[65] The organisation draws attention to the need

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[57] Ibidem, pp. 1–2.

[58] Cf. INTERPOL, *Online African Organized Crime…*, op. cit., pp. 20–32.

[59] Ibidem.

[60] On drug trafficking in the 'darknet', see Ocieczek, G., Opitek, P., 'Praktyczne aspekty zwalczania przestępczości narkotykowej dokonywanej w »świecie realnym« i cyberprzestrzeni', *Prokuratura i Prawo* 2022, No. 7–8, pp. 243–251. See also *Scams & Swindles…*, op. cit., pp. 133–148.

[61] See Kumar, R., *Kidney Transplants and Scams: India's Troublesome Legacy*, New Delhi, 2020, pp. 39–69, 131–164.

[62] On terminology: cf. Behan, A., *Waluty wirtualne jako przedmiot przestępstwa*, Kraków, 2022, pp. 237–242. Krasuski, K., Kharif, O., 'Crypto Capital Official Nabbed in Polish Money Laundering Probe', *Bloomberg News*, 25 October, 2019, https://www.bnnbloomberg.ca/crypto-capital-official-nabbed-in-polish-money-laundering-probe-1.1337624 [accessed on 10 January 2023].

[63] Proceedings with the participation of the Polish Prosecutor's Office – cf. e.g.: Krasuski, K., Kharif, O., *Crypto Capital Official…*, op. cit.

[64] Opitek, P., 'Przeciwdziałanie praniu pieniędzy z wykorzystaniem walut wirtualnych w świetle krajowych i międzynarodowych regulacji AML', *Prokuratura i Prawo*, 2020, No. 12, p. 54.

[65] FATF, *Virtual Assets*, available at: https://www.fatf-gafi.org/en/topics/virtual-assets.html, and FATF, *Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers*, available at: https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-rba-virtual-assets-2021.html [accessed on 26 February 2023].

for virtual asset service providers to apply the same financial security measures as applied to other obliged entities. Therefore, VASPs in particular should be subject to Customer Due Diligence (CDD), record keeping, transaction monitoring, and Reporting of Suspicious Transactions (STR). 'Under scrutiny' were, among others, cryptocurrency exchanges, cryptomat operators, crypto hedge funds, crypto wallet administrators and stablecoin administrators.[66] The updated recommendations also provide a recommendation on the licencing and registration of VASPs, as well as the additional recommendation for the public and private sectors on the implementation of the Travel Rule.[67] In the opinion of the FATF, the implementation of these guidelines determines efficient and effective cooperation in combating this form of *cyber-laundering,* while ensuring the transparency of transactions carried out using virtual assets.

From the perspective referred to in this study, the basic problem becomes the double criminality of crimes committed with the use of virtual assets. It is enough to point out the far-reaching differences in regulations. For example, in countries such as Algeria, Bolivia, Morocco, Nepal, Pakistan, or Vietnam, any activity related to cryptocurrencies is prohibited.[68] On the other hand, in others, such as Qatar and Bahrain, it is permissible for citizens of these countries, if the activity itself is carried out outside these countries. There are jurisdictions (e.g. Bangladesh, Iran, Thailand, Colombia, and China – from 2021) where only private transactions are allowed[69] or only a partial ban on cryptocurrency trading is in place (e.g. Iran allows cryptocurrency transactions from 2022 in imports[70]). Finally, we can point to legal solutions such as those in force since 2017 in the People's Republic of China, which prohibit *Initial Coin Offerings* (ICOs), i.e., obtaining cryptocurrencies or digital tokens through *crowdfunding,* similar to the first public offering (usually new) tokens.[71] More recently, in September 2021, the Chinese government also declared all private cryptocurrency transactions illegal, citing concerns about speculative investments, extreme price volatility, gambling scams, and money laundering.[72]

Upon discussing the risks of using cryptocurrencies for money laundering purposes, one should also remember those predicate acts that are (theoretically) 'traditional' crimes. It can be pointed out here, e.g., illegal entry, ransom extortion,

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66 IEWG, *FIU-FinTech…*, op. cit., p. 4.

67 FATF Recommendation 16 imposes the obligation to identify the customer and beneficiary (VASP) and collect and store financial transactions using VA.

68 From: Riley, J., 'The Current Status of Cryptocurrency Regulation in China and Its Effect around the World', *China and WTO Review*, 2021, Vol. 7, No. 1, p. 139. http://dx.doi.org/10.14330/cwr.2021.7.1.06.

69 Riley, J., 'The Current Status of Cryptocurrency…', op. cit., p. 139.

70 www.iranintl.com/en/202208293261; on difficulties with transactions involving Bitcoin and the Iranian gold-backed digital currency PayMon: https://bitcoinpl.org/iranskia-waluta-cyfrowa-paymon [accessed on 27 February 2023]. On the topic of e-Gold and gold security – cf. Behan, A., *Waluty wirtualne…*, op. cit., pp. 40–46.

71 Ibidem, pp. 139–146, and also: Allen, F., Gu, X., Jagtiani, J., 'Fintech, Cryptocurrencies, and CBDC: Financial Structural Transformation in China', *Working Papers – Federal Reserve Bank of Philadelphia*, 2022, 22–12, p. 3. https://doi.org/10.21799/frbp.wp.2022.12.

72 Allen, F., Gu, X., Jagtiani, J., 'Fintech, Cryptocurrencies, and CBDC…', op. cit., p. 3.

theft, appropriation, etc., but committed using modern *blockchain technologies*[73] (or, for example, *the hash tree method* used by *Ripple* in XRP cryptocurrency transactions[74]). Examples of such crimes include hacking into electronic wallets, extorting ransom in cryptocurrencies, cryptojacking,[75] or appropriation of (often illegally obtained) bitcoins.[76] It should be noted that the very process of laundering, even when using virtual currency, often relies on methods of laundering known for years, i.e. *smurfing* and *structuring*.[77] Thus, transactions are typically based on accounts set up by 'mules', which are exchanged by them for cryptocurrencies, and then transferred to cryptocurrency wallets maintained by local virtual asset service operators. An example is a large-scale deal that took place in South Africa, discovered based on a suspicious transaction report submitted by a local VASP.[78] It involved the purchase of large amounts of virtual assets by various people and their immediate transfer to foreign VASPs. In many cases, different people had the same residential address and most addresses of these wallets were accessible from the same IP address. This led to the suspicion that they were being used as 'money laundering schemes'. To obscure the origin of illegal assets, cash transactions were carried out in the first stage, consisting of depositing funds in various accounts at various financial institutions. Then, they were transferred via electronic payments to other accounts to finally purchase cryptocurrency (bitcoins) in local VASPs. More than 150 people participated in this process, responsible for transferring a total of approximately 108,352,900 dollars (11,960 bitcoins).[79] Another example of

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[73] *Blockchain* (*blockchain* technology) is a 'chain of blocks' that are used to store and transmit information about transactions concluded on the Internet. Its practical meaning lies in the possibility of one entity transferring to another 'a unique fragment of Internet property rights in a safe, open manner and on such terms that no one can question the legality of such a transaction' – cf. Zych, J., *Teleinformatyka dla bezpieczeństwa*, Poznań, 2019, pp. 133–134.

[74] Cf.: Kowalczyk, M., 'Ripple – czym jest i czy warto zainwestować?', *Cykl: kryptowaluty*, 11 October 2021, available at: https://www.najlepszekonto.pl/ripple-czem-jest-czy-inwestowac [accessed on 25 February 2023], and about the XRP digital currency: McDonalds, O., *Cryptocurrencies: Money, Trust and Regulation*, Newcastle, 2021, pp. 29–32.

[75] According to the definition of the Office of the Polish Financial Supervision Authority, *crypto-jacking* is: 'a type of cybercrime consisting in infecting and using, without the knowledge and consent of the user, the computing power of a device equipped with a processor (...) to mine cryptocurrencies': https://cebrf.knf.gov.pl/encyklopedia/hasla/385-definicje/797-cryptojacking. See also: Kropopek, K., '»Cryptojacking« wzrósł do rekordowego poziomu, pomimo załamania na rynku', *Comparic*, 28 July 2022, available at: https://comparic.pl/cryptojacking-wzrosl-do-rekordowego-level-despite-the-market-collapse/ [accessed on 26 February 2023], and: SonicWall, *2022 SonicWall Cyber Threat…*, op. cit., pp. 31–33.

[76] Ocieczek, G., Opitek, P., 'Praktyczne aspekty…', op. cit., pp. 247–248.

[77] *Smurfing* is all about carrying out many financial operations (e.g. to fragment the value of assets) by many persons substituted for this purpose (so-called poles, mules), while *structuring*, considered a variation of the former, boils down to many recurring payments to a given account (also 'partial') – cf.: Golonka, A., *Prawnokarne zagadnienia przeciwdziałania…*, op. cit., pp. 31–33, and also: Jasiński, W., *Pranie brudnych pieniędzy*, Warszawa, 1998, pp. 69–70; Wójcik, J.W., *Pranie pieniędzy. Kryminologiczna i kryminalistyczna…*, op. cit., pp. 108–111 (referring to them as payment fragmentation techniques).

[78] FATF, *Virtual Assets Red Flag Indicators of Money Laundering and Terrorist Financing*, p. 6: https://www.fatf-gafi.org/en/publications/methodsandtrends/documents/virtual-assets-red-flag-indicators.html [accessed on 18 February 2023].

[79] Ibidem.

laundering with VASP was the use of a crypto exchange in South Korea, through which approximately 400 million won[80] (more than 300,000 euros) were laundered from *phishing scams*. In this case, money (from *phishing*), i.e. fiat currency, was exchanged for three different types of cryptocurrencies, in multiple transactions, to end up in one foreign VASP wallet after the transfer.[81] A particular danger is seen in the participation of cryptocurrency exchanges in countries such as China (despite the country's relatively restrictive regulations on cryptocurrency trading)[82] or North Korea (*blacklisted* by the FATF), where cryptocurrencies were stolen in 2022 worth approximately 1.7 billion dollars according to estimates.[83] More specifically, experts say that North Korea is 'turning to stealing cryptocurrencies to fund its nuclear arsenal'.[84] Cryptocurrencies are laundered using so-called mixers, which, based on a method known as *blending*, mix cryptocurrencies from different users to lose track of the origin of these assets. There are also reports of brokers in China and non-fungible tokens (NFTs) being used for this purpose.[85]

The choice of the examples of money laundering using cryptocurrencies and the participation of VASPs located in China and North Korea in them was not accidental. These countries are relatively often indicated as a potential threat as regards their participation in the laundering of virtual currency. In relation to China and Hong Kong, it is said explicitly.[86] It is noted that: 'South American drug production and trafficking cartels use virtual currencies to launder money in China and Hong Kong. Bitcoin (…) aspires to be an international means of addressing the drug business.'[87] The threat is also seen by the American *Financial Crimes Enforcement Network* (FinCEN),[88] which recognised the Hong Kong-registered crypto exchange 'Bitzlato' (*Bitzlato Limited*) as 'a major money laundering concern'.[89] Bitzlato offered cryptocurrency exchanges and a vulnerable to money laundering *Peer-to-Peer* (P2P) service. The goal was to finance illegal Russian operations. This

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[80] The South Korean Won (KRW) is the official currency of South Korea.

[81] FATF, *Virtual Assets Red Flag Indicators of Money Laundering and Terrorist Financing*, p. 7, available at: https://www.fatf-gafi.org/en/publications/methodsandtrends/documents/virtual-assets-red-flag-indicators.html [accessed on 18 February 2023].

[82] *Initial Coin Offering* (ICO) is banned in China. On this issue and changes in the Chinese law regulating virtual assets trading – cf. Allen, F., Gu, X., Jagtiani, J., 'Fintech, Cryptocurrencies...', op. cit., s. 3.

[83] Ng, K., 'Crypto theft: North Korea-linked hackers stole $1.7b in 2022', *BBC News*, 2 February 2023. Article available at: https://www.bbc.com/news/world-asia-64494094 [accessed on 25 February 2023].

[84] Ibidem, and also: FinCEN, https://www.justice.gov/opa/pr/two-chinese-nationals-charged-laundering-over-100-million-cryptocurrency-exchange-hack [accessed on 25 February 2023].

[85] Ng, K., 'Crypto theft…', op. cit. Online article.

[86] Opitek, P., 'Przeciwdziałanie praniu…', op. cit., pp. 54–55.

[87] Ibidem, p. 54.

[88] https://www.fincen.gov/news/news-releases/fincen-identifies-virtual-currency-exchange-bitzlato-primary-money-laundering [accessed on 27 February 2023].

[89] The founder of Bitzlato is a Russian citizen, Anatoly Legkodymov (arrested by the US Department of Justice on 17 January 2023). Garcia, M., *Bitzlato Founder Charged With Facilitating Money Laundering of More than $700 Million in Dark Web Funds*, 3 February 2023, available at: https://www.whitecase.com/insight-alert/bitzlato-founder-charged-facilitating-money-laundering-more-700-million-dark-web [accessed on 25 February 2023].

was also possible due to the cooperation of *Hydra Market* – a Russian-speaking black market (i.e., operating on *the darknet*) and sanctions imposed on Russia after its invasion of Ukraine. *Darknet Hydra* shut down on 4 April 2022.[90] The sanctions also covered *Garantex*,[91] considered the most important platform used by cybercriminals for money laundering.[92]

From 1 January 2023, the United States has also implemented a regulation that officially bans Bitzlato transfers.[93] However, the fact remains that the sanctions and other restrictions imposed on trade with Russia have[94] not only failed to eliminate the risks associated with its possible involvement in laundering, but also revealed new cases of laundering of 'Russian money'. It is indicated that the state of South Dakota (USA) even aspires to be called a real world-class tax haven, due to the regulations in force there governing the establishment and operation of 'trusts'[95]. In fact, companies established in the form of trust funds make it possible for Russian oligarchs to invest money anonymously in them. It is even claimed that more than $350 billion is invested in trust funds in South Dakota and that the state legislature has been so completely taken over by the trust industry that there is no chance of changing the regulations.[96] In addition, a 'double standard' is apparent in the United States, as evidenced by the following practice: 'The US government demands information [on financial transactions – author's apposition] from other countries, while divulge details about foreigners' shares in its banks'.[97] This inconsistency hinders cooperation with the US in the field of anti-money laundering. Furthermore, there are indications of deficiencies in the applicable US regulations that dictate the

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[90] Dr. Hack (*pseud.*), 'Największy na świecie rynek Darknet zamknięty', *SATKurier*, 6 April 2022, available at: https://satkurier.pl/news/216131/najwiekszy-na-swiecie-rynek-darknet-zamkniety.html [accessed on 25 February 2023].

[91] US Department of the Treasury, *Treasury Sanctions Russia-Based Hydra, World's Largest Darknet Market, and Ransomware-Enabling Virtual Currency Exchange Garantex*, press release, 5 April, 2022, available at: https://home.treasury.gov/news/press-releases/jy0701 [accessed on 12 March 2023].

[92] 'Rosyjscy cyberprzestępcy szukają nowych sposobów prania pieniędzy. Wszystko przez wojnę', *CyberDefence24*, 25 April 2022, available at: https://cyberdefence24.pl/cyberbezpieczenstwo/rosyjscy-cyberprzestepcy-szukaja-nowych-sposobow-prania-pieniedzy-wszystko-przez-wojne [accessed on 12 March 2023].

[93] Section 9714(a) of the *Combating Russian Money Laundering Act* (*Public Law* 116-283), as amended by S. 6106(b) *National Defense Authorization Act for Fiscal Year 2022* (*Public Law* 117-81).

[94] US Department of the Treasury, *Ukraine-/Russia-related Sanctions*, information available at: https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions. Sanctions imposed by the EU: European Commission, *EU measures following the Russian invasion of Ukraine*, https://taxation-customs.ec.europa.eu/customs-4/international-affairs/eu-measures-following-russian-invasion-ukraine_en [accessed on 15 March 2023].

[95] Bullough, O., 'How Britain let Russia hide its dirty money', *The Guardian*, 25 May 2018, available at: https://www.theguardian.com/news/2018/may/25/how-britain-let-russia-hide-its-dirty-money [accessed on 15 March 2023].

[96] Boyce, J.K., Ndikumana, L., 'Kryzys w Ukrainie daje szansę na oczyszczenie brudnych pieniędzy', *Onet.pl*, 25 March 2022, available at: https://wiadomosci.onet.pl/politico/kryzys-na-ukrainie-gives-szanse-na-oczyczenia-brudnych-pieniedzy/zx0y3xf [accessed on 28 February 2023].

[97] Ibidem.

reporting suspicious transactions. Consequently, a situation arises where: 'a bank, after filing a suspicious activity report, can continue its business with the suspect customer. This is largely because most reports that are not publicly accessible are essentially ignored, akin to being covered in digital dust'.[98]

In turn, the British media write about financing Putin's war in Ukraine with values laundered in Great Britain,[99] which the British authorities do not even try to deny.[100] They only indicate the legislative steps they have taken or intend to take[101] (also in cooperation with other countries[102]) aimed at enforcing the sanctions imposed on Russia and counteracting money laundering. However, the fact remains that Russian oligarchs have been depositing huge sums of money in Great Britain for years (according to the British Office of National Statistics, Russian investments in this country were estimated at 25.5 billion pounds at the end of 2016[103]) and that 'dirty money' from Russia continues to contribute to the country budget. These funds used to be transferred from other countries, such as Cyprus, Bahamas, or financial havens (i.e., British Virgin Islands, Cayman Islands, Gibraltar, Jersey, and Guernsey). This made it possible to effectively hinder the detection of the country from which these funds actually came.[104] Currently, they are mainly transferred by countries that have not decided to include Russia in sanctions, such as Armenia, Vietnam, or China.[105]

Despite the ban on official economic contact with the Russian Federation introduced in many countries, resulting from the sanctions imposed on this country, many of them still maintain trade relations with Russia. Usually, this is not done

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[98] Ibidem.

[99] Neate, R., 'UK failure to tackle »dirty money« led to it »laundering Russia's war funds«', *The Guardian*, 30 June 2022, available at: https://www.theguardian.com/business/2022/jun/30/uk-failure-to-tackle-dirty-money-led-to-it-laundering-russias-war-funds [accessed on 25 February 2023].

[100] Cf. House of Commons Foreign Affairs Committee, *The cost of compliance: illicit finance and the war in Ukraine. Second Report of Session 2022–23 Report, together with formal minutes relating to the report*, published on 30 June 2022 by authority of the House of Commons, pp. 4, 6, available at: https://publications.parliament.uk/pa/cm5803/cmselect/cmfaff/688/report.html [accessed on 15 March 2023].

[101] House of Commons Committee Special Report, *The cost of complacency: illicit finance and the war in Ukraine: Government Response to the Committee's Second Report*, pp. 1–12, available at: https://publications.parliament.uk/pa/cm5803/cmselect/cmfaff/688/report.html [accessed on 15 March 2023].

[102] It is worth pointing out that since the withdrawal of the United Kingdom from the European Union under the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7), the cooperation of this state with EU Member States in the field of criminal matters, regardless of the conventions to which the United Kingdom is a party, is regulated by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand, from 31 December 2020. Cf. also: Grzelak, A., Ostropolski, T., Rakowski, P., 'Uwarunkowania prawne i konsekwencje wyłączenia Zjednoczonego Królestwa ze współpracy w Przestrzeni Wolności, Bezpieczeństwa i Sprawiedliwości (opt-out)', *Europejski Przegląd Sądowy*, 2013, No. 9, pp. 11–19.

[103] Bullough, O., *How Britain…*, op. cit.

[104] Ibidem.

[105] 'Rosyjscy cyberprzestępcy…', op. cit.

openly and legally, but through dealings with *offshore companies* 'with the cooperation of the best lawyers, auditors, bankers, and lobbyists in the world' who help Russian oligarchs develop legal ways to hide and launder their funds.[106] Such actions have been taking place for many years, even before Russia invaded Ukraine (also in European countries[107]). The current situation has only contributed to the perpetrators' search for new methods and ways to hide illegally obtained financial benefits.

JURISDICTION IN CYBERSPACE AND THE FIGHT AGAINST MONEY LAUNDERING

In addition to the difficulties related to the regulations concerning predicate acts, including the definition and regulation of cybercrimes, there are also specific issues related to the prosecution of these offences (both the predicate acts and money laundering) and the fact that they cover the territory of more than one country.[108] This, in turn, raises jurisdictional issues, most notably concerning crimes committed in cyberspace. This issue can be considered on three levels, i.e., legislative, executive, and judicial.[109] The term 'jurisdiction' is usually defined as 'the right of the state to encroach on the sphere of rights and duties of people' or 'the right of the state to regulate their behaviour in matters not only of an internal (national) nature'.[110] Jurisdiction is usually assumed to be territorial,[111] which is reflected in Polish criminal law by the principle of territoriality (Article 5 of the Polish Criminal Code). Derogations from it are provided for in Articles 109–113 of this Code (principles of international criminal law). However, as noted, the territorial application of the principle to 'this territorial creation that is cyberspace'[112] may prove problematic. This is due to the specific nature of such acts. Therefore, more than one proposal has been presented to resolve disputes regarding criminal jurisdiction in cases of crimes

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[106] 'Russian oligarchs: Where do they hide their »dark money«?', *BBC News*, 28 March 2022, available at: https://www.bbc.com/news/world-60608282 [accessed on 15 March 2023].

[107] The routes of 'dirty' means led, among others, to Lithuania, Latvia, Estonia, Denmark, and Sweden, as well as Poland – cf. O'Donnell, J., 'Europol highlights Russian money as biggest laundering threat', *Reuters*, 14 June 2019, available at: https://www.reuters.com/article/us-europe-moneylaundering-europol-idUSKCN1TE2K6/; Harper, J., 'Russian money laundering comes to Poland', *Deutsche Welle*, 19 October 2020, available at: https://www.dw.com/en/how-ing-bank-in-poland-helped-russians-launder-money/a-55322399 [accessed on 15 March 2023].

[108] On this issue cf. Góral, K., Opitek, P., 'Analiza kryminalna transferów kryptowalutowych w pracy prokuratora', cz. II, *Prokuratura i Prawo*, 2020, No. 6, pp. 91–116.

[109] Czekalska, J., 'Jurysdykcja w cyberprzestrzeni a teoria przestrzeni międzynarodowych', *Państwo i Prawo*, 2004, No. 11, p. 74.

[110] Beale, J.H., 'The Jurisdiction of a Sovereign State', *Harvard Law Review* (HLR), 1923, Vol. 36, p. 241, after: Płachta, M., 'Konflikty jurysdykcyjne w sprawach karnych: pojęcie, geneza i środki zaradcze', *Prokuratura i Prawo*, 2010, No. 11, p. 5.

[111] Mann, F.A., 'The Doctrine of Jurisdiction in International Law', *Recueil des Cours de l'Academie de droit international* (RCADI), 1964, Vol. 111, pp. 9–162, after: Płachta, M., 'Konflikty jurysdykcyjne…', op. cit., p. 75.

[112] Czekalska, J., 'Jurysdykcja w cyberprzestrzeni…', op. cit., p. 75.

in cyberspace.[113] It has even been postulated to consider cyberspace as the 'fourth space', as well as to introduce an exception from the principle of territoriality in favour of the principle of nationality.[114] Sharing the doubts about the difficulties caused by determining jurisdiction in cybercrime cases, it does not seem that the last of the proposed legal solutions is the best one (at least in the light of domestic criminal law, bearing in mind, however, a different approach to this issue in other criminal law systems).[115] It does not seem necessary to depart from the traditionally defined place of the act,[116] despite the undoubted specificity of crimes committed in cyberspace and the circumstances in which they occur (open architecture, independence from place, relative anonymity, etc., as features of cyberspace).[117] It remains obvious that the place of the act, in this case, may be both the place of the physical location of the host(s) and the server(s) (infrastructure), the actual presence of the perpetrator at the time of the act, and the place where the effect occurred (e.g. data theft). Thus, the jurisdiction of the state extends to perpetrators residing in its territory and to acts committed with the use of or against infrastructure located in its territory.[118] Judicial conflicts concerning such crimes should be resolved as in the case of all other multi-site crimes, i.e., based on criminal procedure procedures concerning international agreements accepted by a given state.[119] On the other hand, with regard to the legislative level and the principle of double criminality *in concreto*, one should be satisfied with the current method of determining the place(s) of the act(s). Otherwise, it would be more appropriate to consider establishing a separate rule, something like a 'cyber-territoriality' rule, which (perhaps) would lead to a consensus on determining one place of the act, but at the same time – highly likely – it would complicate the activities carried out in criminal proceedings in a cybercrime case. And there are quite a few of them. A significant amount of attention has been devoted to this subject, as evidenced by numerous publications.[120]

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[113] Worona, J., *Cyberprzestrzeń a prawo międzynarodowe. Status quo i perspektywy*, Warszawa, 2020, pp. 99–110.

[114] In addition to Antarctica, outer space, and the open sea – Czekalska, J., 'Jurysdykcja w cyberprzestrzeni…', op. cit., pp. 74, 80–81.

[115] Worona, J., *Cyberprzestrzeń a prawo międzynarodowe*…, op. cit., pp. 99–101, 118–136.

[116] According to Art. 5 § 2 of the Penal Code, 'A prohibited act is deemed to have been committed in the place where the perpetrator acted or omitted to act to which he was obliged, or where the effect constituting the hallmark of the prohibited act occurred or was to occur according to the intention of the perpetrator.'

[117] Aleksandrowicz, T.R., 'Bezpieczeństwo w cyberprzestrzeni…', op. cit., p. 12.

[118] Ibidem, p. 24.

[119] Cf. Article 22 of the Council of Europe Convention on Cybercrime, drawn up in Budapest on 23 November 2001 (Journal of Laws of 2015, item 728), with a total of 67 signatories – see: https://pl.frwiki.wiki/wiki/Convention_sur_la_cybercriminalit%C3%A9 [accessed on 18 March 2023].

[120] Cf. e.g.: Nita-Światłowska, B., 'Wymóg podwójnej karalności oraz zgody skazanego jako przesłanki przejęcia kary pozbawienia wolności do wykonania według konwencji strasburskiej o przekazywaniu osób skazanych', *Europejski Przegląd Sądowy*, 2019, No. 9, pp. 4–12; Kierzynka, R., 'Wzajemne uznawanie orzeczeń przepadku między państwami członkowskimi Unii Europejskiej', *Prokuratura i Prawo*, 2010, No. 9, pp. 16–21; Steinborn, S., 'Kolizje norm o międzynarodowej współpracy w sprawach karnych w zakresie zabezpieczenia mienia', *Europejski Przegląd Sądowy*, 2007, No. 4, pp. 15–25. Regarding the change of terminology and the replacement of

Additionally, explicit emphasis has been placed on the key challenges impeding the full and universal recognition and enforcement of foreign criminal judgments. These include state sovereignty, lack of equivalence of legal systems, lack of trust in international relations and difficulties resulting from the internal legal systems of individual countries.[121] Strategies to overcome these challenges have also been highlighted, such as obtaining agreement consent, employing the principle of reciprocity, engaging in the unification process, utilising the exequatur procedure, and applying the public policy clause.[122] Therefore, it is not surprising that the opinion expressed in the literature on the subject is that 'the principle of double criminality of an act often even prevents cooperation' and 'given the differences in legal regulations, the very definition of types of crime in acts of Community or EU law is difficult'.[123]

SMUGGLING OF MIGRANTS AND TRAFFICKING IN HUMAN BEINGS AND COMBATING MONEY LAUNDERING IN THE LIGHT OF FATF DOCUMENTS

When discussing the issue of international cooperation in combating money laundering and the related aspects connected with the current threats, it would be impossible not to mention one more, i.e., the smuggling of migrants. This problem is also recognised by the FATF.[124] As this organisation pointed out, migrant smuggling is inherently transnational and often involves moving people across borders for exploitation. Therefore, the threats of migrant smuggling and human trafficking, although they are different crimes,[125] cannot be completely separated. This also applies to the perspective of laundering the benefits derived from them. According to Frontex, the profits from such activities, subject to laundering, reach up to 10 billion dollars every year.[126] On the other hand, as regards human trafficking (as a predicate offence of money laundering), although it is certainly not a new phenomenon, the form and methods of committing this crime are subject to change.[127] Human trafficking, not only for sexual purposes but also in the form of, for example, organ trafficking, is increasingly taking place via the Internet. However, the preferred

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the terms: 'requesting state' and 'requested state' with the terms: 'issuing state' and 'executing state' – Barwina, Z., *Zasada wzajemnego uznawania…*, op. cit., p. 157.

121 Aksamitowska-Kobos, M., 'Wnioski sądów polskich…', op. cit., p. 22.

122 Ibidem.

123 Hofmański, P., 'Przyszłość ścigania karnego w Europie', *Europejski Przegląd Sądowy*, 2006, No. 12, p. 5.

124 FATF, *Money Laundering and Terrorist Financing Risks Arising from Migrant Smuggling*, Paris, 2022, pp. 18–27, available at: https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Methodsandtrends/Migrant-smuggling.html [accessed on 15 February 2023].

125 Cf.: Jambor, J., 'Pokrzywdzony – ofiara handlu ludźmi w procedurach dochodzeniowych i sądowych', *Prokuratura i Prawo*, 2022, No. 9, p. 42.

126 FATF, *Money Laundering…*, op. cit., p. 18.

127 Mroczek, R., 'Formy inicjacji procesowej w sprawach o przestępstwa handlu ludźmi', *Prokuratura i Prawo*, 2019, No. 2, pp. 95–97.

form of payment is invariably cash (52%), followed by its transportation (literally) between jurisdictions.[128] For this purpose, the most popular methods include the use of *informal value transfer systems* (IVTS) such as *hawala* and recurring off-site prepaid card transactions.[129] This is rather significant from the perspective of counteracting money laundering and managing related criminal proceedings. The very issue of strategic activities and operational activities carried out in international cooperation in cases of human trafficking has been given enough space in the professional literature.[130] However, an analysis of the difficulties involved would go beyond the scope of this study. Taking into account the merits, and therefore the financial component of these offences, one should refer to the conclusions of the FATF report on the problem of migrant smuggling.[131] In the opinion of this organisation, the basic means of international cooperation in combating money laundering from such acts are: reliable collection, analysis, and exchange of financial information, as well as effective asset recovery.[132]

SUMMARY

To recapitulate, the issues presented above conclusively prove that money laundering as a practice is subject to constant change. They are conditioned both by the current global situation, particularly in the economic and political spheres, and by the development of modern technologies. The dynamics of socio-economic life, as well as the current political situation, create new opportunities for ingenious perpetrators of money laundering, while at the same time posing challenges to the authorities and institutions established to combat this practice.

Considering the fact that the crime of money laundering usually has a cross-border character and often extends beyond the territory of the European Union, it is important to take preventive actions against countries considered as posing a high risk as possible money laundering locations, and to develop rules of cooperation with countries outside the EU. It is evident that in addition to the need to develop legal regulations in this area, specific actions carried out in consultation with these countries are also necessary. Furthermore, one should not overlook the fact that, at the layering stage, money laundering is often committed in jurisdictions that, theoretically, do not raise concerns about the soundness of their financial systems. However, this does not mean that cooperation with these countries is devoid of problems. These are often rooted in the principle of double criminality, as evidenced by the difficulties arising from cryptocurrency transactions described in the study, as

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[128] Yilmaz, A., *Money Laundering Rosks Arising from Migrant Smuggling*, 1 May 2022, https://dxcompliance.com/money-laundering-risks-arising-from-migrant-smuggling/ [accessed on 12 March 2023].

[129] FATF, *Money Laundering…*, op. cit., pp. 20–24.

[130] See, for example: Galla-Podsiadło, K., Jakimko, W., Matyjewicz, M., Nowak, T., 'Współpraca międzynarodowa w sprawach o handel ludźmi', *Prokuratura i Prawo*, 2022, No. 9, pp. 170–229.

[131] FATF, *Money Laundering...*, op. cit., pp. 7, 44–45.

[132] Ibidem, pp. 34–35.

well as the consequences of the war in Ukraine in terms of commercial transactions. As indicated in the second part of the manuscript, cooperation with third countries may prove problematic both at the legislative and judicial levels. This is because third countries are not always willing to cooperate, alleging various formal or factual obstacles as reasons for non-cooperation. One such example include countries classified as tax havens. They make it difficult to trace the flow of 'dirty' asset values or prevent access to information on this subject. They also limit the effectiveness of actions taken by the bodies appointed to combat this phenomenon, in particular by the FIUs of other countries. It is undisputed that the transnational nature of the laundering process requires coordinated actions based on jointly developed legal measures.

