

**“DUAL LEGAL REPRESENTATION” OF A REQUESTED
PERSON IN EUROPEAN ARREST WARRANT PROCEEDINGS –
REMARKS FROM THE POLISH PERSPECTIVE**

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ABSTRACT

This paper focuses on the question whether Polish law offers an adequate legal framework for dual representation, as required by Article 10 of the EU Directive 2013/48 and Article 5 of EU Directive 2016/1919. It explores both perspectives: dual legal representation in proceedings concerning execution of EAW conducted by Polish authorities as well as the right to appoint a lawyer in Poland by the requested person in a case where the EAW is issued by the Polish authorities. The scope of the ensuing analysis is confined to EAWs issued for prosecution of the requested person. Although both above mentioned provisions of EU Directives have not been transposed into Polish national law, their direct application may ensure full exercise of the requested person's right to dual representation. Thanks to the fact that, in Poland, the requested person is treated as a quasi-defendant in criminal proceedings, the Code of Criminal Procedure offers a legal framework allowing for appointment of a defence lawyer in Poland as the executing state.

Key words: European arrest warrant, right to defence, “dual representation”, Directive 2013/48

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1. INTRODUCTION

In accordance with Article 10 para. 1 of the Directive 2013/48/EU of the European Parliament and the Council¹, the requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European Arrest Warrant. Further on, the same Article (in its para. 4) provides for the right of the requested person to appoint a lawyer in the issuing Member State. Thus, although with great resistance of the Member States², the EU Directive instituted the right to “dual legal representation” of the requested person, meaning representation in both interested states, in the proceedings concerning execution of the European Arrest Warrant.

This paper focuses on the question whether Polish law offers an adequate legal framework for dual representation, as required by Article 10 of Directive 2013/48 and Article 5 of Directive 2016/1919³. It explores both perspectives: dual representation in proceedings concerning execution of EAW, i.e. in the course of proceedings conducted by Polish authorities as executing judicial authorities (section 2 of the paper), as well as the right to appoint a lawyer in Poland by the requested person in a case where the EAW is issued by the Polish authorities (section 3 of the article). The scope of the ensuing analysis is confined to EAWs issued for prosecution of the requested person.

¹ Directive of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1-12, hereinafter referred to as “Directive 2013/48” or “the Directive on access to a lawyer”.

² On negotiations concerning dual representation: Steven Cras, “The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings” *Eu crim* 1(2014): 42-43.

³ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings, OJ L 297, 4.11.2016, 1-8.

2. DUAL REPRESENTATION OF THE REQUESTED PERSON IN THE PROCEEDINGS CONCERNING EXECUTION OF EAW IN POLAND

In the opinion of the Polish legislator, implementation of the Directive 2013/48 does not require amendments of the Polish Code of Criminal Procedure (hereinafter referred to as “the CCP”) since the existing legal framework correctly reflects standards stemming from the Directive⁴. As will be argued in further considerations, this assumption is valid only in part.

Under Polish law, the requested person in the proceedings concerning execution of an EAW issued for the purpose of prosecution is treated in the same way as a defendant in ordinary criminal proceedings⁵. Regulations on these proceedings are incorporated into Part XIII of the CCP. Thus, the general part of the CCP (including its Article 6 on access to a lawyer) as well as rules on appointment of defence counsel to a defendant (Articles 78-81a) apply to proceedings conducted before the Polish procedural authorities acting as the executing judicial authorities. In order to implement Article 5 para. 1 of the Directive 2012/13/EU⁶, a new provision was added to Article 607l of the CCP, providing a statutory basis for the Minister of Justice to promulgate the Ordinance on Letter of Rights in European Arrest Warrant Proceedings⁷. The instruction on rights given to the requested person includes the information on the right to contact a lawyer (an advocate or attorney – *adwokat* or *radca prawny* in the Polish legal professions nomenclature) and to hold a direct conversation with him without undue delay. It also provides for the right to assistance of a defence counsel chosen

⁴ See footnote no. 1 to the CCP introduced by the Act of 10 January 2018; Journal of Laws od 2018, item 201.

