


# Towards a Digitalised Criminal Justice System: Lessons from Poland

*Em direção a um sistema de justiça criminal digitalizado: exemplo da Polônia*


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**ABSTRACT:** The Covid-19 pandemic has accelerated technological advancements within the Polish criminal justice system, notably through the integration of remote communication tools for legal proceedings. This paper examines the introduction and impact of remote hearings, including those for detention on remand, arguing for the expansion of remote hearings beyond cases where the defendant is in custody. It highlights the existing legal framework's limitations, such as the conditional telephone contact between a defendant and their defense counsel, which infringes on the right to defense due to the lack of confidentiality and effectiveness in legal assistance. Furthermore, the paper discusses the potential benefits of digitizing criminal proceeding files, including improved efficiency, accessibility, and the safeguarding of the fair trial principle. Despite potential drawbacks like digital exclusion

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and security concerns, the implementation of a unified digital system across all courts is proposed to facilitate data exchange and streamline proceedings. Additionally, the paper addresses the limitations of replacing human interpreters with automated translation software in criminal proceedings, emphasizing the necessity of human oversight to ensure fair trial guarantees. The study suggests a hybrid approach to translation that combines machine translation with human verification, drawing parallels with GDPR provisions for human intervention in automated decision-making processes.

**KEYWORDS:** remote hearings; digitization of criminal proceedings; automated translation; digital technology; Poland.

**RESUMO:** *A pandemia de Covid-19 acelerou os avanços tecnológicos dentro do sistema de justiça criminal da Polônia, especialmente por meio da integração de ferramentas de comunicação remota para os procedimentos legais. Este artigo analisa a introdução e o impacto das audiências virtuais, incluindo aquelas para prisão cautelar, propondo a expansão das audiências remotas para além dos casos em que o réu está sob custódia. Destacam-se as limitações do arcabouço legal existente, como o contato telefônico condicional entre um réu e seu advogado de defesa, que viola o direito à defesa devido à falta de confidencialidade e efetividade na assistência legal. Além disso, o trabalho discute os benefícios potenciais da digitalização dos arquivos dos processos criminais, incluindo melhoria da eficiência, acessibilidade e garantia do princípio do julgamento justo. Apesar de possíveis desvantagens como exclusão digital e preocupações com segurança, propõe-se a implementação de um sistema digital unificado em todos os tribunais para facilitar a troca de dados e otimizar os procedimentos. Adicionalmente, este artigo aborda as limitações da substituição de intérpretes humanos por software de tradução automatizada em processos penais, enfatizando a necessidade de supervisão humana para garantir o julgamento justo. O estudo sugere uma abordagem híbrida para tradução que combina tradução automática com verificação humana, estabelecendo paralelos com as disposições do GDPR para intervenção humana em processos de tomada de decisão automatizados.*

**PALAVRAS-CHAVE:** *audiências virtuais; digitalização do processo penal; tradução automática; tecnologia digital; Polônia.*

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## 1. INTRODUCTION

Technological developments, new software, increased use of mobile devices (mobile Internet), and improved Internet accessibility have led in recent years to social, cultural, and economic changes. The benefits of technological developments were quickly discovered by the private sector, which values its time and money; it was only at the next stage that the benefits of computerization were discovered by public institutions, law enforcement agencies, and the judiciary. In particular, the adoption of emerging technologies in the judiciary has been rather slow. The vast majority of countries have resisted the use of information and communication technology systems to comprehensively handle court proceedings and conduct remote hearings. The obstacles to the widespread adoption of new technologies in the criminal process have been costs, security considerations, concern about the guarantees of the participants in the proceedings and respect for the attorney-client privilege, as well as data security<sup>3</sup>.