On the international stage, not limited to EU countries, the FATF notably serves as the guardian of AML/CFT standards. Based on the documents developed by this organisation, as well as referring to the current threats in the field of money laundering, it should be recognised that the effectiveness of combating the practice requires strengthening bilateral and international cooperation both between the FIUs (including through the Egmont Group) and with law enforcement authorities and other authorities competent in the field of information exchange and mutual legal assistance. This applies in particular to countries that refer to national regulations, thus preventing the disclosure of essential circumstances of underlying acts or money laundering and the detection of their perpetrators. In addition to the necessity of abandoning barriers to the detection of principal crimes and their connection with the laundering of illegal financial benefits, it is also necessary to strengthen cooperation between neighbouring countries (border cooperation) to eliminate regional threats, mainly related to migration problems. Finally, recognising cybercrimes as a significant component of the predicate acts of money laundering, as well as cyber laundering as a form of its commission, it also seems indispensable to strive to develop coherent legal solutions in this area. These should include not only standards specifying the rules for collecting and transferring information about suspicious transactions, but also regulations enabling effective prosecution of their perpetrators and enforcement of adjudicated penalties.

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Cite as:

Golonka A. (2023) *'Cooperation with third countries in combating money laundering in the face of modern challenges'*, Ius Novum (Vol. 17) 4, 15–39. DOI 10.2478/in-2023-0027

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Ius Novum

2023, vol. 17, no. 4, pp. 40–59

THE INVOLVEMENT OF CONSULS AND CONSULAR OFFICERS IN EVIDENCE GATHERING UNDER ARTICLES 177 § 1B(2), 586 § 1, AND ARTICLE 177 § 1 IN CONJUNCTION WITH ARTICLES 582 § 1 AND 581 § 1 OF THE POLISH CODE OF CRIMINAL PROCEDURE

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DOI: 10.2478/in-2023-0028

Abstract

This article explores the involvement of members from both Polish and foreign consular posts in the process of taking evidence in criminal proceedings. Specifically, it examines the participation of Polish consular officers in the interrogation of witnesses and defendants, as outlined in Article 177 § 1b(2) of the Polish Code of Criminal Procedure. Additionally, the article discusses interrogation of these parties by consuls acting on behalf of Polish courts. Governed by both Polish and international law, this process is situated within the realm of international criminal proceedings and consular law. The article also delves into the right to decline to give evidence, a privilege granted to members of consular posts based on their official functions. In this context, we introduce the concept of 'consular secrecy', which can be likened to professional secrecy or secrecy associated with the official roles of certain individuals.

Keywords: consular officers, consular secrecy, consular immunity, declining to give evidence, criminal proceedings, interrogation, witness, defendant, expert witness

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PRELIMINARY INSIGHTS

The 1997 Polish Code of Criminal Procedure[1] (hereinafter referred to as 'PCCP') makes multiple references to both members and consular posts. It is important to note that these references offer a dual perspective: some provisions address them from a national standpoint, while others adopt a foreign perspective. Polish consular posts or officers are mentioned in provisions governing procedural time limits (Article 124 PCCP), their involvement in interrogating a witness who is a Polish national (Article 177 § 1b, item 2 PCCP[2]), and the process of serving court documents on a Polish citizen residing abroad or interrogating that individual as a defendant, witness, or expert witness at the prosecutor or court request (Article 586 § 1 PCCP). Conversely, heads of foreign[3] consular posts or foreign consular officers are referred to in Article 579 § 1 and 2 PCCP, which establish the subjective and objective boundaries of what is commonly known as consular immunity. Additionally, they are mentioned in Article 582 § 1, in conjunction with Article 581 § 1 PCCP, which delineate the subjective boundaries of the right to decline to give evidence. Article 581 § 2 PCCP provides for the exemption of individuals specified in Article 579 § 1 PCCP from the obligation to present correspondence and documents associated with their functions. Moreover, Article 586 § 2 PCCP outlines the subsidiary performance of an act that may not be executed by the Polish diplomatic mission or consular post (as specified in Article 586 § 1 PCCP). Competent consular posts of foreign states are also mentioned as recipients of notifications as specified in Articles 605 § 4 and 612 § 1 PCCP. Furthermore, they are recognised as authorised entities to establish contact with their own citizens in accordance with Article 612 § 2 PCCP. It is essential to note that the Code stipulates that direct communication with consular posts of foreign states in Poland can occur only in situations explicitly designated by the Minister of Justice, as stipulated in Article 613 § 2 PCCP.

None of the aforementioned provisions, however, cover the topic of the legal status of consular officers or consular posts, as these matters are governed by separate legislation. These include the Consular Law of 25 June 2015 (hereinafter referred to as the 'Consular Law'),[4] the Law of 21 January 2021 on Foreign Service,[5] the Vienna Convention on Consular Relations of 24 April 1963 (hereinafter referred to as the 'Convention'),[6] as well as various bilateral agreements.[7] Consequently, the provisions contained in the Polish Code of Criminal Procedure deal with the subject

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1 Act of 6 June 1997, Code of Criminal Procedure (consolidated text: Journal of Laws of 2022, item 1375, as amended).

2 The domestic nature of consular service members may be inferred from the context, rather than from the wording of this provision.

3 In more precise terms, the law avoids using the term 'foreign' and instead uses the phrase 'foreign state', which, in the relevant sentences, functions as an attributive (adjectival) phrase.

4 Consular Law of 25 June 2015 (consolidated text: Journal of Laws of 2023, item 199, as amended).

5 Act of 21 January 2021, on Foreign Service (Journal of Laws of 2023, item 406).

6 The Vienna Convention on Consular Relations concluded in Vienna on 24 April 1963 (Journal of Laws of 1982, No. 13, item 98).

7 See, for example, the Consular Convention between the People's Republic of Poland and the People's Republic of Hungary, signed in Warsaw on 5 June 1973 (Journal of Laws of 1974, No. 5, item 28), or the Consular Convention between the People's Republic of Poland and the

matter for which they were passed, primarily governing procedural relations and the responsibilities of authorities involved in the criminal process, as well as the responsibilities of Polish external authorities[8] and the authorities of foreign states.

Determining whether courts or prosecutors have contact with a person who enjoys immunity based on international law follows information received from the Minister of Foreign Affairs. This is due to the fact that the Minister has the status of a governmental authority that must be notified of any fact that might affect the status of the person referred to in Article 579, § 1 PCCP[9] (Article 24(1) of the Vienna Convention). When relevant authorities petition the Minister, they should provide information in a concise form regarding pertinent facts and the subject matter of the case, along with their findings on the immunity of the person. The relevant procedure is outlined in detail in § 26 of the Regulation of the Minister of Justice of 28 January 2002 (hereinafter referred to as the 'Regulation').[10]

The subject matter of criminal procedural law of interest to members of both the Polish consular service and foreign consular services can be categorised into two groups. Firstly, their actions may be technical in character but of great significance for criminal proceedings. This includes activities such as filing a written pleading (Article 124 PCCP), serving documents,[11] assisting in the interrogation of a Polish citizen as a witness (Article 177 § 1b(2) PCCP), and receiving a notice of the temporary detention of a person during proceedings aimed at extradition to a foreign state (Article 605 § 4 PCCP), or in any occurrence of temporary detention (Article 612 § 1 PCCP). Secondly, there are actions pertaining solely to the collection of evidence, such as the interrogation, in the capacity of a defendant, witness, or expert witness, of a Polish citizen residing abroad (Article 586 § 1 PCCP). It is evident that the majority of provisions governing the participation of consular service members in criminal proceedings aim to improve the efficiency of those proceedings when the regular course of action fails or is impossible to take. These actions reflect the principle expressed in Article 2 § 1(4) PCCP, emphasising expeditiousness in the legal process.[12]

United Kingdom of Great Britain and Northern Ireland, concluded in London on 23 February 1967 (Journal of Laws of 1971, No. 20, item 192, as amended).

[8] J. Symonides, among others, considers consular posts as external authorities of a state, see Symonides, J., in: Bierzanek, R., Symonides, J., *Prawo międzynarodowe publiczne*, Warszawa, 1985, p. 173.

[9] The same applies to 'a person belonging to the family of a member of a consular post forming part of his household' (Article 24(1)(b) of the Convention), as well as members of the private staff (Article 24(1)(c) and (d) of the Convention).

[10] Regulation of the Minister of Justice of 28 January 2002, on the specific duties of courts in international civil and criminal proceedings in international relations (consolidated text: Journal of Laws of 2014, item 1657, as amended).

[11] Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., Olszewski, R. (ed.), Świecki, D. (ed.), Błoński, M., Kasiński, J., Kurowski, M., Małolepszy, A., Misztal, P., Rydz-Sybilak, K., *Polskie postępowanie karne*, Warszawa, 2022, p. 553.

[12] Steinborn, S., 'Komentarz do art. 2', in: Grajewski, J., Rogoziński, P., Steinborn, S., *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX, 2016, comment 6; Grajewski, J., Steinborn, S., 'Komentarz do art. 2', in: Paprzycki, L.K. (ed.) *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX, 2015, comment 1; Kurowski, M., 'Komentarz do art. 2', in: Świecki, D. (ed.) *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2023, comment 5.

An exemption from the regular course of action typically occurs when a Polish citizen who is to participate in a given procedure is abroad. In the case of citizens of the sending state, the involvement of the consular service of their home country in the criminal process is a regular mechanism, either initiated *ex officio* (Article 605 § 4 PCCP) or at the request of those citizens (Article 612 § 1 and 2 PCCP).

The nature of Article 579 § 1, Article 582 § 1 in conjunction with Article 582 § 2 PCCP is even more diverse. In reality, these provisions are procedural safeguards for the members of the consular service referred to in Article 579 § 1(1-2) PCCP. The character of Articles 605 § 4 and 612 § 1 and § 2 PCCP is similar. However, what differs is that members of consular offices are part of a system not aimed at protecting those members, but rather at safeguarding the citizens of those foreign states which have entrusted those members with the performance of consular functions. In these situations, members of consular offices are not subjects of those safeguards but their major constituting elements.

Article 579 § 1 PCCP provides significant safeguards to individuals mentioned in this provision, which, in the long run, could pose a significant obstacle to the attainment of justice.[13] This is because this provision, while not absolving the criminality of an act committed, renders it impossible to prosecute the perpetrator of the act ('are not subject to Polish criminal courts' jurisdiction') if they hold the position of heads of consular posts or other consular officers of a foreign state (item 1 of this Article), or if they are individuals accorded equal status pursuant to international agreements or established international customs (item 2 of the Article). Immunity, in this context, confers a privilege that places the person enjoying it in a more favourable position than those who are not subject to it.[14] Legal scholars commonly regard consular immunity, along with diplomatic immunity, as examples of immunities associated with foreign service,[15] being forms of *incomplete formal immunity*,[16] primarily applicable to acts committed during the performance of official functions and related to those functions.[17] However, this immunity may transform into *full immunity* if corresponding protection on a reciprocal basis is extended to all acts. The aforementioned immunity represents a procedural impediment,[18] creating

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[13] Niewiadomska, I., Fel, S., 'Realizacja zasady sprawiedliwości w karaniu przestępców', *Zeszyty Naukowe KUL*, 2016, No. 3, p. 60; Tokarczyk, R.A., 'Sprawiedliwość jako naczelna wartość prawa', *Annales Universitatis Mariae Curie-Skłodowska*, 1997, No. XLIV, p. 154.

[14] Krzemiński, Z., 'Recenzja »Immunitety w polskim procesie karnym – Warszawa 1970«', *Palestra*, 1971, No. 4, p. 82.

[15] Sowiński, P.K., *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa, 2004, pp. 241–244.

[16] Augustyniak, B., 'Komentarz do art. 579', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, LEX, 2023 [17.05.2023], comment 2.

[17] See Article 5 of the Vienna Convention on Consular Relations concluded in Vienna on 24 April 1963 (Journal of Laws of 1982, No. 13, item 98). The list of consular functions is open, as indicated by the letter 'm' of this Article, allowing consuls to perform any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

[18] Stefański, R.A., 'Immunitet prokuratorski', *Prokuratura i Prawo*, 1997, No. 2, p. 63; Herzog, A., 'Postępowanie w sprawach o uchylenie immunitetu prokuratorskiego – stan prawny i praktyka (część I)', *Prokuratura i Prawo*, 2008, No. 4, p. 5.

a subjective limitation concerning the jurisdiction of Polish courts (Article 17 § 1(8) PCCP). It is important to note that this limitation does not apply to Polish citizens or individuals with permanent residence in Poland, as long as we are discussing acts not performed during the performance of official functions and unrelated to those functions (Article 584 PCCP).[19] Additionally, it does not apply to individuals for whom the sending state has waived their immunity.[20] Article 579 § 2 and 3 PCCP introduce impediments to prosecution, prohibiting the arrest or temporary detention of heads of consular offices or other consular officers of foreign states, except in cases involving felonies. A. Dana characterises consular immunity as an exemption from the general principle of legal equality expressed in Article 31 of the Polish Constitution.[21] However, it should not be regarded as discriminatory, as it does not deny individuals the ability to assert their rights.

The above insights are introductory in nature; the topic of this article is not the entirety of procedural regulations in the area of criminal law affecting the members of the consular service. Instead, it will concern those laws which directly affect the evidence collection process, including those which require the participation of consular officers in the interrogation of a Polish citizen residing abroad, with the former serving as a *sui generis* warrantor of the legal correctness of the interrogation (Article 177 § 1(2) PCCP), and the latter acting as a quasi-interrogative authority (Article 586 § 1 PCCP). Additionally, the article will touch upon the participation of members of the consular service in interrogations as a personal source of evidence (Article 582 § 1 in conjunction with Article 581 § 1 PCCP).

ARTICLE 44 OF THE VIENNA CONVENTION AND ARTICLE 582 § 1 IN CONJUNCTION WITH ARTICLE 581, AND ARTICLE 579 §1(2) PCCP

Within the junction of criminal procedure and consular law lies Article 582 § 1 of the Polish Code of Criminal Procedure (PCCP). This article serves as a safeguarding provision, yet it does not fully align with Article 2 § 2 of the PCCP and the principle of substantial truth expressed within.[22] This discrepancy is a common characteristic of prohibitions concerning the collection of evidence. They are rooted in the necessity to strike a balance between strictly procedural values and other competing interests, often with the latter taking precedence.[23] In the case of Article 582 § 1

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[19] See more on this, Michalski, W., *Immunitety w polskim procesie karnym*, Warszawa, 1970, pp. 57–61.

[20] Kulesza, C., 'Komentarz do art. 17', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, *LEX*, 2020, comment 54.

[21] Dana, A., 'Podmiotowy zakres immunitetu w polskim systemie prawnym', *Doctrina. Studia Społeczno-Polityczne*, 2011, No. 8, pp. 37–38.

[22] Grajewski, J., Steinborn, S., 'Komentarz do art. 2', in: Paprzycki, L.K. (ed.) *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX, 2015, comment 9.

[23] Legal scholars note that declining to give evidence is a reflection of the principle that the truth about the subject matter of the proceedings may not be collected at any price. See Mozgawa-Saj, M., 'Znęcanie się nad osobą najbliższą – aspekt karnoprocesowy', in: Mozgawa, M. (ed.), *Znęcanie się*, LEX, 2020, comment 1 [accessed on 18 July 2023].

PCCP, we encounter a prohibition understood as the exclusion of specific evidence.[24] This exclusion results from the prioritisation of missions carried out on behalf of another country. Effective international cooperation necessitates such safeguards.[25] Similarly, the 1963 Vienna Convention, to which Poland is a signatory, extensively regulates the issue of taking evidence from members of consular posts. The Convention states that members of consular posts may be called upon to attend as witnesses 'in the course of judicial proceedings',[26] without mentioning pre-judicial proceedings (Article 4(1) of the Convention). In contrast, Article 582 PCCP does not explicitly mention 'judicial proceedings'. However, § 29(2) of the Regulation detailing actions related to the interrogation of a member of a consular post indicates that the 'court' is the authority calling upon a person to attend as a witness. This suggests that the interrogation is intended to occur during the judicial phase of the proceedings.

Paragraph 29(2) of the Regulation referred to earlier aligns with Article 44 of the Vienna Convention, which governs the relevant mode of proceedings for individuals specified in Article 579 § 1(1) PCCP. Article 44(1) of the Convention states that 'members of a consular post may be called upon to attend as witnesses'. This category encompasses, as defined in Article 1(1)(g) of the Convention, 'consular officers', 'consular employees',[27] and 'members of the service staff'. Article 44(1) of the Convention, besides directly mentioning 'members of a consular post', also refers to other individuals (referred to in Article 1(1)(g) as 'members of a consular post'), namely 'consular employees' and 'members of the service staff'.[28] While this may seem redundant, it is important to note that 'consular employees' and 'members of the service staff' are not explicitly mentioned as individuals who may be 'called upon to attend as witnesses'.[29] Instead, they are individuals who are expected not to

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[24] Kwiatkowski, Z., *Zakazy dowodowe w procesie karnym*, Kraków, 2005, p. 273. In legal scholarship, the same prohibition is understood as an 'absolute-in-part' prohibition; cf. Sutor, J., 'Składanie zeznań w charakterze świadka przez członków urzędów konsularnych w świetle konwencji konsularnych zawartych przez PRL', *Nowe Prawo*, 1977, No. 7–8, p. 1085.

[25] In international law, the interpretation of privileges and immunities has taken different approaches, often based on the notion that individuals representing the sending state are exclusively subject to the laws of that state, the concept of their representative function, or alternatively, on the principles of extraterritoriality and the freedom to carry out their functions (frequently referred to as the 'functional necessity' or 'theory of the interest of functions' – see more on this, Sutor, J., *Prawo dyplomatyczne i konsularne*, Warszawa, 2006, pp. 206–215. S. Sawicki is considered a proponent of the theory of function, see Sawicki, S., *Prawo konsularne. Studium prawnomiędzynarodowe*, Warszawa, 2003, p. 195. In pre-war legal scholarship, K. Stefko supported the theory of freedom, see Stefko, K., *Dyplomatyczne zwolnienie od jurysdykcji w sprawach cywilnych*, Lwów, 1938, p. 87. The latter used the Polish term 'osoby zakrajowe' (extranational persons) in reference to individuals covered by immunity, see Stefko, K., *Dyplomatyczne*…, op. cit., p. 39.

[26] But also in the course of 'administrative proceedings'.

[27] A 'consular employee' means any person employed in the administrative or technical service of a consular post (Article 1(1)(e) of the Convention).

[28] A 'member of the service staff' means any person employed in the domestic service of a consular post (Article 1(1)(f) of the Convention).

[29] This can be, however, inferred from Article 44 of the Convention (first sentence) which provides that members of a consular post may be called upon to attend as witnesses. This category encompasses both consular employees and members of the service staff (as defined in Article 1(1)(g) of the Convention, which includes consular employees and members of the service staff within the term 'members of the consular post').

decline giving evidence, except in cases mentioned in paragraph 3 of the article. From a linguistic perspective,[30] the phrase 'they should not (...) decline to give evidence' [in Polish: 'nie powinni'] implies an expectation of specific behaviour, while also indicating that this behaviour is not mandatory. 'Consular employees and members of the service staff' are not obligated to decline to give evidence, but they should do so in situations specified in Article 44(3) of the Convention.[31] These situations are exceptions to the general rule that they must provide evidence. However, it is uncertain whether they will provide evidence due to the use of the modal verb 'should not' [in Polish: 'nie powinni'] in the second sentence of § 1. Article 44(3) of the Convention makes giving evidence voluntary ('are under no obligation to give evidence'[32]) for 'members of a consular post' if the evidence concerns 'matters connected with the exercise of their functions'.[33] This implies that when evidence concerns matters unrelated to their functions, they may have an obligation to give evidence. This interpretation could be valid, but the third sentence in Article 44(1) of the Convention forbids the application of any coercive measures or penalties to a 'consular officer' ('no coercive measure or penalty shall be applied to him' [in Polish: 'nie są obowiązani']).[34] It can be argued that this prohibition extends to any situation in which consular officers decline to give evidence,[35] not just those specified in Article 44(3) of the Convention. This is because the third sentence in Article 44(1) of the Convention provides no exceptions or at least no indication that the prohibition applies exclusively to situations where consular officers decline to give evidence related to their functions. It suggests that any evidence provided by consular officers is unenforceable, not just evidence concerning matters connected to their functions. Providing evidence by consular officers is voluntary, but only in the situations outlined in Article 44(3) of the Convention is declining to give evidence justified.[36] However, it is important to note that the third sentence of Article 44(1) of

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[30] See Polish definition of the word 'powinno': https://sjp.pl/powinno [accessed on 25 May 2023].

[31] Article 44(3) of the Convention also stipulates that members of a consular post are entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

[32] It is important to highlight that neither the Convention nor Article 582 PCCP employ a stronger normative expression, such as 'may not be interrogated as witnesses' or 'may not attend as witnesses in (…)'.

[33] Góralczyk, W., Sawicki, S., *Prawo międzynarodowe publiczne w zarysie*, Warszawa, 2007, p. 287.

[34] In contrast, another perspective was voiced by Hofmański, P. (ed.), Sadzik, E., Zgryzek, E., *Kodeks postępowania karnego. Tom III, Komentarz do art. 468–682*, Warszawa, 2007, p. 461.

[35] A similar prohibition against the use of any means of coercion or sanctions with regard to a consular officer 'refusing to appear or provide testimony' is stipulated in Article 20(1)(second sentence) of the Consular Convention between the Republic of Poland and the Republic of Lithuania, signed in Vilnius on 13 January 1992 (Journal of Laws of 1994, No. 30, item 108). This provision does not specify that the prohibition, in the case of refusing to testify, only pertains to testimony related to consular secrets.

[36] It is necessary to emphasise that Article 44(3) through Article 58(2) of the Convention applies directly to honorary consular officers, who constitute the second category of consular officers alongside career consular officers, both of whom may head consular posts (Article 1(2)). However, according to the Convention, these two types of posts are subject to different regulations, with posts headed by career consular officers falling under Chapter II, and posts headed by honorary consular officers falling under Chapter III of the Convention. See more on this, Czubik, P., Kowal-

the Convention pertains only to 'consular officers', as defined in Article 1(1)(d) of the Convention, which includes any person entrusted in that capacity with the exercise of consular functions (including 'heads of consular posts'[37]). This provision does not apply to 'members of a consular post', which includes, in addition to 'consular officers', 'consular employees', and 'members of the service staff'. As such, it could be argued that, in the case of 'consular employees' and 'members of the service staff', coercive measures or penalties might be applicable, except for the right to decline to give evidence concerning 'matters connected with the exercise of their functions', as provided in Article 44(3) of the Convention.

In national law, Article 582 § 1 PCCP mandates the respective application of Article 581 PCCP, granting individuals specified in Article 579 § 1(1-2) PCCP the right to decline to provide evidence and exempting them from the duty to serve as expert witnesses. This exemption applies when the evidence or expert witness opinions pertain to the exercise of official functions by these individuals, or reciprocally, in connection with other functions. The extent to which individuals mentioned in Article 579 PCCP may be exempted from procedural duties raises questions. It is clear that the exemption is valid when evidence or opinions relate to matters connected with the exercise of official functions and, conversely, 'other' functions. However, it remains unclear whether individuals are exempted from the duty to 'serve as a translator or interpreter'. This uncertainty arises because, while 'giving evidence as a witness' and 'giving opinion as an expert' are explicitly mentioned in Article 581 PCCP (applied respectively), translation and interpretation are not explicitly mentioned in Article 582 PCCP, which refers to the former provision. Article 582 PCCP not only mandates the 'respective application' of Article 581 PCCP but also establishes the boundaries of such respective application concerning the right to decline evidence. It specifies that Article 581 PCCP is to be applied respectively when evidence or opinions relate to matters connected with the exercise of official functions, and reciprocally, to other matters. However, the omission of translation and interpretation in the context of potential modifications (resulting from respective application) implies that Article 581 § 1 PCCP should be applied without modification in this regard. Instead, the scope of individuals to whom it applies should be modified, applying it to members of the consular service rather than the diplomatic service, as originally stated. Respective application typically involves adapting a legal provision to a situation different from its original purpose. However, it does not always necessitate modifications, as is the case with exempting individuals mentioned in Article 579 PCCP from the duty to translate or interpret.

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ski, M., *Konsul honorowy*, Kraków, 1999, pp. 98ff; Staszewski, W.Sz., *Konsul honorowy w prawie międzynarodowym i w praktyce polskiej*, Lublin, 2015, pp. 124ff; Trafas, T., 'Funkcja konsula honorowego w świetle polskich uregulowań – dylematy teorii i praktyki', in: Czubik, P., Burek, W. (eds.), *Wybrane zagadnienia współczesnego prawa konsularnego*, Kraków, 2014, pp. 70ff.

[37] A 'head of consular post' means the person charged with the duty of acting in that capacity (Article 1(1)(c) of the Convention). Heads of consular posts are divided into four classes, namely consuls-general, consuls, vice-consuls, and consular agents (Article 9(1)(a)–(g) of the Convention). The terminology is commonly recognised, however, the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts is in no way restricted (Article 9(2) of the Convention).

Given the specific nature of consular functions, which primarily aim to protect the nationals of the sending State in the receiving State (as defined in Article 5(a) and (i) of the Convention), it is reasonable to empower procedural authorities to request individuals mentioned in Article 579 PCCP to 'serve as a translator or interpreter'. This provision is outlined in Article 582 § 1 in conjunction with Article 581 § 1 *in fine* PCCP. Who better to fulfil this role for a national of the sending State than a member of the consular service?

The fact that refusing to provide evidence under Article 582 § 1 in conjunction with Article 581 § 1 PCCP is justified by the need to maintain the confidentiality of matters related to the 'exercise of official functions by those individuals' renders this provision similar to refusing to provide evidence under Article 180 § 1 PCCP, where immunity is granted to specific groups of witnesses due to official or professional secrecy. Several analogies can be drawn between these two provisions. Both involve the right to decline to provide evidence but are limited to matters that are confidential. There are situations in which this right would apply to all facts, while in others, it would entail refusing to answer questions that would breach areas protected by Article 582 PCCP or bilateral agreements. Declining to provide evidence would be equally broad in cases where witnesses, reciprocally, use this protection for matters unrelated to 'exercising official functions'. The principle of reciprocity, extending to 'matters' not connected with the exercise of official functions ('other' matters), results in the right of individuals mentioned in Article 579 § 1(1-2) PCCP to decline to provide evidence taking on its most comprehensive form.

The use of information covered by the concept of consular secrecy, unlike secrets mentioned in Article 180 § 1 (§ 2) PCCP, is contingent on the voluntary consent of the person obligated to maintain the secrecy. Consequently, there is no need to verify whether additional conditions for obtaining such evidence, such as 'the interest of justice' or 'the impossibility of determining a fact by other means', have been met. It also appears that individuals mentioned in Article 579 PCCP are not bound by the time limits specified in Article 186 § 1 PCCP because, legally, they are not obligated to provide evidence within the scope outlined by Article 582 § 1 in conjunction with Article 581 § 1 PCCP. Offering such evidence would be entirely voluntary since, in accordance with Article 581 § 1 PCCP (applied respectively), they can 'consent to testify'.[38] Neither the 2002 Regulation nor the provisions of the Code offer guidance on whether the court can set a deadline for a potential response to a summons to provide testimony. Nevertheless, if such a deadline were established, consent given after its expiration would still be fully effective, as the principle of substantial truth takes precedence over procedural expediency. However, it can be argued that the court cannot indefinitely await a response from the individual mentioned in Article 579 § 1 PCCP, and the maximum time limit may be determined by the 'proposed date of interrogation' (as per § 29(4) of the Regulation).

Article 582 § 1 PCCP applies to individuals mentioned in Article 579 § 1 PCCP. These individuals include heads of consular posts and other consular officers of foreign states (point 1), as well as those equated with them based on

[38] Or consent to attend as a witness or interpreter.

international agreements or universally accepted international customs (point 2). While Article 579 § 1 PCCP does not explicitly specify whether it refers to members of consular posts located in Poland, the overall provisions regulating their status imply that it includes members of consular posts of foreign states. It is important to note that these individuals are not necessarily nationals of those states. Article 22(2) of the Convention states that consular officers may not be appointed from among persons with the nationality of the receiving State, except with the express consent of that State. However, members of consular posts with offices in third countries can also enjoy the procedural privileges granted by Article 582 § 1 in conjunction with Article 581 § 1 PCCP, within the scope determined by Article 54(1) of the Convention. It provides that 'if a consular officer passes through or is in the territory of a third State'[39] (in this example, Poland), 'the third State shall accord to him all immunities provided for by the other articles of the present Convention as may be required to ensure his transit or return.'[40]

In accordance with Article 53(1) of the Convention '[E]very member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.' These privileges and immunities cease to apply when a member of the consular post's functions come to an end. This happens either when the person leaves the receiving State or after a reasonable period for doing so, whichever is sooner (Article 53(3) of the Convention). The question arises whether the cessation of privileges under Article 53(3) of the Convention (upon the conclusion of the consular mission) means only that individuals who are not currently performing the functions mentioned in Article 579 PCCP can be called upon to give evidence in the ordinary manner, or if it also means that the person called upon can no longer decline to give evidence under Article 582 in conjunction with Articles 581 and 579 PCCP. We are inclined to assert that the latter possibility is unlikely, as the phrase 'activities performed during and in connection with the performance of their official duties' in Article 579(1) PCCP does not necessarily imply that exercising those functions and giving evidence must coincide in time. A similar conclusion cannot, however, be drawn from Article 44(3) of the Convention or Article 582 PCCP, which require that the matters which the evidence concerns must be 'connected with the exercise of their functions', without the need for those functions to be actively exercised at the moment. Even if one were to adopt the opposing view that the expiration of privileges should be considered more broadly, encompassing the right to decline to give evidence under Article 582 in conjunction with Articles 581 and 579 PCCP, individuals whose consular mission has ended would not be in a completely disadvantaged position. Former heads of consular posts and other consular officers of foreign states could still rely on the secrecy associated with the functions they

[39] While proceeding to take up or return to his post or when returning to the sending State.

[40] The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State (Article 54(1)(second sentence) of the Convention).

exercised. This time, they would derive their right to decline to give evidence from Article 180 § 1 PCCP, which, after all, does not exclusively concern the 'functions' performed within the structures of the Polish State.

Procedural correspondence with members of the consular service, in contrast to representatives of foreign diplomatic missions, does not require the intermediation of the Minister of Foreign Affairs. Correspondence related to interrogating members of consular posts as witnesses or involving them as experts may be sent by the court directly to those involved (§ 29(2) of the Regulation). This process aligns with Article 44 of the Convention, unless bilateral agreements stipulate otherwise. The Convention does not specify whether obtaining consent to testify from any individuals listed in Article 579 § 1(1-2) PCCP is required. Such consent is solely governed by Article 581 § 1 PCCP. Some legal scholars argue that consent only applies to circumstances related to the exercise of official functions by these individuals and, subject to reciprocity, 'other circumstances'. In cases where the principle of reciprocity does not apply, consent is not required for these 'other circumstances', and individuals listed in Article 579 § 1(1-2) PCCP are obligated to appear and give evidence as witnesses or attend as experts, specialists, or translators and interpreters.[41]

Where the court requests members of the consular service for consent to give evidence or to attend as an interpreter, it must specify the subject matter of the interrogation and attach a summons[42] indicating the proposed interrogation date (§ 29(4) of the Regulation). The summons itself undergoes a correctness check by the court president or an authorised judge, court assessor, or judicial referendary (§ 29(4) of the Regulation), which is exceptional during such proceedings. Pursuant to § 30 of the Regulation, the interrogation date, except when urgent, is scheduled to allow sufficient time between the date of sending the summons and the intended interrogation date for the summoned person to thoroughly acquaint themselves with the contents of the summons and prepare for the interrogation.

The requirement specified in § 29(4) of the Regulation, which makes it obligatory to indicate the subject matter of the proceedings, serves a dual purpose. On one hand, it provides the summoned member of the consular service with an opportunity to understand the significance of the circumstances they might disclose while giving evidence. On the other hand, it prevents the processual authority from exceeding the limits it had set and from encompassing, by the interrogation, the subject matter not previously indicated in the summons.