⁵ In the Polish literature, the requested person is referred to as the “quasi-defendant”, i.e. “quasi-accused” (see: Piotr Hofmański, Elżbieta Sadzik, Kazimierz Zgryzek, Kodeks postępowania karnego. Komentarz, ed. Piotr Hofmański, vol. III, Warszawa: C.H. Beck, 2007, 630. It is common ground that he has the status of the party in the proceedings concerning execution of EAW.

⁶ Directive of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, 1-10.

⁷ Full name: Ordinance of the Minister of Justice of 11 June 2015 regulating the form of instruction on the rights of a person arrested upon the European Arrest Warrant, Journal of Laws of 2015, item 874, thereafter referred to as “the instruction” or “the letter of rights”.

by the requested person and, if he proves lack of financial means to bear the costs of defence, the right to apply for publicly paid defence counsel appointed by a court. The letter of rights should be served on the requested person in a language understood by him. Although such a requirement is not expressly laid down in the CCP, the general rule of Article 72 § 1 of the CCP should apply respectively. Unfortunately, application of this requirement in practice is not fully satisfactory⁸.

Article 607l of the CCP does not regulate when the letter of rights should be served on the requested person. However, the very title of the instruction referring to “a person arrested upon the European Arrest Warrant” clearly indicates that it should be formally presented to the requested person immediately upon arrest. Such interpretation is also consistent with Article 10 para. 1 of the Directive 2013/48. Thus, although the statutory basis for issuing the letter of rights is provided in Article 607l of the CCP concerning court proceedings, in practice the requested person shall receive the letter of rights from the police authorities, once he is arrested under a European Arrest Warrant⁹.

As follows from Article 607k § 2 of the CCP, the requested person is first questioned by the relevant regional public prosecutor who is competent to receive EAWs issued in other Member States. This is not a “hearing by the executing judicial authority” within the meaning of Article 10 para. 2 (c) of the Directive 2013/48, because, in Poland, only regional courts are competent to act as executing judicial authorities¹⁰. However, since the right of access to a lawyer should be granted in such a time, and in

⁸ Please see interviews with defendants arrested in Poland on the basis of the EAW: Fundamental Right Agency. Report “Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings”, September 2019; available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf, 61; hereinafter referred to as “the FRA Report”.

⁹ Please see: Tomasz Ostropolski, „Wystąpienie państwa członkowskiego Unii Europejskiej o przekazanie osoby ściganej na podstawie europejskiego nakazu aresztowania”. In: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*, Warszawa: C.H. Beck, 2016, 796; Sławomir Steinborn, *Komentarz do art. 607l kodeksu postępowania karnego*, Lex/el., 2015, point 18.

¹⁰ See: Notification of Poland concerning the European arrest warrant, Document DG H III no. 9328/04, <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties>.

such a manner, as to enable the requested person to exercise his right effectively and, in any event, without undue delay following his deprivation of liberty (Article 10 para. 2 (b) of the Directive 2013/48), the requested person should have a real opportunity to appoint a defence counsel prior to appearing before the regional public prosecutor. In this connection, some thought should be given to the objective of this questioning. Already at this stage of the proceedings, the public prosecutor should inform the requested person of the content of the EAW and of the possibility of consenting to surrender or consenting to waiver of protection stemming from the “speciality” principle. The prosecutor will also be choosing the interim preventive measures to be applied to the requested person. Thus, this, as it were, initial questioning of the requested person by the public prosecutor may result in the latter’s decision not to apply to the court for remand pending surrender and to impose less severe non-isolatory preventive measures. Bearing in mind the significance of this questioning for the further course of the proceedings, the opportunity to consult with a lawyer prior to it as well as a lawyer’s participation in the questioning itself is of crucial importance for the requested person. Alas, in practice, the instruction in writing is sometimes served on the requested person only during the hearing by the regional court concerning his detention upon execution of the EAW, i.e. after the first interrogation by the public prosecutor¹¹.

The Polish law on early access to a lawyer for a suspect upon his arrest has been analysed from the perspective of its convergence with Directive 2013/48 in several publications¹². The conclusions reached therein should

aspx?Id=328, [date of access: 18.052020]. It clearly states that “The executing judicial authority is the circuit court having territorial jurisdiction”.

¹¹ FRA Report, 61.