The dynamic and unpredictable development of the Covid-19 pandemic quickly put the previous normative reality to the test, prompted the search for new regulations, and raised awareness of the need and inevitability of using emerging technologies and the digitization of services in the justice system. Recent years have shown the beginning of changes towards e-justice<sup>4</sup> not only through the creation of new solutions, but

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<sup>3</sup> See generally, WALLACE, Anne. Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia. *Journal of Law, Information and Science*, vol. 19, n. 1, 2008, <http://classic.austlii.edu.au/au/journals/JL-LawInfoSci/2008/2.html>; TURNER, Jenia I. Remote Criminal Justice. *Texas Tech Law Review*, vol. 53, 2021, p. 197-270; FACTORA, Roni; KARITIA, Dana; LERNAUB, Hagit; AYUBI Danielle Yaffe. Videoconferencing in Legal Hearings and Procedural Justice. *Victims & Offenders*, vol. 18, n. 8, 2023, p. 1557-1579, <https://doi.org/10.1080/15564886.2023.2248465>; BANNON, Alicia; KEITH, Douglas. Remote court: Principles for virtual proceedings during the COVID-19 pandemic and beyond. *Northwestern University Law Review*, vol. 115, iss. 6, 2021, p. 1875-1920; GORI, Pierpaolo; PAHLADSI-INGH, Aniel. Fundamental rights under Covid-19: An European perspective on videoconferencing in court. *ERA Forum*, vol. 21(4), 2021, p. 561-577, <https://doi.org/10.1007/s12027-020-00643-5>.

<sup>4</sup> By e-justice we will mean the use of information and communication technologies to improve citizens' access to justice and to make legal action

also through the adaptation of existing legislation to the possibility of using IT tools in the justice system. The Covid-19 pandemic also appears to have significantly weakened the mistrust of judicial authorities and legal practitioners toward the widespread use of remote communication technologies in the field of justice. The implementation and use of video conferencing tools, case management systems, digital communication and data exchange systems, and artificial intelligence (AI) systems, including machine learning technologies, is noticeable in the justice systems of many countries. But the use of IT tools also raises critical questions about how litigants' rights and their access to justice may be impacted, either positively or negatively.

These changes also have taken place in Poland. The purpose of this paper is to present legal solutions in the Polish criminal procedure relating to remote hearings, remote sessions concerning detention. This paper also explores the potential for the broad implementation of digitization of case files and extensive use of machine translation to ensure the realization of procedural rights and the timeliness principle of criminal proceedings. The analysis of individual legal solutions will be carried out in terms of both assessing their effectiveness and meeting fair trial standards, in particular the protection of the rights of defendants provided for in the European Convention on Human Rights (ECHR)<sup>5</sup> and the case law of the European Court of Human Rights (ECtHR) that is based on the ECHR. It is clearly visible that the multi-level impact resulting from the deployment of technologies in the justice system goes well beyond technological issues and is immutably linked to the need to assess the impact of new technologies on the standard of respect of fundamental rights.

This paper contains observations on institutions already implemented in the Polish legal system, such as the hearing of witnesses

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more effective, see Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Towards a European e Justice Strategy SEC(2008)1947 SEC(2008)1944, COM/2008/0329 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008DC0329>, access: 18 May 2024.

<sup>5</sup> European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, Rome, 4 November 1950. Council of Europe Treaty Series - No. 5.

by videoconference, remote hearings in Polish criminal proceedings, and remote court sessions concerning detention on remand. It also discusses institutions that are in the process of slow implementation, particularly the digitization of case files in criminal proceedings. Additionally, the paper addresses institutions that are not yet implemented but are technologically feasible and, in our view, permissible from the perspective of criminal procedure principles and desirable from the perspective of the objectives of the criminal process, such as the acceptability of the use of automated translation services in the criminal justice process.

## 2. HEARING OF WITNESS BY VIDEOCONFERENCE IN POLAND

Interrogations are among of the main evidentiary activities in criminal proceedings and an essential element of judicial decision-making<sup>6</sup>. Traditionally, most legal interrogations are conducted in the physical presence of the defendant or detainee. However, technological developments over the past few decades have led to growing use of video conferencing in criminal proceedings, which allows participants in a hearing to take part from remote locations and interact with each other using communication technologies<sup>7</sup>. The possibility of conducting a hearing remotely, using videoconferencing platforms, was introduced into the Polish criminal process in 2003<sup>8</sup>. This was part of the trend prevailing in Europe at the time, where such solutions appeared in a number of

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<sup>6</sup> FACTORA, Roni; KARITIA, Dana; LERNAUB, Hagit; AYUBI Danielle Yaffe. Videoconferencing in Legal Hearings and Procedural Justice. *Victims & Offenders*, vol. 18, n. 8, 2023, p. 1557, <https://doi.org/10.1080/15564886.2023.2248465>.

