

POLAND

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Abbreviations in the Polish report

KPK - *Kodeks postępowania karnego* (Code of Criminal Procedure) of 1997

KK - *Kodeks karny* (Criminal Code) of 1997

KKW - *Kodeks karny wykonawczy* (Criminal Enforcement Code) of 1997

Overview Respondents in the Empirical Part of the Research

		Experience
Interview 1 - N	NGO Representative	6 years
Interview 2 – J1	Judge of Regional Court	11 years
Interview 3 – J2	Judge of the Court of Appeals	12 years
Interview 4 – A1	Advocate	5 years
Interview 5 – A2	Advocate	4 years
Interview 6 – J3	Judge of the Court of Appeals	12 years
Interview 7 – J4	Judge of Regional Court	12 years
Interview 8 – J5 and J6	two Judges of Regional Court	J5 – 8 years J6 – 9 years
Interview 9 – A3	Advocate	3 years

General outline of the Polish legal system

Poland is a civil law country. According to Article 87 of the *Konstytucja Rzeczypospolitej Polskiej* (hereinafter: Polish Constitution¹), the universally binding sources of law are the Polish Constitution, statutes, ratified international agreements, and regulations (sub-statutory legal acts). The Polish Constitution is the supreme law of the Republic of Poland. Its provisions are directly applicable. The Article 9 of the Polish Constitution provides that the Republic of Poland shall respect international law binding upon it. Ratified international agreements, after promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), constitute part of the domestic legal order and shall be applied directly, unless their application depends on the enactment of a statute (Article 91(1) of the Polish Constitution). Moreover, Article 91(3) of the Polish Constitution provides that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. The above means that all national authorities are obliged to apply relevant international standards stemming from international conventions.

Judicial cooperation in criminal matters is regulated in Poland mainly by international treaties and *Kodeks postępowania karnego* of 1997 (hereinafter: KPK). Outside of the EU the provisions of bilateral or multilateral treaties define the framework of cooperation. If there are no such sources, the general rules from the KPK are applicable. The cooperation with EU Member States is governed by the provisions of the KPK, where relevant FDs and directives are implemented (Chapter XIII of the KPK).

Cases concerning transfer of sentences fall under the jurisdiction of common courts. The common court system comprises more than 300 District Courts (*sądy rejonowe*), 45 Regional Courts (*sądy okręgowe*) and 11 Court of Appeals (*sądy apelacyjne*). Most of the decisions concerning transfer of sentences are heard by District Courts. If there is a possibility

¹ Constitution of the Republic of Poland 2 April 1997, JL 1997 no 78 item 483.

of lodging appeal against such decisions it is heard by the Court of Appeals. In Poland judges do not specialize in transnational criminal cases. As a general rule, every judge within the Criminal Department of the Regional Court or Court of Appeals may hear all types of cases both domestic and transnational. Polish judges have right to refer preliminary references to the CJEU from 1 December 2014.

Some interviewed judges and advocates reported, that an informal specialization exists based on the practical experience of some judges. In practice, judges J1 and J3 almost exclusively hear cases regarding EAW and other transnational criminal cases. However, as they admitted, this does not influence their regular workload. Thus some of them feel overcharged (J1). Similarly Advocates A1 and A2 stated that in some cities, especially the big ones (e.g. Warsaw) the specialization of judges hearing cases with regard to transnational criminal law seems obvious even though not institutionalized. This seems as a practice in some cases only since another judge (J2) reported that in the Court of Appeals where he works there is no specialization whatsoever with regard to that topic. However, he admitted that in some Regional Courts such practice do exist.

1. Meaning and scope of the fundamental rights subject to this study in the national legal order

1.1. Protection against torture and degrading treatment

a) Status and content of the protection against torture and degrading treatment based on Polish legislation and case-law

The prohibition of torture and inhuman or degrading treatment and punishment is a constitutionally recognised principle in Poland. According to the Article 40 of the Polish Constitution of 1997 “no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited”. This provision is directly applicable (see Article 8 of the Polish Constitution). The abovementioned principle remains in a close relation to the respect for human dignity, which – in accordance with Article 30 of the Polish Constitution – is inherent and inalienable and constitutes the source of an individual’s rights and freedoms. Human dignity is seen as inviolable and public authorities are obliged to respect and protect it. Use of torture and inhuman or degrading treatment or punishment is perceived as a violation of the essence of human dignity².

Prohibition of torture and inhuman or degrading treatment and punishment is a recognised principle of international law expressed in numerous international treaties being a part of the Polish domestic legal system³. Therefore, all national authorities are obliged to apply relevant international standards⁴.

Apart from general prohibition of torture and inhuman or degrading treatment and punishment as provided in Article 40, the Article 41(4) of the Polish Constitution states that “anyone deprived of liberty shall be treated in a humane manner”.

The prohibition of torture and inhuman or degrading treatment and punishment is absolute. Although the limitations of constitutional rights and freedoms are generally possible in extraordinary circumstances, it is inapplicable in this case. According to Article 233(1) and (3) of the Polish Constitution, the statute specifying the scope of limitation of the freedoms and rights of persons and citizens shall not limit the freedoms and rights specified in Article 40 and Article 41(4) even under martial law, state of emergency or state of natural disaster.

² Michał Królikowski, Krzysztof Szczucki, ‘Komentarz do art. 40 Konstytucji’ in Marek Safjan, Leszek Bosek (eds), *Konstytucja RP. Komentarz*, vol 1 (CH Beck 2016) 983.

³ These are among others: ECHR, International Covenant on Civil and Political Rights, The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and CFR.

⁴ See above on the sources of law in Poland in General Outline of the Polish Legal System.

Moreover, the absolute character of the prohibition does not allow to limit its scope in the light of the constitutional principle of proportionality (Article 31(3) of the Polish Constitution), That means that even in ‘ticking bomb’ scenarios the Polish legal system does not allow for application of torture or any other inhuman or degrading treatment⁵.

The Article 40 of the Polish Constitution does not only prohibit behaviour that constitutes torture and inhuman or degrading treatment and punishment but also creates a positive obligation of the state to protect citizens, both by legislative and practical means, against being subjected to torture and inhuman or degrading treatment or punishment. In particular, this duty refers to vulnerable groups of people like minors or prisoners⁶.

The direct penalization of torture and inhuman or degrading treatment in Polish criminal law is limited. There are only two crimes directly referring to torture both being a part of the Chapter XVI of *Kodeks karny* of 1997 (hereinafter: KK) entitled *Crimes against peace, crimes against humanity and war crimes (Przestępstwa przeciwko pokojowi, ludzkości i przestępstwa wojenne)*⁷. Apart from that, there are no other criminal offences directly prohibiting acts of torture and inhuman or degrading treatment. Nonetheless, criminal acts of that nature are penalised indirectly mainly as various forms of causing bodily harm.

The protection against torture and inhuman or degrading treatment remains important in the context of criminal proceedings. Firstly, acts of torture or inhuman or degrading treatment may occur during arrest, questioning of the suspect or detention on remand. Such acts may be subject to punishment according to relevant provisions of substantive criminal law presented above.

Secondly, acts of torture or inhuman or degrading treatment may aim at extorting confession or any other deposition from a suspect or a witness. In order to discourage the authorities to reach for such measures Article 171 § 5 KPK stipulates that in the course of questioning it is prohibited *inter alia* to influence the statements of the testifying person by means of force or illicit threat. All depositions made in circumstances precluding freedom of speech or obtained against the prohibition mentioned above, are inadmissible (Article 171 § 7 KPK). These regulations are supplemented by the provision of Article 168a KPK which states that evidence obtained in connection with the performance of public official’s duties, and as a result of murder, causing intentionally of bodily harm and unlawful deprivation of liberty are inadmissible.

Finally, the prohibition of torture or inhuman or degrading treatment or punishment plays an important role in deciding about transferring a person for the purpose of conducting criminal proceedings or executing penalty to another state (either inside or outside EU). Polish courts accept the position of the ECtHR that it is impossible to transfer a person to a country where that person risks being tortured or treated in an inhuman or degrading way or sentenced to an inhuman or degrading penalty. The Polish Supreme Court acknowledged that the verification of the conditions for extradition (in that case to China) should not be limited

⁵ Królikowski, Szczucki, ‘Komentarz do art. 40 Konstytucji’ (n 2) 982-983.

⁶ Królikowski, Szczucki, ‘Komentarz do art. 40 Konstytucji’ (n 2) 984.

⁷ Article 118a § 2 point 3 KK provides that anyone who, taking part in a mass attack or one of repeated attacks directed against a group of people taken to implement or support the policy of a state or organization, uses torture or subjects a person to cruel or inhuman treatment, is liable to imprisonment for not less than five years or imprisonment for 25 years. Article 123 § 2 KK states *inter alia* that anyone who, in violation of international law, subjects:

- 1) anyone who has surrendered, laid down their arms or is unable to defend themselves;
- 2) the wounded, sick, shipwrecked persons, medical personnel or clergy;
- 3) prisoners of war;
- 4) civilians in an occupied area, annexed or under warfare, or anyone else who is protected by international law during warfare,

to torture, cruel or inhumane treatment is liable to imprisonment for a minimum term of five years or imprisonment for 25 years.

only to those expressly stated in the relevant treaty regarding extradition, but should also take under consideration the provisions of the human rights treaties which refer to extradition procedure⁸.

Prohibition of torture and inhuman or degrading treatment or punishment plays an important role in the process of imposing and executing penalties. The catalogue of sanctions cannot contain any repressive measures that by its nature should be qualified as torture or inhuman, or degrading. One of the most important principles in sentencing is the principle of humanitarianism. It is expressed in Article 3 of the KK, which provides that “the penalties and other measures provided for in this Code must be applied with consideration for the principles of humanitarianism, and especially with respect for human dignity”.

The principle of humanitarianism applies not only during the sentencing phase, but also in the course of the execution of criminal sanctions. Article 4 of the *Kodeks karny wykonawczy* of 1997 (hereinafter: KKW) provides that “penalties, penal measures, compensatory measures, forfeiture, and also protective measures must be applied in a humanitarian manner, with respect for human dignity. The use of torture, or inhuman or degrading treatment or punishment of a convicted person is prohibited. A convicted person retains his or her civil rights and freedoms. Any limitation of such rights and freedoms may only result from a statute or a final ruling issued on the basis of a statute”. The humane treatment in the process of executing penalties (especially those involving deprivation of liberty) is guaranteed by numerous legal provisions in Poland. Most of them – especially in relation to detention facilities – were inserted in the KKW and secondary legislation issued on the basis of the KKW. This does not mean that last few years there were no problems concerning prison conditions in Poland, which lead to violation of the prohibition of inhuman and degrading treatment in individual cases. The case-law of the ECtHR indicates that three types of violations of Article 3 that were (and to some extent are) most frequent.

The first group concerns overcrowding in Polish prisons. In two judgments of 2009, the overcrowding was qualified by the ECtHR as a structural problem of Polish penitentiary system⁹. The statutory rule in Poland (in force at the time of the judgment and today) stipulates that there have to be 3 m² of space per person in each prison facility. As an exception, Article 248 (in force until 5 December 2009) provided that in extraordinary circumstances director of the prison facility could place people deprived of liberty in cells that do not fit that standard. The only obligation was to inform the penitentiary judge about that fact. In practice the above-mentioned provision was abused and led to frequent limitations of living space. In the judgment of 26 May 2008¹⁰ the Constitutional Tribunal declared Article 248 KKW as unconstitutional, but postponed the entry into force of its judgment until 6 December 2009 allowing the adaption of prison facilities for enlarged standard of living space for prisoners. What needs to be underlined the Constitutional Tribunal did not exclude the possibility of limiting the living space in exceptional circumstances, but emphasised that the latter ones should be clearly provided in statute. Currently the living space in prisons is regulated by Article 110, which fulfils the requirements from the judgment discussed above. The general rule – 3 m² of space per person – has been upheld and the situation in which that space can be limited (but to no less than 2 m² of space per person) are enumerated and they are limited in time (depending on circumstances up to 90 or 28 days). Moreover, each placement decision has to be reasoned, there is a possibility of filing complaint to penitentiary court and each prisoner is granted additional ½ hour of walk ability to participate in additional sport,

⁸ Supreme Court Decision 29 July 1997, II KKN 313/97, OSNKW 1997 no 9-10, item 85.

⁹ See application no 17885/04 *Orchowski v Poland*, Judgment (4th Section) of 22 October 2009, CE:ECHR:2009:1022JUD001788504, application no 17599/05 *Norbert Sikorski v Poland*, Judgment (4th Section) of 22 October 2009, CE:ECHR:2009:1022JUD001759905.

¹⁰ Constitutional Tribunal Judgment 26 May 2008, SK 25/07, OTK-A 2008, no 4, item 62.

cultural and educational activities. The amendment of the legal rules led to elimination of systemic problem of overcrowding in Polish prisons.

The second problem leading to violation of Article 3 ECHR in individual cases before ECtHR concerns classification of detainees as dangerous, which entails various additional obligations of the detained person in comparison to regular prison regime (e.g. body searches while entering and leaving the cell, obligation to wear handcuffs or joined shackles, isolation from other detainees during one hour walk). In that case shortcomings concerned both the relevant provisions of the KKW, that made it obligatory to classify certain categories of detainees as dangerous, and the practice of application of rules referring to ‘dangerous’ status (e.g. cases of prolonged and unjustified classification as dangerous). The ECtHR in adjudicated cases criticised cumulative effect and prolonged application of the “dangerous detainee” regime on the person deprived of liberty. In 2015 the relevant provision of the KKW were modified in order to avoid unjustified classifications of detainees as dangerous. The amendment gave more discretionary powers to penitentiary commission (composed of Prison Service officers and other employees appointed by the director of prison) in classifying detainees.

The third important issue is access to sufficient medical care. That problem appears rarer than the other two mentioned above. However in several cases the ECtHR qualified lack of necessary medical care in Polish detention facilities as a violation of Article 3 ECHR. Such conclusion was reached in cases of seriously ill or handicapped prisoners¹¹. In that group of cases the shortcomings at the national level concern the practical functioning of medical care in Polish detention facilities.

Last but not least, the prohibition of torture and inhuman or degrading treatment is important also in relation to detention on remand. Apart from possible acts of maltreatment that may occur during detention or insufficient conditions of detention that may amount to inhuman or degrading treatment, one should notice that the prolonged detention on remand, with all limitations concerning contact with the outside world, may in itself, according to the Polish Constitutional Tribunal, amount to inhuman treatment¹².

b) The protection against torture and degrading treatment and its relevance in judicial cooperation in criminal matters

The role of the competent authorities

The prohibition of torture and inhuman or degrading treatment plays a role in a process of surrendering persons to foreign countries. Polish criminal procedure differentiates between extradition to non-EU countries and surrender on the basis of EU law. In the former case there are two types of regulations. If there exist a bilateral or multilateral treaty concerning extradition, the surrender procedure is regulated by that international agreement. If there is no such treaty, the provisions of KPK are applicable. In the latter case, the Article 604 § 1 KPK provides that it is not permissible to surrender a person, among other, if

- there is a justified concern that, in the requesting State, the surrendered person may be sentenced to a death penalty or that such a penalty may be carried out,
- there is a justified concern that, in the State requesting the surrender, the freedoms and rights of the surrendered persons may be violated.

The above-mentioned provisions (especially very general wording of the second reservation) thus exclude the possibility to surrender a person if there is a justified concern that the person may be subjected to inhuman or degrading treatment or punishment (including death penalty) in the requesting state.

¹¹ See application no 45705/07 *D.G. v Poland*, judgement (4th Section) of 12 February 2013, CE:ECHR:2013:0212JUD004570507.

¹² Supreme Court Judgment 20 November 2012, SK 3/12, OTK-A 2012, no 10, item 123.

In case of extradition, the decision concerning surrender is taken by the Regional Court. That decision can be appealed to the Court of Appeals. The Minister of Justice receives the final decision and decides on surrender taking under consideration the position taken by the court. If the court orders that the surrender is impossible, that decision is binding for the Minister of Justice (Article 603 § 3 KPK). However, if the court allows the surrender, the Minister of Justice still can decide not to surrender a person.

In the AFSJ the person can be transferred to another EU Member State on the basis of EAW procedure or procedure regulated by FD 2008/909.