Article 582 in conjunction with Article 581 § 1 PCCP does not specify the form of consent. However, given that the individual mentioned in Article 579 § 1 PCCP and the procedural authority exchange correspondence, it can be inferred that the predominant form will be in writing. These provisions also do not specify whether consent might be withdrawn, which means that general rules will apply in this

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41 Janicz, M., 'Komentarz do art. 582', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2020, comment 1.

42 This term is misleading because the document in question is not a strict demand; the authority simply 'requests' attendance at the trial or session – see Attachment No. 3 to the Regulation mentioned in footnote 10.

regard (or rather the no-rules principle), as the revocability of statements of will in criminal procedure raises considerable controversy in legal scholarship.[43] The consent itself constitutes a fully autonomous declaration of will by the individual to whom the personalised inquiry from the court is addressed. It cannot be replaced by a statement from a superior or the sending state. Even the explicit waiver of immunity by the sending state in relation to the person mentioned in Article 582 § 1 in conjunction with Article 581 § 1 PCCP does not affect the necessity of applying the procedure provided for in the above-mentioned provisions. In such a situation, Article 580 § 1 PCCP repeals the application of Articles 578 and 579 PCCP to that individual, but not Article 582 § 1 or Article 581 § 1 PCCP. This may be due to a legislator's oversight, but it can also be interpreted as a reflection of respect for the permanence of consular secrecy, which does not cease with the waiver of consular immunity.

Until the end of 2019, individuals with diplomatic or consular immunity were not required to take an oath or receive instructions regarding potential criminal liability for making false statements (§ 31 of the Regulation, currently not in force[44]). The interrogation of a member of a consular post may occur at the requesting court's premises, within the consular post's facility, or at the residence of the person mentioned in Article 579 § 1 PCCP.[45] Courtesy suggests that this choice should be left to the witness. Article 44 (2) of the Convention addresses the location of the consular officer's interrogation, emphasising the need to 'avoid interference with the performance of their functions'. The final option, and the last one mentioned, is accepting a written statement from the witness.

The majority of Poland's bilateral consular conventions contain provisions regarding the participation of consular service members as witnesses in criminal proceedings. These conventions often use similar language to describe the rights of those summoned as witnesses. They may mention the 'right to decline to give evidence' or the 'lack of duty to give evidence', linking these concepts with 'matters related to the performance of their official duties',[46] 'facts connected with the

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[43] See more on this, Nowikowski, I., *Odwoływalność czynności procesowych stron w polskim procesie karnym*, Lublin, 2001, pp. 11ff.

[44] It was repealed on 28 December 2019, by § 1(18) of the Regulation of the Minister of Justice dated 14 November 2019, amending the regulation regarding specific duties of courts in matters related to international civil and criminal proceedings in international relations (Journal of Laws, item 2398).

[45] Similarly, Article 27(2) of the Consular Convention between the Republic of Poland and Romania, drawn up in Bucharest on 25 January 1993 (Journal of Laws of 1994, No. 29, item 104), which provides for the taking of testimony 'in the residence or in the consular office' or 'receiving (…) a written statement'.

[46] Article 22(3) of the Consular Convention between the Republic of Poland and the Russian Federation, drawn up in Moscow on 22 May 1992 (Journal of Laws of 1995, No. 140, item 687), also mentions the 'family of a consular post member and private staff with regard to facts related to the activity of a consular post'. A similar extension of the right to decline to give evidence is included in Article 44(3) of the Consular Convention between the People's Republic of Poland and the Italian Republic, signed in Rome on 9 November 1973 (Journal of Laws of 1977, No. 9, item 35), which grants the aforementioned right to 'families of consular posts' members' and links the right with 'circumstances concerning the activity of a consular post'. Identical provisions are contained in Article 20(3)(second sentence) of the Consular Convention between the People's

performance of their official duties',[47] or 'facts related to the exercise of their functions'.[48] While these conventions primarily address the situation of members of consular posts (which aligns with Article 579 § 1(1) PCCP, granting the right to decline to give evidence primarily to 'heads of consular posts and other consular officers of foreign states'), they often use a broader term, 'members of consular posts',[49] which encompasses 'consular employees' and 'members of the service staff'. Article 579 § 1(2) PCCP covers these categories as 'persons equated with them [that is with persons mentioned in Article 579 § 1(1) PCCP] pursuant to international agreements or generally accepted international customs'. In the absence of such convention-based provisions, these individuals might not be able to exercise their right to decline to give evidence in criminal proceedings. Therefore, Article 579 § 1(1) PCCP provides those mentioned in it with an independent basis for the right to decline to give evidence, while Article 579 § 1(2) PCCP requires an additional examination to establish the existence of the necessary 'agreement' or 'generally accepted international custom'.

Both the right to decline to give evidence and the exemption from the obligation to act as an expert under Article 582 § 1 in conjunction with Article 581 § 1 PCCP are in fact an implementations of Article 44 (1) of the Convention. While the latter provision does not use the term 'refusal to testify' but instead refers to the exemption from the obligation to testify ('shall not … decline to give evidence'), there is no doubt that both provisions aim to achieve the same goal, namely, to prohibit the breach of consular secrecy through testimony. In contrast to Article 582 § 1 PCCP, Article 44 (3) of the Convention also grants 'members of a consular post' the right to decline to give evidence 'as expert witnesses with regard to the law of the sending State'.[50] Disregarding the legal impossibility of appointing legal experts in the domestic context (based on the principle '*iura novit curia*'), these individuals

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Republic of Poland and the French Republic, signed in Paris on 20 February 1976 (Journal of Laws of 1977, No. 19, item 76), and in Article 17(3) of the Consular Convention concluded with Mexico (mentioned elsewhere in this paper). However, the latter Convention states that the right to decline to give evidence is restricted to 'members of families of consular posts' members, if they are not nationals of the receiving State'.

47 See Article 17(3) of the Consular Convention between the People's Republic of Poland and the United Mexican States, signed in Warsaw on 14 June 1985 (Journal of Laws of 1986, No. 37, item 183); Article 43(3) of the Consular Convention between the Government of the People's Republic of Poland and the Government of the People's Republic of China, signed in Beijing on 14 July 1984 (Journal of Laws of 1985, No. 8, item 24).

48 See Article 20(3) of the Consular Convention between the People's Republic of Poland and the Republic of Austria, signed in Vienna on 2 October 1974 (Journal of Laws of 1975, No. 24, item 131).

49 See, among others, Article 22(1) of the Consular Convention between the Republic of Poland and the Russian Federation, op. cit.; Article 21(1) of the Consular Convention between the Republic of Poland and the Republic of Estonia, signed in Tallinn on 2 July 1992 (Journal of Laws of 1997, No. 125, item 798); Article 20(1) of the Consular Convention between the People's Republic of Poland and the Republic of Greece, signed in Warsaw on 30 August 1977 (Journal of Laws of 1979, No. 12, item 82).

50 Similar provisions as to the refusal to 'give an expert opinion on the sending State's legislation' can be found in Article 18(3) of the Consular Convention between the People's Republic of Poland and the Republic of Cuba, signed in Havana on 12 May 1972 (Journal of Laws of 1975, No. 21, item 111).

are provided with more extensive protection under the Code. This protection encompasses all situations where they are required to provide expert opinions, provided that these situations are linked to the exercise of official functions by the individuals in question. This protection also extends, subject to reciprocity, to other circumstances.

THE INVOLVEMENT OF CONSULAR OFFICERS IN COURT INTERROGATIONS (ARTICLE 177 § 1B(2) PCCP)

When a witness is a Polish national residing abroad, Article 177 § 1b(2) PCCP stipulates that a consular officer must be present during the witness interrogation as per Article 177 § 1a PCCP. Article 177 § 1a PCCP outlines a procedure involving the use of technical devices that enable remote interrogations with simultaneous direct image and sound transmission. The participation of a consular officer acts as a substitute for the involvement of a court referendary, judge's assistant, or a court-employed official in cases where their presence is not possible due to organisational and economic constraints. The presence of a consular officer is essential for validating the conditions under which the evidence is obtained and 'ensuring the correctness'[51] of the evidence-taking process in accordance with Article 177 § 1b PCCP. It is, therefore, not accurate to describe this provision as solely 'organisational in character since it supplements the list of authorised individuals under § 1a to be present during remote witness interrogations'.[52] Nevertheless, it is true that the Code does not grant consular officers the authority to report potential violations of interrogation rules, which may imply that the legislator assumes consular officers lack the ability to identify such violations. In some sense, this position relegates consular officers to the role of observers rather than active participants in the evidence-taking process. However, I contend that this does not strip consular officers of the right to raise concerns about the proper conduct of the interrogation if they have any.

The mentioned provision does not specify the location for such an interrogation. This lack of specification can be interpreted as an indication that the participation of a consular officer is not only possible but even recommended in cases where the remote interrogation is conducted by a foreign court.[53] The key factor here is that the witness resides abroad, which presents a unique circumstance justifying departure from the standard practice of conducting direct interrogations. Legal scholars have long argued that moving away from the traditional method of interrogation as outlined in Article 177 § 1 PCCP should only occur in the presence of exceptional and significant circumstances, rather than mere obstacles that can be

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[51] Gruszecka, D., 'Komentarz do art. 177', in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2021, p. 413.

[52] Kurowski, M., 'Komentarz do art. 177', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2023, comment 6.

[53] Kulesza, C., 'Komentarz do art. 177', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2020, comment 13.

easily overcome.[54] With the addition of Article 177 § 1b PCCP in 2020, changes were made to the Consular Law as well. Among the various consular functions enumerated in Article 26(1) of the Consular Law, a new function was introduced, specifically, the 'presence of a consul at the location where the examination of a witness takes place, if it is conducted in the manner specified in Article 177 § 1a' (Article 26(1)(2a) of the Consular Law). Furthermore, it explicitly stated that consuls may be present during witness interrogations 'at the request of a court or prosecutor'.

INTERROGATIONS CONDUCTED BY A CONSUL PURSUANT TO 586 PARA. 1 PCCP, OF CERTAIN PERSONS AS DEFENDANTS, WITNESSES, OR EXPERTS

In the context of interrogations involving certain individuals as defendants, witnesses, or experts, the involvement of a consular officer is contingent upon a request[55] from the court or prosecutor, as explicitly stipulated in Article 26(1)(2) of the Consular Law. However, unlike the situation described in Article 177 § 1b(2) PCCP, in conjunction with Article 26(1)(2a) of the Consular Law, where the consular officer predominantly plays a supervisory role, here, the consular officer assumes an active role, akin to that of a procedural authority, albeit with defined boundaries. While this form of interrogation is considered part of the concept of 'legal assistance', a member of a consular post conducting the interrogation is bound by a pre-established list of questions[56] and lacks the authority to ask additional questions that may become necessary during the interrogation. It is important to note that this differs from situations where one court provides legal assistance to another. Despite Article 26(2) of the Consular Law specifying that interrogations mentioned in Article 26(1)(2) should adhere to relevant provisions of Polish law, there is no explicit legal foundation empowering a member of a consular post to pose unlisted questions. Moreover, applying the pertinent provisions of Polish law requires compliance with procedural rules (e.g., Article 175 § 1 and Article 190 PCCP) and ensuring the interrogated person's freedom of expression (Article 171 PCCP). If a defence lawyer expresses a desire to participate, the consul can permit their presence during the interrogation. However, this raises important implications. The law grants defence lawyers the right to actively partake in the evidence-gathering process, without Article 586 § 1 PCCP diminishing the right to a robust defence, nor abolishing legal norms embodied in Article 301 PCCP. In practice, though, the reality differs. The Polish Ombudsman's report of 7 February

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[54] Wiliński, P., 'Przesłuchanie świadka na odległość w postępowaniu karnym', *Przegląd Sądowy*, 2005, No. 6, pp. 16–18; Stefański, R.A., Zabłocki, S., *Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296*, LEX, 2019, comment 6 to Article 177.

[55] Interrogating a person mentioned in Article 586 § 1 PCCP, whether initiated by the person in question or by a consular post member (an unlikely scenario), is not feasible.

[56] According to § 39 of the Regulation, when submitting a request to interrogate Polish citizens residing abroad, the court must include a 'list of questions to be asked to the interrogated individuals'.

2017 (Reference No. II.510.1297.2016.MH)[57] indicates that consuls often deny defence lawyers (or other legal representatives) participation in interrogations conducted under Article 586 § 1 PCCP. While the consul's interrogation may not be considered identical to that of a procedural authority, it remains an act delegated to the consul, who shares a portion of the responsibility in upholding the principles of the interrogation process.

There is no consensus among legal scholars regarding whether consular interrogations can also extend to nationals of third countries. Some, like S. Steinborn,[58] support this possibility, while others, such as B. Augustyniak[59] and A. Sołtysińska,[60] oppose it. I firmly argue in favour of endorsing the latter position because interrogating such nationals, categorised as 'residing abroad' rather than recognised as 'persons holding Polish citizenship', falls under the purview of Article 585(2) PCCP. This means that interrogations of individuals as 'defendants, witnesses, or experts' should occur based on two different provisions, namely Article 585 § 1 and Article 586 § 1 PCCP. It is worth emphasising that only interrogations under the latter provision may be conducted by 'a Polish diplomatic mission or a consular post'.

A straightforward comparison between Article 586 § 1 PCCP and Article 26(1)(2) of the Consular Law reveals notable differences. While the former pertains to the interrogation of a 'person in the capacity of a defendant, witness, or expert', the latter covers 'parties, participants in the proceedings, witnesses, and suspects'. These distinctions may appear superficial if we categorise 'defendants' as 'parties'[61] and 'experts' as 'participants in the proceedings', allowing for their interrogation with consular assistance. Moreover, Article 26 of the Consular Law lacks any specific indication that it concerns the interrogation of a 'person who holds Polish citizenship',[62] unlike Article 586 § 1 PCCP. This can be explained by the fact that Article 2 of the Consular Law primarily mandates consular functions to be performed in the interest of the 'Republic of Poland and its citizens abroad' (as per Article 1 of the Consular Law). However, the differences between these provisions are more extensive. Article 586 § 1 PCCP mentions requesting the 'Polish (...) consular post' (in an impersonal manner), whereas Article 26(1) of the Consular Law individualises a member of that post, specifying the 'consul' as the one who 'performs the (...) activities listed in Article 26(1)(2)'. This implies that, according to consular law, only this specific member of the consular post, and no other, can handle the court's request to interrogate a person residing abroad who holds Polish citizenship. This

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[57] See also the earlier communication from the Polish Ombudsman (I.510.1297.2016 II.510.1297.2016.MH) to the Minister of Foreign Affairs, available at https://sprawy-generalne.brpo.gov.pl/pdf//2017/2/II.510.1297.2016/966208.pdf [accessed on 22 May 2023].

[58] Steinborn, S., 'Komentarz do art. 586', in: Grajewski, J. (ed.), Paprzycki, L.K., Steinborn, S., *Kodeks postępowania karnego. Komentarz do art. 425–673 k.p.k.*, Tom II, Kraków, 2006, pp. 512–513.

[59] Augustyniak, B., 'Komentarz do art. 586', in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, LEX, 2023, comment 8.

[60] Sołtysińska, A., 'Komentarz do art. 586', in: Jaworski, G., Sołtysińska, A., *Komentarz do niektórych przepisów Kodeksu postępowania karnego*, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz*, LEX, 2010, comment 5.

[61] However, it appears that this particular phrase was crafted for purposes other than criminal proceedings.

[62] Polish citizenship of an interrogated person is also mentioned in § 39(1) of the Regulation.

conclusion is further supported by Article 39(1) of the Regulation,[63] which states that a request to interrogate a person should be directed 'to the consuls of the Republic of Poland to be handled within their responsibilities'. Additionally, Article 26 of the Consular Law mentions consuls as those who, at the court's or prosecutor's request, must perform specified procedural acts. The use of 'consuls' appears to differ from Article 9 of the Convention, which recognises 'consuls' as representatives of one of the several classes of 'heads of consular posts'. Nonetheless, it aligns with the nomenclature established in Article 9(2)(1-4) of the Consular Law. In this provision, 'consuls' alongside 'consuls-general', 'vice-consuls', and 'consular attachés', are considered one of the four titles conferred by the head of the consular service to consular officers.[64] 'Consul' in Article 39(1) of the Regulation and Article 26(1) of the Consular Law can practically be any of the heads of the consular post, even if they hold a consular title different from 'consul'. It is worth noting that Article 26 of the Consular Law inaccurately defines those who request the interrogation of 'parties, participants in the proceedings, and suspects', or those who request to be present during the procedure referred to in Article 177 § 1a PCCP, as 'public administration authorities in the Republic of Poland', although 'procedural authorities' would be a more accurate term.

Some legal scholars support the application of remote interrogation procedures to interrogations conducted under Article 586 § 1 PCCP.[65] However, others argue that these interrogations are exclusively intended for authorities directly involved in criminal proceedings, rather than a 'summoned authority (or) summoned court'.[66] If we consider a consul as an 'external' authority, this possibility may not be feasible, especially as it raises the question of who should assist the person being interrogated abroad. Unfortunately, Article 10(1) of the 2000 Convention on Mutual Legal Assistance in Criminal Matters, which permits the hearing of a person as a witness or expert by videoconference by the judicial authorities of another member state, does not provide clarity. This is because Article 586 § 1 PCCP does not encompass acts between authorities of different member states, while the Convention exclusively addresses such acts. However, a pertinent question arises: can we infer that since this 'remote' interrogation format is possible in international relations, there is no basis for treating acts conducted 'within' the Polish legal system and by Polish consuls differently?[67]

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[63] 'Consuls of the Republic of Poland' as the 'recipients of the request to interrogate a person as a witness, in particular' are also mentioned in § 37 of the Regulation.

[64] In accordance with national legislation, a 'consular officer' is defined as a 'consul or any other member of the diplomatic and consular personnel performing consular functions in the receiving state' (Article 4 of the Consular Law).

[65] Augustyniak, B., 'Komentarz do art. 586…', op. cit., comment 9; Hofmański, P. (ed.), Sadzik, E., Zgryzek, K., *Kodeks…*, op. cit., p. 474.

[66] Paprzycki, L.K., 'Komentarz do art. 177', in: Paprzycki, L.K., *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, LEX, 2015, comment 8.

[67] The Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, concluded in Brussels on 29 May 2000, and the Protocol to the Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, concluded in Luxembourg on 16 October 2001 (Journal of Laws of 2007, No. 135, item 950).

The minutes prepared by a consul are not subject to Article 587 PCCP. Instead, they fall under the purview of Articles 389, 391, 392, or 393 PCCP.[68] An essential condition for conducting an interrogation under Article 586 § 1 PCCP is that the person subjected to questioning must be a Polish citizen and express a willingness to participate, as the consul lacks the authority to employ coercive measures.[69]

Actions mentioned in Article 586 § 1 PCCP can be conducted in a foreign country if a Polish diplomatic mission or consular post is present. This is evident from the provision itself and is explicitly stated in Article 586 § 2 PCCP, which allows these actions to be performed by a foreign court, prosecutor, or another competent authority 'in case it is impossible to perform those actions in the manner specified in § 1'. The legal basis for making such a request when it's impossible to perform the actions specified in Article 586 § 1 PCCP can be an international agreement or even Article 15(1) of the European Convention on Mutual Legal Assistance in Criminal Matters.[70]

CONCLUSIONS

This paper delves into the involvement of consular officers, both Polish and foreign, in the process of gathering evidence in criminal proceedings. The purpose of this text is to serve as a starting point for a more extensive discussion about the roles played by consular officers in criminal proceedings. This is especially necessary because the topic often goes overlooked by legal scholars[71] or is briefly mentioned, with a focus on quoting legal provisions.[72] However, actions performed under Article 586 § 1 of the Code of Criminal Procedure can be regarded as consular functions with a judicial nature. Even though they are subsidiary in character,[73] they frequently have a significant impact on the primary criminal proceedings. Entrusting judicial tasks to consular officers aligns with Article 5(m) of the Convention, which defines consular functions as including 'performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State (…)'.

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[68] Steinborn, S., 'Komentarz do art. 586', in: Paprzycki, L.K. (ed.), *Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego*, LEX, 2015, comment 2a.

[69] Dąbrowski, Ł.D., 'Dowód z przesłuchania stron i innych uczestników procesu przez konsula – wybrane zagadnienia procesowe', in: Burek, W., Czubik, P. (eds.), *Polskie prawo konsularne w okresie zmian*, Warszawa, 2015, p. 37.

[70] The European Convention on Mutual Legal Assistance in Criminal Matters (Journal of Laws of 1999 No. 76, item 854 with amendments).

[71] In his discussion of professional secrecy and confidentiality related to the performance of specific functions, M. Rusinek focuses solely on Article 180 PCCP, M. Rusinek without making reference to Article 582 § 1 in conjunction with Article 581 § 1 PCCP. See Rusinek, M., *Z problematyki zakazów dowodowych w postępowaniu karnym*, Warszawa, 2019, pp. 165–170.

[72] Grzeszczyk, W., *Kodeks postępowania karnego. Komentarz*, LEX, 2012, comments 1–3 to Article 584; Prusak, F., *Kodeks postępowania karnego. Komentarz*, LEX, 1999, comments 1–4 to Article 582; Janicz, M., 'Komentarz do art. 582', in: Dudka, K. (ed.), *Kodeks postępowania karnego*, LEX, 2020, comments 1–3.

[73] Sutor, J., *Prawo dyplomatyczne i konsularne*, Warszawa, 2019, p. 521.

The inconsistencies between the provisions of criminal procedure and those within the Consular Law, including differences in terminology, as discussed in this article, do not fundamentally hinder the ability of consular officers to fulfil their procedural duties. However, they underscore that the regulatory framework related to these participants in criminal proceedings is not as straightforward as it may initially appear. Due to the editorial constraints, this paper has not elaborated on issues beyond the gathering of evidence. Furthermore, the discussion primarily revolved around the roles assigned to individuals mentioned in Article 579 § 1(1-2) PCCP under Article 177 § 1b(2), Article 586 § 1, as well as Article 582 § 1 in conjunction with Article 581 § 1 PCCP. However, this topic warrants a separate and comprehensive discussion.

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Cite as:

Sowiński P.K. (2023) *'The Involvement of Consuls and Consular Officers in Evidence Gathering under Articles 177 § 1b(2), 586 § 1, and Article 177 § 1 in Conjunction with Articles 582 § 1 and 581 § 1 of the Polish Code of Criminal Procedure'*, Ius Novum (Vol. 17) 4, 40–59. DOI 10.2478/in-2023-0028

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Ius Novum

2023, vol. 17, no. 4, pp. 60–76

THE ISSUANCE OF THE EUROPEAN PROTECTION ORDER

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DOI: 10.2478/in-2023-0029

Abstract

This scientific article researches the procedure for issuing a European protection order by a Polish court or public prosecutor, resulting in the enforcement of protective, penal, or probation measures by a competent judicial or equivalent authority in a Member State of the European Union. These measures require refraining from staying in certain environments or places and avoiding contact with or proximity to certain people. This article does not cover provisions concerning the execution of such an order by the competent authority of a Member State. The main research objective is to demonstrate the importance of this measure in continuing the protection of the aggrieved in another Member State. The research findings are original and primarily national in scope but also relevant to other countries due to their relation to an EU instrument. This article analyses the essence of the European protection order, its issuance requirements, including the ruling on the aggrieved's protection measure, necessity of issuing the order, aggrieved's motion, issuance proceedings, authorised issuing authorities, ruling form, forum for issuance, issuance mode, right to appeal, order transmission, and information obligations. The paper is significant for its in-depth dogmatic analysis and substantial theoretical content and is practical in guiding interpretation of the requirements for the application of this measure and the issuance procedure.

Keywords: European protection order, Directive, prosecutor, court, protective measure, penal measure, preventive measure, European Union

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INTRODUCTION

The European protection order was introduced into Polish criminal procedure law by the Act of 28 November 2014 on the protection of and assistance to the aggrieved and a witness.[1] This act implemented, *inter alia*, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.[2] As per Article 288 of the Treaty on the Functioning of the European Union,[3] 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods,' necessitating its transposition into the Polish legal system.

The Directive was implemented through the addition of Chapter 66j 'Application to a Member State of the European Union for the execution of the European protection order' (Articles 611w–611wc) and Chapter 66k 'Application of a Member State of the European Union for the execution of the European protection order' (Articles 611wd–611wj) to the Code of Criminal Procedure. This delineates two procedures: firstly, the application by a Polish court or prosecutor for the execution of an adjudicated protection measure of the aggrieved (Chapter 66j CCP), and secondly, the execution of such a measure issued by another Member State of the European Union (Chapter 66j).

Literature correctly points out that the initial assumption of the transposition is flawed, adopting the stance that the application for execution always initiates the procedure of the European protection order. In contrast, according to the Directive, it is the recognition of the European protection order that initiates the procedure, and the execution constitutes the final stage of the procedure.[4] However, this issue is not crucial for the instrument's functioning.

ESSENCE OF THE EUROPEAN PROTECTION ORDER

The European protection order, as defined in Article 2(1) of Directive 2011/99/EU, is 'a decision taken by a judicial or equivalent authority of a Member State in relation to a protection measure, on the basis of which a judicial or equivalent authority of another Member State takes any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person.'

A protection measure is a decision in criminal matters adopted in the issuing State in accordance with its national law and procedures. It imposes one or more of the following prohibitions or restrictions on a person causing danger to protect a protected person against a criminal act that may endanger their life, physical or psychological integrity, dignity, personal liberty, or sexual integrity:

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1 Journal of Laws of 2015, item 21.

2 OJ L 338, 21.12.2011, p. 2, hereinafter referred to as 'Directive 2011/99/EU'.

3 OJ C 83, 30.3.2010, p. 1.

4 Bieńkowska, E., 'Ochrona ofiar przestępstw w sytuacjach transgranicznych – regulacje polskie na tle wymogów prawa unijnego', *Prokuratura i Prawo*, 2016, No. 5, p. 11.

(a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits;
(b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means;
(c) a prohibition or regulation on approaching the protected person closer than a prescribed distance (Article 2 (2) in conjunction with Article 5 of Directive 2011/99/EU).

The essence of the European protection order is to ensure the protection of the aggrieved, regardless of the European Union Member State they are in. Issuing a European protection order results in the protection of the aggrieved across the entire European Union, not just within the territory of the Member State where the protective measure was originally issued.[5]

The objective of the European protection order, in accordance with Article 1 of Directive 2011/99/EU, is to protect a person against a criminal act by another person which may endanger their life, physical or psychological integrity, dignity, personal liberty, or sexual integrity in a Member State different from the one where a judicial or equivalent authority applied such protection measures. It aims to ensure cross-border protection of the aggrieved,[6] allowing for the continuation of protection in a Member State other than their country of residence and the State issuing the protection measure.[7] This instrument ensures the aggrieved are protected regardless of their location within the European Union, extending beyond the territory of the Member State that issued the protective measure.[8] It sets rules for allowing another Member State to continue a preventive, penal, or probation measure issued by a Polish court or prosecutor, which requires refraining from entering certain environments or places, or from contacting or approaching certain people (Article 611w § 1 CCP). It also aims to prevent a situation where the justified exercise of EU citizens' right to move and reside freely within the Member States, as per Article 21 of the Treaty on the Functioning of the European Union, could result in the loss of protection provided within a criminal proceeding.

GROUNDS FOR THE ISSUANCE OF THE EUROPEAN PROTECTION ORDER

A European protection order may be issued when the following requirements are met: (1) a protective measure for the aggrieved is ruled; (2) the aggrieved resides in another EU Member State; (3) issuing a European protection order is necessary to protect the aggrieved's rights; (4) the aggrieved submits a relevant request. The first

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5 Bieńkowska, E., 'Europejski nakaz ochrony– istota i znaczenie', *Zeszyty Prawnicze*, 2012, No. 4, p. 160.

6 Barcik, J., 'Europejski nakaz ochrony z perspektywy adwokata', *Palestra*, 2016, No. 5, p. 6.

7 Bieńkowska, E., 'Regulacje ustawy o ochronie i pomocy dla pokrzywdzonego i świadka na tle wymogów dyrektywy 2012/29/UE ustanawiającej normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw', in: Mazowiecka, L. (ed.), *Nowe środki ochrony i pomocy dla ofiar*, Warszawa, 2016, p. 32.

8 Bieńkowska, E., 'Europejski nakaz ochrony…', op. cit., p. 160.

three requirements are substantive, and the last one is formal. The latter is particularly important as it initiates the proceeding for issuing the European protection order.

What is executed in another EU Member State is the protection order itself, not the judgment containing the protective measure that requires refraining from staying in certain environments or places, or from contacting or approaching certain people.[9]

1. RULING ON A MEASURE OF PROTECTION OF THE AGGRIEVED

The primary condition for issuing a European protection order is a ruling imposing at least one protective measure on the accused to protect the aggrieved. Under Article 5 of Directive 2011/99/EU, a European protection order may only be issued when a protection measure has been previously adopted in the issuing State, imposing on the person causing danger one or more of the following prohibitions or restrictions: (a) a prohibition from entering certain localities, places, or defined areas where the protected person resides or visits; (b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax, or any other means; (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance. These measures 'aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person's life or physical, psychological, and sexual integrity, for example by preventing any form of harassment, as well as that person's dignity or personal liberty, for example by preventing abductions, stalking, and other forms of indirect coercion, and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts. These personal rights of the protected person correspond to fundamental values recognised and upheld in all Member States' (recital 9 of the preamble to Directive 2011/99/EU).

These measures are specified in Article 611w § 1 of the Code of Criminal Procedure (CCP) using two parameters: (1) by indicating a preventive measure, i.e., a protective, penal, or probation measure; the first two measures are directly named in the provision, and the third one is defined as an obligation to place a perpetrator on probation; (2) the content of these measures in the form of prohibitions or obligations. After 'a probation measure' is mentioned in the provision, it is followed by the phrase: 'consisting in refraining from entering specified environments or places or contacting certain persons or approaching certain persons.' In this context, there is a doubt whether this phrase specifies only the content of the probation measure or also refers to the remaining measures, i.e., the preventive and penal ones. The conjunction of the measures in Article 611w § 1 CCP using the sentential operator 'or' (indicating an ordinary alternative)[10] the *ratio legis* of the provision allow the conclusion that each measure must contain at least one of the obligations. The use of a comma before the phrase also supports this interpretation.

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[9] Sakowicz, A., in: Sakowicz, A., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023, p. 1953.

[10] Wolter, W., Lipczyńska, M., *Elementy logiki. Wykład dla prawników*, Warszawa–Wrocław, 1973, p. 82.

Determining which measures may be subject to the European protection order requires an analysis of the content of a specific measure to determine whether it contains an obligation to refrain from entering certain environments or places or contacting or approaching certain persons. Based on this criterion, measures that may be subject to the European protection order include:

(1) Preventive measures:
   (a) police supervision, provided the procedural authority has included in the decision on its application a ban on contacting the aggrieved or other persons, a ban on approaching certain persons within a specified distance, or a ban on staying in certain places (Article 275 § 2 CCP);
   (b) a preventive measure applied to a person accused of a crime committed against a member of medical staff or a person asked to assist medical staff, *inter alia*, consisting of the prohibition of approaching the aggrieved within the specified distance or contacting them (Article 276a § 1 CCP).

(2) Penal measures:
   – Prohibition of entering certain environments or places, contacting certain persons or approaching certain persons (Article 41a §§ 1–3 CC).

(3) Probation measures ruled in conjunction with:
   (a) conditional suspension of the execution of the penalty of deprivation of liberty, consisting of:
      – refraining from entering certain environments or places (Article 72 § 1 (7) CC),
      – refraining from contacting the aggrieved or other persons in a specified way or approaching the aggrieved persons closer than the distance specified by the court (Article 72 § 1 (7a) in conjunction with § 1a CC),
      – a method of contact between the convicted person and the aggrieved determined by the court in connection with the order to leave the premises occupied jointly with the aggrieved (Article 72 § 1 (7b) in conjunction with § 1b CC).
   (b) conditional discontinuation of the proceeding:
      – refraining from contacting the aggrieved or other persons in a certain way or approaching the aggrieved or other persons closer than the distance determined by the court (Article 67 § 3 in fine CC in conjunction with Article 72 § 1 (7a) and § 1a CC),
      – a method of contact between the convicted person and the aggrieved determined by the court in connection with the order to leave the premises occupied jointly with the aggrieved (Article 67 § 3 in fine CC in conjunction with Article 72 § 1 (7b) in conjunction with § 1b CC);
   (c) conditional early release: the same obligations as those imposed in the event of conditional suspension of the execution of the penalty of deprivation of liberty (Article 159 § 1 CC in conjunction with Article 72 § 1 (7), (7a) in conjunction with § 1a, (7b) in conjunction with § 1b CC).