¹² Please see: *inter alia*, Sławomir Steinborn, Małgorzata Wąsek-Wiaderek, “Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej”, In: Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego, eds. Maria Rogacka-Rzewnicka, Hanna Gajewska-Kraczkowska, Beata Teresa Bieńkowska, Warsaw: Wolters Kluwer, 2015, 442-452; Alicja Klamczyńska, Tomasz Ostropolski, „Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy”, Białostockie Studia Prawnicze 15(2014): 143-162; Kazimierz W. Ujazdowski, „Dyrektywa o dostępie do pomocy adwokackiej i prawie do poinformowania osoby trzeciej o zatrzymaniu – w świetle art. 6 Europejskiej Konwencji Praw Człowieka”, Forum Prawnicze 4(2015): 41-58; Tomasz Tadeusz Koncewicz, Anna

be applied *mutatis mutandis* to the requested person. As is underlined in most of the above cited publications, in general, the legal framework regulating access to a lawyer for the arrested person at the police station seems to be adequate and consistent with the requirements of Directives 2013/48 and 2016/1919. What should be assessed as problematic, meanwhile, is the status of the lawyer providing assistance to the arrested person (a suspected person – please see footnote 24) who is not “a defence counsel” under Polish law. Moreover, there are no adequate regulations which would secure effective exercise of the suspect’s right to a confidential consultation with defence counsel prior to the first interrogation. The former problem does not concern the requested person who, as mentioned above, has the same status as a defendant from the moment of his arrest in Poland under the EAW.

As already pointed out, the requested person is informed of his right to access to a lawyer and to legal aid. However, in-depth analysis of how this actually plays out provides grounds for arguing that, in practice, this access strongly depends on the good will of the procedural authorities and their readiness to act efficiently; this is especially true for requested persons who are unable to afford legal defence. In accordance with Article 245 § 1 of the CCP, an arrested person shall be granted access to a lawyer “without delay” (*niezwłocznie*). In order to exercise this right, the processing authority should present the requested person with a list of on-duty lawyers¹³. However, in accordance with the Ordinance on on-call duties of lawyers,

Podolska, „Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim”, *Palestra* 9(2017): 13–14; Sławomir Steinborn, „Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda”, *Europejski Przegląd Sądowy* 1(2019): 38–45; Małgorzata Wąsek-Wiaderek, „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej”, *Europejski Przegląd Sądowy* 1(2019): 17–22; Barbara Grabowska-Moroz, „Unijna dyrektywa o prawie dostępu do obrońcy – zadanie dla ustawodawcy, wyzwanie dla sądów”, *Przegląd Sądowy* 3(2019): 45–57.

¹³ Please see: § 8 of the Ordinance of the Minister of Justice issued on the basis of Article 517j § 2 of the CCP on the manner of ensuring assistance of a defence counsel to the defendant and the possibility of appointing one in accelerated proceedings, including the organization of on-call duties of lawyers (the Ordinance of 23 June 2015, *Journal of Laws* of 2015, item 920, hereinafter referred to as “the Ordinance on on-call duties of lawyers”). Pursuant to Article 245 § 2 of the CCP, this Ordinance as well as Article 517j § 1 of the CCP on access to a lawyer in accelerated proceedings shall apply *mutatis mutandis* to arrested persons.

such counsels are obligated to remain on standby not at the police station, but on the premises of the local district court; on an exceptional basis, they may be allowed to be on-duty in another location, in practice usually at their own office (§ 7 of the Ordinance). Seeing as the requested person should be questioned by the public prosecutor within 48 hours from the moment of his arrest, the chances for appointment of a defence counsel from the list of lawyers prior to this hearing are slim. This remains true even if one takes into account the opportunity offered by Polish law for defence counsel for a detainee to be appointed by another person (Article 83 § 1 of the CCP). It should be underlined that in general, under Polish law the requested person is not covered by mandatory defence exclusively due his participation in the EAW proceedings. Thus, unless the EAW is issued with reference to a child (a person under 18) or other specific grounds for mandatory defence occur¹⁴, representation of a requested person by a defence counsel is not mandatory¹⁵. This means that the executing authorities are not obliged to arrange *ex officio* defence counsel for a requested person unless specific grounds for mandatory defence are revealed.