In case of EAW procedure the Article 607p § 1 KPK states that the execution of a European warrant will be refused, among other, if it would violate human and citizen freedoms and rights. Therefore, similarly to extradition procedure there is no possibility of surrendering a person if there is a justified concern that the person may be subjected to inhuman or degrading treatment or punishment¹³. In case of a motion of a EU Member State to execute a final and binding judgment imposing a penalty of imprisonment in the Republic of Poland based on implemented provisions of FD 2008/909, it is obligatory for the court to refuse the execution of the motion if, among other, it would violate human and citizen freedoms and rights¹⁴. Both in cases of EAW and motion of a EU Member State to execute a final and binding judgment imposing a penalty of imprisonment, the competent Polish authority is the Regional Court. The decision of that court can be appealed to the Court of Appeals.

Criteria for review

There are no specific statutory rules concerning the decision-making process concerning refusal of surrendering a person to another state. Moreover, there are no judicially created rules referring to that matter. Therefore, the general rules applicable to domestic criminal proceedings should be followed. Formally the issue of possible risk of the transferred person to be subjected to torture or inhuman or degrading treatment or punishment should be taken under consideration by the court *ex officio*. That issue can be also raised by the transferred person, his or her defence counsel and the prosecutor during the court hearing. Polish criminal procedure is based on the principle of material truth (*zasada prawdy materialnej*). That principle is codified in Article 2 § 2 KPK, which states, that the findings should be based exclusively on accurately determined facts. The above means that the court has an obligation to conduct a comprehensive examination of the possibility of surrendering a person, even in case of parties passivity. It can be said that the burden of proof in the discussed case is on the person to be transferred, but that does not mean, that if he or she fails to prove relevant circumstances, that will always result in court's decision authorising the transfer.

The KPK does not specify what is the standard of proof in surrender procedure. In practice it is expected that it will be proved on the balance of probabilities. According to Supreme Court case-law¹⁵ it is enough to prove that there are substantial grounds to believe that the transferred person would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment.¹⁶

All pieces of evidence are evaluated by the court on the basis of the principle of free evaluation of evidence (Article 7 KPK) There are no legal rules that bind the court or any

¹³ For more details on that issue see point 3.1. b) and c).

¹⁴ For more details on that issue see point 3.2. c) and d).

¹⁵ Supreme Court Decision 29 July 1997, II KKN 313/97, OSNKW 1997 no 9-10, item 85.

¹⁶ There are no equivalents in Polish legal language to express the difference between balance of probabilities and "substantial grounds". It is even not discussed at all in the legal doctrine, as opposed to common law countries. In practice, it is the court which decides whether the evidence presented gives such ground.

other criminal justice body with regard to the evaluation of evidence. The reliability of the evidence and its probative value must be determined solely by the court at the moment when evidence is evaluated. According to the established view of the Supreme Court¹⁷ “the conviction of the court of the credibility of some evidence and the lack of credibility of other evidence remains under the protection of Article 7 KPK if:

- 1) it is preceded by a disclosure of all the circumstances of the case during the trial,
- 2) it constitutes a consideration of all factors both in favour of or against the defendant,
- 3) it is consistent with the indications of knowledge and life experience and, moreover, has been substantiated in a justification of the sentence in an exhaustive and logical manner”.

Apart from surrendering procedures the prohibition of torture and inhuman or degrading treatment plays an important role in case of admissibility of evidence gathered abroad. In that respect the relevant point of reference is the case-law of the ECtHR, which underlines that the depositions obtained by foreign authority by the use of torture or inhuman or degrading treatment should not be admitted at trial, similarly as in case of evidence gathered by national authorities¹⁸.

1.2. Fair trial

a) Status and content of the right to fair trial based on national legislation and case-law

National sources

The Polish law does not provide the definition of the “fair trial”¹⁹. Neither in Polish Constitution nor in the KPK the direct reference to the notion of fair trial can be found. In the literature distinct approaches toward defining the fair trial can be identified. One of them provides for the widest possible understanding of fair trial that covers all elements provided in Article 6 ECHR including the right to access to a court, right to public hearing within reasonable time, right to be tried before an impartial and independent court, right to be presumed innocent and right to defence etc.²⁰ This way of interpretation transforms fair trial into the so-called “super-principle”²¹ overarching all others. The other approach calls for a narrowed scope of right to fair trial²². Under this approach this right is understood as principle of procedural loyalty according to which organs conducting proceedings are obliged to inform participants to the proceedings about their rights and obligations as well as refraining from

¹⁷ Supreme Court Decision of 3 September 1998, V KKN 104/98, LEX 35095.

¹⁸ See application no 8139/09 *Othman (Abu-Qatada) v United Kingdom*, Judgement (4th Section) of 17 January 2012, CE:ECHR:2012:0117JUD000813909.

¹⁹ The term “fair trial” is usually translated to Polish language as „rzetelny proces” (see Marian Cieślak, *Podstawowe prawa i wolności w Europejskiej Konwencji Praw Człowieka na tle orzecznictwa Europejskiego Trybunału Praw Człowieka w okresie 1988-1992* (Sąd Najwyższy 1995) 56-57, Piotr Hofmański, *Świadek anonimowy w procesie karnym* (Wolters Kluwer 1998) 36, Paweł Wiliński, *Zasada prawa do obrony w polskim procesie karnym* (Zakamycze 2006) 220-222). However there are some that instead use the term „uczciwy proces” (see Stanisław Waltoś, *Proces karny. Zarys systemu* (Lexis Nexis 2008) 332). See more on the discussion regarding the discrepancies Paweł Wiliński, ‘Pojęcie rzetelnego procesu karnego’ in Anna Gerecka-Żołyńska and others (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi* (Oficyna 2008) 400-401.

²⁰ Piotr Hofmański, *Konwencja Europejska a prawo karne* (TNOiK 1995) 238 and Wiliński, *Zasada prawa do obrony w polskim procesie karnym* (n 19) 220-221.

²¹ Ireneusz Nowikowski, ‘Uwagi o zasadzie rzetelnego procesu karnego (uwagi wybrane)’ in Jerzy Skorupka (ed), *Rzetelny proces karny. Księga Jubileuszowa Profesora Zofii Świdry* (Oficyna 2009).

²² Marian Cieślak, *Polska procedura karna* (Warszawa 1984) 367-368 and Romuald Kmiecik, ‘Naczelne zasady procesowe w postępowaniu karnym’ in Romuald Kmiecik, Edward Skrętowicz, *Proces karny. Część ogólna* (Oficyna 2006) 136.

any coercion, unlawful threat and deception in relation to the defendant. This approach does not incorporate all elements of fair trial as prescribed in Article 6 of the ECHR.

With lack of definition of fair trial in laws regarding criminal procedure, in particular KPK, the search for roots of this right has expanded to the Polish Constitution. Even though the Polish Constitution does not refer to fair trial explicitly, it is seen to be generally rooted in Article 45(1) of the Polish Constitution, which provides that “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”. This view is justified by the jurisprudence of the Constitutional Tribunal itself²³ and sustained in the literature²⁴. Moreover it is the jurisprudence of the Constitutional Tribunal that seems crucial to understand the actual meaning of that notion as applied in Polish criminal proceedings. Nevertheless, it does not mean that the definition and scope of fair trial as derived from the Constitutional Tribunal’s case law is complete and creates the coherent model of constitutional requirements of fair proceedings in criminal or any other judicial context²⁵. Even the terms used to describe what is called the “fair trial” under the scope of Article 6 ECHR are far from uniformity. Frequently the Constitutional Tribunal refers to the „procedural justice” or „procedural fairness” instead of term „fair trial” using it almost in the same context²⁶.

The Constitutional Tribunal does not provide for the definition of procedural fairness. At the same time in its case law some vital elements of that concept are identified. One of the components of the right to fair trial is the right to be heard²⁷. According to that view, the individual must be granted not only with a right to be present during the proceedings but also with a possibility to present his or her reasons and to file evidentiary motions that the court should consider²⁸. Moreover the individual should be granted with the right to participate in person in evidentiary actions such as e.g. interviewing witnesses. The limitations of this right may be provided in the law but they should be always justified²⁹.

The second component of the right to a fair trial as recognized by the Constitutional Tribunal is the obligation of the court to provide justification of judgments and decisions in a clear manner³⁰. The justification of judicial decisions and judgments serves distinct purposes among which are: forcing the self-control of the court which must demonstrate the material and formal correctness of decision and conforms to the requirements of justice, provides the arguments for adopted ruling, becomes a basis of external control, strengthens the sense of public trust and democratic control over the administration of justice and strengthens legal security³¹.

Another fair trial component identified by the Constitutional Tribunal is ensuring that individual participating in proceedings will be able to envisage the course of events³². It must

²³ Constitutional Tribunal Judgment of 16 April 2008, K 40/07, OTK-A 2008, No. 3, Item 44.

²⁴ Paweł Wiliński, *Proces karny w świetle Konstytucji* (Wolters Kluwer 2011) 98 and Jerzy Skorupka, ‘Sprawiedliwość proceduralna jako cel procesu karnego’ in Jerzy Skorupka (ed), *Rzetelny proces karny. Księga Jubileuszowa Profesor Zofii Świdy* (Oficyna 2009) 65.

²⁵ Paweł Wiliński, ‘Rzetelny proces karny w świetle Konstytucji i orzecznictwa Trybunału Konstytucyjnego’ in Paweł Wiliński (ed), *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych* (Oficyna 2009) 653.

²⁶ Constitutional Tribunal Judgment 28 April 2008, SK 11/07, OTK-A 2008, no 3, item 47, para 5.3.

²⁷ Constitutional Tribunal Judgment 27 October 2015, K 5/14, OTK-A 2015, no 9, item 150 and Constitutional Tribunal Judgment 12 May 2002, SK 32/01, OTK-A 2002, no 3, item 31.

²⁸ Constitutional Tribunal Judgment of 10 June 2002, SK 5/02, OTK-A 2002, no 4, item 84.

²⁹ Constitutional Tribunal Judgment 10 June 2002, SK 5/02, OTK-A 2002, no 4, item 84.

³⁰ Wiliński, ‘Rzetelny proces karny w świetle Konstytucji i orzecznictwa Trybunału Konstytucyjnego’ (n 25) 653.

³¹ Constitutional Tribunal Decision 11 April 2005, SK 48/04, OTK-A 2005, No 4, Item 45. See also Constitutional Tribunal Judgment 16 January 2006, SK 30/05, OTK-A 2006, no 1, item 2.

³² Constitutional Tribunal Judgment 16 January 2006, SK 30/05, OTK-A 2006, no 1, item 2.

be done by an appropriate coherence and internal logic of the mechanisms, which the individual is subjected to. As an element of proper shaping proceedings the Constitutional Tribunal identified also the right of individual to have a case heard without unreasonable delay³³.

Similarly the Polish Supreme Court in its case law does not provide for the clear and comprehensive definition of a fair trial³⁴. Moreover, when one reads the case law, it is even not clear how this term should be understood. The Supreme Court writes simultaneously about “fair trial standard”³⁵, “right to fair trial”³⁶, “principle of fair trial”³⁷ and “fair trial guarantees”³⁸. In one of its judgments the Supreme Courts puts equal sign between „fair trial” and „just criminal process”³⁹. This was criticized in the literature since fairness focuses on guarantees provided during trial while the just process refers more to the outcome of the final judgment⁴⁰.

The other important components of the right to fair trial identified by the Supreme Court are the impartiality of the court understood as impartiality of the judge⁴¹, the right to public (transparent) proceedings⁴², the right to have a case heard without unreasonable delay⁴³, right to defence lawyer⁴⁴, right to defence seen as the right to personally undertake all possible actions⁴⁵ and right to access to interpreter⁴⁶. It must be noted that the list presented above cannot be considered as exhaustive.

European sources

The first **Directive 2010/64** did not change much in the Polish law. Even before 2010 the Polish KPK did contain regulations providing the right to the free assistance of an interpreter for every accused who did not have a sufficient command of Polish (Article 72 § 1

³³ Constitutional Tribunal Judgment 26 February 2008, SK 89/06, OTK-A 2008, no 1, item 7.

³⁴ For a complete analyzes of the Polish Supreme Court case law regarding fair trial see Anna Błachnio-Parzych, Jacek Kosonoga, ‘Rzetelny proces karny w orzecznictwie Sądu Najwyższego’ in Paweł Wiliński (ed), *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych* (Oficyna 2009).

³⁵ Supreme Court Decision 6 April 2001, III KKN 13/01, OSNKW 2001, no 7-8, item 62.

³⁶ Supreme Court Judgment 15 May 2001 V KKN 517/00, OSNKW 2001, no 7-8, item 61.

³⁷ Supreme Court Decision 15 October 2002, V KK 140/02, OSNKW 2003, no 3-4, item 32.

³⁸ Supreme Court Decision 15 October 2002, V KK 140/02, OSNKW 2003, no 3-4, item 32.

³⁹ Supreme Court Judgment 27 July 2007, II KK 332/03, OSNKW 2004, no 9, item 1360. See also Supreme Court Judgment 6 July 2006, IV KK 174/06, OSNwSK 2006, no 1, item 1361 (the Supreme Court to describe the Article 6 ECHR fair trial instead of the term *rzetelny* uses the term *uczciwy* which can be rather translated as “honest”).

⁴⁰ Hofmański, *Konwencja europejska a prawo karne* (n 20) 238.

⁴¹ Supreme Court Judgment 17 May 2007, V KK 105/06, Lex 282293. In this case the Supreme Court held that the impartiality test incorporates two elements: subjectivity (the internal conviction of judge of his impartiality in a given case) and objectivity (all facts, excluding the judge’s personal relation with the case – that could raise doubts regarding his impartiality).

⁴² Błachnio-Parzych, *Kosonoga* (n 34) para 3.3.

⁴³ Supreme Court Decision 3 July 2003, II KO 32/03, OSNwSK 2003, no 1, item 1467 (‘In catalogue of directives enlisted in the mentioned Article [Article 2 § 1 KPK defining aims of criminal process] the requirement to resolve cases without unreasonable delay, as mentioned in Article 45(1) of the Constitution and in Article 6 § 1 ECHR, is included’).

⁴⁴ Supreme Court Judgment 19 September 2007, III K 130/07, Lex 310629 (The Supreme Court held that the essential element of providing the accused with a fair trial is ensuring that his right to defence lawyer is observed).

⁴⁵ Supreme Court Resolution 20 September 2007, I KZP 26/07, OSNKW 2007, no 10, item 71 (The Supreme Court confirms the position of the ECtHR on the right to remain silent and freedom from self incrimination as elements of the international standards of fair trial).

⁴⁶ Supreme Court Judgment 3 April 2003, III KN 143/01, Lex 78914 (The Supreme Court acknowledged that the right to interpreter refers not only to those that cannot speak in Polish at all but also to those that cannot speak in Polish in sufficient manner).

KPK). The law provided also that the interpreter should be summoned to assist in all procedures with the participation of such accused (Article 72 § 2 KPK) and those most crucial decisions during the course of proceedings, e.g. charging decision, indictment, judgment should be translated in writing (Article 72 § 3 KPK).

Nevertheless, one change rooted in the Directive has been introduced to Polish law together with the big amendment to the KPK in 2013⁴⁷. Article 72 § 2 KPK was amended by adding to it new provision which stated that at the request of the accused or his defense counsel, the interpreter should also be summoned, when the accused needs to communicate with his defense counsel in connection with the procedure, in which the accused is entitled to participate. It was done to implement Article 2 (2) of the Directive. Even though new wording of Article 72 § 2 KPK is less specific than the Directive it should be interpreted in the light of the Directive as allowing the accused or suspect to communicate with his or her defense counsel regarding future possible actions, such as filing appeals⁴⁸.

The second of discussed directives, **Directive 2012/13** had a deadline dated as of 2 June 2014 for the EU states to implement it. The most crucial regulations referred to access of the accused and defence lawyers to the materials of the preliminary investigation – dossier (Article 156 § 5 and 5a KPK), the scope of notifications provided to the arrested suspect (Article 244 KPK), the scope of notifications provided to the accused detained on remand (Article 263 KPK) and the scope of notifications provided to the accused (Article 300 KPK). The KPK did not provide for the actual pattern instruction that should be used in these situations. Instead the KPK referred in that respect to the Regulations that were prepared by the Minister of Justice. These Regulations regarding notifications for the arrested suspect⁴⁹, for the accused detained on remand⁵⁰ and in general for every accused in criminal proceedings⁵¹ came into force on 4th and 7th of July 2015 which happened one month after the date set by the Directive.