The possibility of ruling to refrain from entering certain environments or places and refrain from contacting the aggrieved or other persons in a certain way or approaching the aggrieved or other persons closer than the distance determined

by the court is also contained in the penalty of limitation of liberty (Article 34 § 3 in fine in conjunction with Article 72 § 1 (7), (7a) in conjunction with § 1a CC). However, they cannot be covered by the European protection order when they are not obligations connected with placing a perpetrator on probation.

The prohibition of entering certain environments or places, contacting certain persons, or approaching certain persons may be ruled as a protection measure in relation to a perpetrator who committed a criminal act in a state of insanity (Article 99 § 1 in conjunction with Article 39 (2b) CC). However, this measure cannot be considered under Article 611w § 1 CCP, which specifies measures for the European protection order. The omission of these measures has been criticised in the doctrine for being discriminatory and violating the constitutional principle of equality before the law. It is argued that by this omission the legislator deprived 'aggrieved persons protected in the country by protection measures in the form of the penalty of limitation of liberty or means ensuring the right to protection in cross-border situations, even though these protection measures correspond to those in Article 5 of Directive 2011/99/EU and involve the application of preventive measures or belong to the category of penal measures or probation obligations.'[11] This criticism of the Code of Criminal Procedure's approach is valid, as these measures fall within the scope of Article 5 Directive 2011/99/EU, which covers such obligations regardless of their legal nature. However, the claim that they are connected with the application of preventive measures or fall within the category of penal measures or probation obligations is incorrect. While their content is identical, they possess a distinctly different legal character. The aggrieved should be subject to the European protection order, regardless of the nature of the obligations imposed on the accused, since their interest constitutes the rationale of the European protection order.

Article 611w § 1 CCP does not require that the decision on applying any of these measures be final. However, this does not imply that a European protection order can be issued in every situation where the ruling is not final. Undoubtedly, the decision must be enforceable. Since the decision is enforceable upon its issuance and, in the event of an appeal, it does not stay the execution of the challenged decision, the court that issued it or the court competent to hear the appeal may stay the execution of the ruling (Article 462 § 1 CCP). Therefore, the European protection order may also be issued when the decision on the application of a preventive measure is not final. The same applies to probation measures used in connection with conditional release from serving the rest of the penalty of deprivation of liberty in an execution proceeding, which are imposed by means of a decision (Article 159 § 1 PEC), with the exception of a situation where the prosecutor has objected to granting conditional release, as then the decision on conditional release is enforceable only when it becomes final (Article 162 § 2 in conjunction with Article 154 § 1 PEC). This also applies to probationary measures modified after being ruled in connection with conditional discontinuation of the proceeding or conditional suspension of the execution of the penalty of deprivation of liberty (Article 67 § 3 and Article 74 § 1 CC).

[11] Bieńkowska, E., 'Ochrona ofiar…', op. cit., p. 13.

Penal measures and probation measures discussed, with the exception of the above-mentioned situations, are ruled by means of a sentence and are subject to execution when they become final. Thus, the European protection order concerning these measures may be issued only after such a sentence becomes final.[12]

2. STAYING OF THE AGGRIEVED IN ANOTHER MEMBER STATE

The Act uses a broad term to specify this condition, namely it requires that the aggrieved stay in another EU country or declare an intention to stay there (Article 611w § 1 in fine CCP). Literature correctly notes that 'staying' has a broader meaning than the expressions 'has a permanent or temporary place of residence' (cf. Article 611ff § 1 CCP) or 'has a legal permanent place of residence' (Article 607zd § 1 CCP) used in other provisions. This means that even a short-term leave of the aggrieved to another Member State is sufficient and does not have to be combined with a change of place of residence.[13] Before deciding on the issuance of a European protection order, a court or a prosecutor shall consider, *inter alia*, the length of the period or periods that the aggrieved person intends to spend in the executing State (Article 6 par. 1 of Directive 2011/99/EU).

A declaration of the intention to move may be submitted in writing or orally for the record (Article 116 CCP). It must extend beyond a mere statement of intent to stay in another Member State in the near or distant future.[14] If the aggrieved is already in that country, a relevant declaration is not necessary, as their presence there sufficiently indicates this fact.[15]

3. NECESSITY OF ISSUING THE EUROPEAN PROTECTION ORDER FOR THE PURPOSE OF PROTECTING THE RIGHTS OF THE AGGRIEVED

The European protection order may be issued only when necessary to protect the rights of the aggrieved. It aims to ensure the personal safety of the aggrieved and prevent infringement of their rights, such as bodily integrity, health, life, personal liberty, and sexual integrity[16] The order cannot be issued to protect another person. This protection is limited to the aggrieved because Directive 2011/99/EU covers only such persons.

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[12] Grajewski, J., Steinborn, S., in: Paprzycki, L.K. (ed.), *Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego*, LEX/el. 2015, thesis 3 to Article 611w.

[13] Augustyniak, B., in: Grzegorczyk, T. (ed.), *Kodeks postępowania karnego. Komentarz Art. 425–673*, Vol. II, Warszawa, 2018, p. 1365; Dąbkiewicz, K., *Kodeks postępowania karnego. Komentarz do zmian 2015*, Warszawa, 2015, p. 591; Nita-Światłowska, B., in: Skorupka, J., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 2089.

[14] Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks…*, op. cit., p. 1955.

[15] Kraszewska, K., 'Postępowanie w przedmiocie wydania europejskiego nakazu ochrony w polskim procesie karnym', *Kwartalnik Prawo – Społeczeństwo – Ekonomia*, 2018, No. 4, p. 16.

[16] Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany…*, op. cit., thesis 10 to Article 611w.

It cannot protect a person closest to the aggrieved. The non-coverage of this person by the European protection order is questioned in the literature because recital 12 of the preamble to Directive 2011/99/EU implies an obligation to provide such protection.[17] According to that provision, if a protection measure is adopted for the protection of a relative of the main protected person, a European protection order may also be issued in respect. However, the interpretation that it is admissible to issue a European protection order to enforce a measure or obligation that serves to protect a person closest to the aggrieved, on the grounds that the threat to that closest person indirectly also poses a threat to the aggrieved, is too far-reaching.[18]

This explicitly implies that the measures must be ruled in a criminal proceeding, and those applied in civil or administrative proceedings are excluded.[19] Moreover, Article 2(2) of Directive 2011/99/EU stipulates that a 'protection measure' means 'a decision in criminal matters', i.e., a measure that is penal in nature.[20]

For the issuance of the European protection order, the type of crime committed is generally irrelevant. However, the application of some protection measures is related to specific types of offences; for example, a penal measure in the form of a ban on entering certain environments or places, contacting certain persons, and approaching certain persons may be adjudicated in the event of a conviction for a crime against sexual integrity or decency to the detriment of a minor or another offence against liberty, and in the case of a conviction for a violent intentional crime (Article 41a § 1 CC).

The age of the aggrieved is also irrelevant; it can also concern a minor.[21] Recital 15 of the preamble to Directive 2011/99/EU emphasises that: 'In the procedures for the issuing and recognition of a European protection order, competent authorities should give appropriate consideration to the needs of victims, including particularly vulnerable persons, such as minors.'

An application by a Polish court or a Polish prosecutor for the execution of a European protection order does not stay the execution of a preventive measure, a penal measure, or an obligation connected with putting a perpetrator on probation (Article 611wa CCP). It is rightly emphasised in the doctrine as connected with guaranteeing the fullest possible protection for victims, covering the territory of both the issuing State and the executing State.[22] It ensures the continuation of

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[17] Kraszewska, K., 'Postępowanie…', op. cit., p. 16.

[18] Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany…*, op. cit., thesis 6 to Article 611w.

[19] Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks…*, op. cit., p. 1954. Protection measures applicable in a civil proceeding are laid down in Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L 181, 29.6.2013, p. 4).

[20] Janicz, M., in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 1614.

[21] Statkiewicz, A., 'Ochrona małoletnich w postępowaniu karnym w Unii Europejskiej', in: Bator, A., Jabłoński, M., Maciejewski, M., Wójtowicz, K. (eds), *Współczesne koncepcje ochrony wolności i praw podstawowych*, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław, 2013, p. 159.

[22] Augustyniak, B., in: Grzegorczyk, T., *Kodeks…*, op. cit., p. 1367; Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks…*, op. cit., p. 1957; Nita-Światłowska, B., in: Skorupka, J., *Kodeks…*, op. cit., p. 2092.

the protection of the aggrieved regardless of temporary changes in their place of residence and the decisions taken by the authority of the executing State or delay in the execution of the order by that authority.[23]

The European protection order may be issued regardless of the aggrieved's citizenship; they may be a Polish citizen, a foreigner, a person holding dual citizenship, or a stateless person, and do not have to be a citizen of an EU Member State.[24]

4. THE AGGRIEVED PARTY'S REQUEST

The European protection order is issued at the request of the aggrieved (Article 611w § 1 CCP). This means that the order must result from a motion.[25] It is not possible to issue it *ex officio*, which is a rational solution, as the aggrieved knows best whether they need such protection abroad. Under Article 300 § 2 CCP, before the first interview of the aggrieved or after determining the aggrieved without an interview, they are informed that they may file a motion to enforce an injunction barring the perpetrator from approaching or contacting them in another Member State of the European Union based on the European protection order (Articles 611w–611wc CCP). Although the provision refers to informing the aggrieved about available protection and assistance measures laid down in the Act of 28 November 2014 on the protection of the aggrieved and a witness, this act does not contain a regulation of the European protection order; it only introduces the instrument to the Code of Criminal Procedure. This information is laid out in subsection 10 indent 4 of the Appendix 'Information about the rights and obligations of the aggrieved in a criminal proceeding' to the Regulation of the Minister of Justice of 14 September 2020, which determines the form of information about the rights and obligations of the aggrieved in a criminal proceeding.[26] This information is given to the aggrieved in writing, and receipt of which the aggrieved shall confirm by signature. In the event of withdrawal from an interview of the aggrieved, the information shall be delivered (Article 300 § 2 in fine CCP).

If the aggrieved is a minor or a fully or partially legally incapacitated person, their statutory representative or permanent guardian may file the request (Article 51 § 2 CCP). In the event the aggrieved is incapable, particularly due to age or health, the request may be filed by a person who has custody of them (Article 51 § 2 CCP).

There is no deadline for filing the request. It is possible throughout the period of the protective measures application. Neither the of the accused's nor the convicted person's consent is required.[27]

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[23] Sakowicz, A., in: Sakowicz, A., *Kodeks*…, op. cit., p. 1957.

[24] Janicz, M., in: Dudka, K. (ed.), *Kodeks*…, op. cit., p. 1614.

[25] Barcik, J., 'Sędzia polski wobec europejskiego nakazu ochrony', *Iustitia*, 2015, No. 2, p. 92 et seq.; idem, 'Europejski nakaz ochrony…', op. cit., p. 7.

[26] Journal of Laws of 2020, item 1619.

[27] Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany*…, op. cit., theses 8 and 9 to Article 611w.

The aggrieved may submit a request for the issuing of a European protection order either to the competent authority of the issuing State or to the competent authority of the executing State. If such a request is submitted in the executing State, its competent authority shall transfer this request as soon as possible to the competent authority of the issuing State (Article 6(3) of Directive 2011/99/EU).

THE EUROPEAN PROTECTION ORDER ISSUANCE PROCEDURE

The *modus operandi* of the European protection order, as indicated in the literature, is based on a three-stage procedure. First, a European protection order is issued at the request of the protected person, then the order is transmitted to the State where the protected person intends to stay, and shall be recognised by this State. As a result, the executing State is obliged to adopt any necessary protection measures available under its national law to ensure the execution of the European protection order.[28]

1. AUTHORITIES COMPETENT TO ISSUE AN ORDER

The competence of the authority issuing the European protection order depends on the stage of the criminal proceeding. Although the European protection order may be issued at any stage of criminal proceedings, i.e., in the course of a preparatory proceeding, a judicial proceeding, and an enforcement proceeding,[29] the authority competent to issue it is the one that applied or conducts this proceeding. The court has the broadest powers in this field as it may apply all the protection measures provided for in Article 611w § 1 CCP, except for preventive measures applied mainly by a prosecutor in a preparatory proceeding. In the judicial proceeding, the court before which a case is heard is competent (Articles 24 and 25, Articles 31 and 32 CCP), and in the enforcement proceeding, the first instance court that issued the judgement is competent (Article 3 § 1 PEC).

A prosecutor is authorised to issue the European protection order only if a preventive measure is enforced in the course of a preparatory proceeding. A clear indication in Article 611w § 1 *in principio* CCP confirms that it is admissible to issue it at this last stage if 'a Polish court or a prosecutor implements the measure'. Therefore, it is unreasonable to claim that all these protection measures may be imposed at any stage of a criminal proceeding, i.e., in the course of a preparatory, judicial, or enforcement proceeding.[30]

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[28] Barcik, J., 'Europejski nakaz ochrony…', op. cit., p. 6.
[29] Kraszewska, K., 'Postępowanie…', op. cit., p. 15.
[30] Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks…*, op. cit., pp. 1953–1954.

2. THE ORDER FORM

The European protection order is issued in the form of a court's or a prosecutor's decision. In the case of a court, this form results directly from Article 93 § 1 CC, which stipulates that the court issues a decision unless the law requires the issuance of a judgement; in the case of a prosecutor, it indirectly results from Article 611wc CCP, which states that the decision of a court or a prosecutor on the issuance of the European protection order shall not be subject to a complaint.

If the request of the aggrieved is approved, a court or a prosecutor shall issue a decision to apply for the execution of a particular measure or obligation, as directly results from Article 611w § 1 CCP. This formulation is questioned in the literature based on the argument that the decision should concern the transfer of the European protection order understood as an application for its recognition.[31] However, this is not justified, as the term 'a decision to apply for the execution of a particular measure or obligation' best reflects its nature, considering the State issuing the European protection order is primarily competent to issue it and the executing State has primarily the competence to execute it.[32]

The decision should meet the requirements outlined in Article 94 CC; specifically, the justification should indicate that the conditions for issuing the European protection order have been fulfilled.

The decision of the court or the prosecutor is not equivalent to the European protection order; it is a decision to issue it. The European protection order itself is a separate document, prepared using the template provided in the Regulation of the Minister of Justice of 13 January 2015, which determines the form of the European protection order.[33] The distinction between these procedural acts is evident from Article 611w § 2 CCP, which stipulates that a certified copy of the original decision to issue the European protection order should be attached to this order. This provision also includes general instructions on what the European protection order should contain, namely information that enables proper execution, concerning the judgement, the aggrieved, the accused, and the preventive or penal measure or obligation to place the perpetrator on probation, consisting of refraining from entering certain environments or places, contacting certain persons, or approaching certain persons.

The form of the European protection order aligns with Annex 1 to Directive 2011/99/EU. A comparison with the template in the Annex to the Regulation of the Minister of Justice reveals no substantive differences between the documents; the existing differences are editorial in nature. However, it is difficult to agree with the objection that the Minister of Justice lacks the competence to regulate this issue,[34] because, firstly, Article 611w § 7 CCP expressly authorises this body to do so;

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[31] Bieńkowska, E., 'Uprawnienia pokrzywdzonego w ujęciu nowych projektów nowelizacji prawa karnego', *Prokuratura i Prawo*, 2014, No. 11–12, pp. 84–85; Kraszewska, K., 'Postępowanie…', op. cit., p. 17.

[32] Kraszewska, K., 'Postępowanie…', op. cit., p. 17.

[33] Journal of Laws of 2015, item 123.

[34] Bieńkowska, E., 'Uprawnienia…', op. cit., p. 83.

and, secondly, the Directive allows national authorities of Member States to choose the form and methods (*argumento ex* Article 288 of the Treaty on the Functioning of the European Union).

Due to the inability to apply the EU Directive directly, entities applying the law are compelled to interpret the national provision as closely as possible in the spirit of the EU provision.[35]

The order, in accordance with Article 611w § 4 CCP, should be translated into the official language of the executing State or another language indicated by that State.

3. FORUM FOR ISSUING THE ORDER

The court shall take a decision to issue a European protection order during a session. This session is held in camera (Article 95b § 1 CCP).

Article 6(4) of Directive 2011/99/EU stipulates that, 'before issuing a European protection order, the person causing danger shall be given the right to be heard.'

The Code of Criminal Procedure does not provide for the participation of the aggrieved in the session, as, according to Article 92 § 1 CCP, the party demonstrating legal interest in the decision has the right to participate in the hearing as stipulated by the statute unless mandatory. The aggrieved is not notified of the hearing but may participate, if present (Article 96 § 2 CCP). This constitutes a significant limitation of their rights. Thus, this leads to a *de lege ferenda* proposal to introduce to Chapter 66j CCP an obligation to notify the aggrieved of the session date to enable their attendance.

4. MODE OF ISSUANCE

The issuance of the European protection order is discretionary, as indicated by the phrase 'the court or the prosecutor may (...) request the execution of the measure' in Article 611w § 1 *in medio* CCP. Important considerations for its issuance include the length of time the protected person stays in another Member State and the seriousness of the need for protection (Article 6(1) of Directive 2011/99/EU). The decision in this respect is left to the discretion of the court or prosecutor, who may refuse to issue the order even if all conditions are met, provided they consider the request would be pointless, for example, due to a short period remaining for the execution of a penal measure or a probation obligation.[36]

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[35] Buczek, Ł., 'Europejski nakaz ochrony w polskim postępowaniu karnym', in: *Особливості інтеграції країн у світовий економічний та політико-правовий простір*, матеріали II Міжнародної науково-практичної конференції 04 грудня 2015 р., Mariupol, 2015, p. 26.

[36] Grajewski, J., Steinborn, S., in: Paprzycki, L.K., *Komentarz aktualizowany…*, op. cit., thesis 15 to Article 661w.

5. ENTITLEMENT TO APPEAL

The decision on the European protection order issued by the court or the prosecutor is not be subject to appeal. This exclusion is stated *expresis verbis* in Article 611wc CCP. The provision's indication that there is no right to complain against the decision concerning the order means that it is inadmissible to challenge either the decision to issue or refuse a European protection order, or the decision to revoke it. Therefore, the legislator did not implement Article 6(4) of Directive 2011/99/EU, which provides for the right to challenge a given protection measure if the person has not been granted these rights in the procedure leading to the adoption of the protection measure, and Article 6(7) which stipulates that if the request to issue a European protection order is rejected, the competent authority of the issuing State shall inform the protected person of any applicable legal remedies that are available, under its national law, against such a decision. It is noted in the literature that there is a lack of equality between the parties to the proceeding due to the fact that the aggrieved, in the event of the refusal to issue a European protection order, may apply for its issuance again, while the person causing danger, in the event of a decision to issue a European protection order, has no right to any appeal measures.[37]

6. THE EUROPEAN ORDER TRANSMISSION PROCEDURE

The court or the prosecutor transmits the European protection order for execution directly to the competent court or another competent authority of a Member State of the European Union. The competence of this authority is determined by the domestic law of the concerned State.

The copy of the judgement and the order, as per Article 611w § 5 CCP, may be transmitted using automatic data transmission devices in a manner that establishes the authenticity of the documents. Upon request from the competent court or authority of the executing State, the court or the prosecutor transmits a copy of the judgement and the original order. Article 8(1) of Directive 2011/99/EU also allows for such a transmission, stipulating that the competent authority of the issuing State transmits the European protection order to the competent authority of the executing State by any means which leaves a written record so as to allow the competent authority of the executing State to establish its authenticity. All official communication shall also be made directly between those competent authorities.

The order should be translated into the official language of the executing State or another language indicated by this State (Article 611w § 4 CCP).

Within the structure of the public prosecution office, the authorities that may apply for the execution of the European protection order include: Director of the Department for Organised Crime and Corruption of the National Public Prosecution Office, Head of the Department of Internal Affairs of the National Public Prosecution Office, head of the territorially competent branch department,

[37] Kraszewska, K., 'Postępowanie…', op. cit., p. 18.

and the regional or district prosecutor (§ 297 of the Regulation of the Minister of Justice of 7 April 2016: Rules and regulations for the internal functioning of common organisational units of the public prosecution office[38]).

In the event of difficulties in determining the competent court or another authority of the executing State, the court or the prosecutor may also apply to relevant organisational units of the European Judicial Network or Eurojust (Article 611w § 6 CCP). Under § 348 (3) of the Regulation of the Minister of Justice of 18 June 2019: Rules and regulations for the operation of common courts,[39] the court may apply to a national representative in Eurojust for information or assistance in matters within the competence of Eurojust that are under the jurisdiction of the Republic of Poland or in which the Republic of Poland is directly involved, particularly for assistance in determining the authority in a Member State of the European Union that is competent to execute mutual legal assistance requests, European protection orders, and other judgements subject to mutual recognition.

The prosecutor who has requested the execution of the European protection order shall, if necessary, consult with a judicial authority of another Member State of the European Union and, particularly at the request of that authority, provide further necessary information allowing the execution of the decision or order. This can be done via the contact points of the European Judicial Network, Eurojust, or the National Prosecution Office (Article 298(1) and (2) of the Rules and Regulations for the Public Prosecution Office).

Where necessary, the order is be transmitted to more than one executing State (Article 611w § 2 CCP). This may be justified when the aggrieved is staying, or his statement indicates that he intends to stay, in the territory of several Member States of the European Union in the close time period.[40]

7. INFORMATION OBLIGATIONS

In the event a measure or an obligation is to be modified or revoked, the court or the prosecutor is obliged to immediately notify the competent court or another authority of the executing State; this notification may also be transmitted using automatic data transmission devices in a manner that allows the establishment of the authenticity of the transferred documents (Article 611wb CCP). The obligation arises from the principle that only the competent authority of the issuing State is entitled to make decisions on modifying or revoking a protection measure.[41] This obligation arises in the event of:

(1) revocation or modification of a preventive measure by means of revoking the obligations covered by the European protection order;
(2) recognition of a penal measure as executable in accordance with Article 84 §§ 1 and 2a CC;

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38 Journal of Laws of 2023, item 1115, hereinafter referred to as 'R&R PP'.
39 Journal of Laws of 2022, item 2514, as amended.
40 Nita-Światłowska, B., in: Skorupka, J., *Kodeks*…, op. cit., p. 2090.
41 Augustyniak, B., in: Grzegorczyk, T. (ed.), *Kodeks*…, op. cit., p. 1368.

(3) revocation of the obligation covered by the European protection order (Article 67 § 4 in conjunction with Article 72 § 4, Article 74 § 3 CC, Article 159 § 1 PEC), as well as successful completion of the probation period (Article 76 CC) or the commencement of the proceeding conditionally discontinued (Article 68 CC), a ruling to execute a conditionally suspended penalty of deprivation of liberty (Article 75 CC) or the cancellation of the conditional early release (Article 82 CC);
(4) reversal of the sentence imposing a penal measure or a probation measure covered by the European protection order as a result of a cassation, reopening of a proceeding or an extraordinary complaint;
(5) remission, based on a pardon or amnesty granted, of a penal measure or a penalty within which a probation measure was ruled, or the measure alone;
(6) limitation of the execution of a penal measure or a penalty with which a probation measure is connected (Article 103 CC).

It is correctly noted in legal scholarship that the obligation to provide information also extends to cases where, following the submission of a constitutional complaint, the Constitutional Tribunal issues an interim decision to suspend or stay the enforcement of a judgment (as per Article 7 (1) of the Act of 30 November 2016 on the Organisation and Procedure Before the Constitutional Tribunal).[42] Similarly, this obligation should apply to the suspension of the penalty or order enforcement to interrupt the enforcement of a penalty issued by the court or the Prosecutor General in the course of pardon proceedings (Article 568 CCP).

CONCLUSIONS

1. The provisions of Chapter 66j CCP 'Application to a Member State of the European Union for the execution of the European protection order' stem from the transposition of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order. These provisions are particularly significant in the context of protecting interests of the aggrieved, as the European protection order enables continuation of protection for the aggrieved in an EU Member State other than the one which granted the protection measure.
2. The European protection order pertains to the execution, in another EU Member State, of preventive, penal, and probation measures, which include obligations to refrain from entering certain environments or places, contacting specific persons, or approaching certain persons within a prescribed distance. Determining which measures may be subject to the European protection order necessitates an analysis of the content of a specific measure to ascertain whether it contains at least one of such obligations. The order cannot apply to obligations imposed within the penalty of limitation of liberty or as a protective measure. This exclusion is problematic, as the aggrieved should be subject to the European protection order

[42] Journal of Laws of 2019, item 2393.

irrespective of the nature of the obligations imposed on the accused, since the *ratio legis* of the analysed provisions is the protection of the aggrieved.

3. The issuance of the European protection order does not require the aggrieved to reside permanently or temporarily in another EU Member State; it is sufficient if they intend to move there, even for a short period, that allows for their protection.
4. The European protection order aims to ensure personal security of the aggrieved and prevent the violation of rights such as bodily integrity, health, life, personal liberty, and sexual integrity. It should not be issued to protect another person.
5. The issuance of the European protection order must be based on an application; the aggrieved may submit a request in writing or orally for the record. Issuing the order *ex officio* is not permissible.
6. The court or the prosecutor is authorised to issue the order; however, the prosecutor may do so only as a preventive measure in a preparatory proceeding. The issuance should take the form of a decision with a justification indicating the fulfilment of conditions for issuing a protection order. The decision is to issue the order, and the European protection order itself is a separate document drafted using a template provided in the Regulation of the Minister of Justice. The decision on the European protection order is not subject to appeal.
7. The court or the prosecutor shall transmit the European protection order for execution directly to a competent judicial authority of another Member State of the European Union. The competence of this authority is determined by the domestic law of the Member State concerned. As per Article 611w § 5 CCP, the copy of the order and the judgement can also be transmitted using automatic data transmission devices in a manner that guarantees the authenticity of the documents.

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Cite as:

Stefański R.A. (2023) *'The issuance of the European protection order'*, Ius Novum (Vol. 17) 4, 60–76. DOI 10.2478/in-2023-0029

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Ius Novum

2023, vol. 17, no. 4, pp. 77–90

ISSUANCE OF THE EUROPEAN INVESTIGATION ORDER AT THE STAGE OF A PREPARATORY PROCEEDING FOR THE PURPOSE OF OBTAINING INFORMATION CONSTITUTING BANK SECRECY

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DOI: 10.2478/in-2023-0030

Abstract

The article discusses matters related to the issuance of the European Investigation Order (EIO) during the stage of a preparatory proceeding, the objective of which is to obtain information protected by banking secrecy from a foreign bank. Attention is drawn to the essence of this instrument of international cooperation in criminal matters and its comprehensive nature. A key problem revealed in prosecutorial and judicial practice consists of determining the entity competent to issue the European Investigation Order in the *in rem* phase of the preparatory proceedings. This issue also necessitates determining whether, in such a procedural situation, it is necessary to obtain the consent of the district court to access information subject to bank secrecy and whether this affects the scope of competence of the court or the prosecutor. An examination of case law and the accompanying opinions of the doctrine presented in the article reveals a non-uniform, even mutually exclusive, approach to this issue. A critical look at the presented range of views enables a clear stance on the aforementioned issues and the formulation of a *de lege ferenda* proposal.

Keywords: European Investigation Order, banking secrecy, preparatory proceedings

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CIRCUMSTANCES OF THE INTRODUCTION OF THE EIO INTO THE POLISH LEGAL SYSTEM

One form of international cooperation in criminal matters is the European Investigation Order (hereinafter 'EIO'). It is separately regulated in Chapter 62c CCP ('Request addressed to a Member State of the European Union to carry out investigative measures under the EIO') and Chapter 62d CCP ('Request made by a Member State of the European Union to carry out investigative measures under the EIO'), which were introduced by the Act of 10 January 2018 amending the Code of Criminal Procedure and some other acts (Journal of Laws of 2018, item 201). The amendment came into force on 8 February 2018.[1] The introduction of the EIO into the national legal system resulted from the need to implement Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014; hereinafter 'Directive 2014/41/EU'). Its adoption was primarily due to the fact that the existing instruments of international cooperation in criminal matters proved too complex, internally inconsistent, and limited in scope.[2] The doctrine expresses the view that Directive 2014/41/EU is one of the most important acts of the European Union in the field of criminal procedure.[3]

The significance of the EIO is primarily evidenced by the universality of its application. Directive 2014/41/EU does not impose any limitations with regard to the seriousness of the offence under investigation or the statutory penalty.[4]

There is no doubt that the EIO is a relatively new instrument. Nevertheless, practically since the beginning of its application, it has been a tool frequently and willingly used to obtain necessary evidence from European Union countries that have adopted and apply the EIOs.[5] In Poland, the EIO is primarily applied during the stage of preparatory proceedings and is used by prosecutors.[6]

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[1] The transposition was delayed, as under Article 36(1) Directive 2014/41/EU Member States should have taken the necessary measures to comply with this Directive by 22 May 2017.

[2] See Buczma, S.R., in: Buczma, S.R., Kierzynka, R., *Europejski nakaz dochodzeniowy. Nowy model współpracy w sprawach karnych w Unii Europejskiej*, Warszawa, 2018, p. 145 et seq.; Klimczak, J., Wzorek, D., Zielińska, E., *Europejski nakaz dochodzeniowy w praktyce sądowej i prokuratorskiej – ujawnione problemy i perspektywy rozwoju*, Warszawa, 2022, p. 23; Król, A., 'Europejski nakaz dochodzeniowy jako kompleksowy instrument współpracy w sprawach karnych w Unii Europejskich', *Rocznik Administracji Publicznej*, 2019, No. 5, p. 126 et seq.; Kusak, M., 'Europejski Nakaz Dochodzeniowy – przełom w dziedzinie europejskiego ścigania karnego?', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, Yearly LXXIV, 2012, No. 2, pp. 93–94.

[3] Kluza, J., 'Implementacja w polskim porządku prawnym dyrektywy o europejskim nakazie dochodzenia', *Zeszyty Naukowe Towarzystwa Doktorantów UJ. Nauki Społeczne*, 2018, Vol. 21, No. 2, p. 10.

[4] Cf. Krzysztofiuk, G., 'Europejski nakaz dochodzeniowy', *Prokuratura i Prawo*, 2015, No. 12, p. 81.

[5] Ireland and Denmark are not taking part in the adoption of Directive 2014/41/EU and are not bound by it or subject to its application – see recitals 44 and 45 of the Preamble to the Directive. For more on the issue see Klimczak, J., Wzorek, D., Zielińska, E., *Europejski*…, op. cit., pp. 15–17.

[6] In the period 2018–2020 Polish prosecution offices sent 17,001 EIO applications in total: 3,716 in 2018, 6,702 in 1019, and 6,583 in 2020. The biggest number of EIOs were sent to Germany

The main aim of the EIO was to enable the request for one or more investigative measures to gather evidence in an executing EU country. It was assumed that the EIO should have a horizontal dimension, covering all investigative activities aimed at collecting evidence.[7] Directive 2014/41/EU does not establish a closed catalogue of investigative activities to be performed under the EIO.[8]

The scope of the concept of the EIO is defined in Article 1 of Directive 2014/41/EU. It is a judicial decision issued or validated by a judicial authority of a Member State (the issuing State) to have one or several specific investigative measure(s) carried out in another Member State (the executing State) to obtain evidence. The EIO may also be issued to obtain evidence already in the possession of the competent authorities of the executing State. Member States shall execute an EIO based on the principle of mutual recognition and in accordance with the Directive.

There is no doubt that, due to the very wide scope of investigative measures adopted to be carried out under the EIO, it also includes activities related to the functioning of banks and banking secrecy. Recitals 27 and 29 of the Preamble to Directive 2014/41/EU indicate that an EIO may be issued to obtain evidence concerning accounts, of whatever nature, held in any bank or non-banking financial institution by a person subject to criminal proceedings. This possibility is broadly understood to comprise not only suspected or accused persons but also any other person for whom such information is deemed necessary by the competent authorities during criminal proceedings. When an EIO is issued to obtain 'details' of a specific account, these details should include at least the name and address of the account holder, details of any powers of attorney over the account, and any other details or documents provided by the account holder when the account was opened and are still held by the bank.