<sup>7</sup> See ROSSNER, Meredith; TAIT, David. Presence and participation in a virtual court. *Criminology & Criminal Justice*, vol. 23, n. 1. 2023, 135-157. <https://doi.org/10.1177/17488958211017372>; WALLACE, Anne. Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia. *Journal of Law, Information and Science*, vol. 19, n. 1, 2008, <http://classic.austlii.edu.au/au/journals/JLlawInfoSci/2008/2.html>;

<sup>8</sup> GORI, Pierpaolo; PAHLADSINGH, Aniel. Fundamental rights under Covid-19: An European perspective on videoconferencing in court. *ERA Forum*, vol. 21(4), 2021, p. 561-577, <https://doi.org/10.1007/s12027-020-00643-5>.

countries at the turn of the 20th century and 21<sup>st</sup> centuries<sup>9</sup>. Initially such hearings included only witnesses and experts, but in subsequent years they were extended to defendants as well. These regulations were mainly intended to allow the hearing of witnesses who could not travel or pay travel expenses, who were intimidated or who faced threats to their life and health. In the case of defendants, the decisive factors were safety considerations and the cost of the proceedings, as well as the intention to ensure their right to counsel and the confidentiality of such contacts<sup>10</sup>.

In 2003, Article 177 (1a) of the Polish Code of Criminal Procedure (CCP)<sup>11</sup> was adopted; it provided for the possibility of questioning witnesses, including expert witnesses, using means that allow direct transmission of sound and video. It has been used in both court and preparatory proceedings<sup>12</sup>. The videoconference may take place at the request of a party to the proceedings or *ex officio*. The authority conducting the criminal proceedings should carefully consider such a request and,

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<sup>9</sup> See e.g. Article of 9 and 10 the Second Additional Protocol to the European Convention on Mutual

Assistance in Criminal Matters, European Treaty Series - No. 182, Strasbourg 8 November 2001, <https://rm.coe.int/168008155e> At present, work is continuing on a proposal of Third Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters. Among the proposed changes is facilitating the use of hearing by video conference, see Daft Third Additional Protocol To The European Convention On Mutual Assistance In Criminal Matters. Committee Of Experts on The Operation Of European Conventions on Co-Operation In Criminal Matters (PC-OC), <https://rm.coe.int/pc-oc-2023-07/1680ac805b>, access: 18 May 2024.

<sup>10</sup> SANDERS, Anne. Video-Hearings in Europe Before, During and After the COVID-19 Pandemic. *International Journal for Court Administration*, vol. 12, n. 2, 2020, p. 2-10, doi: <https://doi.org/10.36745/ijca.379>; HAIGH, Richard; PRESTON, Bruce. The court system in a time of crisis: COVID-19 and issues in court administration special issue: Law in the time of COVID. *Osgoode Hall Law Journal*, vol. 57, iss. 3, 2021, p. 869-875, <https://doi.org/10.60082/2817-5069.3608>;

<sup>11</sup> Act of 6 June 1997 - the Code of Criminal Procedure (Dziennik Ustaw 1997, No. 89, item 555 as amended).