The **Directive 2013/48** should have been implemented in the EU states by 27 November 2016. At the moment there are no governmental propositions or bills to amend the KPK as according to the government Polish law is compatible with the Directive.

b) The protection of the right to fair trial

The role of the competent authorities

The protection of the right to fair trial in Poland is provided through the system of different remedies available in criminal proceedings. The review of violation of the fair trial right will be a result of one of the appellate measures, most likely taken in the form of **appeal** (*apelacja*) – Articles 425-458 KPK, which can be brought against court judgments issued in the first instance, as well as extraordinary measure that can be brought to challenge final rulings – an **appeal in cassation** (*kasacja*) – Articles 518-539. There are also other remedies available in the Polish law, e.g. interlocutory appeal (*zażalenie*) however its significance with regard to the violations of the fair trial rights is limited and therefore presentation of this type of remedy will be omitted in this work.

The right to appeal against first instance rulings issued in criminal cases is regulated in Article 78 of the Polish Constitution which provides that each party has the right to appeal against judicial rulings and administrative decisions made in the first instance and exceptions

⁴⁷ Act of 27 September 2013 on changes in Code of Criminal Procedure and in some other acts JL 2013 Item 1247.

⁴⁸ Sławomir Steinborn, 'Komentarz do art. 72 KPK' in Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów* (LEX 2016) para 10.

⁴⁹ JL 2014 item 737.

⁵⁰ JL 2014 item 738.

⁵¹ JL 2014 item 761.

to this principle and the procedure for such appeals must be specified by a statute. Furthermore, Article 176(1) of the Polish Constitution states that court proceedings must have at least two stages. In accordance with the Polish Constitution both parties (prosecution and defence) has the right to challenge judicial rulings made in the first instance. The procedure for appeals is described in detail in the KPK.

The power to review a case on appeal is vested in hands of the court. If the judgment in the first instance was delivered by the district court the power to review the case will be in hands of the regional court (Article 25 § 3 KPK). And if the judgment was delivered by the regional court the appellate court will hear the appeal (Article 26 KPK). The result of the review, according to Articles 437 § 1 and 456 KPK may be as follows:

- 1) upholding the appealed judgment,
- 2) changing the appealed judgment, if the evidence collected in the case so permits,
- 3) reversing the appealed judgment and remanding a case for retrial to the first instance court

The Supreme Court has the exclusive power to review a case on appeal in cassation (Article 27 KPK). As to the effect, the appeal in cassation may result in a reversal of the contested ruling in whole or in a part or in a dismissal if it is groundless (Article 537 § 1 KPK). When reversing the contested ruling the Supreme Court has three choices: remands the case to the court that is competent to conduct the retrial (either the first or second instance court), discontinues the proceedings, or acquits the defendant in case of obviously unfair conviction (Article 537 § 2 KPK).

One other remedy protecting the right to fair trial available in Polish law is a **complaint against the excessive length of court and preliminary proceedings**. It is not regulated in KPK but governed by the Act of 17 June 2004 on complaint against a violation of a party's right to have his or her case heard in preliminary proceedings conducted or supervised by a prosecutor and in court proceedings without unreasonable delay⁵². That Act regulates the submission of a complaint against the excessive length of proceedings, not only in criminal proceedings, but also in other types of proceedings, such as civil and administrative proceeding.

Criteria for review

The review of violation of the fair trial rights during the proceedings before the court of first instance can be based on two different types of criteria. It depends on what right was infringed and what was an impact of that infringement.

The first group of criteria is provided in Article 439 KPK, which enumerates the so-called absolute grounds for an appeal (*bezwzględne przyczyny odwoławcze*). These are aggravated violations of law, whose existence always result in the overturning of an appealed ruling, regardless of the extent to which the ruling was contested, pleas raised or the influence of a defect in the content of a ruling issued in the first instance. Some of them, which relate directly to the right to fair trial are: the ruling was issued with the participation of an unauthorised person or a person without a capacity to adjudicate or a person who should have been disqualified by law; the defendant has no defence lawyer in court proceedings if such legal representation is mandatory, or due to a defence lawyer's absence during procedures

⁵² JL 2004 no 179 item 1843, as amended. Enactment of this Act was a consequence of application no 30210/96 *Kudła v Poland*, Judgement (Grand Chamber) of 26 October 2000, CE:ECHR:2000:1026JUD003021096. At this very moment, the new amendments to this Act are being processed in Polish Parliament being a result of application no 72287/10, 13927/11 and 46187/11 *Rutkowski et al. v Poland*, judgement (4th Section) of 7 July 2015, CE:ECHR:2015:0707JUD007228710.

when his participation is obligatory; the case has been heard in the absence of the defendant whose presence is mandatory

The second group of criteria is known as the relative grounds for an appeal (*względne przyczyny odwoławcze*) and is provided in Article 438 KPK. Among these are violations of the procedural law and all other infringements of the right to a fair trial that do not fall under the grounds enumerated in Article 439 KPK can be appealed based on Article 438 KPK. However, the limitation provided in this regulation demands that the violation of the procedural law will be established only “if it might have influenced the content of the appealed ruling”. Therefore, minor violations might not be considered as influential enough to overturn the judgment.

The review of violation of the fair trial rights, which can be brought to challenge final rulings, may be conducted in form of an appeal in cassation. The KPK limits the number of pleas that can be raised in an appeal in cassation compared to those available in the appeal. Pursuant to Article 523 KPK, an appeal in cassation can be submitted only for the purpose of addressing the defects enumerated in Article 439 KPK (absolute grounds for appeal) or other gross violations of law that might have affected the content of a ruling in a material way. It means that the scope of grounds is narrowed down.

1.3. Family life

a) Status and content of the right to family life based on National legislation and case-law (including the concept of family)

The right to family life is guaranteed in Polish legal system by the Polish Constitution and ECHR (Article 8). As the last one is common to all States the analysis limits to the Polish legal system.

According to Article 47 of the Polish Constitution “Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life”. The right to family life is treated today as a right autonomous (even if often interconnected) to the right to privacy⁵³. There is no general legal definition of “family” in the Polish Constitution nor in any statute (there are some for the use of a given statute) so it should be defined for the purpose of every legal act separately.

As most of the rights protected by the Polish Constitution the right to family life can be limited under the conditions provided for its Article 31(3) which states that “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”.

Content of the right to family life cannot be described exhaustively but in the context of criminal cases it is worth to mention some provisions of KKW. Article 67 which describes the aims of the punishment of depriving liberty, states in § 3 that one of the means of impact on the convicted person is letting him/her to maintain the contacts with family and the outside world. Moreover according to Article 102 point 2 KKW, the convicted person has right to maintain relationships with family and other close persons (*osobami bliskimi*). This right is specified in Article 105 § 1 KKW according to which maintaining of relationships with family and other close persons shall be done by visits, correspondence, phone calls, packages and money transfers and in justified situations, prior to the consent of the Prison Director, also by other means of communication and by facilitating of maintaining contact with associations aiding to the prisoners.

⁵³ Kinga Michałowska, ‘Prawo do życia rodzinnego na tle ogólnie pojmowanej prywatności jednostki’ (2013) 911 Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie 51.

In one of the ECtHR judgment against Poland it was specified that the convicted persons have the right to participate in the funeral of close persons.⁵⁴ This is now included expressly in the text of Article 141a § 1 KKW. At the moment there is also a case pending before Polish courts commenced by family of a deceased prisoner against detention facility which did not let the family to part to dying person being in prison's hospital⁵⁵.

Before 1 January 2012 Article 100 KKW provided that the convicted person should serve the sentence in the detention facility the nearest to his/her home, if it possible. The reform of 2012 erased this provision but the academics prove that the other provisions of the PEC relating to the family life described earlier makes this rule still valid.⁵⁶ In any case Article 87a § 2 KKW still provides that convicted persons having custody over the children shall serve the sentence in the prisons the nearest of the children's place of stay. The lack of certainty where the prisoner transferred from another country will serve the sentence (whether it would be close to his family) can have negative impact on his/her right to family life.

It is also worth to mention here that Polish law limits the notion of marriage to the heterosexual couples, does not provide for registered partnerships⁵⁷ and partners being in informal relationships do not have rights similar to those stemming from marriage. On the ground of the Polish Constitution an important role is played by its Article 18 which provides the definition of the marriage: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."⁵⁸ This provision is interpreted by lot of courts and academics not only as forbidding to adopt laws on same-sex marriages and registered partnerships in Poland⁵⁹ but also as excluding the recognition of foreign same sex marriages and partnerships (as public order clause). There are also different opinions but for while they are in minority⁶⁰. For while there were refused: registration of same sex marriage concluded abroad⁶¹, registration of children having in their birth act the same sex parents⁶², accordance of Polish citizenship to a child born from surrogate mother for same sex couple which was indicated in the birth certificate as legal and natural parents⁶³.

There are pending cases before ECHR related to some of these judgments and it is possible that in the future there will be a preliminary reference from Polish courts to CJEU on

⁵⁴ Application no 26761/95 *Płoski v Poland*, Judgement (4th Section) of 12 November 2002, CE:ECHR:2002:1112JUD002676195. In this case Poland denied the applicant attendance at the funeral of his parents that violated Article 8 ECHR.

⁵⁵ <http://www.hfhr.pl/prawo-do-pozegnania-podlega-ochronie-prawnej/> accessed 13 October 2017. The Opinion of Helsinki Foundation for Human Rights as amicus curiae in the case: http://www.hfhr.pl/wp-content/uploads/2016/01/Prawo_do_pozegnania.pdf accessed 13 October 2017.

⁵⁶ See Krzysztof Dąbkiewicz, 'W sprawie „miejsca” odbywania kary pozbawienia wolności przez skazanego' (2015) 1 *Probacja* 23.

⁵⁷ A few projects of law introducing such an institution were deposited in Sejm (lower Chamber of Polish Parliament) in 2004 (never proceeded) and in 2011 (rejected by Sejm in 2013).

⁵⁸ Also according to the Code of Family and Guardianship 25 February 1964 (JL No 9 item 59) marriage is a union of a man and a woman (see for example its Article 1 § 1: 'A marriage is concluded when a man and a woman are both present before the head of a registry office and make a statement that they take each other in marital union').

⁵⁹ See Constitutional Tribunal Judgment 11 May 2005, K 18/04, JL 2005, no 86, item 744: 'Marriage, being the union of a man and woman, has acquired a distinct constitutional status within the domestic law of the Republic of Poland, on the basis of Article 18 of the Constitution. Any modification of this status would be possible only by the way of an amendment of the Constitution (according to Article 235 thereof); in no circumstances would it be possible by way of a ratified international agreement'.

⁶⁰ Mateusz Pilich, 'Związki quasi-mażeńskie w polskim prawie prywatnym międzynarodowym po nowelizacji k.k. (2011) 2 Państwo i Prawo 84 and works quoted thereof.

⁶¹ Judgment of Provincial Administrative Court in Gdańsk, 14 January 2016, III SA/Gd 835/15.

⁶² Judgment of Provincial Administrative Court in Gdańsk, 17 December 2014, II OSK 1298/13.

⁶³ Judgment of Provincial Administrative Court in Gdańsk, 6 May 2015, II OSK 2419/13.

the issue of non-recognition of status acquired in another Member State as an impediment to the free movement of persons. But for a while it is not at all obvious that a same-sex relationship will be treated as family by Polish authorities and profit from the protection of their “family life” in the context of criminal proceedings (for example in case of transfer of a person being married to a same sex person). From the other side some Polish statutes accord certain rights to persons being in cohabitation (inter alia Article 115 § 11 KK). There is a recent trend to cover by these notions also same sex persons⁶⁴, so it can be a sign of changes in the Polish law.

b) The protection of the right to family life

The role of the competent authorities

Once the breach of the right to family life during the execution of a penalty occurs there are various way of contesting the decision. According to the current version of Article 6 § 1 KKW the convicted person can appeal decision adopted by the court during executive proceedings in cases provided by the KKW. The reform of 2012 limited the right of convicted person to appeal the decision taken in the executive proceedings as before he/she could appealed all the decisions. According to Article 6 § 2 KKW the convicted person can make proposals, requests and complaints to authorities executing judgments (Article 102 point 10 confirms that it is the right of the convicted persons). According to Article 7 § 1 KKW the convicted person can appeal all decisions taken by executing authorities (other than courts) on the basis of breach of the law.

Moreover it is possible to claim damages in civil proceedings. It is also possible to make a complaint to ECHR (often used in Poland). The last possibility is confirmed *expressis verbis* by Article 103 KKW.

Criteria for review

During the proceedings the standard rules on evidence are applied (see point 1.1. b ii). The individual shall obtain all the rights mentioned above (i.a. those ensured by Article 105 § 1 KKW like right to visits, correspondence, phone calls, packages and money transfers and in justified situations).

2. National legal framework implementing the obligation of mutual recognition in the EAW, FD 2008/909 and FD 2008/947

2.1. The status of the principle of mutual recognition and mutual trust in the national legal order

There are no provisions on principle of mutual recognition nor mutual trust in the Polish Constitution or statutes (including KK and KPK) It is thus binding in the Polish legal system on the basis of the EU law.

Polish Constitutional Tribunal accepts the “principle of mutual confidence”.⁶⁵

⁶⁴ Supreme Court Judgment 28 November 2012, III CZP 65/12, OSNC 2013, no 3, item 57 (in relation to Article 691 § 1 of Polish Civil Code), Supreme Court Seven Justices Resolution 25 February 2016, I KZP 20/15 (in relation to Article 115 § 11 KK).

⁶⁵ Constitutional Tribunal Judgment 27 April 2005 no P 1/05, OTK ZU no 4/A/2005, item 42, para 5.9 (text in English http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf accessed 13 October 2017) ‘Effectiveness in combating of such crime depends to a large degree on the development of more advanced forms of cooperation between the Member States of the EU than the traditional extradition procedure. This is possible thanks to the high level of mutual confidence between legal systems, built on the basis of principles of political systems assuring the protection of fundamental human rights and liberties. Common standards of such protection justify the resignation from some of the formal guarantees, which are contained in the classical instruments of international cooperation’.

The interviews showed that judges in Poland have very high level of trust towards the judiciary and the protection of fundamental rights by other Member States (all judges declared it, A1's observations confirmed it). But often they feel distrust from certain other Member States, especially the United Kingdom. For example J1 said: "It is hard to imagine for me to verify the conditions in the prisons of the state which issued EAW.[...] But I had the opposite cases. Often British judicial authorities ask very detailed, irritating questions about the Roma." J2: "I treat the principle of mutuality as an axiom. I would not ever think about verifying it [protection of fundamental rights in other Member States]". But some of the judges stated that in case of evidenced breach of fundamental rights the mutual trust could be broken (J5 and J6)

2.2. The functioning of the EAW for the purpose of executing a custodial sentence or detention order

The FD EAW was implemented in Poland by the Act of 18 March 2004⁶⁶. The special chapters on EAW were added to the KPK. Chapter 65a (Articles 607a-607j) governs the procedure when Poland is an issuing State and Chapter 65b (Articles 607k-607) governs the procedure when Poland is an executing State.

According to J1 most of EAW issued in Poland is for the purpose of executing a custodial sentence.

Issuing authority

In case of suspicion that a person prosecuted for the offence committed in the territory of the Republic of Poland is in the territory of a EU Member State a request to the court (*sąd okręgowy*) having territorial jurisdiction can be done by a prosecutor or in upon motion of the competent regional court (in judicial and executive proceedings).

According to Article 607b KPK a EAW may not be issued if it does not serve the interest of justice (this restriction was added by the statute of 2013⁶⁷ which entered into life on 1 July 2015, as an answer to the critique of the lack of principle of proportionality in Polish law), nor in connection with criminal proceedings against the person prosecuted for the offence punishable by the deprivation of liberty for up to one year; nor in order to execute the penalty of deprivation of liberty for up to 4 months or another measure involving deprivation of liberty for up to 4 months. Once the court adopts a EAW it orders a translation of the order on the official language of the executing Member State (Article 607c § 2 KPK).