The situation of a requested person who is not able to afford costs of defence is even worse. Despite the latest amendments to Article 81a of the CCP providing for speedy consideration of a request for legal aid, the

¹⁴ Article 79 of the CCP provides that a defendant must be assisted by defence counsel if: 1) he is under 18; 2) he is deaf, mute or blind; 3) there are reasons to doubt his sanity; 4) there is justified doubt whether the condition of his mental health allows him to participate in the proceedings or to conduct his defence in an independent and reasonable manner. In addition, the court may decide that services of a defence counsel are mandatory also due to other circumstances impeding the defence.

¹⁵ The information on Polish law presented in the FRA Report on this issue is currently incorrect. FRA Report, 63 states “Across all Member States, legal representation is mandatory in EAW cases and is arranged by executing authorities unless defendants want to contact their own lawyer.” Article 80 of the CCP which provided for mandatory defence of a detained accused in the proceedings conducted before a regional court was amended in 2015. This provision was seen as a legal basis for mandatory defence of a requested person, if he was deprived of liberty (see: Anna Demenko, Prawo do obrony formalnej w transgranicznym postępowaniu karnym w Unii Europejskiej, *Lex/el.* 2013, para. 3.1.3. However, since 1 July 2015, the fact that the accused is deprived of liberty is not any more a ground for mandatory defence in the proceedings conducted before a regional court. Thus, currently Article 80 of the CCP does provide for mandatory defence of the requested person.

procedure of appointment of publicly funded defence counsel, which is based on verification of financial means (a means test), typically lasts a few days rather than a few hours. That said, it would be difficult to assess the current legal framework as being contrary to the requirements of Directive 2016/1919. Its Article 6 does not guarantee to the requested person a right to have publicly funded defence counsel appointed immediately after arrest. Under Article 6 para. 1 of this Directive, a decision whether to grant legal aid and on the assignment of a lawyer shall be made “without undue delay”. By using such an vague term, the Directive leaves ample flexibility for the implementing Member States.

Although Article 10 para. 2 (b) of Directive 2013/48 grants the requested person a right to meet and to communicate with a lawyer, and such communication should be confidential, Polish law does not follow this requirement¹⁶. Confidentiality of communications between a defendant and a defence counsel is a rule. However, it may be subject to the following exceptions. Firstly, in exceptional cases justified by their particular circumstances, the arresting authority may decide that its representative / officer will be present during such a conversation (Article 245 § 1 of the CCP). Furthermore, also in exceptional circumstances, during the first 14 days of detention the public prosecutor may decide that he (or a person authorized by him) will be present during the meeting of a defendant and his defence counsel. Both regulations apply to the requested person and concern also communication by correspondence. In EAW proceed-

¹⁶ Please see critical remarks on this issue: Alicja Klamczyńska, Tomasz Ostropolski, „Prawo...”, 158–159; Andrzej Sakowicz, „Prawo podejrzanego tymczasowo aresztowanego do kontaktu z obrońcą (wybrane aspekty konstytucyjne i prawnomiędzynarodowe)”, In: *Fiat iustitia perat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej*, eds. Piotr Hofmański, Piotr Kardas, Paweł Wiliński, Warszawa: Wolters Kluwer, 2014, 494–499; Kazimierz W. Ujazdowski, „Dyrektywa...”, 54. However, some authors argue that, since the Directive allows for temporal limitation of access to a lawyer, the exceptions to confidentiality of communications between a defendant and his defence counsel, which are also limited temporally, should be accepted by application of argumentation *a fortiori*. Please see Małgorzata Wąsek-Wiaderek, „Standard ochrony praw oskarżonego w świetle Europejskiej Konwencji Praw Człowieka” In: *System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego*. Tom VI, ed. Cezary Kulesza, Warszawa: Wolters Kluwer, 2016, 592; Sławomir Steinborn, „Dostęp...”, 44.

ings, unlike in an ordinary criminal case, it is difficult to find reasonable grounds for interference in the confidentiality of communications between the requested person and his defence counsel. Hence, in practice, requested persons more often complain about language barriers as obstacles to communication with lawyers than about imposition of statutory limits on confidentiality of such communications¹⁷.

In accordance with Article 6071 §§ 1 and 2 of the CCP, defence counsel and the public prosecutor have the right to participate in the hearing before the local regional court acting as executing judicial authority. Thus, the rights of the requested person indicated in Article 10 para. 2 (c) of the Directive 2013/48 are preserved by the CCP.