SCOPE OF THE EIO AND ENTITIES AUTHORISED TO ISSUE IT VERSUS REGULATIONS CONCERNING ACCOUNTS AND BANKING TRANSACTIONS

Directive 2014/41/EU was implemented into the Polish legal system without detailed solutions in the field of bank accounts and transactions being regulated therein. It is noteworthy that Directive 2014/41/EU regulates issues related to information about bank accounts and banking transactions.[9]

As far as the former is concerned, in accordance with Article 26 of Directive 2014/41/EU, an EIO may be issued to determine whether any natural or legal person subject to the criminal proceedings holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State. If so, it aims to obtain all the details of the identified accounts. The obligation to provide the aforementioned information shall apply only to the extent that the

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and the United Kingdom; thus in: Klimczak, J., Wzorek, D., Zielińska, E., *Europejski*…, op. cit., pp. 100–101.

7 See Article 3 of Directive 2014/41/EU.

8 Cf. Klimczak, J., Wzorek, D., Zielińska, E., *Europejski*…, op. cit., p. 27.

9 See Kierzynka, R., in: Buczma, S.R., Kierzynka, R., *Europejski*…, op. cit., p. 201.

information is in the possession of the bank maintaining the account. The issuing authority shall indicate in the EIO the reasons why it considers the requested information to be of substantial value for the purpose of the criminal proceedings and on what grounds it presumes that banks in the executing State hold the account and, to the extent available, which banks may be involved. It shall also include in the EIO any information available that may facilitate its execution. On the other hand, Article 27 of Directive 2014/41/EU states that an EIO may also be issued to obtain the details of specified bank accounts and banking operations carried out during a defined period through one or more specified accounts, including the details of any sending or recipient account. In this case, the obligation also applies only to the extent that the information is in the possession of the bank where the account is held. When requesting the information in the EIO, the issuing authority shall indicate the reasons why it considers the requested information relevant for the purpose of the criminal proceedings. J. Klimczak, D. Wzorek, and E. Zielińska point out that the provisions of Articles 26 and 27 of Directive 2014/41/EU did not have to be introduced into the Polish legal system because the possibility of obtaining information subject to bank secrecy for the purpose of criminal or fiscal proceedings is laid down in Article 105 and Article 106b of the Banking Law.[10]

As mentioned earlier, the provisions of Chapter 62c CCP, which regulate the issue of applying to a Member State of the European Union to take investigative measures based on the EIO, do not contain specific provisions determining the mode and rules of conduct when banking secrecy is the subject of the investigative activities. They only contain general information applicable to any other EIO.

The essential elements of the EIO are outlined in Article 589y § 1 CCP. These include: the identification of the authority issuing and validating the EIO, with their addresses, telephone numbers, facsimile, and email addresses; the date and place of the EIO issue; the indication of the requested investigative measures subject to the EIO or the evidence to be obtained, or the circumstances to be determined as a result of the investigative activity; available data specifying the identity and nationality of the person subject to the EIO, as well as the address of residence or another address, including the address of the prison, if the person is a prisoner; the reference number of the files and the indication of the type of proceeding in connection with which the EIO was issued; a description and legal classification of the act being an object of the proceeding; and a brief description of the facts concerning the case.[11]

The broad objective scope of the EIO is accompanied by an equally broad subjective and temporal approach. According to Article 589w § 1 CCP, if it is necessary to present or obtain evidence that is or can be presented in the territory of another Member State of the European Union, the court hearing the case or the prosecutor conducting the preparatory proceeding[12] may issue a European Investigation Order *ex officio* or at the request of a party, counsel for the defence or an attorney acting

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[10] Klimczak, J., Wzorek, D., Zielińska, E., *Europejski*…, op. cit., p. 83.

[11] The EIO shall be issued with the use of the form set out in Regulation of the Minister of Justice of 8 February 2018 determining the template of the form of the European Investigation Order (Journal of Laws of 2018, item 366).

[12] Cf. Krzysztofiuk, G., *Europejski*…, op. cit., pp. 81–82.

as proxy, if only the EIO is applicable in this State. This means that an EIO may be issued at both the stage of a preparatory proceeding (investigation, inquiry) and a court hearing. In the case of a preparatory proceeding, its stage (*in rem* or in personam) is irrelevant.[13] However, the temporal extension is additionally included in § 2 of Article 589 CCP, where it is indicated that the issuance of an EIO may also take place at the stage of a verification proceeding referred to in Article 307 CCP.

Article 589w §§ 1 and 2 CCP stipulate that the main entities that may issue an EIO are a court and a prosecutor.[14] However, due to the specific competence of law enforcement authorities, the Polish legislator allowed for the possibility of issuing an EIO by other entities that conduct relevant proceedings. Firstly, these include the Police, as well as other entities that, in accordance with Article 312 CCP, have the powers of the Police, i.e., the Border Guard, the Internal Security Agency, the National Revenue Administration, the Central Anti-Corruption Bureau, and the Military Police (within the scope of their competence), and other bodies provided for in special provisions.[15] Secondly, an EIO may also be issued by the authorities referred to in Article 133 § 1 and Article 134 § 1 of the Fiscal Penal Code that conduct preparatory proceedings in cases concerning fiscal crimes and misdemeanours. These include, *inter alia*, the head of the customs office, the head of the tax office, and the head of the National Revenue Administration. It should be noted that the above-mentioned bodies are not independent entities, as each EIO they issue requires approval by a prosecutor. It is necessary to share the opinion expressed by J. Kosowski that the adoption of the rule allowing for the issuance of an EIO by both a prosecutor and a non-prosecution body conducting a preparatory proceeding is aimed at invigorating and accelerating the procedure in question. Giving this competence only to courts could lead to a slowdown in the proceedings, especially if in practice the number of EIOs grows dynamically, which seems to be a certain prospect.[16]

CONCEPT AND SCOPE OF BANKING SECRECY AND SUBSTANTIVE LAW RULES OF ACCESS TO IT

In the absence of a separate regulation of access to information protected by banking secrecy within the EIO proceeding in Chapter 62c CCP, it is necessary to analyse the general provisions that regulate this issue, and then compare them with the

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[13] Cf. Janicz, M., in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 1413.

[14] See the judgement of the Court of Justice of 8 December 2020, C-584/19, criminal proceeding against *A. and Others*, EU:C:2000:1002; Kobes, P., *Czy prokurator może wydać europejski nakaz dochodzeniowy? Omówienie wyroku TS z dnia 8 grudnia 2020 r., C-584/19 (Staatsanwaltschaft Wien)*, LEX/el., 2020.

[15] For example, the bodies referred to in Regulation of the Minister of Justice of 22 September 2015 concerning bodies, apart from the Police, authorised to investigate and to file and support an indictment before a first instance court in cases in which an investigation was conducted, as well as cases referred to those bodies (Journal of Laws of 2018, item 522).

[16] Kosowski, J., 'Europejski Nakaz Dochodzeniowy – zagadnienia wybrane', *Wiedza Obronna*, 2021, Vol. 277, No. 4, p. 6.

above-mentioned procedural regulations. The rules of protection of banking secrecy are laid down in detail in the provisions of the Act of 29 August 1997: Banking Law (Journal of Laws of 2022, item 2324, as amended; hereinafter 'BL'). Access to this type of secret is strictly limited and depends on both the category of the entity seeking access and the stage of the criminal proceeding in question.

The general principle of the protection of banking secrecy is established in Article 104(1) BL. According to this provision, a bank, its employees, and persons through whom the bank performs banking operations are obliged to maintain banking secrecy. This secrecy encompasses all information concerning banking operations obtained during negotiations, the conclusion, and the performance of agreements based on which the operations are performed. It is unequivocal that the legislator defines the scope of banking secrecy very broadly, with its essential element being banking operations in connection with which specific information subject to protection is generated.[17] Notably, a bank is not bound by banking secrecy towards the person to whom the confidential information relates. Furthermore, such a person may authorise the bank to provide specific information to a person or an organisational unit they indicate (e.g., a prosecutor conducting or supervising a preparatory proceeding in which that person is the aggrieved party).[18]

In criminal proceedings concerning an ordinary offence or a fiscal offence, the provision of information constituting banking secrecy is more complex. Focusing solely on the stage of a preparatory proceeding, two independent types of procedure can be distinguished.

The first, outlined in Article 105 (1)(2)(b) of the BL, enables a prosecutor to autonomously request information constituting banking secrecy. This applies to cases in which the request is made in connection with a criminal proceeding conducted in relation to an offence or a fiscal offence:

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[17] Banking operations include: accepting cash deposits payable on demand or at a specified date and keeping accounts of these deposits; maintaining other bank accounts; granting credits; granting and confirming bank guarantees and opening and confirming letters of credit; issuing bank securities; conducting bank monetary settlements; performing other activities provided only for the bank in separate acts (Article 5 par.1 BL). Banking operations also include the following activities insofar as they are performed by banks: granting money loans; cheque and promissory note operations; and operations involving warranties; providing payment services and issuing electronic money; forward financial operations; purchase and sale of monetary receivables; storing items and securities and providing safe deposit boxes; purchase and sale of foreign currencies; granting and confirming guarantees; performing commissioned activities connected with the issuance of securities; intermediation in money transfers and foreign exchange settlements; intermediation in concluding structured deposit agreements; providing advice on structured deposits; providing crowdfunding services referred to in Article 2(1)(a) Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (OJ L 347, 20.10.2020, p. 1), based on the authorisation referred to in Article 12(1) therein (Article 5(2) BL).

[18] When the authorisation is granted in an electronic form, the bank is obliged to record this authorisation on an electronic data carrier within the meaning of Article 3(1) Act of 17 February 2005 on computerisation of operations conducted by entities implementing public tasks (Journal of Laws of 2023, item 57) (Article 104 (3) BL).

(a) against a natural person who is a party to an agreement concluded with the bank, within the scope of information concerning that natural person;
(b) committed in connection with the activities of a legal person or an organisational unit without legal personality, within the scope of information concerning this legal person or organisational unit;
(c) specified in Article 165a or Article 299 CC;
(d) within the scope of concluding a contract for the performance of banking operations with a natural person, a legal person, or an organisational unit without legal personality, in order to verify the conclusion of such agreements and their duration.[19]

The second procedural mode, regulated in Article 106b BL, concerns cases other than those specified in Articles 105 and 106a BL.[20] These are most often proceedings concerning ordinary offences or fiscal offences still in the *in rem* stage. For guarantee-related reasons, the legislator decided that in such procedural situations, the prosecutor conducting a proceeding (including the supervising prosecutor) could not independently request information constituting banking secrecy. Instead, they may request that a bank, bank employees, and persons through whom the bank performs banking operations provide information constituting banking secrecy based on a decision issued upon their motion by the competent district court. For this, a prosecutor must submit an application for consent to obtain such information, containing the case number or files reference number, a description of the offence subject to the preparatory proceeding with its legal classification, circumstances justifying the need to obtain information, indication of the person or organisational unit concerned, the entity obliged to provide information and data, as well as the type and scope of information. Upon examining the application, the territorially competent district court shall issue a decision to give consent to disclose information, determining its type and scope, the person or organisational unit concerned, and an entity obliged to provide it, or refuse consent. The prosecutor may appeal against the court's decision. To obtain information constituting banking secrecy, having obtained the aforementioned consent, the prosecutor informs the entity obliged to provide information in writing about the content of the court's decision, the person or organisational unit concerned, and the type and scope of information. In practice, this usually means that the prosecutor sends an appropriate letter to

[19] From the point of view of possibilities of applying for the execution of an EIO in Poland that Member States of the European Union have in accordance with the provisions of Chapter 62d CCP, it is worth pointing out that a bank is also obliged to provide information constituting banking secrecy requested by a court or a prosecutor in connection with the execution of a request for legal assistance originating from a foreign country that, under a ratified international agreement binding the Republic of Poland, has the right to request information protected by banking secrecy (Article 105(1)(2)(c) BL).

[20] Article 106a BL provides for a separate mode of access to information constituting banking secrecy, which is applicable *inter alia* in the event of a justified suspicion that the bank's operations are used to conceal criminal activities or for purposes related to the commission of fiscal offences or offences other than those referred to in Article 165a or Article 299 CC, as well as the possibility of blocking funds on a bank account and suspending transactions by a prosecutor.

the bank, attaching a copy of the court's decision. The prosecutor does not issue a separate decision requesting the provision of items, e.g. a copy of a bank account agreement, transactions record etc.

COMPETENCE TO ISSUE AN EIO AT THE STAGE OF A PREPARATORY PROCEEDING

From the standpoint of investigative activities carried out via the EIO, aimed at obtaining evidence in cross-border cases, bank documentation plays a crucial role. This type of evidence is often key in both complex cases of so-called VAT carousels and relatively straightforward cases of fraud, such as those committed using the Internet.[21]

In the Polish model, banking secrecy is subject to a specific regime where access is strictly limited. This secrecy is part of relative evidentiary bans, and the access limitations are mainly guarantee-related in nature. The importance of the issue is underscored by the fact that, firstly, the court is responsible for granting consent to access banking information, and secondly, this decision is made at the district court level. The competence standard in this area is rigid, as the jurisdiction of the district court is unaffected by the legal classification of the offence under investigation in a preparatory proceeding. This means that even if a regional court is the first-instance court competent to hear the criminal case, it is not authorised to decide on consent to access information constituting banking secrecy. This elevates the issue of banking secrecy to a position requiring more in-depth analysis and professional experience than, for instance, issues of exemption from medical confidentiality or lawyer-client privilege, which are also resolved at the regional court level.[22]

The absence of leges speciales concerning the procedure for obtaining banking secrets in connection with the execution of an EIO has led to significant discrepancies in case law in recent years. Notably, the interpretational doubts mainly concerned the *in rem* stage of the preparatory proceedings, the stage where no decision has been made to present charges. The act of presenting charges concludes the *in rem* ('concerning the case') stage and commences the in personam ('against a person') stage. For an investigation (inquiry) to transition from *in rem* to *in personam*, it is generally insufficient to merely draft a decision to present charges. As the Supreme Court rightly observed in its judgement of 16 January 2009, IV KK 256/08,

> 'There is a significant difference between the terms "issuance" of a decision under Article 71 § 1 CCP and "drawing up" a decision under Article 313 § 1 CCP. For the "issuance" to be effective, some further procedural activities indicated in the latter provision, referred to as "promulgation" of the decision, are necessary. Therefore, to consider that the proceeding has transformed from the *in rem* stage to the in personam stage, apart from

[21] Cf. Klimczak, J., Wzorek, D., Zielińska, E., *Europejski*…, op. cit., pp. 141–142.
[22] See Article 180 CCP in conjunction with Article 329 § 1 CCP.

the cases indicated in Article 313 § 1 in fine CCP, it is not sufficient to draw up a decision on presenting charges; it is also necessary to announce it to the suspect (...).'[23]

The main interpretational issue centres on the correct determination of the court and prosecutor's competences and their mutual procedural relations in situations where, during an investigation in the *in rem* stage, the prosecutor deems it necessary to access banking secrets in a foreign bank via the EIO facility. Specifically, this concerns the question of which authority, in the outlined arrangement, is entitled to issue an EIO and whether it is then necessary to obtain the consent of the district court, and if so, what procedural consequences in terms of competence arise from this fact.

Case law in the aforementioned scope has proven inconsistent to the extent that it is possible to identify as many as four distinct groups of views. The close dates of issuance of particular judgments and their mutual contradiction have led to completely divergent judicial and prosecutorial practices across the country, causing legal chaos and a lack of certainty and stability in case law. From a historical perspective, it is first necessary to highlight the earliest stance presented by the Appellate Court in Gdańsk in its judgment of 23 May 2018, II AKz 408/18. This judgment emphasises the competence of the district court and places its position in the field of the EIO above that of the prosecutor. According to the Court,

'(...) the prosecutor's inability to obtain information subject to banking secrecy pursuant to the provision of Article 106b(1) of the Act of 29 August 1997: Banking Law without a prior decision issued by the territorially competent district court prevents the public prosecutor from independently issuing a European Investigation Order pursuant to Article 589w § 1 CCP.' This stems from the need to adopt an interpretative approach to the provision in question, leading to the conclusion that when a prosecutor's action under national law is contingent on a decision by the competent district court, the potential authority to issue an EIO also resides with that court.'[24]

In discussing the legal justification, the Court explained that this interpretation aligns with the pro-EU method of interpretation, respecting the requirements of Directive 2014/41/EU.

An opinion equally emphasising the court's role is presented in the decision of the Appellate Court in Katowice, dated 29 January 2019, II AKz 53/19. The Court stated:

'(...) At the stage of a preparatory proceeding, pursuant to Article 589w § 1 CCP, as a rule, the body competent to issue a European Investigation Order is a prosecutor, except in the situation referred to in § 2 therein. However, the prosecutor rightly pointed out that in this case, there was an exception referred to in § 5, pursuant to which the decision on the issuance of an EIO concerning evidence, provided its admission, obtaining, or presenting requires the issuance of a decision, replaces this decision. On the other hand, Article 106b § 1 of the Act of 29 August 1997: Banking Law clearly stipulates that the prosecutor may request a bank to provide information constituting banking secrecy only

[23] For more on the issue see: Stefański, R.A., 'Skuteczność przedstawienia zarzutów', *Prokuratura i Prawo*, 2013, No. 6, p. 5 et seq.

[24] This stance is highlighted in: Klimczak, J., Wzorek, D., Zielińska, E., *Europejski*…, op. cit., p. 39.

> with the consent of the territorially competent District Court. Thus, if obtaining evidence protected by banking secrecy requires prior District Court consent to be exempted from banking secrecy, issuing such a decision does not mandate a separate decision by the prosecutor regarding the issuance of an EIO. This scenario represents an exception to the rule emphasised in Article 589w § 1 CCP, as specified in § 5 of the same provision. However, it should be emphasised that the District Court's decision stating that there are reasons for granting consent to exempt from banking secrecy substitutes for a decision on the issuance of an EIO (...).'

The third, distinctly different view was presented in the decision of the Appellate Court in Łódź of 9 September 2018, II AKz 496/18. This view differs from the earlier judgments by enhancing the prosecutor's competence and diminishing the court's role. The content of the above-mentioned judgment clearly indicates that it is a prosecutor, not a district court, who is competent to issue an EIO in a preparatory proceeding, even when it concerns information constituting banking secrecy.[25] The Court justified the lack of need to obtain the consent of a district court to access banking secrecy in this mode, stating, *inter alia*, that:

> '(...) The provision in Article 106b(1) of the Act of 29 August 1997: Banking Law (consolidated text: Journal of Laws 2017, item 1876) determining the entitlement to request the provision of information constituting banking secrecy based on a decision issued by a Polish court refers only to banks under Polish jurisdiction (...).'[26]

Thus, the Court adopted the stance that the regulation in Article 106b(1) BL applies only to domestic banks located in Poland. Therefore, it does not apply to foreign banks, i.e., foreign entities not subject to Polish jurisdiction. When determining the competence of a court in relation to the EIO, the Court decided that:

> '(...) the solution in Article 589w CCP, expressing a relatively broad specification of the types of entities authorised in Poland to issue a European Investigation Order, limits the competence of a Polish court in this area only to the stage of a jurisdictional proceeding, indicating at the same time that it is applicable to the court hearing the case (...).'

The same view regarding the powers of a prosecutor was expressed in the decision issued by the Appellate Court in Kraków on 23 October 2018, II AKz 524/18. It states: 'The right to request information constituting banking secrecy based on a decision issued by a Polish court cannot apply to foreign banking entities operating in the territory of a foreign country (...).' Consequently, the Court clearly decided that: 'A prosecutor, not a court, is competent to issue an EIO at the investigation stage (...).'

A. Król expresses a similar opinion on a prosecutor's competence. According to her, the body authorised to issue an EIO at the stage of a preparatory proceeding is

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[25] M. Janicz criticises this stance in: idem, Dudka, K. (ed.), *Kodeks*…, op. cit., p. 1421.

[26] The Court's stance has been assessed as 'debatable' in the doctrine (thus in: Klimczak, J., Wzorek, D., Zielińska, E., *Europejski*…, op. cit., p. 45) and such that 'one cannot agree with' (thus in: Kuczyńska, H., 'Komentarz do art. 589w k.p.k.', in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz 2021*, Legalis).

a prosecutor conducting this proceeding, and other bodies that, under the provisions in force, may conduct proceedings or may be entrusted with the task of conducting such proceedings (subject to the obligation to obtain a prosecutor's approval of an EIO), even in the event of investigative activities that in similar domestic cases would require a prior competent court's decision.[27]

Finally, the fourth stance, which appears as somewhat of a compromise in light of the above-mentioned views, emphasises the competence of both a prosecutor and a court. This was particularly expressed in the decision of the Supreme Court of 2 June 2022, I KZP 17/21, and the earlier decision of the Appellate Court in Katowice dated 4 September 2018, II AKz 645/18. In the latter ruling, the Court posited that if, at the stage of a preparatory proceeding, it is necessary to issue a decision concerning an EIO regarding information constituting banking secrecy, a prosecutor is competent to issue it. However, the prosecutor is obliged to apply for and obtain the consent of a district court to disclose such information. Developing this thesis, the Court explained:

> 'The District Court should examine the substantive grounds of the prosecutor's motion to give consent to grant exemption from banking secrecy in accordance with Article 106b therein, as would occur in the event of conducting investigative activities in a purely domestic dimension.'

The necessity for a district court to take a stance arises from the need for this body to assess potential infringements of procedural guarantees ensuring the lawfulness of obtaining evidence in the Polish procedure. For this reason,

> 'The first instance court should act as in analogous cases concerning motions lodged pursuant to Article 106b of the Banking Law, i.e., firstly, examine whether a prosecutor has reasonable grounds to independently request data constituting banking secrecy in the mode laid down in Article 105(1)(2)(b) of the Banking Law, and next state whether granting consent in the mode pursuant to the provision under Article 106b of the Banking Law would not infringe the guarantee function of banking secrecy, including whether the requested information can be obtained in another legally admissible way.'

A.H. Ochnio concurred with the above opinion. The author correctly states that the purpose of the changes introduced by Directive 2014/41/EU suggests that Article 589w § 5 of the CCP cannot justify the interpretation that in a preparatory proceeding a court takes over the competence to issue an EIO if it concerns information constituting banking secrecy, and the domestic law in a given case mandates a public prosecutor to obtain exemption from this secrecy. A prosecutor retains the competence in question and is obliged to obtain judicial exemption from banking secrecy for the purpose of incidental proceedings regarding the issuance of an EIO.[28]

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[27] Król, A., 'Europejski…', op. cit., p. 144.

[28] Ochnio, A.H., 'Europejski nakaz dochodzeniowy dotyczący informacji objętych tajemnicą bankową. Glosa do postanowienia Sądu Apelacyjnego w Katowicach – Wydział II Karny z dnia 4 września 2018 r., II AKz 645/18', *Orzecznictwo Sądów Polskich*, 2021, No. 7–8, pp. 115–116. The judgement was also recognised as right in: Kuczyńska, H., *Komentarz do art. 589w k.p.k.* …, op. cit.

The decision of the Supreme Court of 2 June 2022, I KZP 17/21, which extensively refers to the judgement of the Appellate Court in Katowice discussed above, points out:

> 'The prosecutor conducting a preparatory proceeding is an authority entitled to issue the European Investigation Order in this proceeding (Article 589w § 1 of the CCP in conjunction with Article 2(a)(i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1), unless the provisions of the CCP or a special act reserve the right to admit and present evidence to the jurisdiction of the court as a judicial action in the preparatory proceeding. In such a case, this court is competent to issue a European Investigation Order.'

Of particular importance from the perspective of the matter in question is another thesis of the Court, expressed as follows:

> 'In the *in rem* stage of the preparatory proceeding, the prosecutor is an authority entitled to issue a decision on the issuance of a European Investigation Order regarding information constituting banking secrecy in relation to a bank based in another Member State of the European Union (Article 589w § 1 of the CCP). Before issuing this decision, he must obtain the consent of the competent district court to access such information (Article 106b(1) and (3) of the Banking Law applied respectively in conjunction with Article 589 § 5 second sentence of the CCP).'

This interpretation clarifies that the assumption of Article 589w § 1 of the CCP ordering a prosecutor in the *in rem* stage to submit an application not to a district court but to the public prosecution office or a judicial body of another European Union Member State is certainly erroneous.[29]

The view expressed in the Supreme Court judgement demonstrates that a prosecutor's competence to issue an EIO in a preparatory proceeding is limited when a particular evidentiary activity requires prior issuance of a decision by a court.[30] At this point, it is pertinent to highlight the clear differentiation in the general competences of a prosecutor and a court at the stage of a preparatory proceeding. At this stage of a criminal proceeding, the prosecutor conducting or supervising an investigation is a dominus eminens.[31] Conversely, the general competence of a court at this stage stems from Article 329 § 1 of the CCP, which specifies judicial actions that are 'provided for in statute'. Thus, the competence of a court is exceptional in nature and should not be interpreted more broadly. Concurrently, Article 589w § 1 of the CCP stipulates that the court hearing a case or the prosecutor conducting a preparatory proceeding may (*ex officio* or at the request of a party) issue an EIO. Therefore, this provision does not inherently entitle a court to issue an EIO at the stage of a preparatory proceeding. It should be noted that Article 6(1)(b) of Directive 2014/41/EU mandates that the issuing body may only issue an EIO where, *inter alia*, the condition of equivalence is met, i.e., the investigative measure(s) indicated in

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[29] Cf. the judgement of the Appellate Court in Lublin of 18 April 2018, II AKz 210/18, unpublished; I am quoting from Janicz, M., in: Dudka, K. (ed.), *Kodeks*…, op. cit., p. 1421.

[30] See Article 589w § 5 CCP in conjunction with Article 2(c)(i) Directive 2014/41/EU.

[31] See Article 311 CCP and Article 325a CCP in conjunction with Article 326 § 1 CCP.

the EIO could have been ordered under the same conditions in a similar domestic case. This indicates that the obligation of a prosecutor who needs to issue an EIO to apply to a district court for consent to access banking secrets finds normative justification in the provision of Directive 2014/41/EU.

Finally, attention should be drawn to the correct interpretation by the Supreme Court, as explained in the aforementioned judgment, that

> '(...) pursuant to the ruling issued in accordance with Article 106b(1) and (3) of the Banking Law, when there is a need to issue a European Investigation Order and transmit it to another European Union Member State, a foreign bank is not exempted from banking secrecy (if such is provided for in the legal system of the territory where the bank is registered). Instead, only a court shall verify the scope and necessity of obtaining such information by the prosecutor conducting a preparatory proceeding. If banking secrecy is applicable in the country where a bank is registered, and there is a procedure for exempting a bank from this secrecy for the purposes of a criminal proceeding in that country, the executing authority may implement such a procedure (Article 9(1) of Directive 2014/41/EU).'

This reasoning effectively counters the previously indicated argument regarding the lack of a Polish court's right to give consent to access the banking secrets of a foreign bank as grounds for excluding the competence of a district court with regard to the EIO. A district court is tasked with examining the application of a prosecutor who intends to issue an EIO, not to interfere in the legal (banking) system of another country, but to assess the prosecutor's intention primarily from a perspective related to legal guarantees. The interpretation of a court's consent to interview persons bound by professional secrecy, such as lawyer-client or physician-patient privilege (Article 180 § 2 of the Criminal Procedure Code), should be understood similarly.[32] In such cases, it is the prosecutor, not the court, who is entitled to issue an EIO, albeit contingent on a prior positive decision by the court.

CONCLUSIONS

The considerations presented above lead to the conclusion that the EIO is an instrument of international cooperation in criminal matters, offering broad application possibilities in both preparatory and judicial proceedings. Despite the tool's relatively short history, it is widely and frequently utilised, especially by prosecutors. Regrettably, in the practice of law application, issues quickly arose regarding the procedure to be employed in situations where the objective of the EIO is to gain access to banking secrecy from a foreign bank. Opinions on this issue, expressed not only in case law but also in doctrine, are inconsistent, leading to a non-uniform application of the law.[33] The most convincing stance among the views presented above appears to be that of the Supreme Court in its ruling of 2 June 2022,

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[32] Cf. Kusak, M., *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami*, Warszawa, 2019, pp. 26–27.

[33] For the issue of differentiated proceeding models in the prosecutors' practice see: Klimczak, J., Wzorek, D., Zielińska, E., *Europejski…*, op. cit., pp. 147–149.

I KZP 17/21, where the Court adopts a competence model for accessing banking information that mirrors the model established in Article 106b of the Banking Law. It is not possible to unequivocally predict the future direction of the interpretation of the relevant provisions and to what extent courts will recognise the position expressed in the Supreme Court's judgement. Therefore, it seems prudent for the legislator, recognising the absence of pertinent regulations on competence in the CCP and Banking Law and the existing interpretational issues as well as the stance of the Supreme Court, to clearly define, de lege ferenda, the roles of a prosecutor and a court in issuing an EIO in a preparatory proceeding for the purpose of obtaining information constituting banking secrecy.

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Cite as:

Kąkol C. (2023) *'Issuance of the European investigation order at the stage of a preparatory proceeding for the purpose of obtaining information constituting bank secrecy'*, Ius Novum (Vol. 17) 4, 77–90. DOI 10.2478/in-2023-0030

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Ius Novum

2023, vol. 17, no. 4, pp. 91–107

CONSEQUENCES OF INTRODUCING THE POSSIBILITY OF IMPOSING AN IRREDUCIBLE LIFE SENTENCE INTO THE CRIMINAL CODE WITH REGARD TO EXTRADITION AND THE EXECUTION OF THE EUROPEAN ARREST WARRANT

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DOI: 10.2478/in-2023-0031

Abstract

The Act of 7 July 2022, amending the Act – Criminal Code and certain other acts, introduced the possibility of imposing a sentence of life imprisonment without parole into the Criminal Code. The legislator provided for two grounds for the optional imposition of an irreducible life imprisonment sentence. The first (Article 77 § 3 of the Criminal Code) is based on formal grounds: a previous conviction for a specific type of crime (against life and health, freedom, sexual freedom, public security, or of a terrorist nature) to life imprisonment or imprisonment for a term of not less than 20 years. The second ground (Article 77 § 4 of the Criminal Code) operates on a substantive condition: the nature and circumstances of the act and the personal characteristics of the perpetrator indicate that the perpetrator's remaining at liberty would pose a permanent danger to the life, health, freedom, or sexual freedom of others. This article posits that the provisions of Article 77 § 3 and 4 of the Criminal Code are incompatible with Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment. As a result of the introduction of this type of punishment in Polish law, we may

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unfortunately realistically expect other states to refuse to hand over individuals prosecuted for crimes punishable by such punishment or those already sentenced to such punishment.

Keywords: life imprisonment, life imprisonment without parole, parole, conditional release, prohibition of conditional release, European arrest warrant, extradition

INTRODUCTION

The Act of 7 July 2022 amending the Act – Criminal Code and certain other acts[1] constitutes the largest amendment to the 1997 Criminal Code. Its primary objective is to tighten criminal liability for the most serious crimes, particularly those against life, health, liberty, sexual freedom, and those committed by perpetrators of traffic accidents while intoxicated, under the influence of narcotics, or when the perpetrator fled the scene of the accident, as well as crimes committed by recidivists. This goal is achieved by changing the system of sanctions, i.e., by eliminating the type-separated penalty of 25 years' imprisonment, increasing the general upper limit of imprisonment from 15 to 30 years, raising the general limit of extraordinary aggravation of penalty from 20 to 30 years imprisonment, increasing the upper limits of sanctions for crimes punishable by 12 years' imprisonment to 15 years (up to 20 years in the case of crimes punishable by 15 years' imprisonment), raising the lower limits of sanctions for certain types of crimes, and creating new aggravated crimes (e.g., rape). The legislator also introduced the possibility of imposing life imprisonment without parole.

After the majority of the provisions of the above-mentioned act enter into force (i.e., 1 October 2023), non-reducible life imprisonment will be possible for certain crimes grouped in 'Chapter XVI Crimes against Peace, Humanity, and War Crimes' and 'Chapter XVII Crimes against the Republic of Poland', for the crimes of murder (Art. 148 § 1, 2, and 3 of the Criminal Code), intentional infliction of grievous bodily harm with fatal consequence (Article 156 § 3 of the Criminal Code), and for certain new aggravated crimes (rape) introduced in this act.[2]

In our view, this form of life imprisonment should not be termed 'absolute' life imprisonment. Indeed, any sentence of life imprisonment is absolute in nature, as it cannot be conditionally suspended. The correct term for this penalty is, therefore, 'irreducible life sentence (irreducible life imprisonment)', a term commonly used in European Court of Human Rights case law.[3]

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[1] Journal of Laws of 2022, item 2600. Most of the provisions of this law were supposed to enter into force on 14 March 2023. However, this date has been postponed until 1 October 2023.