<sup>12</sup> See more LACH, Arkadiusz; KLUBIŃSKA, Maja; BADOWIEC, Renata. Conflicting interests of witnesses and defendants in a fair criminal trial - can a hearing by videoconference be the best instrument to reconcile them? *Revista Brasileira de Direito Processual Penal*, vol. 8, n. 3, 2022, p. 1177-1178, <https://doi.org/10.22197/rbdpp.v8i3.737>.

if there are no serious reasons to refuse it, examine the witness in this manner<sup>13</sup>. The conditions for the application of that article are general and do not include any specific prerequisites for the use of a remote hearing, nor does it indicate the circumstances when it would be particularly appropriate to conduct hearings in this form. As practice shows, video-hearings are used because of the financial cost of having a witness come to court or the prosecutor's office, and may be due to factual circumstances, such as the illness or age of the witness, including expert witness, who stays in a location away from the seat of the court. Video-hearing of a witness may be done with the assistance of an interpreter. It should be noted that the conditions of the remote hearing are included in a general and flexible manner, which means that in necessary cases this form of interrogation can effectively replace the traditional form. Besides, video-hearing is a form of interrogation that is in line with the principle of direct examination of evidence applies in force in the Polish criminal process, which requires the trial authority to have direct contact with the source of evidence and the means of evidence<sup>14</sup>.

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<sup>13</sup> SANDERS, Anne. Video-Hearings in Europe Before, During and After the COVID-19 Pandemic. *International Journal for Court Administration*, vol. 12, n. 2, 2020, p. 3, doi: <https://doi.org/10.36745/ijca.379>.

<sup>14</sup> The principle of direct examination of evidence refers mostly to the court since the presentation of evidence is conducted in a direct form during court proceedings. It also plays an important role in preliminary proceedings, see more JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. *International Encyclopedia of Laws: Criminal Law*. The Netherlands. Kluwer Law International, 2019, p. 199-200. Although the addressee of the principle of direct examination of evidence is, above all, the first-instance court as this court establishes facts which are the substantial basis of a ruling on the matter of litigation, this rule applies to all procedural bodies and litigants. With regard to the parties, taking evidence directly in a hearing should fully implement the right to defence and the rule of adversarial proceedings by the active participation of the parties in hearing of evidence. In consequence, the parties may have a direct access to each piece of evidence and participate actively in hearing evidence during a trial if they are present and express their will to participate actively in hearing evidence before the court. Thus the rule of immediacy guarantees that the court will rely on the evidence obtained and taken in a way allowing full examination of the case, which is also the implementation of the defendant's procedural guarantee.; see also SAKOWICZ, Andrzej. Commentary on the Judgment of the Supreme Court of 18 March 2015 (Ref. No. II KK 318/1). *Białostockie Studia Prawnicze*, vol. 21, 2016, p. 214-215, <http://doi.org/10.15290/bsp.2016.21.en.16>

The essence of the adopted solution is that videoconference can take place either at a court or a prosecutor's office closest to the location of the witness or expert witness, or at his or her location. The task of the court or prosecutor's office unit where the witness or expert witness appears is to ensure the proper conduct of the hearing. It is also possible to hear a person at his or her location, if he or she is unable to appear at the court or prosecutor's office (e.g. such as persons who are bedridden). In such a situation, a prosecutor or a police officer of the unit summoned as part of legal assistance (in preparatory proceedings) or a court registrar, an assistant judge, or an official employed by the court in whose district the witness is staying (in court proceedings) must be present at the location of the witness participating in the video-hearing. The literature indicates that the authority conducting a video-hearings should be able to observe the witness's facial expressions, gestures, and the way he or she speaks. These observations are essential for assessing the credibility of the witness<sup>15</sup>. Eye contact is particularly important, especially when video-hearing is conducted in court proceedings. In such a case, appropriate equipment should be installed in the courtroom to allow the participants in the proceedings to follow the course of the hearing<sup>16</sup>, observe the facial expressions of the person being heard, and ask questions of all parties. In particular, the procedural guarantee of the right to defense requires that the defendant and his or her counsel be able to see and hear the witness well, as well as ask him or her questions.