If the place of stay of the prosecuted person is not known the copy of the EAW is send by a prosecutor or a court to the central Police unit co-operating with Interpol, together with a motion to commence international search. If the place of stay of the prosecuted person is known the copy of the EAW is send directly to competent judicial authority of the executing State (a copy shall also be transmitted to the Minister of Justice - Article 607d § 2 KPK).

Decision on the execution of penalty (not for offences other than those that give rise to surrender unless one of 8 exceptions arises – Article 607e § 2 KPK). In the court's hearing both public prosecutor and prosecuted person may participate.

Sending of the copy of the decision by the court to the competent judicial authority of the executing State (Article 607g KPK).

Executing authority

⁶⁶ Act to amend the KK, the KPK and the Petty Offences Code (Ustawa z dnia 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń), JL 2004, no 69, item 626, 4081-4091.

⁶⁷ Act of 27 September 2013 on changes in KPK and in some other acts (JL 2013, item 1247).

After receiving of the EAW (directly from the court of other EU Member State or via SIS, *Interpol*, or *European judicial network*) the prosecutor shall hear the requested person, inform her/him about the content of the EAW and the right to consent to the surrender and to consent to non application of Article 607e § 1 KPK⁶⁸. After the prosecutor shall make a request to the competent regional court⁶⁹ (*sąd okręgowy*). The court takes a decision on the provisional detention (not longer than 100 days⁷⁰) and a transfer of the person at a hearing in which the prosecutor and defence counsel have the right to participate⁷¹. When notifying the requested person of the hearing, the court shall serve the EAW along with its translation submitted by the public prosecutor. If not possible to translate it before the session, the translation shall be ordered by the court. It is deemed sufficient to inform the person of the content of the EAW if this does not hinder the execution of his/her rights.⁷²

During the proceeding the court shall take from the person a statement of consent to the extradition or consent to non-application of the provision of Article 607e § 1 KPK filed with the record. The statement may not be withdrawn, of which the prosecuted person shall be advised⁷³.

The complaint (*appeal*) can be made within 3 days as of the announcement of the decision, and if the prosecuted person has been deprived of liberty and has not been brought to the court session - as of the date of its service⁷⁴. The decision is notified to the issuing authority. Surrender shall take place within 10 days of the final decision⁷⁵. If the Member State does not receive a person at the time limits, an immediate release of such a person shall be ordered, provided that the person is not deprived of liberty in another case⁷⁶.

According to Advocate A1 EAW is sometimes adopted in trivial cases. If the person lives abroad, even if his/her address is known to the prosecutor, it is easier to use EAW than ask another Member State for the legal assistance. The reason is a lack of knowledge of other instruments but also bad experience with them.

2.3. FD 2008/909 transfer of prisoners

a) Forwarding judgments imposing sentence and transfer of convicted persons (issuing state)

Right to initiate the proceedings for transfer and the scope of application of FD 2008/909 on transfer of prisoners

If a Polish court has sentenced a Polish citizen or a foreigner to penalty of imprisonment liable to execution, the regional court in the circuit where the judgment was rendered with the consent of the offender (where necessary), may file a motion to enforce this judgment directly to a competent court or other authority of a EU Member State, if the transfer of the judgment for the purpose of enforcement will allow a higher extent the

⁶⁸ Article 607k § 2 KPK.

⁶⁹ And to a competent authority if separate regulations of the Polish law provide that prosecuting a person against whom a European Warrant has been issued shall depend on its permission (Article 607k § 4).

⁷⁰ Article 607k § 3 KPK. According to Article 607k § 3a even before receiving the EAW the Polish courts have possibility to adopt a provisional detention for a period not longer than 7 days if it is requested by the competent judicial authority that has issued the EAW, ensuring that a valid and final sentencing judgment has been rendered as regards the prosecuted person or another decision has been issued serving as the basis for deprivation of liberty.

⁷¹ Article 607l § 1 KPK.

⁷² Article 607l § 1a KPK.

⁷³ Article 607m § 2 KPK.

⁷⁴ Article 607m § 3 KPK.

⁷⁵ Article 607n § 1 KPK.

⁷⁶ Article 607n § 3 KPK.

educational and preventive objectives of the penalty to be realized. The relevant motion may also be submitted on a request of the offender, Polish Minister of Justice or competent court or other authority of the executing State. In practice there are also cases where the court, which passed a custodial sentence (other than regional court), files a motion to competent regional court to transfer the convicted person to another EU Member State⁷⁷. The Polish KPK does not expressly provide such a possibility, but at the same time it is not prohibited by the any domestic legislation and FD 2008/909. In the majority of cases where the judgment is to be forwarded to another EU Member State for execution the proceedings before the regional court is initiated by the sentenced person⁷⁸.

A motion to execute a judgment in another EU Member State concerns all judgments where a person has been convicted for the penalty of imprisonment. The KK defines three separate penalties that involve the deprivation of a convicted person's liberty (imprisonment). These are:

- 1) the penalty of imprisonment (*pozbawienie wolności*),
- 2) the penalty of 25 years of imprisonment (*25 lat pozbawienia wolności*),
- 3) the penalty of life imprisonment (*dożywotnie pozbawienie wolności*).

The penalty of imprisonment (a term in prison) lasts for at least a month and for no longer than 15 years. This penalty is imposed in months and years (Article 37 KK). In exceptional cases, the court may impose a term of imprisonment that is longer than 15 years. First, this is admissible whenever a statute stipulates a possibility of an extraordinary increase (aggravation) of a penalty imposed. In accordance with Article 38 § 2 KK, the extraordinarily aggravated penalty must not exceed 20 years of imprisonment. Second, the imposition of a penalty harsher than 15 years of imprisonment is possible in a situation where a perpetrator commits several offences and an aggregate penalty is imposed. The aggregate term of imprisonment so calculated may not exceed 20 years (Article 86 § 1 KK). Third, a penalty of up to 20 years of imprisonment may also be imposed in a situation where a statute allows for the decrease of an upper limit of a penalty that may be imposed for an offence that normally is subject to the penalty of 25 years of imprisonment.

The possibility of forwarding a judgment for execution in another EU Member State concerns both Polish citizen and foreigners. According to Article 10 § 1 KK only a person who is 17 years old may be held criminally liable. In case of some offences (e.g. an attempt on the life of the President of Poland, aggravated intentional homicide, causing of grievous bodily harm, causing a life-threatening event) the KK provides liability for 15 year-olds (see Article 10 § 2 KK), if that liability deemed appropriate given the circumstances of the case and the level of mental development of the offender, the characteristics and personal situation, and especially if previously attempts at educational or correctional measures have been ineffective.

Criteria for determining where the convicted person will be transferred and the factors taken into consideration when deciding about the transfer

If a Polish court has sentenced a Polish citizen or a foreigner to penalty of imprisonment liable to execution, the regional court in the circuit where the judgment was rendered can decide to transfer the judgment for the purpose of enforcement if it allows that the educational and preventive objectives of the penalty to be realized in a higher extent than in Poland. The relevant provision of the KPK emphasis the educational and preventive objectives of the penalty as a decisive factor. As it is emphasized in the legal doctrine the implementation of the FD 2008/909 in the above respect is only partially correct, because the

⁷⁷ Eleonora Zielińska, Agnieszka Serzysko, *Przekazywanie skazanych na kary pozbawienia wolności* (Instytut Wymiaru Sprawiedliwości 2015) 71.

⁷⁸ Zielińska, Serzysko, *Przekazywanie skazanych na kary pozbawienia wolności* (n 77) 52.

Polish legal provisions lack any reference to social rehabilitation of the sentenced person, which is underlined in Article 5(6) of the FD⁷⁹.

The motion to transfer a sentenced person is submitted by the court to a competent court or other authority of:

- 1) the executing State, of which the offender is a citizen and where he resides permanently or temporarily,
- 2) the executing State, of which the offender is a citizen and where he does not reside either permanently or temporarily, but to which he will be extradited on the basis of a final and binding judicial decision, after the execution of the penalty or release from a penal institution,
- 3) another executing State, with the consent of a competent court or other authority of this State (the consent should be received before transferring a motion),

- insofar as the offender is staying in the territory of the Republic of Poland or in the State, to which the motion was addressed.

In situations enlisted in 1) and 2) the court may submit a motion to a competent court or other authority of the executing State for an opinion on the forwarding of the judgment.

If circumstances are disclosed indicating that forwarding the judgment to the executing State for the purpose of enforcement would not allow the educational and preventive objectives of the penalty to be realised to a greater extent, the court may renounce the submission of motion or withdraw it (Article 611ta § 2 KPK).

Second crucial factor in deciding about transfer is the consent of the convicted person. The general rule is that if the transfer procedure is not initiated on the motion of the convict, he or she must consent to that. However, as stated in Article 611t § 5 KPK the consent of the offender for the surrender is not required if the motion is submitted to:

- 1) the executing State, of which the offender is a citizen and where he resides permanently or temporarily,
- 2) the executing State, to which the offender will be deported, after the execution of the penalty or release from a penitentiary institution,
- 3) the executing State, to which the offender has fled for fear of criminal proceedings pending in the Republic of Poland and obligation to serve the penalty imposed.

In that context it is necessary to mention that according to Article 6(5) of the FD 2008/909 the lack of consent of the sentenced person in cases where the judgment together with the certificate is forwarded to the Member State of nationality of the sentenced person or Member State in which the sentenced person lives shall not apply to Poland as an issuing State and as an executing State in cases where the judgment was issued before the lapse of five years from 5 December 2011. So until 6 December 2016 the consent of the transferred person is necessary in all cases involving Poland as either issuing or executing state.

The consent is given by the person to be transferred himself or herself, regardless of age or other factors. In case that person may have difficulties in understanding the decision taken, the role of the court is to explain the relevant issues in a manner understandable for the sentenced person.

Although it is not mentioned expressly in the KPK the regional court before granting the consent for the transfer of sentenced person should also analyse whether the decision to forward the judgment to the executing State is reasonable in the context of possible grounds for refusal, taking for example the length of the custodial sentence to be executed⁸⁰.

Principle of speciality

⁷⁹ Zielińska, Serzysko, *Przekazywanie skazanych na kary pozbawienia wolności* (n 77) 60-61.

⁸⁰ Zielińska, Serzysko, *Przekazywanie skazanych na kary pozbawienia wolności* (n 77) 53-56.

If the executing State requests a consent to prosecute the sentenced person for an offence committed prior to the surrender or to execute penalties imposed prior to the surrender, the court issues the decision with respect to the motion within 30 days (Article 611tc § 3 KPK). In that case the court applies the KPK's rules applicable to EAW (Articles 607e § 3 point 6, Article 607p, Article 607r and Article 607s § 1 and 2 KPK).

The general rule is, as in the case of EAW, that a transferred person shall not be prosecuted for any offences committed before his or her transfer other than that for which he or she was transferred. Nor shall he or she serve a penalty of imprisonment or other measures involving deprivation of liberty imposed on him in connection with such offences.

The principle of specialty protects only those persons who have been transferred to another EU Member State. It does not protect the person that has fled to the executing state⁸¹.

In deciding about the consent to prosecute the offender for an offence committed or to execute penalties imposed prior to the surrender, the Article 611tc § 3 KPK obliges the court to apply *mutatis mutandis* the grounds for refusal of execution of the EAW issued by another EU Member State.

The KPK provides also that the sentenced person who agreed to be transferred to another EU Member State may waive the protection granted by the principle of specialty. However, that provision can hardly be applied in practice. As it emphasized in the legal doctrine, if the request of the executing State is forwarded to Polish authorities it means that the person is already at the territory of the executing State. In that case the waiver is declared in front of the competent authority in the executing State. Therefore it is unclear what was the objective of the discussed provision⁸².

The decision of the regional court on issues concerning principle of specialty are not subject to appeal.

The six interviewed judges indicated that the sentenced person most frequently (or exclusively) asks for his judgment to be forwarded for execution to another EU Member State. Two judges pointed out that they had cases in which another EU Member State (Germany, Austria) initiated the procedure.

The judges are not unanimous in their answer to the question whether the sentenced person knows that he or she is going to be transferred. One of them says they generally know, another claims that they know 'in most cases' and still another one says that it is not common for sentenced persons to know.

b) The obligation to recognize foreign judgments and execute the sentence (executing state)

Law governing enforcement and adaptation of the sentence

The general rule referring to the enforcement of the sentence is that the relevant Polish legal provisions are applicable. The competent court dealing with cases concerning recognition of foreign judgments is the Regional Court in which circuit the person to be transferred resides permanently or temporarily. If it is not possible to establish jurisdiction in accordance with the principle defined above, the case will be heard by the Regional Court in Warsaw (Articles 611th § 1 and 2 KPK). If the court, to which the judgment was submitted, does not have jurisdiction to action the order, it will refer the judgment to the competent court and notify thereof an appropriate court or other authority of the issuing State.

When ruling on the enforcement of a penalty of imprisonment, the court determines the legal classification of the offence according to Polish law (Article 611tl KPK). If the penalty or measure imposed by the issuing State exceeds the statutory penalty for the offence

⁸¹ Sławomir Steinborn, 'Komentarz do art. 611tc KPK' in LK Paprzycki (ed), *Kodeks postępowania karnego. Komentarz do art. 425-673* (Wolters Kluwer 2013) 1272.

⁸² Steinborn, 'Komentarz do art. 611tc KPK' (n 81) 1274-1275.

under Polish law, the court determines the penalty or measure to be executed according to Polish law to the extent corresponding with the statutory maximum, taking into consideration the period of actual deprivation of liberty abroad and penalty or measure executed. If the court do not have documents or information necessary for the execution of a penalty in the territory of the Republic of Poland, it adjourns the hearing and addresses a competent authority of the issuing State to provide such documents or information.

The duration of the deprivation of liberty in the executing State is credited against the penalty of imprisonment imposed or served.

If the penalty consisting in the deprivation of liberty is unknown to the Polish law, the court determines that the penalty to be enforced will be the penalty of imprisonment. If the offence, in accordance with the legal classification adopted in Poland, is not punishable with the penalty of imprisonment, the penalty imposed by the issuing State is enforced, but its duration may not exceed six months.

On a motion of a competent court or other authority of the issuing State, the court provides information on the contents of Polish law applicable to the conditional release (Article 611tm § 2 KPK). If the issuing State withdraws the motion until the commencement of execution of the penalty, the judgment will not be enforced. Polish KPK do not provide the possibility (as in Article 17 FD 2008/909) to apply foreign rules concerning parole. Since the exceptions to application of Polish law in execution of the penalty has to be expressly stated in the KPK there is no possibility of applying foreign legal provisions concerning parole⁸³.

The decision whether to execute the judgement issued in EU Member State in Poland depends on whether it will allow the educational and preventive objectives of the penalty to be realised to a greater extent than abroad (Article 611 tg § 2 KPK).

The regional court acts on a motion of EU Member State. There is also a possibility that regional court on a motion of sentenced person, or *ex officio*, may address a competent court or other authority of the issuing State with the motion for the transfer of the judgment for the purpose of enforcement in Poland.

Time limits for the decision to recognize

After receiving the motion issued by a competent court or other judicial authority of the issuing State, the court is obliged to immediately initiate the enforcement of the judgment. The decision on enforcement of the judgment is issued by the Regional Court within 40 days of the receipt of the judgment and certificate. The decision taken by the court is subject to interlocutory appeal. In such a case the proceedings with respect to the enforcement of the judgment should be concluded with a final and binding judicial decision within 90 days of the receipt of the judgment and certificate. If that time limit cannot be kept, the competent court or other authority of the issuing State is notified thereof and informed of the reasons for delay and of the expected date of issue of the judgment.

Principle of speciality

In case of the enforcement of a final and binding judgment of another EU Member State the general rule is that a sentenced person cannot be prosecuted for other offences, nor he can serve a penalty of imprisonment or other measures involving deprivation of liberty imposed on him in connection with such offences. However, the KPK provides several exceptions to that rule. In that context Article 611tm § 1 stipulates that the rules concerning principle of specialty concerning EAW shall be applied accordingly (Article 607e KPK). The exceptions provided in the above-mentioned provisions fully implement the Article 18(2) of the FD 2008/909. However it is worth adding two general remarks on application of

⁸³ Sławomir Steinborn, 'Komentarz do art. 611tm KPK' in LK Paprzycki (ed), *Kodeks postępowania karnego. Komentarz do art. 425-673* (Wolters Kluwer 2013) 1337.

principle of specialty. Firstly, the principle of specialty protects sentenced person only in case of non-consensual enforcement of a final and binding judgment. Secondly, the protection is granted only when the sentenced person was transferred to Poland. The principle of specialty does not apply when the sentenced person fled to Poland or otherwise found himself or herself at the territory of Poland.