[2] Article 197 CC:

§ 4. If the perpetrator commits rape against a minor under 15 years of age or the perpetrator of an act specified in § 1–3 acts with particular cruelty or the consequence of this act is severe damage to health, he shall be subject to imprisonment for a term not shorter than 5 years or to life imprisonment.

§ 5. If the consequence of the act specified in § 1–4 is the death of a human being, the perpetrator shall be subject to imprisonment for a term not shorter than 8 years or to life imprisonment.

[3] Cf. e.g. ECtHR judgment of 9 July 2013, *Vinter and others v. UK*, ECtHR judgment of 4 September 2014. *Trabelsi v. Belgium*.

The legislator has provided two grounds for the optional imposition of an irreducible life imprisonment sentence. The first of these (Article 77 § 3 of the Criminal Code) is based on a formal condition, i.e., a previous conviction for a specific type of crime (against life and health, freedom, sexual freedom, public security, or terrorism) to life imprisonment or a sentence of imprisonment for a term of not less than 20 years. On the other hand, the second ground (Article 77 § 4 of the Criminal Code) operates on a substantive condition, i.e., that the nature and circumstances of the act and the personal characteristics of the perpetrator indicate that the perpetrator's remaining at liberty would pose a permanent danger to the life, health, freedom, or sexual freedom of others.

The purpose of this study is to analyse the procedural consequences of introducing the penalty of life imprisonment in an irreducible form into the Criminal Code, particularly in the context of criminal proceedings in cases involving international relations. Current jurisprudence of the European Court of Human Rights (hereinafter 'ECtHR') suggests that this punishment is incompatible with Article 3 of the European Convention on Human Rights (hereinafter 'ECHR').[4] The filing of a complaint by the convicted individual will likely result in the ECtHR finding a violation of the ECHR, which, in light of Article 540 § 3 of the Code of Criminal Procedure, will be the basis for reopening proceedings in the convicted person's favour. It appears that convictions applying the provisions in question will be rare, as judges, aware of their incompatibility with Article 3 of the ECHR, are unlikely to apply them or will do so infrequently. However, this does not negate the other adverse effects of introducing these provisions for the Republic of Poland, which are independent of whether convictions under them will occur.

According to the authors, as a result of the introduction of Articles 77 § 3 and 4 of the Criminal Code, we may unfortunately realistically expect refusals to surrender persons prosecuted for crimes punishable by such a punishment or those already sentenced. It is highly probable that the procedural effect of refusal to surrender a person prosecuted under the application of active extradition *sensu largo*, both under classic extradition and the European arrest warrant (EAW), will occur with respect to suspects for crimes punishable by life imprisonment, i.e., in practice, for the crimes of murder, certain qualified types of rape, and causing grievous bodily harm with fatal consequence, or those sentenced under the application of Article 77 § 3 and 4 of the Code of Criminal Procedure.

1. INCOMPATIBILITY OF ARTICLE 77 § 3 AND 4 OF THE CRIMINAL CODE WITH ARTICLE 3 ECHR

It is aptly noted in legal literature that eliminating the possibility of conditional release absolutely precludes the achievement of one of the recognised objectives of punishment.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284.

> 'Psychiatrists, psychologists, as well as lawyers (and other specialists) highlight the impossibility of making a generally and absolutely negative prognosis regarding the convicted person in advance. This would be an expression of the assumption of absolute 'non-resocialisability'. This, in turn, is an apparent untruth, as it contradicts the concept of the human being, ontologically related to history and time, not as a 'closed being', but rather as a dynamic and constantly evolving category.'[5]

Experts in criminal law have repeatedly indicated that the introduction of the possibility of imposing an irreducible life imprisonment sentence in the Polish legal system violates Article 3 of the ECHR, which prohibits torture, inhuman or degrading treatment, and punishment. It is argued that presuming in advance that one refuses to assess the conduct of the convicted person by a body set up for that purpose renders the sentence imposed as characterised in Article 3 ECHR. This is not mitigated by the fact that the convicted person can apply for a pardon, as it is an extraordinary measure, and therefore the ECtHR has considered this type of regulation contradictory and in violation of Article 3 ECHR.[6]

Although Poland's choice of a particular system of punishment, including regulations on conditional release, is in principle outside the scope of ECHR control, the chosen system cannot violate the principles set forth in the ECHR, particularly Article 3, which prohibits torture, inhuman, and degrading treatment.

In *Vinter v. United Kingdom*[7] the European Court of Human Rights held that Article 3 of the ECHR, which prohibits inhuman or degrading punishment, must be interpreted as including a requirement of the reducibility of life imprisonment. This means an assessment allowing the national authorities to consider whether, during the course of the sentence, the convicted person's rehabilitation has progressed to such an extent that his further isolation is no longer justifiable on legitimate penological grounds.

It is highlighted in the literature that

> 'this finding was considered by the European Court of Human Rights itself as a breakthrough. In the subsequent *Trabelsi v. Belgium* judgment (judgment of 4 September 2014, 140/10, Legalis), the *Vinter* case was cited as changing the previous line of ECtHR jurisprudence. According to this line, the mere possibility of adjusting a life sentence, even subject only to the discretion of the head of state, was sufficient to consider that the requirements of Article 3 ECHR had been met'.[8]

R. Kierzynka aptly points out,

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[5] Wilk, L., 'Kara dożywotniego pozbawienia wolności a instytucje warunkowego zwolnienia i prawa łaski', *Prokuratura i Prawo*, 2008, No. 10, p. 19.

[6] Płatek, M., *Opinia prawna na temat Projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk 2154)*, pp. 20–21, https://orka.sejm.gov.pl/rexdomk8.nsf/0/EB55C-1136FABB1F0C1258232004C80B4/%24File/i331-18A.rtf [accessed on 21 November 2023]. This opinion was issued for bill in 2019, which contained a similar provision.

[7] ECtHR judgment of 9 July 2013, Application No. 66069/09, Legalis.

[8] Kierzynka, R., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego. Komentarz. Art. 607r*, Legalis.

> 'since the *Vinter* judgment, the Strasbourg standard for commutation of a life sentence is therefore met only if the release is based on circumstances within the prisoner's control, i.e., an assessment of his attitude and behaviour. Furthermore, the Court states that a prisoner sentenced to life imprisonment must already know, at the time of the imposition of that sentence, what he must do to be considered for release and under what conditions, including the periods during which such a review would take place or could be requested. These standards are not met by a pardon, which can occur regardless of the assessment of the criminal's degree of rehabilitation. Therefore, the view must be shared that it concerns access to institutions equivalent to conditional release, as well as others, but only those to which access depends on an assessment of the attitude and behaviour of the convicted person himself'.[9]

In this context, J. Kluza's view appears incorrect. He posits that due to several judgments of the European Court of Human Rights (ECtHR) from a dozen years ago, which recognised the right of clemency of the head of state as sufficient to deem life imprisonment reducible (these were isolated judgments at that time, as the current line of jurisprudence had already prevailed), and consequently compatible with Article 3 of the ECHR, the jurisprudence of the ECtHR on this issue is not uniform.[10] However, as mentioned earlier, since the ECtHR's judgment on 9 July 2013 in the *Vinter* case, the Court's jurisprudence has been uniform. Consequently, Article 77 § 3 and 4 of the Criminal Code, in our opinion, will likely be found incompatible with Article 3 of the ECHR. It is doubtful that the ECtHR will shift its jurisprudence towards diminishing human rights protection, narrowing the established understanding of human dignity, the humanity of punishment, and the prohibition of inhuman and degrading punishment.

The Legislative Council to the Prime Minister, which gave its opinion on the draft amendment in question, aptly pointed out that

> 'the President of the Republic of Poland exercises the right of clemency in a discretionary manner, without being guided by a strictly defined set of criteria, and formally without the need to consider whether the convict (including those sentenced to life imprisonment) has achieved a sufficient degree of rehabilitation to allow his return to society. However, the case law of the European Court of Human Rights states in this context that if the provisions of national law governing the presidential right of clemency do not oblige the President to assess whether the continued imprisonment of a person sentenced to life imprisonment is justified on penological grounds, and if they do not set out the specific criteria or conditions to which the President must adhere in applying the right of clemency, and if they do not oblige the President to specify (disclose) the reasons for which he has applied or refused to apply the power of clemency, then the mere existence in national law of a presidential power of clemency is not sufficient to conclude that a sentence of life imprisonment without the possibility of parole is compatible with Article 3 of the Convention.'[11]

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[9] Ibidem.

[10] Kluza, J., 'Kara bezwzględnego dożywotniego pozbawienia wolności w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka', *Prokuratura i Prawo*, 2021, No. 1, p. 21 et seq.

[11] *Opinia Rady Legislacyjnej z dnia 29 października 2021 r. o projekcie ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (UD 281) z dnia 16 września 2021 r. i powołane tam wyroki ETPC*, https://www.gov.pl/web/radalegislacyjna/opinia-z-29-pazdziernika-2021-r-o-projekcie-ustawy-o-zmianie-ustawy--kodeks-karny-oraz-niektorych-innych-ustaw-ud-281-z-dnia-16-wrzesnia-2021-r [accessed on 21 November 2023].

It is generally accepted in ECtHR case law that the imposition of life imprisonment on an adult criminal is not incompatible with the Convention provided that it is not grossly disproportionate and if there is both the prospect of release and the possibility of a review of the sentence, both of which conditions must be met from the moment the sentence is imposed.[12]

The ECtHR stresses that a person sentenced to life imprisonment has the right to know, at the time of serving his sentence, what conditions he must fulfil to be entitled to apply for early release and under what conditions such release may take place, including the period of time to be served before he is entitled to apply for conditional release. If national law does not provide for any mechanism or possibility of review of life imprisonment, incompatibility with Article 3 already exists at the time such a sentence is imposed and not at a later imprisonment.[13]

The ECtHR takes the view that Article 3 ECHR must be interpreted as requiring the introduction of the possibility of a reduction of the sentence imposed, allowing national authorities to consider whether changes in the prisoner's life are so significant and the rehabilitation progress during the course of the sentence so substantial that further imprisonment is not justified on legitimate penological grounds. If national law does not provide for such a review, the entire sentence of life imprisonment will be incompatible with Article 3 ECHR.[14] Imposing a sentence of life imprisonment on an adult that cannot be reduced, thereby depriving that person of any hope of release, violates Article 3 ECHR.[15] A prisoner sentenced to life imprisonment should have a realistic chance of returning to society, which implies the need to guarantee such prisoners the opportunity to make progress towards early release.

If an irreducible life sentence is imposed, the convicted person may not be motivated to take steps towards his or her own rehabilitation, which could negatively impact other inmates and the state of security and order in the prison where the sentence is served. The prospect of conditional release is a very strong incentive for the convict to actively engage in the rehabilitation process. The disciplinary function of the possibility of conditional release and the fact that depriving a person of one of the most human feelings – hope – creates a situation likened to that of a 'caged animal', whose aggressiveness and desperation can only be curbed.[16]

It should be stressed that this provision does not necessitate granting the convict the right to conditional early release, but only guarantees the right to apply for it. Therefore, it is necessary to shape legal solutions concerning the execution of the sentence of imprisonment in such a way that the duration of its execution depends on the rehabilitation progress of the convicted person, including their attitude and decision to undergo rehabilitation measures, which is their right, not an obligation. Consequently, the decision not to grant conditional release must be based on

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12 ECtHR judgment of 26 April 2016, *Murray v. the Netherlands*, Application No. 10511/10.

13 ECtHR judgment of 20 May 2014, *László Magyar v. Hungary*, Application No. 73593/10; ECtHR judgment of 9 July 2013, op. cit.

14 ECtHR judgment of 3 February 2015, Application No. 57592/08.

15 ECtHR judgment of 2 September 2010, Application No. 36295/02.

16 Wilk, L., 'Kara dożywotniego…', op. cit., p. 19.

an analysis of the convicted person's situation while serving their sentence and not at the time of sentencing, as is implied by Article 77 § 3 and 4 of the Criminal Code.

In view of the incompatibility of the regulation in question with Article 3 of the ECHR, as confirmed by judgments of the ECtHR regarding analogous regulations in other countries, a Polish court imposing an irreducible life imprisonment sentence would expose itself to the application of a provision that is incompatible with higher-level regulations.

The possibility for the court to exclude the right to apply for conditional early release in the judgment reflects a profound lack of confidence in the penitentiary court and is based on the absurd assumption that the court imposing the penalty will make a better assessment of whether the convicted person's remaining at liberty, e.g., in 25 years' time, will pose a permanent threat to the life, health, freedom, or sexual freedom of others, than the penitentiary court, which will make such an assessment, e.g., after 25 years of serving the sentence.

It is rightly pointed out in the literature that it is

> 'the court possibly deciding on the question of conditional release in 25 years' time that will have relevant knowledge based on what are probably far greater diagnostic possibilities than those available to current science. Progress in medical science, particularly relating to the central nervous system and interference with brain functioning, is so rapid that it is indeed difficult to predict the possibilities in these areas in such a long time. Relying on current knowledge, therefore, as to the possibility of correcting certain features of a person's personality, with a view to a conditional release in 25 years' time, does not seem convincing. Even if such medical advances do not occur, judges adjudicating in the future will be well aware of this.'[17]

In this context, it is necessary to take the position that imposing a sentence of irreducible life imprisonment only realises the justice function of criminal law, and this in its most primitive form (revenge). The individual prevention and protective function can be fulfilled to an identical extent without imposing irreducible life imprisonment. General prevention is not achieved by irreducible life imprisonment, because potential perpetrators of crimes punishable by such a penalty will not be deterred from committing them by the fact that the penalty in question is imposed on other perpetrators. As a consequence, the normative solution introduced by the legislator appears not to meet the standards of criminal law, as it does not take into account to any extent other functions of criminal law than the justice function.

It is aptly pointed out in the literature that the process of rehabilitation of the criminal can only be successful if the convicted person actively participates in it. The prospect of parole is a very strong motivator for the convict to actively engage in the rehabilitation process. The institution of early conditional release is very

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[17] Bulenda, T., Klimczak, J., Woźniakowska-Fajst, D., 'Młodzi zabójcy skazani na karę dożywotnego pozbawienia wolności – sylwetka, czyn, polityka karania', in: Rzepliński, A., Ejchart-Dubois, M., Niełaczna, M. (eds), *Dożywotnie pozbawienie wolności. Zabójca, jego zbrodnia i kara*, Warszawa, 2017, Legalis.

important for maintaining discipline in prison. The lack of the possibility of parole causes convicts not to be sufficiently motivated to comply with the prison rules.[18]

It is also stressed that such a solution is extremely dangerous because the situation of fellow inmates and prison staff becomes difficult when a convict is deprived of hope, thereby contradicting the content of Article 67 of the Criminal Executive Code. This provision is oriented towards arousing in the convict the will to cooperate in shaping his attitudes and to abide by the law after serving the sentence.[19]

> 'The exclusion of the chances of parole distorts the sense of the work done by the penitentiary staff. Information that proper behaviour, work on oneself, participation in therapy, exemplary behaviour, rewards, no punishment, pro-social attitude – all this counts for nothing and is meaningless, has devastating effects. It damages penitentiary work, reduces security in prisons for both staff and inmates, and shows disregard for Article 40 of the Polish Constitution, Article 41(3) of the Polish Constitution, Article 53 § 1 of the Criminal Code, and also for Article 67 of the Criminal Executive Code. This solution is also contrary to Recommendation 102.2 of the European Prison Rules of the Council of Europe of 11 January 2006. Rule 102.2 points out that imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment. The *a priori* assumption that a sentenced prisoner is deprived for life of the chance to apply for conditional early release is a provision incompatible with Recommendation 102.2 of the European Prison Rules.'[20]

Therefore, there is no doubt that sentences issued based on Article 77 § 3 or 4 of the Criminal Code will be appealed to the ECtHR, which will declare Poland's violation of Article 3 of the ECHR and award compensation to the convicted person, although, as will be presented later in this article.

2. CONSEQUENCES OF THE INCOMPATIBILITY OF ARTICLE 77 § 3 AND 4 OF THE CRIMINAL CODE WITH ARTICLE 3 ECHR IN TERMS OF THE EXECUTION OF THE EUROPEAN ARREST WARRANT

There is also a serious risk that the consequence of this amendment will be that Member States will not consent to the execution of a European arrest warrant and will not be obliged to judge such perpetrators themselves. Dangerous killers, rapists, and perpetrators of grievous bodily harm with fatal consequences may find themselves at large. Indeed, the ECtHR, in its judgments in the cases of 9 July 2013, *Vinter and Others v UK*,[21] and 4 September 2014, *Trabelsi v Belgium*[22], ruled that the transfer of a suspect, even to a state not bound by the ECHR, without establishing

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[18] Zoll, A., in: Wróbel, W. (ed.), *Kodeks karny. Część ogólna. Tom I. Część II. Komentarz do art. 53–116*, Warszawa, 2016, thesis 7 to Article 77.

[19] Płatek, M., *Opinia prawna*…, op. cit., p. 21.

[20] Ibidem.

[21] Action No. 66069/09, Legalis.

[22] Action No. 140/10, Legalis.

whether and under what conditions parole would be possible in the event of a life sentence, violates Article 3 of the ECHR.

In addition, according to Article 607r § 1(6) of the Code of Criminal Procedure, 'the execution of a European arrest warrant may be refused if life imprisonment or another measure involving deprivation of liberty without the possibility of seeking a reduction of that sentence may be imposed for the crime to which the EAW relates in the country in which the European arrest warrant was issued.' The equivalents of this provision can be found in the legislation of other states, as it is an implementation of Article 5(2) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.[23] It should be noted that Article 607r § 1 point 6 of the Code of Criminal Procedure is a provision with rather general grounds for application, compared to the implemented provision. This is because it defines the negative prerequisite of its application as the lack of an opportunity to apply for a reduction of the life imprisonment sentence, while the above-mentioned provision of EU law is more precise, defining it, *inter alia*, as the right to apply for a pardon.

In the literature, two ways of interpreting the above-mentioned notion of 'opportunity to apply for its reduction', as referred to in Article 607r § 1 point 6 of the Code of Criminal Procedure, can be distinguished. The first position, which does not apply the standards arising from the ECtHR judgments (with regard to Article 3 of the ECHR), considers the right to request a pardon as a possibility to shorten such a sentence.[24] This broad understanding of the term may result from an interpretation referring to the wording of the implemented provision, which explicitly indicates that the possibility of non-application of the EAW is excluded when the suspect in the issuing state will have the right to application of measures of clemency. However, it seems that the notion of the 'application of measures of clemency' in this provision should be interpreted as such a right of clemency, the application of which is conditional on adequate progress in rehabilitation, and the convicted person at the time of sentencing to life imprisonment should be able to find out the conditions for conditional release. In Poland, however, the institution of pardon by the President of the Republic of Poland does not meet such conditions, which, in our opinion, renders the above-mentioned view erroneous.

Therefore, the opposite position, which takes into account the ECtHR case law, should be accepted. Consequently, the mere possibility of reducing the life imprisonment sentence, which depends solely on the discretion of the Head of State, is not sufficient to consider such a sentence as reducible and therefore not violating

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[23] OJ L 190, 18.7.2002, p. 1. According to its Article 5(2), if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.

[24] Steinborn, S., in: Grajewski, J. (ed.), *Kodeks postępowania karnego. Komentarz,* Vol. 2, Warszawa, 2013, pp. 864–865; Górski, A., Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks postępowania karnego. Komentarz. Art. 607r*, Legalis.

Article 3 of the ECHR. In Poland, the pardon takes place based on circumstances which are within the convict's control, i.e., the decision to pardon does not occur in connection with an assessment of his attitude and behaviour.[25]

If, in any of the EU countries, the equivalent of 607r § 1(6) of the Code of Criminal Procedure is also defined in such a general way (without specifying *expressis verbis* the right to clemency as the grounds for reducibility), there is a serious risk that these countries will be able to refuse to execute the European arrest warrant issued by Poland against suspects for crimes punishable by life imprisonment, i.e., crimes of murder, certain aggravated types of rape, and causing grievous bodily harm with fatal consequence. An analogous risk will arise with regard to the EU countries that have not implemented the Council Framework Decision in question.

When analysing the issue of the procedural aspect of the consequences of adopting the punishment of irreducible life imprisonment in the Polish legal system, a key issue is the extradition of perpetrators of crimes punishable by such punishment by other states to Poland. From a terminological point of view, this is the institution of extradition *sensu largo*, an aggregate term covering all types of forced surrender abroad or bringing from abroad of an accused person in order to conduct criminal proceedings against him.[26] The subject of interest here is active extradition, consisting of a request for the surrender of a criminal directed by the Polish authorities to the country where the person being prosecuted is located.[27] It includes classical extradition and the European arrest warrant.

Although the subject of the present discussion is the execution of the European arrest warrant with regard to the surrender of criminals punishable by irreducible life imprisonment, a moment's attention should also be paid to classical extradition. Extradition is an institution regulated by international conventions,[28] bilateral agreements or takes place on the principle of reciprocity. The Code norms are applied in a subsidiary manner to international agreements (cf. Article 615 § 2 of the Code of Criminal Procedure).

It should be pointed out that, in the area of interest here, the statutory regulation of active extradition provides for two prohibitions:

(1) a prohibition of prosecution, conviction or imprisonment, without the consent of the issuing State, for the purpose of executing a sentence for a crime committed before the date of surrender other than that for which the surrender occurred (Article 596 of the Code of Criminal Procedure);
(2) a prohibition of execution of penalties other than those imposed for the crimes in respect of which surrender has taken place, where it has been restricted at the

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[25] So aptly Kierzynka, R., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego…*, op. cit. Cf. also Nita-Światłowska, B., 'Możliwość orzeczenia kary dożywotniego pozbawienia wolności bez dostępu do warunkowego przedterminowego zwolnienia jako przeszkoda ekstradycyjna wynikająca z Europejskiej Konwencji Praw Człowieka', *Europejski Przegląd Sądowy*, 2017, No. 6, pp. 27–33.

[26] Cf. Waltoś, S., Hofmański, P., *Proces karny. Zarys systemu*, Warszawa, 2020, p. 655.

[27] Cf. Grzegorczyk, T. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX/el., 2003, Vol. 1 to art. 593.

[28] In particular, the European Convention on Extradition of 13 December 1957 (Journal of Laws of 1994, No. 70, item 308–310), hereinafter 'ECE'.

time of surrender that with respect to the surrendered person, sentences already imposed shall be executed only for those crimes in respect of which surrender has taken place (Article 597 of the Code of Criminal Procedure).

Both of these prohibitions may apply to the situation of the adoption of an irreducible life imprisonment in the Polish legal system and the issue of extraditing a prosecuted or convicted person.

In the first case, there is the question of the issuing State prohibiting the prosecution, conviction, or deprivation of liberty for the purpose of executing a sentence in respect of a crime punishable by irreducible life imprisonment. The principle of speciality is not absolute, as the issuing state may also consent to proceedings against the surrendered person in respect of crimes other than those in relation to which the surrender took place.[29] However, if the issuing state, irrespective of whether it is a party to the ECHR, would consider – in accordance with the case law of the ECtHR – a sentence of irreducible life imprisonment to be incompatible with Article 3 of the ECHR and therefore incompatible with international law, it should then prohibit the prosecution, conviction or deprivation of liberty for the purpose of executing the sentence in respect of a perpetrator of a crime punishable by, or sentenced to, such a sentence. In practice, such an eventuality should realistically be anticipated. Attention must also be drawn here to the differences in the regulation of this prohibition that international agreements sometimes contain. For example, under Article 28(2) of the ECE, contracting parties may conclude between themselves bilateral or multilateral agreements in order to supplement the provisions of the ECE or to facilitate the application of the principles contained therein. Thus, these agreements may also mitigate the rigours provided for in Article 14 of the ECE by the principle of speciality.[30] Such a solution is contained, for example, in the Agreement signed on 17 July 2003 in Berlin between the Republic of Poland and the Federal Republic of Germany on supplementing and facilitating the application of the ECE.[31] According to Article 7(4) of that Agreement, in surrender proceedings, a prosecuted person may voluntarily declare into the record before a judge or prosecutor, after being instructed on the legal consequences of that declaration, in full knowledge of those consequences, his consent to waive the principle of speciality; such consent may not be revoked. According to Article 615 § 2 of the Code of Criminal Procedure in such a situation the provision of Article 596 of the Code of Criminal Procedure is not applicable.[32] In the situation under consideration, the decision would therefore lie in the hands of the prosecuted person themselves, but it is difficult to suppose that they would be willing to consent to incur liability for a crime punishable by irreducible life imprisonment.

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[29] Augustyniak, B., in: Świecki, D., *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, Vol. 3 to art. 596. LEX/el 2023; Steinborn, S., in: Paprzycki, L. (ed.), Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego, Vol. 2 to Article 596, LEX/el, 2015.

[30] Cf. Steinborn, S., in: Paprzycki, L. (ed.), *Komentarz aktualizowany...*, op. cit., Vol. 10 to Article 596, LEX/el, 2015.

[31] Journal of Laws 2004. No. 244, item 2451.

[32] Order of the Supreme Court of 21 January 2009, V KK 231/08, *Biuletyn Prawa Karnego Sądu Najwyższego*, 2009, No. 3, p. 72.

In the second case it is a prohibition on the execution of a life sentence imposed for a crime other than that for which the surrender took place, if it were to be considered irreducible under Polish law. The provision of Article 597 of the Code of Criminal Procedure refers only to the surrender of a person prosecuted for the purpose of enforcing a validly imposed imprisonment. It is applicable when, by a final sentence of a Polish court, the perpetrator has been sentenced for several crimes to imprisonment and, in order to be able to execute them, a request has been made to the foreign state for the surrender of the perpetrator, but the state has restricted at the time of surrender that the basis for the surrender is only some of these crimes.[33] It is therefore necessary to adapt the judgment in such a way that it is possible to enforce the imprisonment only for the crimes on which the surrender is based, which is done at the session. In the situation under consideration, the issuing State could, for the reasons indicated above, while allowing the execution of other custodial sentences imposed by a Polish court against a convicted person currently residing on the territory of that State, prohibit the execution of an irreducible life imprisonment sentence against the convicted person.

The prohibitions indicated above in points 1 and 2 are binding on the Polish authorities and may be used by other states considering irreducible life imprisonment to be contrary to international law – apart from the regime of surrender of persons prosecuted under the EAW – as instruments not allowing the execution of irreducible life imprisonment sentences imposed by Polish courts against Polish or other nationals, or even not allowing the initiation and conduct of criminal proceedings for crimes punishable by such sanctions.

Turning to the fundamental procedural instrument used within the framework of active extradition *sensu largo*, i.e., the EAW, it should first of all be noted that its key importance stems from the fact that it is applied in relations with the countries of the European Union (and some other countries[34]), i.e., with the countries with which Poland has the closest international relations, and thus it is the extradition instrument most frequently used in practice. For this reason, it is in the area of application of the EAW that the consequences of the adoption in Polish law of an irreducible life imprisonment sentence, which cannot be reconciled with international legal regulations, may be particularly visible and perceptible.

The regulations of Polish procedural law concerning the application to a Member State of the European Union for the surrender of a person prosecuted on the basis of a European arrest warrant are provided for in Chapter 65a of the Code of Criminal Procedure. It is understood that the provisions of this chapter regulate the proceedings related to the issuance of an EAW by a Polish court in connection with the need to ensure the presence of a person prosecuted for a crime under the jurisdiction of Polish criminal courts who is in the territory of a European Union

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[33] Steinborn, S., in: Paprzycki, L. (ed.), *Komentarz aktualizowany...*, op. cit., Vol. 2 to Article 597, LEX/el 2015.

[34] Cf. e.g. Council Decision of 27 June 2006 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ L 292, 21.10.2006, p. 1.

Member State. The execution of this warrant takes place in another state for the purpose of handing over the prosecuted person to Poland – and thus under foreign law. The consideration of the possible reasons for refusing to execute the EAW cannot, therefore, be made on the basis of dozens of legal systems, as this would not be operative or necessary. The point is that the obligation to introduce this procedural institution into the legislation of all Member States of the European Union was enforced by the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, known as the 'Framework Decision'. Under Article 34(1) of the Framework Decision, Member States were required to take the necessary measures to comply with its provisions by 31 December 2003. The obligation to implement the Framework Decision in the laws of the Member States (as to its objectives, but with the choice of form and means of implementation for the Member States) was laid down in Article 34(2) of the Treaty on European Union in the version of the Treaty of Nice, which was repealed by the Treaty of Lisbon. However, a norm of an intertemporal nature (Article 9 of Protocol No. 36 to the founding Treaties[35]) preserved the legal effects of framework decisions until those acts were repealed, annulled, or amended in application of the new Treaties. It is important to point out, firstly, that in the light of the practice of the European Commission, transposition rules analogous to those of directives apply to framework decisions.[36] Secondly, it should be pointed out that the Court of Justice confirmed that framework decisions are binding, and the fact that the provisions of the Treaty on European Union at the time excluded the possibility of direct effect of framework decisions did not prevent national courts from being obliged to interpret domestic law in accordance with framework decisions (principle of indirect effect).[37] This is of crucial practical importance and has influenced, inter alia, the jurisprudence of national courts with regard to the EAW.[38] As an addendum, it should also be noted that, in the light of the case law of the Court of Justice, the principle of the primacy of EU law also applies to framework decisions.[39]

These remarks are all the more important because the issue of the procedural aspects of the surrender to Poland of persons prosecuted under the EAW for crimes for which an irreducible life sentence has been or may be imposed must be considered first and foremost against the background of the provisions of the Framework Decision, which Member States were obliged to implement. Indeed, the domestic regulations of these states must lead to the achievement of the result prescribed by the Framework Decision. Thus, pursuant to Article 5(2) of the Framework Decision, the execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the

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35 OJ C 202, 7.6.2016, p. 1.

36 Cf. Szwarc, M., 'Decyzje ramowe jako instrument harmonizacji ustawodawstwa karnego państw członkowskich', *Państwo i Prawo*, 2005, No. 7, p. 22.

37 Cf. Judgment of the CJ of 16 June 2005 in Case C-105/03 *Maria Pupino* [2005] ECR I-5285. 2005, pp. I-5285.

38 Cf. Kenig-Witkowska, M., Łazowski, A., in: Kenig-Witkowska, M. (ed.), *Prawo instytucjonalne Unii Europejskiej*, Warszawa, 2015, p. 201.

39 Judgment of the Court, 26 February 2013, Case C-399/11, *Melloni v Ministerio Fiscal*, Lex.

condition that if the crime on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant shall be subject to the condition that there are provisions in the legal system of the issuing Member State for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure. As mentioned above, this is only such a right of clemency, the application of which by the head of state directly depends, *inter alia*, on the behaviour of the convicted person himself,[40] and not purely discretionary – as in Polish law.

Despite the reference in Article 5(2) of the Framework Decision to a condition under the law of the executing Member State, the literature has expressed the view that, where the crime forming the basis of the EAW is punishable by life imprisonment, the execution of the warrant may only take place if the law of the issuing state allows for a review of the sentence upon request or at the latest after 20 years, or the application of the power of clemency. If the legal system of the issuing state does not provide for such possibilities, the execution of the EAW must be obligatorily refused.[41] It is noteworthy that this is the only ground for refusal which, based on the difference in legal regulations in the state of surrender and execution, does not refer to the fact of the content of the decision itself, but to the provisions of the enforcement law affecting the actual severity of the sanction imposed.[42]

The regulation introduced by the Polish legislator does not meet the criteria of reducibility and therefore, by virtue of national provisions implementing Article 5(2) of the Framework Decision, the EAW executing state may refuse to execute it. As argued in the case law, the executing state may request any information from the EAW issuing state and use the information known to it *ex officio* in order to verify whether there are serious and verified grounds for believing that a person subject to a European arrest warrant issued for the purpose of conducting criminal proceedings or executing a custodial sentence will, due to the conditions of his deprivation of liberty in the indicated state, be subject to a real risk of inhuman or degrading treatment.[43]

The Polish legislator implemented Article 5(2) of the Framework Decision in Article 607r § 1(6) of the Code of Criminal Procedure, which enables the court to refuse to execute the EAW if life imprisonment or another measure involving deprivation of liberty without the possibility to apply for its reduction may be imposed in the state of issuance of the European warrant for the crime to which the European warrant relates. It should be noted that, as in Article 5(2) of the

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[40] Cf. Nita-Światłowska, B., 'Możliwość orzeczenia…', op. cit., pp. 27–33, and Hermeliński, W., Nita, B., 'Kara dożywotniego pozbawienia wolności bez dostępu do warunkowego przedterminowego zwolnienia – refleksje w kontekście gwarancji wynikających z Europejskiej Konwencji Praw Człowieka', *Palestra,* 2018, No. 10, pp. 21–29.