Polish law has not been amended in order to implement Article 10 paras. 4 and 5 of Directive 2013/48¹⁸. There is no specific statutory obligation to inform the requested person of his right to appoint a lawyer in the issuing Member State, neither does the law provide for a duty of the executing judicial authorities in Poland to promptly inform the competent authority in the issuing Member State of the requested person's wish to exercise this right¹⁹. This failure to implement Article 10 paras. 4 and 5 of the Directive is surprising – and incomprehensible. Implementation could be achieved simply by supplementing the Ordinance on Letter of Rights in European Arrest Warrant Proceedings. Despite this failure, executing judicial authorities in Poland are not free to neglect the obligation stemming from the Directive. Since the deadline for its transposition expired on 27 November 2016, from this day on Article 10 paras. 4 and 5 of the Directive on access to a lawyer shall be applied directly by Polish courts

¹⁷ FRA Report, 64.

¹⁸ As transpires from the Report of the Commission on transposition of the Directive 2013/48, Article 10 paras. 4 and 5 has not been implemented by many Member States. Please see Document COM(2019) 560 final of 26 September 2019, p. 18; also: TRAINAC final report. Assessment, good practices and recommendations on the right to interpretation and translation, the right of information and the right to access to a lawyer in criminal proceedings, 2016, 338-340.

¹⁹ Barbara Grabowska-Moroz (ed.), *Prawo dostępu do obrońcy w świetle prawa europejskiego*, Warszawa, 2018, 44; <http://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf>.

and public prosecutors²⁰. Thus, at least oral information should be provided to every requested person on his right to dual representation “without undue delay”, i.e. not later than before the hearing concerning the execution of the EAW. This duty should be incumbent upon the public prosecutor interrogating the requested person before taking the case concerning execution of EAW before the local regional court. Information in writing could be provided immediately before the hearing of the requested person by judicial authorities. Article 6071 § 1a of the CCP institutes the duty to notify the requested person on the date of this hearing and to serve on him the EAW along with its translation into a language understandable for him. Written information on the right to appoint a lawyer in the issuing Member State as well on the right to assistance stemming from Article 10 para. 5 of Directive 2013/48 may be served on the requested person together with the EAW.

Moreover, the obligation to provide such information in due time may also be inferred from the principle of loyalty defined in Article 16 § 1 of the CCP. Pursuant to this provision, procedural organs are obligated to instruct the parties to the proceedings of their rights, and any lack or inaccuracy of such instruction may not result in any adverse consequences to these parties. Article 10 para. 4 and 5 of the Directive indubitably institutes a clear and unequivocal duty to inform the requested person of his right to dual representation. Accordingly, this provision of the Directive may be treated as a substantive source of the right to dual representation, while Article 16 § 1 of the CCP – as a provision imposing a formal obligation to inform the requested person of his rights. At the same time, it merits emphasis that both provisions are imperfect in that neither the Directive nor the Code of Criminal Procedure offers an effective remedy for the requested person in case of failure to inform him about the right to appoint a lawyer in the issuing state²¹. This circumstance cannot be taken

²⁰ On direct application of directives, please see: judgment of the Court of Justice of 15 January 2014, C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and others.*, EU:C:2014:2, para. 31; judgment of the Court of Justice of 15 May 2014, C-337/13, *Almos Agrárkúkereskedelmi Kft v. Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága*, EU:C:2014:328, para. 31.

²¹ Article 12 of the Directive does not provide for a concrete and precise “remedy” for a violation of the right of access to a lawyer. It is drafted in quite general terms. See critically

as grounds for refusal to execute the EAW, since the Framework Decision on EAW sets out an exhaustive list of circumstances justifying mandatory or optional obstacles to surrender. As transpires from the FRA Report, persons arrested in Poland on the basis of an EAW are not informed about their right to appoint a defence counsel in the issuing Member State. Also, no assistance is granted in this regard.²²

3. DUAL REPRESENTATION OF A REQUESTED PERSON IN POLAND AS THE ISSUING MEMBER STATE

Article 10 para. 4 of Directive 2013/48 defines the role of a lawyer appointed in the issuing Member State as very narrow. His task is “to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested person under Framework Decision 2002/584/JHA”. Leaving aside all practical problems entailed in dual representation, such as language barriers or financial aspects of appointment of the defence counsel²³, further analysis will focus on the legal framework for conducting effective defence by a lawyer appointed in Poland as the issuing Member State.