Most of the interviewed judges (Judge 1, 2, 4, 5 and 6) underlined that family ties are the most important (or even exclusive) factor in deciding about the execution of the foreign judgment in Poland.

In the opinion of the interviewed judges 2, 3, 4 and 5 the existence of circumstances justifying the motion to execute a prison sentence in Poland should be substantiated by the person filing a motion. Judge 1 underlined the court's obligation to prove relevant circumstances.

Judge 5: The Polish court *ex officio* initiates the procedure for transfer of the sentenced person if the foreigner was sentenced in Poland.

Judge 1: I think that the main reason for the transfer of sentenced person to Poland is the willingness of the other EU Member States to get rid of such people. The administrative decision on deportation is taken and in such a case the consent is not relevant.

2.4. FD 2008/947

a) Scope of application

The FD 2008/947 has been incorporated to the Polish legal system by the parliament act dated on 16 October 2011 that came into force on the 1 of January 2012. The application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions became a part of the KPK in Chapters 66h and 66i. The chapter 66h regulates the procedure involving Poland as the 'issuing state' and the parallel chapter 66i regulates the procedure involving Poland as the 'executing state'.

The probation measures and alternative sanctions in Poland as defined in Article 2 FD 2008/947 according to Article 611u KPK are as follows:

- suspended sentence – sentence for deprivation of liberty, the execution of which is conditionally suspended (*wyrok skazujący na karę pozbawienia wolności z warunkowym zawieszeniem jej wykonania*)⁸⁴
- conditional sentence – conditional discontinuation of proceedings (*warunkowe umorzenie postępowania*)⁸⁵,
- conditional release – conditional release (*warunkowe przedterminowe zwolnienie*)⁸⁶,
- alternative sanction – sentence for limitation of liberty (*wyrok skazujący na karę ograniczenia wolności*)⁸⁷ and autonomous penal measure (*samoistny środek karny*)⁸⁸

The motion to enforce the judgment regarding probation measure or alternative sanction filed by the Polish court may relate only to the Polish citizen or a foreigner (Article 611u § 1 KPK). The latter does not necessarily have to be a EU citizen. What matters is in fact a place where the offender lawfully resides, if he or she is staying in that country or declares the intention of returning there.

The motion to enforce in Poland the judgment regarding probation measure or alternative sanction may similarly relate both to the Polish citizen or a foreigner. As a rule the offender should lawfully reside on the territory of Poland (Article 611ud § 1 KPK). Nevertheless, on a motion of the appropriate court or other authority of the issuing State, the

⁸⁴ Articles 69-70 KK.

⁸⁵ Articles 66-68 KK.

⁸⁶ Articles 77-78 KK.

⁸⁷ Articles 34-35 KK.

⁸⁸ Articles 39 §§. 2-2d and 5 KK.

court may consent to the enforcement of penalty or penal measure, imposed on a offender who does not have a lawful residence in the territory of the Republic of Poland, if it will allow the educational and preventive objectives of the penalty or measure to be better achieved (Article 611ud § 4 KPK).

b) The procedure

According to Article 611u § 1 KPK Polish court acting in a capacity of a court of the “issuing state” may file a motion to enforce the judgment regarding probation measure or alternative sanction to a competent court or other authority of a EU Member State. The choice of the EU Member State where the motion is filed with is based on the offender’s lawful residence, if he or she is staying in that country or declares the intention of returning there. The motion may also be, on a motion of the accused, submitted to a EU Member State other than the State where the accused has his lawful residence, if a competent court or other authority of that State consents (Article 611u § 2 KPK). The motion may be submitted to only one executing State and may be resubmitted to another State only if the judgment has not been executed in whole or in part by the primary State (Article 611u § 3 KPK).

When filing a motion the court is acting *ex officio* and the offender is not initiating the procedure. Moreover the consent of the offender is not necessary in that case. This does not mean however that the offender cannot file a motion with the court triggering the proceedings if the court believes that the motion should be filed with the court of the EU Member State.

The Polish court submits the motion together with the copy of the judgment and a certificate enabling the correct enforcement of the judgment (Article 611u § 4 KPK). All documents must be translated into the official language of the executing State or another language indicated by that State (Article 611u § 5 KPK).

The Polish court examines the possibility of filing the motion at a hearing during which the public prosecutor, the aggrieved party, the offender, if he is staying in the territory of the Republic of Poland, and his defense counsel, if he appears, may participate. The decision of the court is not subject to interlocutory appeal.

In situations when Poland is acting in a capacity of an “executing state” the final and binding judgment is executed by the District Court in which judicial circuit the offender has a lawful residence. The judgment will be executed if in the prescribed probation period the offender is obliged:

- 1) to report at specific times to a specific authority,
- 2) to keep a specified authority informed about every change of residence, place of employment or to obtain consent for any such change,
- 3) to be or to cease being in certain communities or locations, including the ban on entering certain places or public events,
- 4) to avoid contact with specified persons or to avoid approaching specified persons,
- 5) to avoid having specified objects, which were used or are likely to be used by the sentenced person with a view to committing a criminal offence;
- 6) to provide support to a specified person,
- 7) to remedy damage caused,
- 8) to perform educational activity,
- 9) to perform supervised community service or to perform paid work,
- 10) to submit to specified restrictions and limitations with respect to the execution of profession or in professional or business activity,
- 11) to submit to medical or therapeutic treatment,
- 12) to submit to supervision on the part of probation officer, social worker or public institution, whose object of activity is to educate, prevent depravation and be responsible for sentenced persons.

The court examines the case regarding enforcement of the judgment in a hearing during which the public prosecutor, the offender if he is staying in the territory of the Republic of Poland and his defense counsel if he has appeared, have the right to participate in (Article 611ue § 1 KPK).

The court issues the decision within 30 days of the receipt of the judgment and the certificate (Article 611uf § 1 KPK). And since the decision of the court on enforcement of the judgment is subject to interlocutory appeal (Article 611uf § 2 KPK) the whole proceedings, including the review stage, should be concluded in a final manner within 60 days of the receipt of the judgment and the certificate (Article 611uf § 3 KPK).

When ruling on the enforcement of the penalty or measure, the court determines the legal classification of the offence according to Polish law. If the kind of penalty or measure or manner of fulfilling duties imposed is unknown to Polish law, the court determines the penalty, measure or duty pursuant to Polish law. The penalty or penal measure is determined on the basis of the judgment issued by a court of a EU Member State, prescribed scale of penalties for the offence under Polish law and the actual period of service of penalty, measure or fulfillment of the probation duty abroad, with differences considered in favour of the offender. If the penalty, measure, duty or probation period exceeds those provided for in the law, the court determines it at the upper level of the scale prescribed under Polish law (Article 611ue § 3 KPK).

If the judgment does not determine the penalty of imprisonment, which will be imposed on the offender should he fail to perform his duties or should conditionally suspended proceedings be resumed, the court in the decision on enforcement rules exclusively as to the duties imposed therein (Article 611ue § 4 KPK).

c) Relation to other measures

The FD 2008/947 is the first multilateral act binding Poland with regard to the transfer of probation measures between European states. Poland has never ratified the Council of Europe Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

Since the Member States may continue to apply bilateral or multilateral agreements or arrangements in force after 6 December 2008, in so far as they allow the objectives of the FD 2008/947 to be extended or enlarged and help to simplify or facilitate further the procedures for the supervision of probation measures and alternative sanctions (Article 23 para. 2 FD 2008/947) Poland is free to remain in force the currently binding agreements. Poland signed only one such agreement in 1990 with Austria⁸⁹. The agreement has a broader scope of application than FD 2008/947 since it refers not only to the probation measures but also to judgments sentencing for non-suspended penalty of imprisonment⁹⁰. This agreement was never enforced in practice with regard to the probation measures⁹¹.

According to the interviewed judges, the use of regulations allowing for transfer of probative measures and alternative sanctions is quite rare. Judge 5 admitted that he ordered a transfer of suspended sentence only once or twice in his life at most. The result of his decision was execution of this penalty in the Netherlands. Judge 6 also gave one decision on the same issue where the executing state is Latvia. However up to day the judgment is not transferred due to

⁸⁹ Umowa pomiędzy Polską a Austrią o wzajemnym wykonywaniu orzeczeń sądowych w sprawach karnych of 19 April 1990 (JL 1991, no 14, item 58).

⁹⁰ See more on the scope of the agreement in Eleonora Zielińska, Agnieszka Serzysko, *Wzajemne uznawanie orzeczeń probacyjnych* (Instytut Wymiaru Sprawiedliwości 2015) 3-4.

⁹¹ This is reported by Zielińska, Serzysko, *Wzajemne uznawanie orzeczeń probacyjnych* (n 90) 4 based on unofficial data received from the Ministry of Justice and presented in unpublished PhD Dissertation Rafał Kierzyńska, *Wzajemne uznawanie środków probacyjnych i kar alternatywnych w Unii Europejskiej* 89.

problems regarding translation of documents. Other interviewed judges confirmed that they never had a chance to encounter such cases in their practice. In the opinion of Judge 5, the lack of popularity of such mechanisms is very low, since Polish authorities may successfully execute the ordered probative measure or alternative sanction even outside of the territory of Poland.

3. Limitations on mutual recognition provided in the EAW, FD 2008/909 and FD 2008/947 as implemented in the National legal order

3.1 EAW for the purpose of executing a custodial sentence or detention order

a) Safeguards for the requested (convicted) person

Access to lawyer

As there are no special provisions on access to a lawyer during the proceedings related to EAW, the general rules provided by the KPK apply. This means that according to Article 6 KPK the sentenced person has the right to defend himself or herself, including the use of defence counsel and he or she should be informed of this right⁹².

In general the right to defence in Polish law contains two elements: right of the defendant to personally undertake all possible actions in connection with pending proceedings, which are designed to completely refute the charges or obtain a decision that reflects the degree of guilt of the offender and the right to defence in its formal aspect, i.e. right to defence counsel.

There are two forms of the right to a defence counsel:

- 1) optional defence (*obrona fakultatywna*) when a defendant can make his own decision whether to choose a defence counsel or not;
- 2) mandatory defence (*obrona obligatoryjna*) when by law a defendant must have a defence counsel during the proceedings (Article 79 § 1 and 2 and Article 80 KPK); in this case, if a defendant has not chosen a defence counsel on his or her own, the court is obliged to appoint a defence counsel for the defendant (*ex officio* defence);

The appointment of an *ex officio* defence counsel (*obrońca z urzędu*) is limited to situations in which the mandatory defence is prescribed by law and the defendant does not choose a defence counsel by his own, as well as when the defendant or suspect can prove that he or she is unable to bear the costs of defence without prejudice to his or her necessary maintenance or that of his or her family (Article 78 KPK).

The mandatory defence (*obrona obligatoryjna*) is granted to a defendant in Polish criminal proceedings in following situations (Article 79 § 1 and 2 and Article 80 KPK):

- 1) the defendant has not attained eighteen years of age,
- 2) the defendant is deaf, mute or blind,
- 3) there is a justified doubt as to whether the defendant's ability to comprehend the meaning of his or her actions or to control his behaviour was not, at the time of committing the offence, significantly reduced, or non-existent,
- 4) there is a justified doubt as to whether the condition of the defendant's mental health allows him or her to participate in the proceedings or to conduct his or her defence in an independent and reasonable manner,
- 5) if the court deems it necessary due to circumstances impeding the defence (i.e. they are an elderly person or a person who has problems with communication),
- 6) in proceedings before the regional court, if being charged with a felony.

⁹² The right to defence is also expressly stated in the Article 42(2) of the Polish Constitution, which provides, that "anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He or she may, in particular, choose defence lawyer or avail himself or herself – in accordance with principles specified by statute – of a defence lawyer appointed by the court".

As it was said above, in the case of mandatory defence, it is up to the defendant to choose the defence counsel on his own but if he does not do so, the *ex officio* defence counsel will be granted by the court.

All the judges stated that the right to a lawyer is fully respected, but they all see the problem with the quality of the service of the *ex officio* lawyers. In some courts (J1) they solve this problem by indicating which lawyer should be chosen (they have an unofficial list of lawyers specialised in EAWs). Also advocates (A1) state that there is not a lot of lawyers specialised in EAW. Advocate A1 observes also that the access to an *ex officio* lawyer should be ensured immediately at the occasion of the first action taken by the prosecutor; in practice it is done while the person is heard.

Access to documents, translation and the right to information

In every criminal case, regardless of its nature, the general provisions on translation and interpretation provided in the KPK apply (see point 1.2. a) ii).

There are no special provisions concerning Poland as the issuing state. When Poland is an executing state according to Article 6071 § 1a KPK the court when notifying of the hearing concerning the decision on surrender shall serve the EAW along with its translation submitted by the public prosecutor. It states also that if due to particular circumstances it is not possible to prepare a translation prior to the hearing, the translation shall be ordered by the court. The translation is not always obligatory as at the end this article indicates that “it is deemed sufficient to inform the person of the content of the EAW if this does not hinder the execution of their rights, including the rights listed in § 2” (i.a. right to make a statement of his/her consent to surrender).

According to NGO representative (N) in Poland the access to the information for persons being imprisoned is not sufficient. Information is formulated in formal, legal language which is hard to be understood by the prisoners. More practical information (how to start the procedure) would be useful.

As to the right to be informed Article 6071 § 4 KPK obliges the Minister of Justice to define a template of the advice of the rights vested in the person to which a EAW refers in the case of their arrest⁹³:

- the right to information about the reasons for arrest and to be listened to,
- the right to provide explanations, refuse to provide explanations or refuse to answer particular questions, it is not necessary to specify reasons for refusal and the right to make or refuse to make a statement in his/her case,
- the right to immediate contact with an attorney or legal counsel and to talk directly to him/her,
- the right to legal aid of defence counsel selected by him/her,
- the right to free assistance of translator or interpreter,
- the right to receive a copy of an arrest report and examine the case file within the scope referring to the reasons for arrest,
- the right to inform about arrest the closest person or other specified person, as well as an employer, school, university,
- the right to contact consular office or diplomatic mission of the state of which he/she is a citizen
- the right to file to court c against arrest within 7 days from detention date.

⁹³ Ministry of Justice’s website: <https://www.ms.gov.pl/pl/dzialalnosc/wzory-pouczen/> accessed 13 October 2017.

- the right to immediate release, if reasons for arrest ceased to exist, or after expiry of 48 hours from arrest, unless detained person is brought within this period to court with a motion for provisional detention
- the right to information about the content of EAW and to receive its copy together with translation and notice of court hearing in the matter of transferring and temporary arrest.
- the right to make statement in the matter of transferring and the right to grant consent for transfer and consent for prosecuting for other offences than included in the motion for transfer, and also consent for execution of a punishment consisting in deprivation of liberty or remedies consisting in deprivation of liberty for such offences (together with information that the consent may not be revoked)
- the right to file a complaint against transfer within 3 days from the order announcement date, and in the event if detained person is not brought to court session – from the order delivery date
- the right to access to any necessary medical aid.

Right to be heard

If Poland is an executing State in every case the requested person has the right to be heard by the public prosecutor. It takes place after receiving by him the EAW, but before bringing the case to the court (607k § 2 KPK).

According to all interviewed judges the right to be heard is effective and respected in Poland. The person is heard twice, by the public prosecutor and by the court, which starts with the open question “What would you like to say about your case” (J1).