[41] Barwina, Z., *Zasada wzajemnego uznawania w sprawach karnych*, Warszawa, 2012, p. 254.

[42] Ibidem, p. 254.

[43] Cf. e.g. judgment of the Court, 5 April 2016, ECLI:EU:C:2016:198; judgment of the Court of Appeals in Katowice of 3 February 2010, II AKz 38/10, *Orzecznictwo Sądu Apelacyjnego w Katowicach*, 2010, No. 1, item 24.

Framework Decision, refusal to execute the EAW on these grounds is optional. Nonetheless, it is rightly noted that considerations of safeguards justify the demand that, if it is found impossible to seek a reduction of life imprisonment, refusal to execute the EAW should be the rule.[44] It is also rightly argued in the doctrine that the wording of the implementation act should be interpreted in accordance with the provisions of the Framework Decision. Thus, although the wording of Article 607r § 1(6) of the Code of Criminal Procedure seems to imply that it applies only to an EAW issued for the purpose of conducting criminal proceedings against a prosecuted person, as it refers to the threat of a penalty, the wording of Article 5 of the Framework Decision should also be taken into account here, where it is clearly indicated that it refers to situations where an EAW was issued for the purpose of executing a sentence or prosecution. Taking also into account the aim of the regulation, it would be difficult to rationally justify providing this specific protection to a person against whom criminal proceedings are still pending, while omitting a convicted person against whom a life sentence has already been imposed. The provision of Article 607r § 1(6) should therefore be interpreted broadly, in accordance with Article 5 of the Framework Decision.[45]

Similarly, it is rightly pointed out that the wording of this provision is in accordance with the requirements of ECtHR case law. Indeed, the ECtHR has ruled that the transfer of a suspect, which must be clearly emphasised – and even to a state not bound by the ECHR, without establishing whether and under what conditions, in the event of a life sentence, it will be possible to apply for early release, violates Article 3 ECHR.[46]

SUMMARY

To sum up the above considerations, the consequence of declaring irreducible life imprisonment contrary to international law, in particular the prohibition of torture, inhuman and degrading treatment expressed in Article 3 of the ECHR, is the highly likely procedural effect of refusing to surrender a prosecuted person in the application of active extradition *sensu largo*, under both classical extradition and the EAW. With regard to the former institution, the issuing state, even without recognising the jurisdiction of the ECtHR, guided by its jurisprudence on violations of international law, may prohibit the prosecution for such crimes or the execution of an irreducible life sentence. Also in the context of the execution of the EAW, a full basis for refusing to surrender a prosecuted person in such situations is provided by Article 5(2) of the Framework Decision, which is subject to implementation in the domestic law

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[44] Steinborn, S., in: Paprzycki, L. (ed.), 'Komentarz aktualizowany...', op. cit., Vol. 15 to art. 607r k.p.k., LEX/el, 2015.

[45] Ibidem, Vol. 15 to *Article 607r*, Nita-Światłowska, B., *Komentarz do* art. 607r k.p.k., Vol. VII.4, Legalis.

[46] In the judgments delivered in the cases of 9 July 2013, op. cit. and of 4 September 2014, *Trabelsi v. Belgium* (Application No. 140/10, Legalis); cf. also Nita-Światłowska, B., 'Możliwość orzeczenia…', op. cit., pp. 27–33.

systems of the Council of Europe member states and should be directly applicable for guarantee reasons. Although it is not possible to clearly anticipate the development of the practice of international circulation concerning active extradition *sensu largo*, the formation of the ECtHR's line of jurisprudence on the definition of irreducible life imprisonment as not meeting the criteria of Article 3 of the ECHR, even taking into account the model of the institution of pardon functioning in Polish law, fills with pessimism as to the possibility of effective prosecution of perpetrators of such crimes by Polish law enforcement authorities and courts outside the country. As a result of the introduction of the punishment of irreducible life imprisonment in Polish law, we may unfortunately realistically expect the refusal of other countries to extradite those prosecuted for crimes punishable by such a punishment or sentenced to such punishments.

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Cite as:

Tyburcy T., Rogoziński P. (2023) *'Consequences of introducing the possibility of imposing an irreducible life sentence into the criminal code with regard to extradition and the execution of the european arrest warrant'*, Ius Novum (Vol. 17) 4, 91–107. DOI 10.2478/in-2023-0031

Ius Novum
2023, vol. 17, no. 4, pp. 108–124

THE COMPETENCES OF THE INTERNATIONAL CRIMINAL COURT AND THE CONFLICT IN UKRAINE

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DOI: 10.2478/in-2023-0032

Abstract
This article endeavours to answer whether, in light of the current International Criminal Court's (ICC) powers, it is possible to hold the Russian Federation accountable for international crimes. The answer hinges on the type of crimes committed, as some (such as the crime of aggression) are considered excluded from the ICC's jurisdiction. The article also explores alternative methods of holding Russia accountable, such as establishing a special *ad hoc* tribunal, a topic widely discussed in the European Parliament and culminating in a resolution of 19 January 2023.

Keywords: International Criminal Court, conflict in Ukraine, competences of ICC, the possibility of prosecuting Russian Federation

INTRODUCTION

On 17 March 2023, global media were abuzz with the news that the International Criminal Court in The Hague issued arrest warrants for the President of the Russian Federation, Vladimir Putin, and the Presidential Commissioner for Children, Maria Lvovska-Belova. The warrants were issued due to the forced deportation of Ukrainian children from occupied territories to Russia. The Hague Tribunal, in its statement, declared it had reasonable grounds to believe that President Putin bears individual criminal responsibility for the war crime of unlawfully deporting children

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and unlawfully transferring them from occupied areas of Ukraine to Russia.[1] Similar charges apply to Maria Lvovska-Belova,[2] with the alleged crimes dating back to at least the beginning of the invasion of Ukrainian territory on 24 February 2022.[3]

The International Criminal Court (hereinafter 'the ICC') currently stands as the only legal body with universal jurisdiction in international criminal matters. Individuals are accountable to it for international crimes covered by Article 5 of the Rome Statute of the ICC, including crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.[4]

> 'For nearly half a century – almost as long as the United Nations has been in existence – the General Assembly has recognised the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many people thought that the horrific practices of World War II – the camps, acts of atrocities, exterminations, the Holocaust – could not be repeated. And yet it happened differently – in Cambodia, in Bosnia and Herzegovina and in Rwanda. Our times – even the last decade – have shown that human ability to do wrong has no limits. Genocide is also a topical word today, in the current, disgusting reality that requires unprecedented action from us.'[5]

Finally, after many years of negotiations conducted within the UN, on 15 June 1998 in Rome, at the Diplomatic Conference of Government Plenipotentiaries for the Establishment of the International Criminal Court, attended by representatives of 160 countries, 33 intergovernmental organisations and 236 non-governmental organisations gathered in the CICC, Kofi Annan, Secretary-General of the United Nations, said:

> 'The long-standing dream of a permanent international criminal court is becoming a reality. Punishment of the guilty by the Tribunal will be compensation for people (…) who became victims of crime, and the fate of the perpetrators will become a warning to potential criminals. The activities of the Tribunal will bring closer the day when no authority, no army will be able to violate human rights with impunity.'[6]

After years of concerted efforts by the international community, the International Criminal Court was established on 1 July 2002. The treaty establishing the ICC was adopted at the United Nations Diplomatic Conference in Rome on 17 July 1998.

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1 Del Monte, M., Barlaoura, N., *Russia's war on Ukraine Forcibly displaced Ukrainian children*, EPRS European Parliamentary Research Service, PE 747.093 – April 2023, p. 1 et seq.

2 International Criminal Court, *Situation in Ukraine*, https://www.icc-cpi.int/situations/ukraine [accessed on 20 May 2023].

3 International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and [accessed on 16 May 2023].

4 *Rome Statute of the International Criminal Court of 17 July 1998* (Journal of Laws of 2003, No. 78, item 708, as amended).

5 Annan, K., Former Secretary General of the United Nations, *Speech on the occasion of the 50th Anniversary of the International Bar Association*, 11 June 1997, New York, https://press.un.org/en/1997/19970612.sgsm6257.html [accessed on 24 November 2023].

6 Statement published on the official website of the United Nations Information Center UNIC in Warsaw: www.unic.un.org.pl/prawa_czlowieka/mtk; quoted [after:] Działak-Jankowska, J., *Status polityczny oraz prawny międzynarodowego korespondenta wojennego*, University of Warsaw, Faculty of Journalism and Political Science, Warszawa, 2015 (PhD thesis), p. 63.

As a permanent legal body, not constrained by time or territorial limits, the ICC is expected to be more effective in adjudicating crimes than existing *ad hoc* tribunals. The Tribunal's establishment through a 'treaty' mechanism removes any objections regarding its legality.[7] There will no longer be situations where defendants, like the former Serbian President Slobodan Milosevic during the Yugoslav Tribunal, could consistently challenge the Tribunal's legality and deny its right to adjudicate their cases due to its establishment by a UN Security Council resolution rather than an international convention.

The ICC's most significant strength, which will determine whether the Court becomes more than just another 'written warning' in the annals of UN initiatives,[8] is its general and universal scope of activity and the broad range of competencies conferred upon it. An analysis of these competencies, combined with an assessment of the admissibility of prosecuting international crimes by the ICC Prosecutor, will provide insights into the possibility of prosecuting the perpetrators of specific acts committed as a result of the aggression against Ukraine on 24 February 2022.

THE COMPETENCES OF THE COURT

The general scope of the Tribunal's competences is articulated in Article 1 of the Statute of the ICC, which broadly defines the acts subject to prosecution. Subsequent sections of the Statute provide more precise definitions of the Tribunal's jurisdiction.

THE *RATIONE MATERIAE* COMPETENCIES

The *ratione materiae* competencies and thus the material jurisdiction of the Tribunal, indicate the cases that may be considered by this legal body. The ICC's jurisdiction encompasses the most serious international crimes listed in the Statute. Contrary to earlier plans of the International Law Commission[9] and in adherence to the principle of *nullum crimen sine lege*, the definitions of prohibited acts subject to the Tribunal's jurisdiction were clarified, with autonomous definitions of individual crimes supplemented in the Statute.

Pursuant to the Statute, the ICC can adjudicate cases concerning the following crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.

Genocide, as repeatedly emphasised by the UN Secretary-General, can be perpetrated both in times of peace and war. Its definition, recognised in international law, is contained in the Convention of 9 December 1948, on the Prevention and Punishment of the Crime of Genocide.[10] This definition has been incorporated in

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[7] Płachta, M., *Międzynarodowy Trybunał Karny*, Vol. I, Zakamycze, 2004, p. 112 et seq.

[8] Sterio, M., Dutton, Y., 'The War in Ukraine and the Legitimacy of the International Criminal Court', *American University Law Review*, January 2023, Vol. 72, Issue 3, p. 728.

[9] Ogonowski, P., 'Koncepcja Międzynarodowego Sądu Karnego', *Prokuratura i Prawo*, 1998, No. 7–8, p. 46.

[10] Journal of Laws of 16 January 1952, No. 2, item 9.

its entirety into Article 6 of the Statute of the ICC. Therefore, genocide means any of the acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, including acts such as killing members of the group, causing serious bodily or mental harm, deliberately inflicting on the group of conditions of life calculated to bring about to its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.

The liability for direct and public incitement to commit genocide, attempting to commit such a crime, commissioning, aiding, and abetting is also clearly provided for (Article 25(3) of the Statute).

The concept of 'crimes against humanity' first appeared in the early 20th century, but defining it proved challenging. For the ICC Statute, it was assumed that these acts were undertaken in support of state policy, committed as part of a widespread or systematic attack directed against the civilian population (Article 7). These criminal acts include mass killings, exterminations, slavery, forced deportations, torture, and persecution on racial, ethnic, national, political or grounds recognised as unacceptable by international law, as well as other inhumane acts of a similar character.

Notably, punishable acts classified as crimes against humanity include sexual crimes (rapes, forced prostitution, etc.) committed on a mass scale, as reportedly occurred in the conflict in Ukraine, such as in Bucha.[11] This legal classification of acts was first used in the Statute of the Tribunal for the former Yugoslavia.[12] Previously, sexual violence was not considered a crime per se, but rather an 'element of actions' in armed conflicts. Since 1993, these acts have been prosecuted and punished by international legal bodies.

Crimes against humanity are one of the most serious categories of offenses within the jurisdiction of the Court. Their characteristic feature is the fact that, similarly to the crime of genocide, they can be committed during armed conflicts and in times of peace. The ICC Statute provides for criminal liability not only for the perpetrator but also for those who instigate, induce, order, assist, or incite to commit such a crime, as well as those attempting to commit it (Article 25(3)).

The ICC was inaugurated in March 2003, with the Prosecutor taking office in June 2003. The first case before the Tribunal was brought in December 2003, when the President of Uganda referred a 'situation' concerning crimes committed by the LRA rebel group in northeastern Uganda. The mass crimes committed by the LRA against the civilian population, including forced conscription of children under the age of 15 into the army, mass executions, rapes, sexual slavery, and forced displacement, were deemed crimes against humanity within the jurisdiction of the Court. In February 2004, another attack occurred in the Barlony camp, further emphasising the gravity of these crimes. It is estimated that the Lord's Resistance Army (LRA) activities resulted in over 200 murders in the Barlony camp. In a press statement

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[11] On the so-called genocidal rape and the possibility of prosecuting members of the Russian armed forces for this type of crime: Szkodzińska, O., 'Zasadność zarzutu gwałtu ludobójczego w kontekście trwającej wojny na Ukrainie', *Wojskowy Przegląd Prawniczy*, 2023, No. 1, p. 37 et seq.

[12] Nowakowska-Małusecka, J., *Odpowiedzialność karna jednostek za zbrodnie popełnione w byłej Jugosławii i w Rwandzie*, Katowice, 2000, pp. 73–76.

on 23 February 2004,[13] the ICC Prosecutor committed to taking all necessary steps to ensure a fair investigation of the case and to bring those responsible to justice. This case marked the Tribunal's first. Since then, two decades have passed, and the Court has dealt with more than forty cases, all from Africa.[14] The conflict in Ukraine is the first non-African case to come before the Tribunal.

The Court also has jurisdiction over war crimes, especially those committed on a large scale or as part of a predetermined plan or policy (Article 8). The statutory definition of war crimes includes:

In the context of an internationally characterised armed conflict:

- Serious violations of the four 1949 Geneva Conventions for the Protection of Victims of Armed Conflict[15]

The term 'grave breaches' is defined in Article 8(2)(a) of the Statute.[16] It does not cite specific provisions of the Convention, but only lists the acts which constitute such violations. These include acts against protected people (e.g., the wounded, sick, prisoners of war) or goods (e.g., medical equipment), such as wilful killing, torture, conducting biological experiments, wilfully causing great suffering, extensive destruction and appropriation of property not justified by military necessity, compelling to serve in the forces of a hostile power, depriving of the right to a fair trial, unlawful deportation, and taking hostages.

- Other serious violations of the laws and customs of international law.[17]

This category encompasses a wide range of prohibited acts, including attacking or bombarding undefended cities or buildings, unlawful use of enemy flags, banners, military insignia, UN or Red Cross emblems resulting in death or serious bodily harm, attacking religious facilities, hospitals, humanitarian aid facilities, using weapons prohibited by international law, recruiting children under 15 to participate in the conflict, committing rape, forced prostitution, starving civilians or using them as 'human shields'.

In a situation where the armed conflict is not of an international character:

- Serious violation of the so-called 'minimum humanitarianism' principle from Article 3 common to the four Geneva Conventions.[18]

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[13] The full text of the ICC Prosecutor's statement was published on the official website of the Court: www.icc-cpi.int/php/index.php [accessed on 20 May 2023].

[14] For this reason, it was widely criticised (and boycotted) by African countries, called a 'colonial court' and a 'a plot of Western powers'. Sterio, M., Dutton, Y., 'The War…', op. cit., p. 797 et seq.

[15] Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Active Armies; Journal of Laws of 12 September 1956, No. 38, item 171. Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea; Journal of Laws of 12 September 1956, No. 38, item 171. Geneva Convention of 12 August 1949 relating to the treatment of prisoners of war; Journal of Laws of 12 September 1956, No. 38, item 171. Geneva Convention of 12 August 1949 for the Protection of Civilian Persons in Time of War; Journal of Laws of 12 September 1956, No. 38, item 171.

[16] Ambos, K. (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, BECK, 2022, p. 56 et seq.

[17] Ibidem, p. 182 et seq.

[18] Ibidem, p. 881 et seq.

The aforementioned principle applies to prohibited acts committed against persons not directly involved in hostilities or against those who laid down their arms or were excluded from combat due to illness, wounds or imprisonment. These crimes consist of attacks on the lives, personal dignity and bodily integrity of the above-mentioned persons, cruel treatment and torture, taking hostages from them, depriving them of the right to a fair and fair trial.

- Other serious violations of laws and customs within established norms of international law.[19]

The list of crimes specified in Article 8(2)(e) of the Statute is a closed catalogue. Given the ICC's role as an international criminal code, adherence to the principle of *nullum crimen sine lege* required a strict and unambiguous definition of crimes under its jurisdiction. This was crucial for non-international conflicts, which continue to provoke lively discussions in academia. It is generally accepted that the right of a party to conduct certain military actions in a non-international conflict are not unlimited, and certain methods of warfare are outright forbidden. The Statute covers attacks on civilians, civilian objects, humanitarian personnel and facilities, recruitment of children under 15 to participate in a conflict, all forms of sexual violence, medically unjustified experimentation on adversaries, forced resettlement not necessitated by military needs, and unjustified destruction of enemy property.

Including these acts in the Tribunal's jurisdiction is a fully justified position. The majority of post-World War II crimes (e.g., in Rwanda) occurred in internal conflicts. Common justice dictates that protection against such serious crimes should be based on the same principles as those applicable in international conflicts.

The ICC also has judicial competence concerning the crime of aggression (Article 5(1)(d)). However, jurisdiction in this area was initially suspended until the crime was precisely defined. A resolution adopted by the UN General Assembly in 1974[20] defined aggression as the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.

The definition of aggression was a key focus for the ICC's Preparatory Commission during its later stages. In addition to proposals from Arab countries, the Committee also deliberated over attempts to define the crime of aggression synthetically without specifying individual, specific manifestations.[21] A controversial issue was the role of the UN Security Council, which under the UN Charter, has exclusive

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[19] Ibidem, p. 929 et seq.

[20] Resolution of 14 December 1974 on the definition of aggression (Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), University of Minnesota, Human Rights Library, http://hrlibrary.umn.edu/instree/GAres3314.html [accessed on 15 May 2023]. It was not given a binding character, for example, acts considered as acts of aggression were indicated, but the catalogue was left open, e.g. an attack by armed forces on the territory of another state, sending by or on behalf of a state bands or armed groups to carry out armed attacks against another state.

[21] Płachta, M., 'Dalsze prace nad Międzynarodowym Trybunałem Karnym', *Prokuratura i Prawo*, 1999, No. 6, p. 135.

competence in identifying acts of aggression.[22] Proposals regarding the crime of aggression were presented to the Assembly of States Parties for inclusion in the Statute during the Review Conference in Kampala on 10–11 June 2010 (Resolutions No. 5 and 6).[23] Reaching consensus on this matter was a significant achievement in the development of international law, impacting the ICC's adjudication quality and efficiency, despite some criticism in legal literature.[24] At this time, a definition of the crime of aggression and proceedings initiation processes for suspected commission of this crime were incorporated into the Statute.[25]

Initially, only 43 states ratified the Kampala Amendments, and it was evident that the procedure would only come into effect after acceptance by the States Parties, which occurred on 15 December 2017. Consequently, the General Assembly of the States Parties to the Statute passed a resolution enabling the ICC's jurisdiction over the crime of aggression from 17 July 2018.[26] Significantly for the current discussions, ICC proceedings are based on the principle of complaint. The Tribunal does not act *ex officio*; a 'representation of the situation' by a state party, the UN Security Council, or the ICC Prosecutor is necessary to initiate proceedings.[27] Although Ukraine is not a party to the Statute, it does not preclude the Court from exercising jurisdiction over crimes committed on its territory. Ukraine recognised the ICC's jurisdiction and commenced cooperation with it regarding crimes against humanity committed during the Maidan events between November 2013 and February 2014[28] and subsequently all crimes committed on Ukrainian territory *de lege ferenda* from February 2015 onwards.[29] It is thus now possible to prosecute all three types of crimes: against humanity, genocide and war crimes. This was the case in 2014,[30] and that recognition lead to an ongoing investigation at the ICC into

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[22] The issue of the role of the UN Security Council has been the subject of discussion since the session of the UN Special Committee in New York held on 4–15 August 1997 (report on the work of the Committee: *Państwo i Prawo*, 1997, No. 10, pp. 88–90).

[23] Resolution RC/Res.6, text available on the UN website: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-b&chapter=18&clang=_en [accessed on 12 May 2023].

[24] Reisinger Coracini, A., 'The Kampala Amendments on the Crime of Aggression Before Activation: Evaluating the Legal Framework of a Political Compromise – Part 1', *OpinioJuris*, 29 September 2017, and *Part 2*, *OpinioJuris*, 2 October 2017. Texts available on the website www.opiniojuris.org [accessed on 12 May 2023].

[25] A kind of *novum* in relation to the current legal status is the omission of the first-shot requirement, according to which the party that first used force is guilty of the attack. The Court may take into account both the priority of use of force and the *animus aggressionis* (Latin: intent to attack). Karska, E., 'Dorobek Konferencji Rewizyjnej Statutu MTK ze szczególnym uwzględnieniem poprawki definiującej zbrodnię agresji', *Kwartalnik Prawa Publicznego*, 2010, No. 3, p. 20.

[26] Wong, M.S., 'Aggression and state responsibility at the International Criminal Court', *International and Comparative Law Quarterly*, 2021, Vol. 70, pp. 961–962.

[27] Podkówka, A., 'Międzynarodowy Trybunał Karny jako wypełnienie »luki bezkarności« w prawie międzynarodowym', *Zeszyty Naukowe TD UJ, Nauki Społeczne*, 2018, Vol. 21, No. 2, p. 55.

[28] International Criminal Court, *Situation in Ukraine…*, op. cit.

[29] Ibidem.

[30] International Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, https://www.icc-cpi.int/news/

crimes committed in Ukraine by any person and in any part of its territory. This investigation resulted in the March 2023 arrest warrant for the president of the Russian Federation and his commissioner.[31]

The matter becomes more complicated in the case of the crime of aggression. The 'post-Kampala' definition of the crime of aggression,[32] as stated in Article 8bis(1) of the Statute, describes it as the planning, preparation, initiation or execution, by a person in a position to exercise effective control or direction, of an act of aggression[33] which 'by its character, gravity and scale'[34] constitutes a manifest violation of the Charter of the United Nations. When analysing the *ratione materiae* competencies, it is clear that the ICC may have jurisdiction over the prosecution of the crime of aggression committed against Ukraine.[35] However, this provision does not permit the initiation of proceedings by the Tribunal due to the lack of a prerequisite for personal jurisdiction ('*a person in a position allowing for effective control over or directing the actions of the state*'). Such jurisdiction can only be exercised in relation to nationals of states that have ratified the Statute and the Kampala Amendments, and only if such a state has not excluded this jurisdiction.[36] The Russian Federation, not being a party to the Statute, cannot be placed under jurisdiction in the context of the crime of aggression, regardless of whether it commits that specific crime on the territory of a State party to the Statute or not. Prosecution for the crime of aggression would also be impractical for another, more straightforward reason. Such proceedings are to be initiated and/or conducted in close cooperation with the UN Security Council. Given that the Russian Federation is a veto-wielding member of the Security Council, it is difficult to imagine that the Council would agree to such a solution.[37]

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prosecutor-international-criminal-court-fatou-bensouda-opens-preliminary-examination-ukraine [accessed on 24 November 2023].

[31] The exact scope of the Tribunal's work in this case in the period from 2014 to 2022 is presented below: Kuczyńska, H., 'Odpowiedzialność…', op. cit., p. 9 et seq. The next stage of ICC's work can be observed on its website – cf.: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and and https://www.icc-cpi.int/situations/ukraine [both accessed on 15 May 2023].

[32] https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/poprawki-do-rzymskiego-statutu-miedzynarodowego-trybunalu-karnego-18753723 [accessed on 17 May 2023].

[33] Article 8bis(2) defining an act of aggression: Amendments to the Rome Statute of the International Criminal Court, done in Rome on 17 July 1998, adopted at the Review Conference in Kampala (Resolutions No. 5 and 6) on 10 and 11 June 2010. Journal of Laws 2018, item 1753. On 'an act of aggression', cf. e.g. Jurewicz, J., *Jurysdykcja przedmiotowa Międzynarodowego Trybunału Karnego*, Łódź, 2008, pp. 83–97; Płachta, M., *Międzynarodowy…*, op. cit., pp. 450–508; Izydorczyk, J., Wiliński, P., *Międzynarodowy Trybunał Karny*, Zakamycze, 2004, pp. 58–60.

[34] Wong, M.S., *Aggression…*, op. cit., pp. 963, 966, 982.

[35] K. Nowakowska's interview with B. Krzan: 'Za Wojnę w Ukrainie może odpowiedzieć nie tylko Putin. Prof. Krzan: Zbrodnia wojenna i zbrodnia przeciwko ludzkości na pewno się kwalifikują', *Gazeta Prawna*, 3 March 2022, https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8371206,putin-mtk-wojna-w-ukrainie-jak-wyglada-proces.html [accessed on 20 May 2023].

[36] Heinsch, R., 'The Crime of Aggression After Kampala: Success or Burden for the Future?', *Goettingen Journal of International Law*, 2010, No. 2, pp. 721–723.

[37] In detail about such hypothetical proceedings in the case of the crime of aggression against Ukraine: Kuczyńska, H., 'Odpowiedzialność…', op. cit., p. 14 et seq.

RATIONE PERSONAE COMPETENCIES

Ratione personae competencies, as the subjective jurisdiction of the court, delineate the entities that may appear before the Tribunal as a party. The Statute of the ICC, in Article 1 and Article 25(1), specifies that the Court's jurisdiction applies solely to natural persons guilty of the most serious international crimes. This precludes the possibility of bringing legal persons or states, such as the Russian Federation, to criminal liability before the ICC. Furthermore, the Statute excludes persons under the age of 18 at the time of the alleged crime from its jurisdiction. It should be clearly stated that individuals from both sides of a conflict may be prosecuted equally for the specified international law crimes in the Statute (with the exception of the crime of aggression). In the case of the crime of aggression, prosecution is only possible on the part of the aggressor and for individually specified persons, after fulfilling a number of formal requirements. As explained by the Lithuanian MEP and former Prime Minister A. Kubilius, the crime of aggression, deemed the mother of all crimes, must not go unpunished under any circumstances. Therefore, the potential establishment of a special *ad hoc* tribunal to consider solely the issue of the crime of aggression should be contemplated. It would complement the investigative activities of the ICC and its Prosecutor, as their activities would also cover the alleged genocide, war crimes, and crimes against humanity committed in Ukraine. However, by extending its jurisdiction to include the crime of aggression, it would fill the current gap.[38]

Concerning the Tribunal's jurisdiction, a pivotal element is the principle of individual liability for an act, expressly stated in Article 25(2) of the Statute. Any natural person who directly perpetrates a crime, or acts as an accomplice, principal, instigator, assistant, or attempts to commit mass crimes specified in the statute, shall be criminally liable to the extent of their fault. The possibility of mitigating punishment or exemption from criminal liability for persons in high-ranking positions, such as heads of state, government members, parliamentarians, or other state functionaries, is explicitly ruled out. The Court does not recognise privileges or immunities;[39] they do not constitute any obstacle to the exercise of the Court's jurisdiction.

Separate liability is stipulated for superiors who knew or should have known about the commission of crimes by subordinates but did not take steps to prevent or punish the guilty parties. A superior bears criminal liability under the rules set out in the Statute if they knowingly disregarded information indicating the commission

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[38] Świętochowska, E., 'Nowa Norymberga: Jak osądzić rosyjskich zbrodniarzy na czele z Putinem?', *Gazeta Prawna*, 30 December 2022, https://www.gazetaprawna.pl/wiadomosci/swiat/artykuly/8621294,wojna-w-ukrainie-zbrodnie-wojenne-sad.html; Bielecki, T., 'Europosłowie: Rozliczyć Putina, nie tylko żołnierzy', *Deutsche Welle*, 19 January 2023, https://www.dw.com/pl/europos%C5%82owie-rozliczy%C4%87-putina-nie-tylko-%C5%BCo%C5%82nierzy/a-64449463 [both accessed on 17 May 2023].

[39] Serious doubts in the context of the immunities of state leaders and the possibility of holding them accountable to the ICC in the context of, *inter alia*, cases of Al. Bashir, who, despite arrest warrants issued by the ICC in 2009 and 2010, has not been delivered to the Court to date: Singhi, Y., 'Head of State immunity: The ICC's biggest impediment', *Indian Journal of International Law*, 2021, No. 59, p. 391 et seq. Also on the need for states to cooperate with the ICC as a condition for its efficient functioning: Sterio, M., Dutton, Y., 'The War…', op. cit., p. 805.

or intention to commit a crime by a subordinate, and these crimes pertained to the scope of activity under their actual control. Additionally, acting on the orders of a government or superior does not absolve one from criminal responsibility, unless the offender was legally obliged to obey the order, the order was not manifestly unlawful, or the defendant did not know it was unlawful. Manifest unlawfulness as a 'mitigating circumstance' is not considered in the case of crimes of genocide and crimes against humanity, which are deemed manifestly unlawful by the Statute.

The essential condition for incurring criminal liability is the intentional act of the perpetrator. The offender carries out the crime consciously, aware of the effect as a normal consequence of the action taken, and with the intention of causing a specific effect. In principle, liability is not limited for acting under the influence of error – whether of fact or law, except when the perpetrator's intention is negated.

The grounds for excluding criminal liability are detailed in Article 31 of the Statute.[40] The catalogue of these grounds is not strictly closed, allowing the Court to consider other bases for exclusion when evaluating specific cases. These conditions include, among others: mental illness or mental retardation precluding the ability to understand the nature of the act, self-defence or defence of another person, acting under duress caused by the threat of direct loss of life or serious bodily harm.

A fair trial before the Court is guaranteed by the universal principle of criminal law *ne bis in idem*. No one can be tried by the Court for a crime for which they have already been convicted or acquitted by the ICC. Similarly, a person cannot be held criminally liable in another court for acts for which they have already been tried by the Court. The only exceptions to this principle are cases of an unfair or biased trial or proceedings in another court intended to shield the concerned person from the jurisdiction of the Court (Article 20 of the Statute).[41]

RATIONE LOCI COMPETENCIES

The scope of *ratione loci* competencies determines the territorial jurisdiction of the Tribunal, based on where the prosecuted acts were committed. The Statute of the ICC stipulates that the Court has jurisdiction over crimes committed in:

(1) the country of the 'place of the act' or the registration of the ship or aircraft or the country of which the defendant is a citizen – if this country is a Party to the Statute,
(2) a country which is or is not a party to the Statute, provided that the UN Security Council, acting as the guardian of world peace and security, submits a relevant request to the Prosecutor, pursuant to Chapter VII of the UN Charter,
(3) a country which is not a party to the Statute but which, by means of a declaration submitted to the Secretary of the ICC after the date of entry into force of the Statute, has recognised the jurisdiction of the ICC with respect to the crime, as was the case with Ukraine.

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[40] Klamberg, M., *Commentary Rome Statute*, Part 3, 2016, points 310–317; Krebs, B., 'Justification and Excuse in Article 31(1) of the Rome Statute', *Cambridge Journal of International and Comparative Law*, 2013, No. 2, pp. 382–410.

[41] Conway, G., *Commentary Rome Statute*, Part 2, 2017, points 243–249.