Where the requested person wishes to have a lawyer in the issuing state, the judicial authorities of the executing Member State shall inform the competent authority in the issuing Member State. In reply, the Polish judicial authorities must, without delay, provide the requested person with information facilitating his appointment of a lawyer in Poland. Article 10 para. 5 of the Directive has not been implemented into Polish law. No provision imposing a duty to offer such information has been introduced into the CCP. Accordingly, Article 10 para. 5 of Directive 2013/48 shall be applied directly by the Polish judicial authorities. However, defining the scope of information which should be provided, and likewise the means

on this issue: Anneli Soo, “Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13th of September 2016)”, *European Journal of Crime, Criminal Law and Criminal Justice* 25(2017): 337–341.

²² FRA Report, 65.

²³ FRA Report, 66.

of its transmission to the requested person, may cause some difficulties. If an EAW was issued for the purpose of prosecution at the pre-trial stage of criminal proceedings in Poland with respect to a person who has not yet been interrogated as a suspect²⁴, it seems justified to provide him with exactly the same information on the right to appoint a defence counsel as is given to a suspected person prior to his first interrogation as a suspect, in accordance with Article 300 § 1 of the CCP. Thus, the instruction forwarded to the requested person should contain information on the right to appoint a lawyer of his own choosing in Poland and, in a case of proven lack of financial means, also on the right to apply for appointment of publicly funded defence counsel. In the case of an EAW issued at the trial stage of the proceedings, a requested person who has the status of a defendant in Poland as the issuing state, is already aware of his rights provided by the CCP. Despite this fact, it is justified to provide such requested persons with the same information as is given to those who have not yet been interrogated as suspects in Poland before issuing the EAW.

Since the information provided should “facilitate” the requested person’s appointment of a lawyer in the issuing state, it should also contain the list of lawyers offering advice in the region in which the criminal proceedings are conducted.

As already mentioned above, a defence counsel for a defendant being held in custody may be appointed also by “another person”, of which he should be notified immediately. This opportunity could easily be used to safeguard the right of the requested person to appoint a lawyer in the issuing Member State. However, this could be done only “until a defendant who is deprived of liberty appoints a defence counsel” (Article 83 § 1 of the CCP). Thus, the crucial question is whether appointment of a defence counsel in the executing Member State shall be treated as an obstacle impeding application of Article 83 § 1 of the CCP in Poland as the issuing Member State. There are strong arguments supporting a negative answer

²⁴ With reference to a suspected person who is in hiding or absent from the country, drawing up a written decision to charge him with a criminal offence results in change of his status from “a suspected person” (“osoba podejrzana”) to “a suspect” (“podejrzany” – Article 313 § 1 of the CCP). A decision on detention on remand and the EAW may be issued against such “suspect”. For obvious reasons, such a suspect will not be instructed of his procedural rights in that he has not been interrogated prior to issue of the EAW.

to this question. The crucial point is appointment of a defence counsel by the requested person in Poland. In interpreting Article 83 § 1 of the CCP, one should take as a point of reference only the legal status and legal situation of the requested person in Poland. A different approach would bring unacceptable results: for example, a requested person represented in the executing Member State by three defence counsels would not be able to appoint one in Poland as the issuing Member State, since Article 77 of the CCP limits the number of lawyers to three. To summarize, it should be argued that “another person” – which, in practice, means “everybody” – may appoint a defence counsel for a requested person remaining in custody until he makes his own arrangements in this regard in Poland. Since Article 83 § 1 of the CCP considerably facilitates appointment of a defence counsel in Poland as the issuing Member State, the requested person should also be informed of the contents of this provision. Unfortunately, interviews with Polish lawyers conducted by the European Union Agency for Fundamental Rights indicate that no assistance facilitating appointment of a defence counsel in Poland as the issuing state is provided by the competent Polish authorities²⁵.

As already mentioned, the Directive provides for a very narrow role of the lawyer appointed in the issuing Member State, limited to providing a lawyer in the executing Member State with “information and advice”. It is obvious that the term “information” should be understood widely as covering all circumstances which may be relevant for deciding on surrender. Thus, a lawyer may plead that the requested person will be exposed to a risk of inhuman or degrading treatment if surrendered²⁶ or cite other circumstances justifying refusal of surrender, whether rooted in the necessity of safeguarding the requested person’s fundamental rights²⁷ or in inadmissibility of criminal proceedings against the requested person. In order to perform his duties, the defence counsel in the issuing state should have

²⁵ FRA Report, 65.