Additional guarantees are provided for the cases when EAW was accompanied by the request to interrogate the prosecuted person. According to Article 607k § 5 KPK such an interrogation should be carried out before the decision on the EAW is taken and it shall be held in the presence of a person indicated in the EAW. The general provisions on legal assistance (Article 588 § 4 KPK) shall be applied. According to them the “Polish law shall be applied to procedures performed pursuant to a request from a foreign court or public prosecutor. However, if these bodies require special proceedings or some special form of assistance, their wishes shall be honoured, unless this is in conflict with the principles of the legal order of the Republic of Poland”.

b) Grounds for non-execution of an EAW for the purpose of executing a custodial sentence or detention order

Grounds for non-execution of EAW are provided for Articles 607p-607y KPK. Some provisions of Articles 607p-607y KPK relate to both categories of EAW and some only to an EAW for the purpose of executing a custodial sentence or detention order. However to have the whole picture it must be taken into account that some of the mandatory grounds of refusal listed in KPK are also provided for in Article 55 (2) and (4) of the Polish Constitution. It may create important consequences in case of collision between FD and Polish law. In case of collision between EU law and statutes the former one prevails⁹⁴. But in case of the collision

⁹⁴ Article 91(3) of the Polish Constitution: ‘If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws’.

between the FD and the Polish Constitution, according to Polish law, the later will prevail⁹⁵. According to Article 8 (1) of the Polish Constitution “The Constitution shall be the supreme law of the Republic of Poland” and the Polish Constitutional Court does not accept the supremacy of EU law over the Polish Constitution. In a judgment assessing the conformity of the Accession Treaty with the Polish Constitution, it stated that in case of a collision between provisions of the EU law and the Polish Constitution “the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland’s withdrawal from the EU”⁹⁶.

Historical background of amendments to the Polish Constitution

At the time of implementing of the FD EAW the Polish Constitution prohibited in Article 55 (1) “the extradition of a Polish citizen”. In the judgment of 27 April 2005⁹⁷ The Polish Constitutional Tribunal decided that the surrender procedure according to the EAW is understood as a form of extradition and thus the provisions of the KPK which permitted surrender of a Polish national to an EU Member State under the EAW⁹⁸ is inconsistent with Article 55 (1) of the Polish Constitution.

On 8 September 2006 the Parliament modified Article 55 (which came into force on 7 November 2006) by adding exceptions to the prohibition of extradition of Polish nationals which permitted to apply EAW. At the same time the amendment introduced the new barriers to the EAW concerning Polish citizens, not provided for the FD. In case of EAW involving Polish citizens the surrender is possible only if the offence was committed outside of the territory of Poland (§ 2 point 1) and with the requirement of double criminality (§ 2 point 2). The amendment added also to the existing prohibition of the extradition of a person suspected of the commission of a crime for political reasons but without the use of force⁹⁹, a prohibition of an extradition which would violate rights and freedoms of persons and citizens (§ 4). As this provision is of crucial importance it is worth to quote current version of Article 55 in its entirety:

“1. The extradition of a Polish citizen shall be prohibited, except in cases specified in sections 2 and 3.

1. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

- 1) was committed outside the territory of the Republic of Poland, and
- 2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

⁹⁵ Article 91(3) of the Constitution: “If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws”.

⁹⁶ Constitutional Tribunal Judgment 11 May 2005, K 18/04, JL 2005, no 86, item 744, para 13 ((text in English available at: http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf – accessed 13 October 2017)

⁹⁷ Constitutional Tribunal Judgment of 27 April 2005 No P 1/05, OTK ZU no 4/A/2005, item 42, para 5.9 (text in English available at: http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf accessed 13 October 2017)) .

⁹⁸ Article 607t § 1.

⁹⁹ It means that in case of political offences’ committed with use of force, it is possible to surrender.

2. [...]
3. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens. [...]"

There are thus four mandatory grounds for refusal stemming from the Polish Constitution – two applicable only in case of surrender of Polish citizens and two of general applicability. All four grounds were introduced to the KPK as mandatory grounds for refusal in Article 607p, when this act was amended as required by the above-mentioned decision of the Constitutional Tribunal of 27 April 2005¹⁰⁰.

Mandatory ('shall refuse')

Article 607p KPK provides for six mandatory grounds for refusal, concerning everyone (§1) and additional two, concerning only Polish nationals (§ 2).

<u>Framework Decision</u>	<u>Article</u>	<u>Polish Code of Criminal Procedure</u>	<u>Article</u>	<u>Divergences</u>
the offence is covered by an amnesty in the executing Member State	3§1	the offence referred to in the EAW is, if Polish criminal courts have jurisdiction, subject to a remission due to an amnesty	607p§1 point 1	-
final judgment has already been passed by a Member State upon the requested person in respect of the same offence – <i>Ne bis in idem</i>	3§2	final and valid judgment concerning the same criminal acts has been delivered in another country	607p§1 point 2	broadened in comparison with F.D. – includes sentences from non-EU States (in F.D. it is an optional ground)
-	-	in relation to the prosecuted person a final and valid decision on surrendering him/her to another EU Member State has been issued	607p§1 point 3	additional ground, not provided for in the F.D.
the person concerned may not be held criminally responsible by the executing State owing to his/her age	3§3	the person concerned, owing to his/her age, cannot, according to the Polish criminal law, be held liable for the acts that have led to the issuance of the EAW	607p§1 point 4	-
-	-	infringement of freedoms, human and citizen rights	607p§1 point 5	additional ground, the protection of human rights mentioned only in recital 12 of F.D.
-	-	offence committed without violence for political	607p§1 point 6	additional ground, in F.D. mentioned

¹⁰⁰ By the Act of 27 October 2006.

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		reasons		in the preamble
-	-	double criminality (in case of Polish citizens)	607p § 2	additional ground, (in F.D. provided for as optional)
-	-	Territoriality (in case of Polish citizens)	607p § 2	additional ground (in F.D. provided for as optional)
if the EAW was issued in order to execute a custodial sentence or a precautionary measure, and <u>the person is a citizen of the country of execution</u> or resides there permanently, and this country takes upon itself the obligation to execute the penalty of deprivation of liberty or the preventive measure	-	lack of consent to being surrendered expressed by the Polish national or by a person exercising his/her asylum right in the Republic of Poland in case of EAW aiming at the execution of the sentence of imprisonment or the measure involving deprivation of liberty against the person being a Polish citizen or enjoying asylum in the Republic of Poland – in such a case Poland takes upon itself the obligation to execute the penalty of deprivation of liberty or the preventive measure (art 607s § 3)	607s § 1	Additional ground in case of Polish citizens (in F.D. provided for as optional)

Optional ('may refuse')

Article 607r provides for six optional grounds for refusal (it states "The execution of the Warrant may be refused, if [...]")

<u>Framework Decision</u>	<u>Article</u>	<u>Polish Code of Criminal Procedure</u>	<u>Article</u>	<u>Divergences</u>
in one of the cases referred to in Article 2(4), the act on which the EAW is based does not constitute an offence under the law of the executing Member State	4§1	the act which is a ground for the EAW does not constitute an offence under the Polish law	607r.§ 1	concerns only non-nationals (for Polish citizens obligatory ground)
the person who is the subject of the EAW is being prosecuted in the executing Member State for the same act as that on which the EAW is based	4§2	the person involved in the EAW proceedings is also subject to criminal proceedings in Poland for the same offence	607r.§ 2	-
existence of judicial decision not to prosecute for the offence on which the EAW is based or to	4§3	existence of a final and valid decision in connection with the criminal act constituting the grounds for	607r§ 3	-

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halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings		EAW on refusal to institute, to discontinue or to conclude the proceedings		
prosecution or penalising the person concerned by the EAW is prohibited by law, and the acts providing grounds for the EAW are also subject to the jurisdiction of the country of execution	4§4	prosecution or execution of penalty not feasible by Polish law due to the limitation and the offences concerned are within jurisdiction of Polish courts	607r§ 4	narrowed in comparison to F.D.: the grounds limited to the case of time limit
issuing a valid judgment in a third country against the person concerned for the same offence	4§5	-	-	A mandatory ground for refusal – see art 607p§1 point 2
offences which have been committed in whole or in part in the territory of the executing Member State	4§7a	offences committed wholly or partially in the territory of the Republic of Poland or onboard of a Polish ship or aircraft	607r§ 5	concerns only non-nationals (for Polish citizens – obligatory ground - see Article 607p § 2)
-	-	in the country of the EAW's issuance the offence is subject to the penalty of life imprisonment or other penal measure resulting in the deprivation of liberty without the possibility of applying for an earlier release	607r§ 6	Additional ground
In case of the EAW issued for the purpose of enforcing a custodial sentence or a detention order, if the person did not appear in person at the trial resulting in the decision (with the exceptions indicated in points a-d)	4a	if the person did not appear in person at the trial resulting in the decision (with the exceptions in points 1 and 2)	607r§ 3	Introduced by the Act of 29 July 2011 ¹⁰¹
if the EAW was issued in order to execute a		lack of consent to being surrendered expressed by	607s § 2	-

¹⁰¹ JL no 191 item 1135.

custodial sentence or a precautionary measure, and the person is a citizen of the country of execution or resides there permanently, and this country takes upon itself the obligation to execute the penalty of deprivation of liberty or the preventive measure		the person which resides permanently in Poland - in such a case Poland takes upon itself the obligation to execute the penalty of deprivation of liberty or the preventive measure (art 607s § 3)		
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Conclusions

The Polish legislation contains a number of mandatory grounds for refusal not provided for in the FD.

Grounds provided for in Article 55 § 2 of the Polish Constitution run afoul of the FD, which provides for a closed list of grounds for refusal. They also seem to be contrary to the principle of non-discrimination, as they differentiate nationals and non-nationals.

According to the judges the grounds for refusal are not very often used in Poland. They happen rarely: lack of age or double criminality (J1), lack of double criminality, especially in tax and drug cases, the ongoing proceeding in Poland or that the offence was committed on the territory of Poland (J2), lack of double criminality (A1). In case of irregularities often instead of refuse the execution the judges contact with the authorities of another Member State which amend or annul EAW (J4 and J5).

c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?

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

These provisions are broad and are not limited to the specific right or freedom (it seems to cover any kind of freedoms and rights). It is not specified whether they relate to the rights guaranteed by the Polish Constitution or ECHR or EU rights. The most natural interpretation would be that they relate to the Polish Constitution, as the term used in Article 55(4) is similar to the title of Chapter 2 of the Polish Constitution¹⁰².

These grounds seem at the first glance to be contrary to the FD, because of the *numerus clausus* of grounds of the Articles 3-4a. Yet the picture is not entirely clear, considering the pending discussion on whether the protection of human rights could be a separate, overriding ground for refusal. Especially Article 1(3)¹⁰³ and the recitals 12¹⁰⁴, 13¹⁰⁵ show the importance of the protection of fundamental rights as well as the recent case law of

¹⁰² Article 55 (4) “wolności i prawa człowieka i obywatela” and Chapter 2 „Wolności, prawa i obowiązki człowieka i obywatela”.

¹⁰³ “This FD shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU”.

¹⁰⁴ “This FD respects fundamental rights and observes the principles recognised by Article 6 of the TEU and reflected in the CFR [...]”.

¹⁰⁵ “No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

the CJEU¹⁰⁶. The clarification whether the grounds of refusal indicated in Article 55 § 4 are contrary to the FD must be probably done by the CJEU.

Past violations

Polish law contains very broad provision protecting fundamental rights – the refusal of a EAW is mandatory if ‘it would infringe freedoms and human and citizens rights’ (see point 3.1 c)). It is not specified whether it concerns future or past violations, so it can be used for both cases.

There is also a separate article related exclusively to past violation occurred in the context of judgments *in absentia*. Article 607r § 3 KPK which limits the grounds of refusal of the EAW issued in order to execute the penalty ordered in judgments *in absentia*. It states that it is possible to refuse the execution also of such EAWs unless:

- a) wanted person was summoned to participate in or was notified in another manner of the date and place of the trial or session and advised that a failure to appear would not prevent the issuance of a ruling, or the wanted person had a defence counsel who was present at the trial or session,
- b) after a copy of the ruling had been served on the wanted person along with an advice of their right, time frame and manner of submission in the warrant issuing state of a motion for new court proceedings to be conducted with the participation of the wanted person in relation to the same case, the wanted person failed to file such a motion within the statutory time frame or declared that they did not object to the ruling,
- c) EWA issuing authority ensures that, immediately after transferring the wanted person to the warrant issuing state, the copy of the relevant ruling shall be delivered to that person together with the advice of the right, time frame and manner of submission of a motion for new court proceedings to be conducted with their in relation to the same case.”

The literal interpretation of Article 607r § 3 KPK suggests that if one of this scenarios occurs it is not possible to refuse the execution of the EAW issued in order to execute the penalty ordered in judgments *in absentia* (as was intended by the FD 2009/299). But it should not be forgotten that the Article 55 of the Polish Constitution provides the general ground of refusal in case of violation of fundamental rights. It is thus possible that in cases of other violations of the right to a fair trial the general provision referring to infringement of freedoms and human and citizens rights will be applicable. It has not yet been decided in case law.

Violations of procedural safeguards

As stated in point 3.1 c) Polish law contains very broad provision protecting fundamental rights – the refusal of EAW is mandatory if ‘it would infringe freedoms and human and citizens rights’. It can include the violation of procedural safeguards. But the interviews with judges showed that in case of irregularities related to EAW proceeding Polish judges instead of refusing the execution of the EAW rather contact the authorities which issued EAW and try to discuss with them the alteration or cancellation of the warrant.

Risk of future violations

As it stated in point 3.1 c) Polish law contains very broad provision protecting fundamental rights – the refusal of a EAW is mandatory if “it would infringe freedoms and human and citizens rights”. In theory it is possible to refuse the execution of the EAW if in other EU Member State there will be a risk of violation of fundamental rights (for example

¹⁰⁶ Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, judgement of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198.

inhuman or degrading treatment in prisons). But in practice Polish judges declare very high level of trust towards other EU Member States and do not verify the standard of the protection of fundamental right there. For while there are no cases implementing joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi* and *Robert Căldăraru*.

According to A1 the refusal on the ground of the breach of fundamental right rather does not happen in Poland but there are cases in opposite direction. Especially British courts often inquire them (order reports) on the conditions in prison in Poland and different aspects of the proceedings and on the basis of them refuse the execution of EAWs.

3.2. FD 2008/909

a) Safeguards for the convicted person

Access to lawyer

In cases when Poland is the issuing state (Articles 611t-611tf KPK) there are no specific provisions relating to access to lawyer. Therefore the general rules of access to lawyer in criminal proceedings as provided in KPK are applicable (compare: 3.1. a).

The abovementioned rules are thus applied in proceedings concerning the transfer of sentenced person. That person can choose a defence counsel by its own. If he or she did not do that and there were circumstances justifying mandatory defence (e.g. the sentenced person is under 18 years old) or a person filed a justified motion for a defence counsel on the basis of Article 78 KPK (compare: 3.1. a), the *ex officio* lawyer will be appointed. The court is obliged to inform the defence counsel about the date and place of court hearing concerning the execution of custodial sentence abroad.

In proceedings when Poland is an executing state (Articles 611tg-611ts KPK), apart from applying general rules mentioned above, the law provides for additional ground for appointing the defence counsel *ex officio*. According to Article 611ti § 1 KPK if an offender who is not staying on the territory of the Republic of Poland, is not assisted by a defence counsel, the president of the court competent to hear the case may appoint a defence counsel *ex officio* for him. The appointment is not obligatory. It is argued that appointment of defence counsel will be justified in particular when complicated legal issues are to be resolved in the course of proceedings¹⁰⁷.

In every case the defence counsel is appointed, the court is obliged to inform him or her about the date and place of court hearing.

All interviewed judges indicated that Polish Code of Criminal Procedure grants the sentenced persons sufficient safeguards in reference to right to information, translation and access to legal aid.

Judge 1: Right to legal aid is provided in practice at every stage of procedure. I do not see any shortcomings in that matter. The quality of legal aid is sufficient. In cases heard in the criminal department of our court the legal aid is provided by the limited number of specialized defence lawyers. They are well prepared to provide legal aid in cases involving mutual recognition of custodial sentences.

Judge 2: I am very critical about the quality of service of *ex officio* lawyers.

Judge 3: I do not recall from my practice any situations where the legal aid was poor. However I heard from other judges about situations, where the sentenced person complained about quality of service of *ex officio* lawyer.

Access to documents, translation and the right to information and opinion of the convicted person to the transfer

¹⁰⁷ Sławomir Steinborn, 'Komentarz do art. 611ti KPK' in LK Paprzycki (ed), *Kodeks postępowania karnego. Komentarz do art. 425-673* (Wolters Kluwer 2013) 1297-1298.

The KPK does not contain any specific provisions concerning access to documents and translation referring to proceedings concerning execution of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, both in cases Poland is issuing and executing state. In that case the general rules provided in KPK applies.