In principle, the ICC cannot prosecute crimes committed in the territory of non-signatory states to the Statute. However, such a limitation would significantly weaken the Tribunal's operational scope, especially as many states, including Israel, Libya, as well as the USA, which aspires to the title of 'carrying the torch of civilisation',[42] withdrew their signature from the text of the Statute.[43] To ensure a uniform and universal criminal jurisdiction, state parties and the UN Security Council have the right to present to the ICC Prosecutor situations indicating that crimes within the Court's jurisdiction have been committed in non-party states. The ICC Prosecutor can also act *ex officio* under Article 15 of the Statute, conducting an initial examination of a case and then applying to the Pre-Trial Chamber for authorisation to initiate an investigation. In the conflict in Ukraine, not only did Ukrainian authorities apply in 2015 under Article 12(3) of the Statute for ICC jurisdiction over future crimes committed on its territory, but in March 2022, forty state parties to the Statute requested the Prosecutor to investigate the case under Article 14 of the Statute.[44]

RATIONES TEMPORIS COMPETENCIES

Article 1 of the ICC Statute establishes the Tribunal as a permanent institution, not subject to time limits. In line with the principle of *lex retro non agit*, its jurisdiction, in principle, covers crimes committed after the Statute's entry into force, i.e., from 1 July 2002. For any state joining the Statute post this date, the Court's jurisdiction applies only to crimes committed from the Statute's effective date for that country. If a state has previously made a declaration recognising the Court's jurisdiction over a specific crime, the Court may exercise its jurisdiction over that crime from the date specified in the declaration, and for other crimes, from when the Statute becomes effective for that state. On 25 February 2014, Ukraine submitted a declaration to the Court extending its jurisdiction over the Maidan crimes. On 8 September 2015, Ukraine submitted to the jurisdiction of the ICC all crimes committed on Ukrainian territory since 20 February 2015.[45]

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[42] *Koniec Świata kowbojów*, article available at: https://www.rp.pl/literatura/art5632541-koniec-swiata-kowbojow [accessed on 19 May 2023].

[43] In May 2002, the US Undersecretary General for International Relations, Marc Grossman, announced that the US was officially withdrawing President Clinton's signature from the Charter. In November 2016, Russia also announced – by decree of the Russian president – that it was withdrawing its signature from the treaty (although both countries signed the treaty in 2000). For this reason, Putin does not need to be detained within Russia's borders for delivery to the ICC. Zdrojewski, D., 'Złe wieści dla Putina. Sojusznik Rosji chce ratyfikować Statut Rzymski', *Interia*, 23 March 2023, https://wydarzenia.interia.pl/zagranica/news-zle-wiesci-dla-putina-sojusznik-rosji-chce-ratyfikowacstatu,nId,6673000#utm_source=paste&utm_medium= paste&utm_campaign=firefox [accessed on 12 May 2023].

[44] International Criminal Court, *Situation in Ukraine…*, op. cit.

[45] *Declaration of the Verkhovna Rada of Ukraine*: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationVerkhovnaRadaEng.pdf. Second document on the page: https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine [accessed on 24 November 2023].

RATIONE IURIS COMPETENCIES

The *ratione iuris* competencies define the applicable legal provisions in proceedings before the ICC, while the statutes of the Criminal Tribunals for the former Yugoslavia and Rwanda do not explicitly specify such jurisdiction.[46] The Statute of the Permanent Court, on the other hand, akin to the Statute of the International Court of Justice, *expresssis verbis* in Art. 21, outlines the range of legal sources to be used by the Tribunal and its legal bodies. Primarily, the ICC applies its Statute, the Elements of the Definition of Crimes,[47] Rules of Procedure and Evidence,[48] and relevant conventions, principles, and rules of international law. Only in the absence of these sources may the Court rely on general principles of law interpreted from the national laws of various legal systems, including those of states that would otherwise exercise jurisdiction, provided they are consistent with the Statute and international standards. The ICC's interpretation of the law must align with fundamental human rights guarantees and be free from any discrimination based on age, race, language, religion, national or ethnic origin, property, or other status.

Despite the extensive array of powers vested in the ICC, the primary responsibility for prosecuting and trying criminals is lies with states. A case will only be initiated before the Court if a state fails to fulfil this obligation, i.e. when the state is 'unwilling' or 'unable' to prosecute crimes effectively (e.g. due to the collapse of the justice system). This underpins the principle of complementarity, central to the Tribunal's concept and the Statute. The ICC aims to 'force' states to exercise their powers and to 'control' this performance.[49] Only secondarily does it exercise jurisdiction in lieu of the state, ensuring the gravest crimes do not go unpunished. When prioritising national jurisdictions, it is typically the courts of Russia and Ukraine, or other states with jurisdiction over the committed crimes, that are obliged to conduct proceedings. Demonstrating the ICC's competence to conduct proceedings must always be grounded in the principle of complementarity.[50] In the current political

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[46] More on that: Podkówka, A., 'Międzynarodowy…', op. cit., p. 49.

[47] Płachta, M., *Międzynarodowy…*, op. cit., pp. 212–227.

[48] The Rules of Procedure and Evidence should be applied in conjunction with the provisions of the Statute when the Court considers a particular case. They constitute a legal instrument of this kind to which the ICC's decision-making rules are subordinated. The 'Explanatory Note' attached to the Rules stipulates that the provisions of the Rules may not affect in any way the domestic judiciary system of the State – Party to the Statute. Płachta, M., *Międzynarodowy…*, op. cit., pp. 227–249.

[49] Płachta, M., Wyrozumska, A., 'Problem ratyfikacji Statutu Międzynarodowego Trybunału Karnego (uwagi polemiczne w związku z artykułem Karola Karskiego)', *Państwo i Prawo*, 2001, No. 5, pp. 95–96.

[50] In detail about the principle of complementarity, e.g. Helios, J., 'Legalność (nielegalność) Międzynarodowego Trybunału Karnego w Hadze – rozważania w oparciu o zasadę suwerenności państw-stron Statutu MTK', *Zeszyty Naukowe PWSZ w Legnicy*, 2007, No. 1, p. 52 et seq.; Marshall, K.A., 'Prevention and Complementarity in the International Criminal Court: A Positive Approach', *Human Rights Brief 17*, 2010, No. 2, https://www.corteidh.or.cr/tablas/r24177.pdf [accessed on 20 May 2023]; Augusto, T., 'Having Regard to the Jurisprudence of the ICC, Consider Whether the Concept of "Complementarity" in the Rome Statute is Working', *Giuricivile*, 14 September 2017, https://giuricivile.it/complementarity-in-the-rome-statute/ [accessed on 20 May 2023].

situation, it is unlikely the aggressor state would judge the perpetrators of the crimes committed. It is also difficult for a victim state to do so, although it would be the most understandable situation.[51] On the other hand, the competences of third countries may raise some doubts. A specific precedent in this matter was created in Nuremberg, where such a possibility was allowed.[52] From a Polish perspective, such a possibility exists based on Article 112 of the Penal Code.[53]

CONCLUSIONS

Since 2014, the ICC has been investigating crimes committed by the Russian Federation in Ukraine (excluding the crime of aggression). The models for prosecuting international crimes are not consistent. As noted by H. Kuczyńska, the crime of aggression can only be prosecuted in states voluntarily submitting to this jurisdiction. This significantly weakens the role of the ICC on the international arena, as limiting the grounds for responsibility for the crime of aggression to the *de facto* leaders of the states accepting jurisdiction means that they are understandably not interested in signing such a 'chirograph' on themselves.[54] And just as it is possible to hold Russian leaders accountable by the ICC for other crimes (however, it is important to remember that such a person must be brought before the ICC, as the Court does not proceed in the absence of the accused),[55] the crime of aggression either falls under national court jurisdiction (currently unlikely) or necessitates a special quasi-tribunal, as proposed by the Lithuanian politician A. Kubilius already in 2022.[56]

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[51] Of course, thousands of investigations are under way in Ukraine regarding the commission of crimes under international law by both Russian and Belarusian troops in the country. Also in Poland, in March 2022, an investigation into war crimes in Ukraine was launched based on Article 117 PC. It is 'ancillary' to the proceedings before the ICC. Świetlińska, M., 'Ruszyło śledztwo w sprawie zbrodni wojennych w Ukrainie', *Dziennik Prawny*, 15 March 2022, https://www.dziennikprawny.pl/pl/a/ruszylo-sledztwo-w-sprawie-zbrodni-wojennych-na-ukrainie [accessed on 17 May 2023]. Such an approach to the investigation in Poland may raise doubts as the activities of the ICC should be complementary and not vice versa. There is also a doubt as to the compatibility of the signs with Article 117 of the Penal Code with the definition of crime in international law. Proceedings are also conducted in a number of other countries (e.g. in Lithuania, which was also the first to refer this case to the ICC, in Estonia, Slovakia, Germany) and within the EU with the support provided by Eurojust. Osiński, Ł., 'Eurojust wspiera wspólny zespół dochodzeniowy w sprawie zbrodni wojennych na Ukrainie', *Gazeta Prawna*, 28 March 2022, https://www.gazetaprawna.pl/wiadomosci/swiat/artykuly/8389013,eurojust-wspiera-wspolny-zespol-dochodzeniowy-w-sprawie-zbrodni-wojennych-na-ukrainie.html [accessed on 17 May 2023].

[52] It is difficult to indicate here universal protection justifying the existence of this type of competence, because, as rightly argued in the literature, there is no treaty that would introduce such an obligation.

[53] The Penal Code Act of 6 June 1997, Journal of Laws of 1997, No. 88 item 553, as amended.

[54] Kuczyńska, H., 'Odpowiedzialność…', op. cit., p. 26.

[55] The Tribunal does not have its own police officers who could arrest perpetrators hiding abroad. It is up to states to arrest and bring suspects to The Hague to stand trial. As years of experience in the functioning of the ICC show, the cooperation between the states signatories of the statute and the Court is not the best. Sterio, M., Dutton, Y., 'The War…', op. cit., p. 818.

[56] Kubilus, A., *An international special tribunal for Putin´s aggression crimes*, opinion available at: https://www.youtube.com/watch?v=Sz7czN0zoHA [accessed on 15 May 2023].

Such a project was indeed adopted by the European Parliament in a resolution of 19 January 2023.[57] It once again condemned Russia's aggressive war against Ukraine, expressed unwavering support for Ukraine's independence, sovereignty, and territorial integrity within internationally recognised borders, and called on Russia to immediately cease all military activities in Ukraine and unconditionally withdraw all its armed forces and military equipment from all internationally recognised Ukrainian territory. It emphasised that Russia's aggression in Ukraine constitutes a clear and undisputed violation of the United Nations Charter, which, in the interest of world security and international order, cannot remain unanswered by the international community. For this reason, it highlighted the urgent need for the EU and its Member States, in close cooperation with Ukraine and the international community, preferably through the UN, to establish a special international tribunal. This tribunal would prosecute the crime of aggression against Ukraine committed by the political and military leadership of the Russian Federation and its allies and find a legally reasonable, common approach to addressing this matter. The creation of such a tribunal was noted as essential to fill a large gap in the current institutional structure of international criminal justice.

The resolution also stressed that a special international court would have jurisdiction to examine not only the situation of President Putin and the political and military leaders of the Russian Federation, but also that of President Lukashenko and political and military leaders of Belarus. Belarus, as an enabling state from whose territory and with whose logistical support the Russian Federation is waging an aggressive war against Ukraine, falls under the category of the crime of aggression under Article 8 bis of the Statute. The EU's preparatory work on the Special Court should commence without delay, focusing on setting conditions for the Court in cooperation with Ukraine and supporting Ukrainian and international authorities in securing evidence for use in the future Special Court.

It is hoped that establishing this special court for the crime of aggression will send a clear signal to Russian society and the international community that President Putin and the Russian leadership could be convicted of all crimes, including aggression against Ukraine. Concurrently, considering changes to the legal bases on which the current ICC operates is necessary. Looking realistically into the future, such modifications should ensure that the Tribunal's jurisdiction cannot be questioned in any way.

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Cite as:

Tkaczyk-Rymanowska K. (2023) *'The Competences of the International Criminal Court and the conflict in Ukraine'*, Ius Novum (Vol. 17) 4, 108–124. DOI 10.2478/in-2023-0032

Ius Novum
2023, vol. 17, no. 4, pp. 125–133

GLOSS ON THE JUDGEMENT OF THE SUPREME COURT OF 28 FEBRUARY 2023, I KZP 13/22 (EXPRESSING APPROVAL)

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DOI: 10.2478/in-2023-0033

Abstract
The present gloss refers to the thesis and considerations expressed in the Supreme Court judgement of 28 February 2023, I KZP 13/22, concerning the exception to the rule of speciality stipulated in Article 14(1)(b) of the European Convention on Extradition. The author presents arguments concerning the broad international legal context of the analysed regulation, which develops and confirms the accuracy of the Supreme Court's stance on a broader than lexical interpretation of the term 'final discharge'. Moreover, the paper discusses the nature of the exception in question in the light of the standard of protection laid down in Article 52(4) of the Constitution of the Republic of Poland.

Keywords: extradition, rule of speciality, European Convention on Extradition, cumulative sentence, cumulative penalty

In the glossed judgement, the Supreme Court addressed the interpretation of one of the exceptions to the rule of speciality, as regulated in Article 14(1)(b) of the European Convention on Extradition (ECE).[1]

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[1] Done at Paris on 13 December 1957, together with the Additional Protocol to the European Convention on Extradition done at Strasbourg on 15 October 1957 and the Second Additional Protocol to the European Convention on Extradition done at Strasbourg on 17 March 1978, Journal of Laws of 1994, No. 70, item 307; Article 14(1)(b): 'A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he

As the procedural realities of the case, on which the aforementioned judgement was based, show, the issue raised has considerable practical significance. It influences the scope of application of the rule of speciality under certain procedural circumstances. In the case that raised doubts of the Appellate Court, the convict was subject to a cumulative sentence of deprivation of liberty, which was imposed in violation of the rule of speciality. Following the execution of another single penalty within the extradition procedure, based on Article 9 § 4 PEC,[2] the execution of the defective cumulative sentence was suspended. This suspension prevented the execution of the cumulative penalty of deprivation of liberty and the accompanying fine.[3] Having left prison, the convict stayed in the territory of the Republic of Poland continuously for over 45 days. It should be added that he was properly informed about the possible consequences of staying in Poland. Eventually, as a result of another conviction, a new sentence combining single penalties not covered by the extradition was issued in accordance with the exception to the rule of speciality laid down in Article 14(1)(b) ECE. Hearing the appeal lodged by counsel for the defence, the Appellate Court posed a legal question:

> 'Whether the phrase »his final discharge in the territory of the Party to which he has been surrendered«, co-defining the exception under Article 14(1)(b) to the rule limiting the prosecution laid down in Article 14(1) of the European Convention on Extradition of 13 December 1957 (together with the Additional Protocols of 15 October 1975 and 17 March 1978; Journal of Laws of 1994, No. 70, item 307), should be interpreted as applicable to the situation where a convicted person did not leave the territory of Poland within 45 days of his final discharge due to legal obstacles to executing a penalty laid down in Article 14(1), in connection with which he was extradited, or has returned after such discharge and leaving the territory of Poland within 45 days, provided that no restrictions on his personal freedoms, including his place of residence, were imposed on the person when he was discharged from prison.'

Determining the limits of the rule of speciality presents a significant challenge to the axiology of the legal system. As pointed out in the literature,

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was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases: (…)

(b) when that person having had the opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.'

[2] Act of 6 June 1997: Penalty Execution Code, consolidated text, Journal of Laws of 2023, item 127, as amended; hereinafter 'PEC'.

[3] There is an established opinion in case law according to which: 'the rule of speciality formulated in Article 607e § 1 CCP constitutes a negative premise for imposing a cumulative penalty including the penalty of deprivation of liberty imposed for offences other than those that constituted grounds for the issuance of the European arrest warrant. Both the issuance of a cumulative imprisonment sentence not covered by the decision on extradition and the execution of a prior cumulative sentence covering such penalties constitute flagrant infringement of Article 607e § 1 CCP' (Supreme Court judgement of 12 October 2022, I KK 343/22, LEX, No. 3521321; also see the judgements referred to therein: the Supreme Court judgement of 6 February 2020, II KK 2/20, LEX, No. 3078349; the Supreme Court judgement of 14 January 2014, V KK 357/13, OSNKW 2014/8/61, LEX, No. 1491071; the Supreme Court judgement of 20 October 2011, III KK 140/11, LEX, No. 1044023).

> 'on the one hand, an overly broad application of the rule of speciality is considered a factor limiting the possibility of punishing individuals for acts prohibited within the criminal jurisdiction of the country requesting extradition. This limitation, resulting from the state's sovereignty, consequently reduces the effectiveness of the extradition system. On the other hand, an excessively narrow application of this principle may result in the infringement of the procedural rights of the extradited person.'[4]

Furthermore, regardless of the assumptions concerning the pursued goal, achieving it necessitates the use of a specific legislative technique. This technique, based on international law, must accommodate the diversity of legal systems in the States-Parties to the Convention. Consequently, it employs general terms, whose adaptation within a particular domestic legal system seems feasible only through case law. This appears to be the role of the Supreme Court judgement of 28 February 2023, I KZP 13/22,[5] which expresses the thesis that: **'the concept of »his final discharge in the territory of the Party to which he has been surrendered«, co-defining the exception under Article 14(1)(b) to the rule limiting prosecution laid down in Article 14(1) first sentence of the European Convention on Extradition of 13 December 1957 (…), may also be applied to situations where the individual was discharged due to the recognition of obstacles to the execution of the deprivation of liberty penalty resulting from the rule of speciality.'**

In extradition-related literature, it is highlighted that the rule of speciality is not unlimited in time but ceases after a certain period if the fugitive voluntarily stays in the requesting state post-discharge.[6] Therefore, it is pertinent to emphasise the convict's intent to remain in the country to which he was surrendered for a period that leaves no doubt about his decision. In this context, the pragmatic aspect of the discussed exception to the rule of speciality, where the exercise of actual personal freedoms is crucial, becomes evident.

The discussed exception pertains to the very nature of the rule of speciality. Literature, referencing the stance of the Supreme Court of Cassation in Italy, points out that

> 'the limitation of the scope of prosecution, constituting an exception to the principle of full criminal jurisdiction over all persons in the territory of the state, must end with the expiry of certain deadlines. This is why international agreements stipulate such deadlines. If the discharged individual does not leave the country within the specified period, despite having the opportunity to do so, he manifests the intent to stay in that territory, thereby subjecting himself to national legislation without restrictions.'[7]

The interpretational dilemma resolved by the Supreme Court concerns a fundamental understanding of the concept of 'final discharge'. The question is whether its content should be perceived through the prism of the ontological aspect,

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[4] Milczanowski, S., 'Uwagi na temat zasady specjalności jako przesłanki ekstradycyjnej', *Nowa Kodyfikacja Prawa Karnego*, Volume XXV, AUW No 3165, Wrocław, 2009, p. 129.

[5] OSNK 2023/3/10, LEX, No. 3500602.

[6] Vogler, T., 'The rule of speciality in extradition law', *International Review of Penal Law. Extradition*, 1991, Vol. 62, No. 1–2, p. 238.

[7] Knypl, Z., *Europejska konwencja o ekstradycji. Komentarz*, Sopot, 1994, p. 157.

i.e., the actual situation of the person surrendered, in terms of their unrestricted personal freedoms, or whether it is necessary to consider a normative aspect, i.e., case law applicable in legal transactions concerning a convict's personal freedoms, even if it is impossible to implement the decisions therein.

It should be emphasised that the problematic phrase ought to be interpreted autonomously, independent of the content of the provisions of the Code of Criminal Procedure,[8] i.e. Article 599 CCP or Article 607e § 3(2) CCP, as suggested by the Appellate Court in the legal question. The Supreme Court rightly pointed out that referencing these provisions for the purpose of interpreting the stipulations of the Convention would constitute an infringement of the prohibition of synonymous interpretation. The aforementioned regulations refer directly to the moment of 'final termination of a proceeding',[9] and not 'final discharge', which in turn is present in other acts of international law based on analogous regulations: in Article 27(3)(a) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[10] and in Article LAW. SURR.106(2)(a) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.[11]

In the glossed judgement, the Supreme Court emphasised that

> 'the possibility of such broader interpretation is confirmed by the different wording of Article 14(1)(b) ECE in comparison to Article 599 CCP and Article 607e § 3(2) CCP, which refer to legal occurrences that have a strict normative »anchoring« (grounds), i.e., the final termination of a criminal proceeding or the completion of service or execution of a penalty, and not only ontological, such as an actual discharge that is supposed to be final, but where there are no clear normative criteria for assessing this final nature (which is understandable given the international character of Article 14(1)(b) ECE)'.

Furthermore, literature notes a distinction between the analogous regulations in the national system and the Framework Decision on the EAW.[12] It is also highlighted that, even based on Polish regulations, the hypothesis concerns specific behaviour, while the stipulation is that the rule of speciality should be abrogated, 'moreover, this occurs in a situation where a person formerly convicted is (still or again) within the territory of the Republic of Poland, i.e., within the limits of the rule of territoriality of the application of criminal law (Article 5 CC[13]). In other words,

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[8] Act of 6 June 1997: Code of Criminal Procedure, consolidated text, Journal of Laws of 2022, item 1375, as amended; hereinafter 'CCP'.

[9] In Article 529 CCP of 1969: 'within one month of the date of valid termination of a proceeding, and in the event of conviction: within two months of the completion of serving the penalty or its remission.'

[10] OJ L 190, 18.7.2002, p. 1.

[11] OJ L 149, 30.4.2021; https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01) [accessed on 14 August 2023].

[12] Stępkowski, Ł., 'Zasada specjalności europejskiego nakazu aresztowania i art. 607e § 3 pkt 2 k.p.k. a możliwość ścigania wydanego obywatela polskiego za przestępstwa nieobjęte tym nakazem', *Przegląd Sądowy*, 2022, No. 5, pp. 101–102.

[13] Act of 6 June 1997: Criminal Code, consolidated text, Journal of Laws 2022.1138, as amended; hereinafter 'CC'.

the stipulation is that a certain additional legal protection (a guarantee of impunity) of the person surrendered should be abolished.'[14] The main premise for applying the discussed exception to the rule of speciality, related to the convict's attitude, lies in the nature of the course of the proceeding.

Regardless of this, the Supreme Court rightly drew attention to the subsidiary nature of the provisions contained in Section XIII CCP ('Proceedings in criminal cases connected with international relations'), *inter alia*, in relation to international agreements to which Poland is bound, due to the principle of the conflict of laws established in Article 615 § 2 CCP. The priority of a ratified international agreement also stems from constitutional regulations.[15] Therefore, although provisions of Article 599 CCP and Article 607e CCP introduced in 2003 and 2004 respectively, were intended to adapt Polish regulations to international and European law,[16] their wording does not mirror the content of analogous provisions laid down in the Framework Decision on the EAW or Article 14(1)(b) ECE.

Differences in the wording of the discussed exception to the extradition-related rule of speciality are also evident in bilateral agreements to which the Republic of Poland is a party. Some treaties explicitly refer to factual issues concerning freedom of movement. For example, the Extradition Treaty between the Republic of India and the Republic of Poland[17] and the Extradition Treaty between the United States of America and the Republic of Poland[18] stipulate a period of 30 days from the day the person surrendered **had the opportunity to leave freely**. The extradition agreement between the USA and France of 1996 was similarly formulated.[19] In literature on the American extradition model emphasis is placed on the surrendered person's freedom to leave the US and the consequences of remaining in its territory.[20] Although the indicated circumstances granting this freedom include only a judgement on the exclusion of being subject to extradition, acquittal, or the completion of the service of a sentence, there is little doubt that the physical possibility of leaving the United States is a decisive factor.

However, some agreements use phrases referring to the extradited person's legal situation. The Convention between the Polish People's Republic and the

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[14] Ibidem, p. 102.

[15] See the Supreme Court ruling of 29 August 2007, II KK 134/07, OSNwSK 2007/1/1887, LEX, No. 310647.

[16] Mozgawa-Saj, M., *Ekstradycja w polskim postępowaniu karnym*, Warszawa, 2015, pp. 42–43.

[17] Signed at New Delhi on 17 February 2003, Journal of Laws of 2005, No. 156, item 1304, Article 10(3)(b).

[18] Signed at Washington on 10 July 1996, Journal of Laws of 1999, No. 93, item 1066, Article 19(3)(b).

[19] The following phrase was used therein: '(…) when having had the opportunity to do so, the person extradited did not leave the territory of the Requesting State within 30 days of his **final release** (emphasis by Sz.K.)'; Article 19(1)(b) of the Extradition Treaty between the United States of America and the Republic of France, signed on 23 April 1996, https://www.state.gov/wp-content/uploads/2019/02/02-201-France-Extradition.pdf#:~:text=The%20President%20of%20the%20United%20States%20of%20America,Exchanges%20of%20Letters%20of%20June%202%20and%2011 [accessed on 16 August 2023].

[20] Bassiouni, M.Ch., 'Extradition: the United States Model', *International Review of Penal Law. Extradition*, 1991, Vol. 62, No. 1–2, p. 495.

Republic of Turkey on legal assistance in criminal matters, on extradition, and on the transfer of sentenced persons states[21]: 'the consent shall not be required in the following cases: (...) the person extradited fails to quit the territory of the Contracting Party to which he or she had been extradited within one month after termination of the proceeding or after the date of the completion of the sentence if one has been imposed'. Similarly, the agreement with Australia refers to the person who 'has had an opportunity to leave the territory of the Requesting Party and has not done so within 45 days of final discharge in respect of the offence for which that person was extradited.'[22]

Z. Knypl asserts that

> 'final discharge within the meaning of Article 14(1)(b) Convention occurs when the person extradited no longer has any obligations in relation to the proceeding or the execution of the penalty. Conditional release is not final if it is combined with specific restrictions imposed on the released person's freedom. The possibility of leaving the territory referred to in this provision means a real possibility, which does not occur, for example, if the person is bedridden.'[23]

The commentator discusses obligations, which seem to refer to the normative layer of 'final discharge' as used in Article 14(1)(b) ECE, in contrast to 'final release', which refers to actual liberation.[24] However, this author also emphasises the released person's physical freedom, dependent on the nature of the probation obligations imposed under Article 159 PEC. While such freedom may be limited, or, in the event of the will to leave the country, may exclude supervision by a probation officer, trustworthy person, association, organisation, or institution aiming to care for upbringing, prevent demoralisation or assist convicts, most obligations laid down in Article 72 § 1 CC do not appear to involve the obligation to stay in the territory of Poland. Therefore, imposing them does not challenge the assertion that conditional release was final within the meaning of Article 14(1)(b) ECE.

Despite some terminological differences, it appears that international legal provisions, including those in the regulation mentioned above, base the premise of the discussed exception to the rule of speciality on an ontological nature. That is, it refers to the actual situation of the person extradited, which corresponds to the content of Article 14(1) ECE: 'A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence (...), nor shall he be for any other reason **restricted in his personal freedom**.'[25] It is unsurprising that, given the international legal

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[21] Signed at Ankara on 9 January 1989, Journal of Laws of 1991, No. 52, item 224; Article 21(2)(a).

[22] Treaty between Australia and the Republic of Poland on Extradition, done at Canberra on 3 June 1998, Journal of Laws of 2000, No. 5, item 51; Article 12(3).

[23] Knypl, Z., *Europejska konwencja…*, op. cit., p. 162.

[24] See footnote 16.

[25] It is necessary to quote the observation made by Z. Knypl, who points out that 'the English words used in Article 14(1): 'nor shall he be for any other reason restricted in his personal freedom' were translated into Polish: "*ani też poddana jakimkolwiek ograniczeniom wolności osobistej za jakiekolwiek przestępstwo popełnione przed wydaniem*" [meaning 'nor shall he be restricted in his personal freedom for any offence committed prior to his surrender']; Knypl, Z., ibidem, p. 144.

nature of the act, stipulations contained within it must be characterised by greater flexibility. This flexibility allows for the application of specific treaty provisions across various legal systems, i.e., regardless of the specific institutions of national law that may apply to the person extradited.

This is confirmed by the content of some declarations and reservations of States-Parties to Article 14(1)(b) ECE.[26]

> 'The Swiss Federal Council declares that the Swiss authorities consider release to be final within the meaning of Article 14 if it allows the person extradited to move freely without violating the rules of conduct and other conditions imposed by the competent authority. For the Swiss authorities, the extradited person shall, in any case, be deemed to be able to leave the State within the meaning of this Article, provided there is no **actual obstacle** [emphasised by Sz.K.] to leave it, such as illness or another real limitation of his freedom to move.'

Similarly,

> 'Israel shall not give consent to extradition by means of derogating from the rule of limitation of prosecution (...) provided that there is no proceeding against the person sought, and he is not convicted or detained in order to execute a penalty, unless he voluntarily returns to the Requesting State or, **having the opportunity to do so**, does not leave the Requesting State within 60 days.'

The stances of Switzerland and Israel leave no doubt that these countries make the application of the exception to the rule of speciality dependent only on the occurrence of the physical possibility of leaving the State to which the person was extradited, which confirms the accuracy of the Supreme Court's interpretation presented in the glossed judgement.

Regarding the procedural situation that formed the basis for asking a legal question and the expression of the opinion by the Supreme Court, it should be emphasised that a cumulative sentence issued with the infringement of the rule of speciality will always be defective and will never be enforced in conformity with the law. Obtaining the extraditing State's consent to extend extradition would also be irrelevant to this issue as such a measure would not validate a cumulative sentence. Therefore, if a convict is released following a recognition of this sentence's defectiveness, which definitively prevents the execution of the imposed cumulative penalty, the release of the convict resulting from the suspension of the sentence's execution will be final in both factual and legal sense. The mode of suspending execution of a sentence laid down in Article 9 § 4 PEC does not provide for any limitation of the extradited person's personal freedom. For this reason, both literal and functional interpretations of the analysed premise of the exception to the rule of speciality confirm the possibility of extending prosecution, regardless of the occurrence of a defective and unenforceable cumulative sentence in legal transactions.

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[26] Government declaration of 31 March 1994 concerning the ratification of the European Convention on Extradition, done at Paris on 13 December 1957 by the Republic of Poland, Journal of Laws, 1994, No. 70 item 308.

It is also worth noting that the expiry of the principle of limitation of prosecution may result in the regulation of the convict's legal and criminal situation. For example, in the present case, this can result from the issuance of a new cumulative sentence. One cannot also exclude a situation in which a person, who has been extradited, intentionally stays in the territory of the requesting state, which is his homeland, in order to regulate their legal and criminal situation, or 'settle accounts' with the justice system. After serving potential penalties, to live freely in their country of origin.

Finally, it should be noted that the Court's question *ad quem* is also conditional. In the event of a positive answer concerning the first issue:

> 'whether the above-mentioned exception to the rule of the limitation of prosecution (the rule of speciality) may be applied in relation to a Polish citizen in the light of the provisions laid down in Article 52(4) Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item 483, as amended) and in conjunction with the content of international law laid down in Article 3 Protocol No. 4 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1995, No. 36, item 175) and in Article 12(4) International Covenant on Civil and Political Rights (Journal of Laws of 1997, No. 38, item 167); in this regard, the Supreme Court's stance.'

Dealing with the issue, the Supreme Court rightly pointed out that in the judgement of the Appellate Court in Gdańsk on 31 May 2016,[27] as well as in the commentaries expressing the opinion that applying the exception to the rule of speciality in relation to the failure to leave the country by a Polish citizen was inadmissible, there was no detailed justification of the opinion, as opposed to the stance that allows for such a possibility.[28] Moreover, it is difficult to demonstrate a logical connection between the phenomenon of extraditing a country's own citizens or prohibiting their return to the country and the aforementioned exception to the rule of speciality. The premises of this exception, as already shown, are the physical freedom of the extradited person and the freedom to make a conscious (proper provision of information) decision to stay in the country with a relatively long time to consider it in accordance with the rule: *volenti non fit iniuria*. It should be emphasised that this is a specific exception to the exception provided by the rule of speciality in relation to the State's exercise of jurisdiction over persons staying in its territory. In fact, it expresses nothing other than the rule of territoriality, which obviously cannot be perceived as unconstitutional in the light of the applicable standard laid down in Article 52(4) of the Constitution. Therefore, the adopted solution does not infringe national or international standards of human rights protection; thus, the Supreme Court's stance on the issue also deserves approval.

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[27] II Akzw 921/16, LEX, No. 2087808, KSAG 2016/3/208-213.

[28] See e.g. Mozgawa-Saj, M., *Ekstradycja…*, op. cit., pp. 107–109.

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Cite as:

Krajnik S. (2023) *'Gloss on the judgement of the Supreme Court of 28 February 2023, I KZP 13/22 (expressing approval)'*, Ius Novum (Vol. 17) 4, 125–133. DOI 10.2478/in-2023-0033

Ius Novum
2023, vol. 17, no. 4

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Ius Novum

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