²⁶ For judicial authority to this effect, please see judgment of the Court of Justice of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, Araynosi and Căldăraru, ECLI:EU:C:2016:198; judgment of the Court of Justice of 15 October 2019, C-128/18, Dumitru-Tudor Dorobantu, ECLI:EU:C:2019:857.

²⁷ For judicial authority to this effect, please see judgment of the Court of Justice of 25 July 2018, C-216/18PPU, LM, ECLI:EU:C:2018:586.

access to the case file. If the defence counsel's powers of attorney are not restricted, he is authorized to act in the entire proceedings and is entitled to exercise all the rights provided in the CCP for counsel to a defendant in ordinary criminal proceedings²⁸. Thus, a defence counsel appointed in Poland as the issuing state has the right to access the case file in accordance with Article 156 of the CCP. At the pre-trial stage of criminal proceedings, such access may be limited as warranted for ensuring the correct course of proceedings or protecting an important state interest.

Some doubts, however, may arise as to whether defence counsel appointed for the requested person in Poland as the issuing state is entitled to access to the case file under the special regime applicable in proceedings concerning requests for detention on remand. Article 156 § 5a of the CCP states that if, in the course of preparatory proceedings, the request for applying or extending detention on remand has been filed, the suspect and his defence counsel shall immediately receive access to the part of the case file containing the evidence attached to such request (except testimony of witnesses granted special protection under Article 250 § 2b of the CCP). Under this special regime, access to the case file cannot be refused due to the need of ensuring the correct course of proceedings or protecting an important state interest. Moreover, as transpires from Article 249a of the CCP, a decision on detention may rely on the circumstances established on the basis of evidence accessible to the defendant and to his defence counsel and on testimony of witnesses protected under Article 250 § 2b of the CCP. Without doubt, such evidence as should be accessible to the defence at the moment of issuing the detention order should have the same status also later on, during application of detention on remand. If a suspect does not have a defence counsel at the moment of imposing detention on remand, counsel appointed at a later stage of the preliminary proceedings should have unlimited access to the part of the case file which was taken

²⁸ This view seems to be supported by the latest judgement of the Court of Justice of 12 March 2020, C-659/18, VW, ECLI:EU:C:2020:201. The Court said that the exercise by a suspect or accused person of the right of access to a lawyer laid down by Directive 2013/48, does not depend on the person concerned appearing. Moreover, the fact that a suspect or accused person has failed to appear is not one of the reasons for derogating from the right of access to a lawyer set out exhaustively in that directive.

as the basis for the decision on detention on remand²⁹. It could be argued that, because of absence of the requested person in Poland, this special regime should not be applied since detention on remand, once imposed and once it becomes a basis for issuing the EAW, is not prolonged or executed anymore in Poland until surrender. This argument, however, must be rejected. The request for applying detention on remand was submitted to the court and was accepted. Although the decision on detention on remand is not executed in Poland, the objective fact is that the suspect is taken into custody in the executing Member State because the EAW was issued by the Polish authorities. Thus, in the case of an EAW issued at the investigative stage of the proceedings, defence counsel appointed in Poland as the issuing Member State within a “dual representation” framework should have access to the case file as provided for in Article 156 § 5a of the CCP.

Some doubts have been raised in the literature as to whether access to evidence in accordance with Article 156 § 5a of the CCP extends also to a right to make copies or photocopies of the case files. An affirmative answer to this question would be of crucial importance for effective dual representation. Since Article 156 § 5a of the CCP does not regulate this issue at all, the general rule of Article 156 § 5 of the CCP should apply, which would mean that the defence lawyer should request from the public prosecutor an order authorizing him to make copies of the case file. The aim of such authorization is not only to record access to, and use of, the case file, but also to supervise the scope of access to the case file. Some authors argue that the public prosecutor may not refuse a request for copying the part of the case file which is accessible in accordance with Article 156 § 5a of the CCP³⁰, but this view is not commonly shared in the doctrine. The prevailing opinion is that the public prosecutor may deny authorization for copying also this part of the case file on the basis of the general provisions of Article 156 § 5 of the CCP³¹. As defence lawyers observe in

²⁹ Please see Sławomir Steinborn, *Komentarz do art. 156 Kodeksu postępowania karnego*, LEX/el., 2016, point 31; Andrzej Mucha Joanna Kogut, “Udostępnienie akt postępowania przygotowawczego na podstawie art. 156 § 5a k.p.k. a obowiązek wyrażenia zgody na sporządzenie odpisów, kopii lub fotokopii akt”, *Paestra* 10(2016): 48.