NGO representative (N): The sentenced persons do not always have access to information about their rights, access to relevant legislation. The access to information differs depending on whether the person is in detention facility for the first time and if he/she speaks Polish. The information that the sentenced persons get usually concern the rights they have, but not how they may claim rights in practice. Sentenced persons get mainly information about the legal provisions, without clear information about how the procedure looks like and what to do at each of its stage. In the detention facility the main source of information about rights are other sentenced persons. The prison staff is also a source of information. If a lawyer represents someone, then the latter one serves as such a source. The sentenced persons address themselves for information also to NGOs. The awareness of rights among sentenced persons is constantly growing.

Article 156 KPK governs the access to documents in Polish criminal proceedings. During court proceedings, access to case materials is almost unlimited for its participants (Article 156 § 1 KPK). The defendant as well as his defence counsel does not need to provide any justification to get an access to the document and can review the court files upon their request. Moreover, at the request of the accused or his defence counsel, paid for photocopies of case file documents can be obtained and the photocopies made by them are free of charge (Article 156 § 2 KPK). It is also possible to obtain the certified copies of case files in cases of justified need upon the decision of the court president (or other judge executing his duties) or a court referenda (Article 156 § 3 KPK). Some restrictions with regard to access to court files are applied in case of the danger to secret information classified as ‘confidential’ or ‘strictly confidential’ being disclosed. In such cases the files may be reviewed and copies and photocopies made only in accordance with the restrictions imposed by the president of the court or by the court itself (Article 156 § 4 KPK). As a rule, the certified copies or photocopies may not be issued unless the law provides otherwise.

The access to translated documents and interpreter in all criminal proceedings including during the proceedings regarding execution of custodial sentences, is governed by Article 72 KPK. The law provides that the defendant (in case of execution of custodial sentence the sentenced person) who does not have a sufficient command of Polish is entitled to the assistance of an interpreter (Article 72 § 1 KPK). Such assistance is provided free of charge. An interpreter should be summoned to assist in all procedures involving the participation of the sentenced person. That means that throughout the hearing held before the Polish court (both when Poland is issuing and executing state) the interpreter will be always present to assist the sentenced person if he or she is present during proceedings. Moreover, at the request of the sentenced person or his or her defence counsel, the interpreter should also be summoned when the sentenced person needs to communicate with his lawyer in connection with a procedure in which the sentenced person is entitled to participate (Article 72 § 2 KPK). That means that even outside of the courtroom the assistance of the interpreter to facilitate communication between sentenced person and defence counsel is granted free of charge.

Moreover, a court decisions in reference to transferring a judgment or executing foreign one must be served upon the defendant together with a translation (Article 72 § 3

KPK). If the defendant so agrees and if the appeal or interlocutory appeal against a decision or the judgment that concludes the proceedings is not admissible, it is sufficient to announce the translated judgment or decision orally. That option may only be used when Poland is an issuing state.

Judge 4: The quality of translations differs from case to case.

Judge 1: It seems to me that the quality of translations is very good. We have a number of very good translators, limited but excellent. I often read foreign translations and often there are of bad quality.

Judge 5: Our translations are very good.

The defendant in criminal proceedings is granted a general right to information. The provisions referring to execution of custodial sentences do not expressly provide for any information that must be notified to the defendant with regard to that specific type of proceedings. However, according to Article 16 § 2 KPK all authorities conducting the proceedings, if the need occurs, has an obligation to inform the parties to the proceedings of their rights and duties, even if it is not explicitly required by the law. If, in view of the circumstances, the instruction was indispensable and the authority failed to give such an advice or gave wrong advice that may not result in any adverse consequences to the participant of the proceedings.

In cases in which Poland acts as an issuing state, the convicted person who stays on the territory of the Republic of Poland may participate in the court hearing (Article 611tb § 1 KPK). He or she is informed about the date and place of the hearing. According to Article 611tb § 2 KPK the court enables a convict staying on the territory of the Republic of Poland, to present his position with respect to the motion to surrender orally or in writing. If the consent of the accused for surrender is required, the court is obliged to take the declaration in this respect from the convict staying on the territory on the Republic of Poland. According to the Article 611tb § 4 KPK if the convicted person is staying on the territory of the Republic of Poland, the court notifies him of the submission of the judgment to execution in another EU Member State. In the remaining cases, the notification is forwarded to the executing State together with the certificate and the relevant judgment.

In cases Poland acts as an executing state, the sentenced person may orally or in writing express his consent for the transfer (where applicable) or make a declaration of waiver of the specialty rule protection, if the consent or declaration has not been expressed in the issuing State. During the court hearing the sentenced person has a right to make any statement concerning the case he or she wishes.

Right to be heard

The provisions of the Polish KPK guarantee a right to be heard at the court hearing both in cases Poland is an issuing and executing state (for details see ii. above).

b) Consent of the executing state

In cases where Poland is an issuing state and the FD 2008/909 demands consent of the executing state (Article 4(1)(c)), before submitting the motion to execute Polish custodial sentence, the court addresses a competent court or other authority of EU Member State, asking for the consent to forward the judgment for the purpose of enforcement.

In cases Poland is an executing state, on a motion of a competent court or other authority of the issuing State, the court may consent to the execution of the penalty of imprisonment, imposed on the offender who is not a Polish citizen or does not reside

permanently or temporarily in the territory of the Republic of Poland, if it will allow the educational and preventive objectives of the penalty to be realised to a greater extent.

c) Interplay with the FD on the EAW

Poland implemented Article 25 of the FD 2008/909 by amending the provisions in the KPK concerning EAW. According to Article 607s § 5 KPK in case of a penalty that is to be executed in Poland on the basis of implemented Articles 4(6) or Article 5(3) of the FD 584/2002, it is executed pursuant to Polish law. The provisions of Chapter 66g KPK regulating the execution of custodial sentences apply accordingly.

d) Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a convicted person)

The grounds for refusal to execute a foreign judgment are enlisted in Article 611tk KPK. There are two kinds of grounds for refusal: mandatory and optional.

According to Article 611tk § 1 KPK the court is obliged to refuse the motion to execute a foreign judgment if:

- 1) the act to which this judgment relates, does not constitute an offence under Polish law (unless the act does not constitute an offence because Polish law does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State),
- 2) the judgment forwarded for the enforcement concerns the same offence committed by the same person, with respect to which criminal proceedings have already been finally concluded in a EU Member State and a judgment imposing a penalty of imprisonment has already been executed,
- 3) the offender does not consent to the transfer, unless:
 - a. he is a Polish citizen and he resides permanently or temporarily in the territory of the Republic of Poland,
 - b. a decision on expulsion or deportation to the territory of the Republic of Poland was issued against him,
 - c. he has fled to the territory of the Republic of Poland for fear of criminal proceedings conducted in the issuing State or duty to serve the penalty,
- 4) the offender may not be held criminally responsible for the acts on which the judgment is based owing to his age,
- 5) this would violate human and citizen's rights and freedoms,
- 6) the execution of the penalty is connected with the application of a therapy or other measures unknown to the law,
- 7) the offender is not a Polish citizen, unless conditions mentioned in Article 611tk § 4 KPK are fulfilled (Article 611tk § 4 KPK states that the court may consent to the transfer for the purpose of enforcement of the judgment, issued against the offender who is not a Polish citizen or does not reside in the territory of the Republic of Poland either permanently or temporarily, if due to family or particular personal circumstances of the offender, the transfer of the judgment will allow the educational and preventive objectives of the penalty to be better realized).

In the cases provided for in point 2, 3 and 6 the court notifies a competent court or other authority of the issuing State of the possibility of refusing to enforce the judgment before rendering the decision on the enforcement of judgment.

The judicial authority may refuse (optional grounds) on the basis of Article 611tk § 3 KPK to execute the foreign judgment, if:

- 1) despite the motion of the court to supplement the information within a fixed time limit, the certificate has not been enclosed to the judgment or the certificate is incomplete or manifestly does not correspond to the judgment,

- 2) under Polish law, the statute of limitations on the enforcement of the penalty has expired and the offence in question falls under the jurisdiction of Polish courts,
- 3) the offender does not reside in the territory of the Republic of Poland either permanently or temporarily, unless he was expelled to Poland or conditions mentioned in Article 611tk § 4 KPK are fulfilled (Article 611tk § 4 KPK states that the court may consent to the transfer for the purpose of enforcement of the judgment, issued against the offender who is not a Polish citizen or does not reside in the territory of the Republic of Poland either permanently or temporarily, if due to family or particular personal circumstances of the offender, the transfer of the judgment will allow the educational and preventive objectives of the penalty to be better realized),
- 4) from the contents of the certificate attached to the judgment it results that the judgment was passed *in absentia*, unless:
 - a. the offender was summoned to participate in the proceedings or otherwise notified of the time and place of the trial or hearing and instructed that failure to attend does not impede the issue of the judgment,
 - b. a defence counsel of the offender attended the hearing or trial,
 - c. after the judgment was served on the offender together with the advice on his rights, the time limit and manner of submitting of a motion for conducting new court proceedings in the same case and with his participation in the issuing State, the offender has failed to submit such a motion within a prescribed time limit or declared that he does not object to the judgment,
- 5) the judgment relates to an offence, which under Polish law, was committed in the territory of the Republic of Poland or on a Polish aircraft or vessel,
- 6) on the day, when the judgment was received, the remaining penalty is shorter than six months of deprivation of liberty,
- 7) the offender is not subject to the jurisdiction of Polish criminal courts or a consent for prosecution has not been granted, although it is required,
- 8) the offence, to which the judgment related, would be covered by amnesty if fell under the jurisdiction of Polish criminal courts,
- 9) the authority of the issuing State has not consented for the prosecution of the offender for an offence other than the one, which constituted grounds for surrender, or for execution of the penalty of imprisonment imposed on the offender for another offence.

In the cases provided for in point 1, 2, 4, 5 and 8, the court notifies a competent court or other authority of the issuing State of the possibility of refusing to enforce the judgment before rendering the decision on the enforcement of judgment.

In cases the execution of the judgment issued against the offender who is not a Polish citizen or does not reside in the territory of the Republic of Poland either permanently or temporarily, the consent to execute the judgment in Poland can be given by competent regional court if due to family or particular personal circumstances of the offender, the transfer of the judgment will allow the educational and preventive objectives of the penalty to be better realised.

In accordance with Article 7(4) of the FD, the Republic of Poland declared that it will not apply Article 7(1) of the FD¹⁰⁸. Therefore in each case Poland is an executing state the double criminality condition is verified. According to Article 611tk § 1 KPK the court is obliged to refuse the motion to execute a foreign judgment if the act to which this judgment relates, does not constitute an offence under Polish law (unless the act does not constitute an

¹⁰⁸ Council Document 12869/1/16 of 4 November 2016 on Declarations under Article 7 (4) and Article 28 (2) of FD 2008/909 [2016] <http://data.consilium.europa.eu/doc/document/ST-12869-2016-REV-1/en/pdf> accessed 13 October 2017. Another 11 Member States made the same reservation (i.a. the Netherlands and Romania).

offence because Polish law does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State).

e) What role do (possible) fundamental rights violations have in the in the FD 2008/909?

Past violations

Past violations may, at least theoretically, be taken into consideration during the procedure regulated by FD 2008/909 and result in refusal to execute the judgment issued in another EU Member State.

Polish KPK in Article 611tk § 3 point 4 provides that the judicial authority may refuse to execute the foreign judgment, if from the contents of the certificate attached to the judgment it results that the judgment was passed *in absentia*, unless:

- a) the offender was summoned to participate in the proceedings or otherwise notified of the time and place of the trial or hearing and instructed that failure to attend does not impede the issue of the judgment,
- b) a defence counsel of the offender attended the hearing or trial,
- c) after the judgment was served on the offender together with the advice on his rights, the time limit and manner of submitting of a motion for conducting new court proceedings in the same case and with his participation in the issuing State, the offender has failed to submit such a motion within a prescribed time limit or declared that he does not object to the judgment.

That ground of refusal can be perceived as a one designed to minimise the possibility of executing judgment passed with violation of one of the fair trial rights, which is a right to participate at trial.

Apart from the abovementioned ground for refusal of execution of foreign judgment there is also a very general and obligatory ground for refusal, which is regulated in Article 611tk § 1 point 5 KPK. It provides that the execution of judgment in Poland would violate human and citizen's rights and freedoms. Although it may seem that this provision refers exclusively to future violations, it is understood in Polish legal doctrine as referring primarily to past violations. The violations of the right to fair trial before passing a judgment in another EU Member State that is to be recognized in Poland are given as the example of such violations¹⁰⁹. However, as it is correctly emphasized, one need to remember about the mutual trust principle as a basis for EU cooperation in criminal matters. Therefore the discussed ground for refusal do not oblige the court to conduct a thorough investigation in each case on how the fair trial rights were safeguarded in criminal proceedings conducted in another EU Member State. It is presumed that all the standards of fair proceedings are preserved if the judgment was passed in one of the EU Member State¹¹⁰.

The other scenario that is analysed in the legal doctrine referring to past violations is a situation where there are objective reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. In that case the Article 611tk § 1 point 5 KPK can also be applied. However, similarly as in the case of fair trial rights violations, the court dealing with motion to execute foreign judgment usually does not verify the possible discrimination in every case. The principle of mutual trust allows to assume that in general such situations do not occur. The situation changes however if there are reasonable grounds to believe that such a discrimination took place. In that case the court should verify that matter.

¹⁰⁹ Sławomir Steinborn, 'Komentarz do art. 611tk KPK' in LK Paprzycki (ed), *Kodeks postępowania karnego. Komentarz do art. 425-673* (Wolters Kluwer 2013) 1317.

¹¹⁰ Steinborn, 'Komentarz do art. 611tk KPK' (n 109) 1316-1318.

Apart from the abovementioned there are no other express provisions in Polish law, which anyhow, directly or indirectly, refer to past violations that took place during criminal procedure resulting in judgment that is to be executed in Poland. Having searched the existing electronic databases, the authors can conclude that there is also no available case-law concerning human rights violation as a ground for refusal of execution of a judgment passed in another EU Member State.

Violations of procedural safeguards

In case of violations of procedural safeguards in the course of proceedings concerning execution of foreign judgment imposing custodial sentence, the only possible remedy is to appeal the decision given by the court. However the relevant provisions of the Polish KPK demand that the violation of the procedural law will be established only “if it might have influenced the content of the appealed ruling”. Therefore, minor violations might not be considered as influential enough to overturn the decision of the court. In case the decision of the court has been successfully challenged the appellate court reverses the contested first instance ruling and remand a case for retrial to the first instance court.

Risk of future violations

Article 611tk § 1 point 5 KPK provides that the court is obliged to refuse to execute the judgment if its execution in Poland would violate human and citizen's rights and freedoms. That provision may be understood as referring to possible future violations of human rights. The example given in the legal doctrine concern the violation of the prohibition of torture, inhuman or degrading treatment in respect of the prison conditions¹¹¹. However, it seems highly unlikely that Polish court decides to refuse the execution of judgment in Poland justifying that with the poor conditions in detention facilities. In fact neither the conducted interviews nor any scientific research concerning execution of foreign judgments¹¹² indicate that such a situation occurred, even when Poland suffered systemic problem with overcrowding in prisons. The reason might be that a decision of the court refusing to execute judgment would be in fact a manifest lack of confidence in the functioning of Polish penitentiary system and observance of legal rules governing the execution of custodial sentences, which the court most probably would not be willing to express. Moreover, even though Polish penitentiary system experiences various difficulties, one cannot say that executing a sentence in Poland must signify that in each case a person deprived of liberty will be subjected to inhuman or degrading treatment.

On the other hand a possible scenario, especially in the light of the recent case-law of the CJEU (cases *Pál Aranyosi* C-404/15 and *Robert Căldăraru* C-659/15), is that in case Poland is an issuing state, the forwarding of the judgment for execution will be denied if the Polish court establishes that execution of the judgment in other EU Member State might lead to violation of fundamental human rights. Although there is no explicit provision in Polish law forbidding forwarding the judgment for execution, it could be concluded of the systemic interpretation of the FD 2008/909, which similarly as the FD EAW, emphasis in Article 3(4) that the FD shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU. In practice, the abovementioned situation is possible only in cases where the initiative to forward the judgment for execution to a different EU Member State comes from that state or the sentenced person. However, taking under consideration, as revealed in the interviews, that Polish judges treat the mutual trust principle as an axiom, the above-mentioned possibility of denying transfer because of the treat of human rights violations seems rather improbable.