³⁰ See: Andrzej Mucha Joanna Kogut, „Udostępnianie akt...” 48.

³¹ Please see, for instance, Andrzej Sakowicz, „Komentarz do art. 156 kodeksu postępowania karnego”. In: *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz,

their work, such an interpretation is also applied in practice. However, a case of refusal of authorization by the public prosecutor may be subject to judicial control in that, under Article 159 of the CCP, parties who were denied access to the files of preparatory proceedings may appeal this decision before the court. It is quite correctly emphasised that, for the purpose of judicial control, the concept of “access to the files” should include also the right to make copies or photocopies of such files³².

A separate problem which would require in-depth reflection is the question of legal aid for the requested person in Poland as the issuing Member State. It seems that there are no formal obstacles for appointing publicly funded defence counsel for the requested person upon his duly justified motion transmitted to the Polish judicial authorities by the judicial authorities of the executing Member State. In accordance with Article 5 para. 2 of Directive 2016/1919, the issuing Member State shall ensure that requested persons who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State “have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice”. Since this provision has not been transposed into Polish law, it may cause some doubts whether an *ex officio* defence counsel should be appointed in Poland to a requested person who exercises his right to legal assistance in another (executing) state. However, failure to transpose the Directive in this regard cannot deprive a requested person of the rights guaranteed therein. Thus, Article 5 para. 2 of Directive 2016/1919 should be applied directly by the Polish judicial authorities. Moreover, a requested person may rely directly on this provision in his request for legal aid in Poland as the issuing state.

Warszawa: C.H. Beck, 2018, 455; Michał Kurowski, „Komentarz do art. 156 Kodeksu postępowania karnego”, In: Kodeks postępowania karnego. Komentarz, ed. Dariusz Świecki, Lex/el. 2019, point 23.

³² See: Jerzy Skorupka, „Komentarz do art. 159 Kodeksu postępowania karnego”, In: Kodeks postępowania karnego. Tom I. Komentarz do art. 1-166, ed. Ryszard A. Stefański, Stanisław Zabłocki, Warszawa: Wolters Kluwer 2017, 1254; See also contrary view: Tomasz Grzegorzczak, Kodeks postępowania karnego. Komentarz, Warsaw: Lex, 2014, 545-546.

Request for appointment of publicly funded defence counsel should include evidence attesting to the lack of financial means to cover costs of defence counsel by the requested person. Moreover, the scope of authorization given by the court in Poland as the issuing state may be limited to “providing information and advice” to the defence counsel acting in the executing state. Such an application for aid shall be considered by the judicial authority indicated in accordance with the general rules. So, if the application concerns a requested person who has the status of a suspect in Poland, it should be examined by the president of the court competent to hear the case or by a court official (*referendarz*) of such court (Article 81 § 1 of the CCP).

4. CONCLUSIONS

Since Article 10 paras. 4 and 5 of Directive 2013/48 and Article 5 para. 2 of Directive 2016/1919 have not been transposed into Polish national law, only direct application of these provisions may ensure full exercise of the requested person’s right to dual legal representation. On the other hand, thanks to the fact that, in Poland, the requested person is treated as a species of quasi-defendant in criminal proceedings, the Code of Criminal Procedure, in particular Articles 6 and 78-81a of the CCP, offer a legal framework allowing for appointment of defence lawyer in Poland as the executing state. Furthermore, the rules concerning access to the case file at the preparatory stage of the proceedings may be interpreted as allowing the defence lawyer acting in Poland as the issuing state to fulfil his obligation stemming from the need of dual representation. To summarize, it would not be an exaggeration to say that practical obstacles, such as the language barrier, may hinder the effective implementation of the concept of dual representation in practice more than the lack of appropriate legal regulations.

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