¹¹¹ Sławomir Steinborn, ‘Komentarz do art. 611tk KPK’ (n 109) 1317.

¹¹² Zielińska, Serzysko, *Przekazywanie skazanych na kary pozbawienia wolności* (n 77).

Scientific research¹¹³ and interviews did not reveal any cases in which the transfer was refused because of the possible future violations of human rights.

None of the interviewed judges even encountered a decision refusing to accept the transfer of sentenced person because of occurred or possible violation of human rights.

However the judges were in favour of the existence of a general ground of refusal of execution of transfer order in case of breach of fundamental rights in another Member States.

3.3. FD 2008/947

a) Safeguards of the convicted person

Access to lawyer

In cases when Poland is the issuing state the general rules of access to lawyer in criminal proceedings as provided in KPK applies (compare 3.1. a).

In proceedings when Poland is an issuing state regulated in Chapter 66h KPK (Articles 611u-611uc KPK) there are no additional regulations relating to the right to a defence lawyer. Only in Article 611uc is provided that the defence lawyer can be present at the hearing before the Polish court. That means that only general provisions regarding appointment of defence lawyers *ex officio* regulate the appointment of the defence lawyer in this type of proceedings.

On the contrary, in proceedings when Poland acts in the capacity of an executing state, regulated in Chapter 66i KPK (Articles 611ud-uj KPK) the law provides for additional ground for appointing the defence counsel *ex officio*. According to Article 611ue § 1 KPK if an offender who is not staying in the territory of the Republic of Poland, is not assisted by a defence counsel, the president of the court competent to hear the case may appoint a defence counsel *ex officio* for him. It is argued that appointment of defence counsel will be justified in particular when complicated legal issues are to be resolved in the course of proceedings¹¹⁴.

ii. Access to documents, translation and the right to information

Neither Chapter 66h nor 66i of the KPK provide specific regulations regarding access to documents, translation and the right to information in on enforcement of the judgment or decision regarding probation measure or alternative sanction. Therefore in proceedings in which Poland is the issuing or executing state the general rules provided in KPK applies (compare 3.2. a).

The access to translated documents and interpreter in all criminal proceedings including during the proceedings regarding execution of probation measures and alternative sanctions, is governed by Article 72 KPK (compare 3.2 a). That means that throughout the hearing held before the Polish court deciding either to file a motion to enforce a judgment in other state (Article 611uc KPK) or to execute a foreign court's judgment (Article 611ue § 1 KPK) the interpreter will be always present to assist the defendant if defendant is present during proceedings. Moreover, at the request of the defendant or his or her defence counsel, the interpreter should also be summoned when the accused needs to communicate with his lawyer in connection with a procedure in which the accused is entitled to participate (Article 72 § 2 KPK). That means that even outside of the courtroom the assistance of the interpreter to facilitate communication between defendant and defence counsel is granted to the defendant free of charge.

Moreover, every decision and judgment that can be contested in the form of appeal or interlocutory appeal or that concludes the proceedings must be served upon the defendant

¹¹³ Zielińska, Serzysko, *Przekazywanie skazanych na kary pozbawienia wolności* (n 77).

¹¹⁴ Sławomir Steinborn, 'Komentarz do art. 611ti KPK' in LK Paprzycki (ed), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX 2015) para 4.

together with a translation (Article 72 § 3 KPK). If the defendant so agrees and if the appeal or interlocutory appeal against a decision or the judgment that concludes the proceedings is not admissible, it is sufficient to announce the translated judgment or decision orally.

The defendant in criminal proceedings is granted a general right to information. In particular this right is guaranteed extensively during the preliminary stage of criminal proceedings (Article 300 KPK) and when arrest (Article 244 KPK) or detention on remand (Article 263 KPK) are made. The provisions referring to transfer of probative measures and alternative sanctions does not provide for any additional information that must be notified to the defendant with regard to that specific type of proceedings.

Right to be heard

There is no formal obligation to hear a person before the decision on transfer the judgment or decision will be made. However the person concerned has a right to be present during the hearing if he or she remains on the Polish territory (Article 611uc and 611ue § 1 KPK). This means that if the person concerned will be willing to speak during the hearing he or she will be heard. In fact in case of transferring the judgment or decision from Poland to another EU Member State if the person still remains in Poland the person will be heard to establish his or her intent to reside in that other state (Article 611u § 1 KPK). This must be done since the intent to reside in the other state is one of the requirements to make a transfer.

J1: It happens frequently that the citizen has no legal awareness. Let's assume that a part of the conviction is the police supervision. Such person leaves to work outside of the country and his or her sentence cannot be executed. Because of that EAW may be issued. But it would make more sense if the sentence was transferred. And then such person is in London and Liverpool leave no stone unturned. Hires a counsel there and here... In my opinion this is the case more for the curator. We must educate curators. Who should tell the convict if not curator?

In case of execution of judgment to Poland, the person most likely will be already residing in Poland since the formal requirement of the decision is the residency in Poland (see Article 611ud § 1 KPK)¹¹⁵. If the concerned person is deprived of liberty on the Polish territory he or she must be brought to the hearing unless the right to be present has been waived by the concerned person¹¹⁶.

A1: I had a case of young man, who was convicted and whose sentence was suspended. The suspension was connected with the counselling as well as obligation to pay remedies and left the country. The decision to execute the penalty was issued. As well as EAW. The penalty to which this person was sentenced was just 2 years of prison. The actions that we have undertaken in Poland focused on repealing the decision to execute the penalty. And it eventually happened in the court of second instance. As a result the EW was automatically repealed.

b) Double incrimination

¹¹⁵ The execution of judgment must be refused if the offender is not staying in the territory of Poland, unless there are grounds to believe that he will return thereto (Article 611ug § 1 point 2 KPK).

¹¹⁶ Sławomir Steinborn, 'Komentarz do art. 611ue KPK' in LK Paprzycki (ed), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX 2015) para 3.

On 13 March 2012 Poland made a declaration in accordance with Article 10 (4) of the FD that will not apply Article 10 (1) of the FD 2008/947¹¹⁷.

Polish law provides for mandatory and optional grounds for refusal in accordance with Article 11 of the FD 2008/947. According to Article 611ug § 1-2 KPK the Polish court is obliged to refuse recognition of judgment or decision under following grounds:

- 1) the act, with relation to which the judgment was delivered, is not an offence under Polish law. This provision does not apply if the mentioned act does not constitute an offence due to the lack or different regulations regarding relevant fees, taxes, duties or rules of foreign exchange trading in Polish law
- 2) the offender is not present on the territory of the Republic of Poland, unless there are grounds to believe that he will return thereto.

According to Article 611ug § 3 KPK the Polish court, upon its discretion, may refuse to recognize judgment or decision under if:

- 1) despite the motion of the court to supplement the information within a fixed time limit, the certificate referred to in Article 611ud § 2 KPK¹¹⁸ has not been enclosed to the judgment or the certificate is incomplete or manifestly does not correspond to the judgment;
- 2) the judgment transmitted for the enforcement concerns the same offence of the same person, with respect to which criminal proceedings have already been finally concluded in a EU Member State and a judgment imposing a conditional penalty of imprisonment or an autonomous penalty or measure non involving deprivation of liberty or a fine has already been executed,
- 3) under Polish law, the statute of limitations on the enforcement of the penalty has expired and the offence in question falls under the jurisdiction of Polish courts,
- 4) the judgment relates to an offence which, under Polish law, was committed in the territory of the Republic of Poland or on a Polish aircraft or vessel,
- 5) the offender may not be held criminally responsible for the acts on which the judgment is based owing to his age,
- 6) the offender was granted immunity, due to which it is impossible to supervise the fulfillment of duties imposed upon him,
- 7) from the contents of the certificate referred to in Article 611ud § 2 KPK it results that:
 - a) the offender was summoned to participate in the proceedings or otherwise notified of the time and place of the trial or hearing and instructed that failure to attend does not impede the issue of the judgment,
 - b) the offender was assisted by a defense counsel, who attended the hearing or trial,
 - c) after the judgment was served on the offender together with the instruction on his rights, the time limit and manner of submitting of a petition for conducting new court proceedings in the same case and with his participation in the issuing State, the offender has failed to submit such a petition within a prescribed time limit or declared that he does not object to the judgment,
- 8) the judgment pertains exclusively to the duties other than those defined in Article 611ud § 1 KPK or it was transmitted despite the fact that the conditions stipulated in Article 611u KPK have not been fulfilled,
- 9) the offence, to which the judgment relates, would be covered by amnesty if fell under the jurisdiction of Polish criminal courts,

¹¹⁷ Declaration available through European Judicial Network <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=715> accessed 13 October 2017.

¹¹⁸ This is the certificate referred to in Article 6 (1) FD 2008/947.

10) the judgment imposes a measure connected with medical treatment non-existent in the law,

11) the remaining period of execution of duties imposed is shorter than six months.

The Polish law does not provide for necessity to obtain consent of the person concerned while making decision on transfer of a person or recognition of a judgment or decision. What matters is the residency of that person or her intent to reside in the state where the judgment or decision is about to be transferred¹¹⁹. If the concerned person moved to the state where the transfer is about to take place, the intent of residing in that state is presumed. However, in situation when the person resides in Poland the transfer of the decision or judgment will be dependent on that person's statement of intent.

It must be noted, that other study showed that in all 14 analyzed cases in which Poland was the issuing state, it was the concerned person that initiated proceedings by requesting forwarding judgment to another state¹²⁰. Therefore in every analyzed case, the consent was obtained even though formally it is not necessary.

According to Article 611ue § 3 KPK, the penalty or penal measure is determined on the basis of the judgment issued by a court of an EU Member State, prescribed scale of penalties for the offence under Polish law and the actual period of service of penalty, measure or fulfillment of the probation duty abroad, with differences considered in favour of the offender. If the penalty, measure, duty or probation period exceeds those provided for in the law, the court determines it at the upper level of the scale prescribed under Polish law.

On 13 March 2012 Poland made a declaration¹²¹ in accordance with Article 14 (3) of the FD 2008/947 that as an executing State it will refuse to assume the responsibility provided for in Article 14(1)(b) and (c) FD 2008/947:

(a) in cases relating to an alternative sanction, where the judgment does not contain a custodial sentence or measure involving deprivation of liberty to be enforced in case of non-compliance with the obligations or instructions concerned;

(b) in cases relating to a conditional sentence.

The declaration of Poland is not broader than Article 14 (3) FD 2008/947. In fact is narrower not containing the third ground provided in Article 14 (3) (c)¹²². According to Article 611ue § 4 KPK if the judgment does not determine the penalty of imprisonment, which will be imposed on the offender should he fail to perform his duties or should conditionally suspended proceedings be resumed, the court in the decision on enforcement rules exclusively as to the duties imposed therein.

The justification of making the declaration was based on belief that imposing the substitute sanction of penalty or resuming of conditionally discontinued proceedings in a different legal regime that of the state that undertook the primary ruling would lead to the adverse effect which would be the concurrency of legal regimes¹²³.

Between 1 January 2012 and 31 March 2015 in Poland only three cases involving request from other EU states for execution of judgment with relation to FD 2008/947 took

¹¹⁹ Article 611u § 1 KPK.

¹²⁰ Zielińska, Serzysko, *Wzajemne uznawanie orzeczeń probacyjnych* (n 90) 49.

¹²¹ Declaration available through European Judicial Network <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=715> accessed 13 October 2017.

¹²² Article 14 (3) (c) FD 2008/947 reads as follow: In cases where the judgment relates to acts which do not constitute an offence under the law of the executing State, whatever its constituent elements or however it is described.

¹²³ This justification was presented in the draft of the amendments to the KPK incorporating FD 2008/947 into Polish legal system – *Uzasadnienie projektu ustawy o zmianie ustawy Kodeks postępowania karnego i niektórych innych ustaw*, Druk no 4583/VI of 17 August 2011, 62.

place¹²⁴. The requests were received from Austria (III Kop 136/14), Germany (IV Kop 212/12) and The Netherlands (IV Kop 214/12). They all involved measures involving deprivation of liberty, the execution of which was conditionally suspended. In two cases the judgment was recognized and executed and in one case the proceedings were discontinued for unreported reasons.

c) What role do (possible) fundamental rights violations have in the FD 2008/947?

It does not seem that the fundamental rights violations or possible fundamental rights violations play any role with regard to FD 2008/947. The Polish law does not provide for any specific regulation that allows for refusal of recognition and enforcement because of violation of fundamental rights has occurred in the issuing country. Nor it provides for the possibility of refusing recognition and enforcement of a judgment or suspension thereof due to a violation of procedural safeguards in the course of the mutual recognition proceedings.

To sum up

In Poland the fundamental rights being the subject of the study - the prohibition of torture and inhuman or degrading treatment and punishment, the right to fair trial and the right to family life are constitutionally recognised principles protected by the Constitution, international treaties and sometimes laws. There are some doubts as to the extent of the right to the fair trial but even though the Polish Constitution does not refer to it explicitly, it also is seen to be generally rooted in Article 45(1) of the Polish Constitution, which provides that “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”.

However in last years there were some problems with violation of some of them in individual cases. The case-law of the ECtHR indicates that most frequent have been overcrowding in Polish prisons. In two judgments of 2009, the overcrowding was qualified by the ECtHR as a structural problem of Polish penitentiary system. As to the right to family life it is worth to mention here that Polish law limits the notion of marriage to the heterosexual couples and does not provide for registered partnerships. From the other side some Polish statutes accord certain rights to persons being in cohabitation (inter alia Article 115 § 11 KK). There is a recent trend to cover by these notions also same sex persons, so it can be a sign of changes in the Polish law.

In Poland the EAW and decisions on transfer of judgments and probation measures are adopted by the courts. But judges do not specialize in transnational criminal cases. Every judge within the Criminal Department of the Regional Court or Court of Appeals may hear all types of cases both domestic and transnational. Some interviewed judges and advocates reported, that an informal specialization exists based on the practical experience of some judges. The interviews showed very interesting phenomenon, contrary for example to Dutch one, that judges in Poland have very high level of trust towards the judiciary and the protection of fundamental rights by other Member States. However they often feel distrust from certain other Member States, especially the United Kingdom

As to three FDs the main observations is that Poland implemented FD EAW adding new grounds of refusal and changing the character of some of them (from facultative to obligatory). Polish law contains very broad provision protecting fundamental rights both in

¹²⁴ According to statistical data received upon request from the Polish Ministry of Justice on 3 November 2016 (DSF-II-0320-222/16) no cases involving execution of judgments delivered in other EU states regarding FD 2008/947 were reported. However, independent study shows that such cases took place (See Zielińska, Serzysko, *Wzajemne uznawanie orzeczeń probacyjnych* (n 90) 60). Therefore, information provided in this study is based on the mentioned report.

the law and the Constitution – the refusal of EAW is mandatory if ‘it would infringe freedoms and human and citizens rights’. It can include the violation of procedural safeguards. But the interviews with judges showed that in case of irregularities related to EAW proceeding Polish judges instead of refusing the execution of the EAW rather contact the authorities which issued EAW and try to discuss with them the alteration or cancellation of the warrant.

As to the FD 2008/909 according to the interviewed judges the sentenced person most frequently (or exclusively) asks for his judgment to be forwarded for execution to another EU Member State. Moreover that family ties are the most important (or even exclusive) factor in deciding about the execution of the foreign judgment in Poland.

The research has shown that the use of regulations allowing for transfer of probative measures and alternative sanctions is quite rare. One of the possible explanations is that the lack of popularity of such mechanisms is very low, since Polish authorities may successfully execute the ordered probative measure or alternative sanction even outside of the territory of Poland

All the interviewed judges stated that the right to a lawyer in Poland is fully respected, but they all see the problem with the quality of the service of the *ex officio* lawyers. In some courts they solve this problem by indicating which lawyer should be chosen. According to all interviewed judges the right to be heard is effective and respected in Poland, as the person is heard twice –by the prosecutor and the court. According to NGO representative in Poland the access to the information for persons being imprisoned is not sufficient. Information is formulated in formal, legal language which is hard to be understood by the prisoners. More practical information (how to start the procedure) would be useful.