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<sup>15</sup> LACH, Arkadiusz. Przesłuchanie na odległość w postępowaniu karnym [Hearing by videoconference in criminal proceedings]. *Państwo i Prawo*, vol. 12, 2006, p. 80-87; LACH, Arkadiusz; KLUBIŃSKA, Maja; BADOWIEC, Renata. Conflicting interests of witnesses and defendants in a fair criminal trial - can a hearing by videoconference be the best instrument to reconcile them? *Revista Brasileira de Direito Processual Penal*, vol. 8, n. 3, 2022, p. 1180, <https://doi.org/10.22197/rbdpp.v8i3.737>. About the role of non-verbal communication in the judicial process, see DENAULT, Vincent; DUNBAR, Norah. Nonverbal communication in courtrooms: Scientific assessments or modern trials by ordeal? *The Advocates' Quarterly*, 2017, vol. 47, n. 3, pp. 280-308.

<sup>16</sup> One has to agree with the ECtHR's view that a poor acoustics in the courtroom and hearing difficulties could give rise to an issue under Article 6 of the ECHR, see ECtHR judgment of 23 February 1994 in the case of *Stanford v. the United Kingdom*, application no. 16757/90, § 26 and § 29.



From the very beginning of the introduction of interrogation in the form of video-hearings, the legislature has provided for the recording of its course through video and audio recording pursuant to Article 147 (2) of the CCP.

Before the Covid-19 pandemic, video-hearings were rarely conducted in Poland as part of domestic proceedings. Typically, courts sought to have all parties attend the hearing in person. Video-hearings were an exception, and the decision to hold them was made by the court or the prosecutor. A thorough evaluation considering matters such as a person's wish to attend and the nature of the case has always been part of the court's (or prosecutor's) decision-making.

The video-hearings were introduced an efficient tool that facilitates and expedites cross-border proceedings and reduces the associated costs, can also reduce the stress of seeing the accused for some victims. Also, the ECtHR points out that video-hearings are an effective instrument of judicial cooperation that may be allowed for compelling reasons<sup>17</sup>. In the Council of Europe member states, the possibility to hold

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<sup>17</sup> The issue of videoconferencing has been analysed in the case law of the ECtHR and some conclusions can be drawn from this background concerning a remote hearing, especially Article 6 of the ECtHR does not always entail a right to be present in person, even where an appellate court has full jurisdiction to review the case on questions of both fact and law. First, defendant's participation in proceedings by videoconference is not as such contrary to the Convention. Nevertheless, recourse to this measure in any given case must serve a legitimate aim; and the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6 of the ECtHR. In *Marcello Viola v. Italy*, the Court the videoconferencing measure aimed at reducing the delays incurred in transferring detainees and thus simplifying and accelerating criminal proceedings (see, ECtHR judgment of 5 October 2006 in the case of *Marcello Viola v. Italy*, application no. 45106/04, § 67–69 and § 75–77, <https://hudoc.echr.coe.int/eng?i=001-7724>). Second, all participants in the hearing should be allowed to observe the witness's demeanour during the examination. In the *Bocos-Cuesta* case, “neither the applicant nor the trial court judges were able to observe their demeanour under questioning and thus form their own impression of their reliability (...). It is true that the trial courts undertook a careful examination of the statements taken from the children and gave the applicant ample opportunity to contest them, but this can scarcely be regarded as a proper substitute for a personal observation of a witness giving oral evidence” (see judgment of the ECtHR of 10 November 2005 in case

such hearings was provided for in legislation on international cooperation, i.e. Articles 9 and 10 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, adopted in 2001, and Articles 10 and 11 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted in 2000. The persons covered by the scope of this legislation on international legal assistance in criminal matters in the field of video-hearings are witnesses, including expert witnesses, and defendants. However, Poland made a statement that video-hearings would not apply to defendants. It should be added that nowadays, regarding this method of hearings, the key role in the member states of the European Union is played by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters<sup>18</sup>, which in Articles 24 and 25 regulated the rules of hearing by video conference and by hearing by telephone conference<sup>19</sup>.

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of *Bocos-Cuesta v. the Netherlands*, application no. 54789/00, § 71, <https://hudoc.echr.coe.int/eng?i=001-70963>). It follows that the technical solutions should allow the witness to be visible during his/her testimony both to judges and jurors and to the accused and defence counsel. Third, a videoconference hearing is sometimes the only way to examine a witness, e.g. when the witness is abroad. See broadly BACHMAIER WINTER, Lorena. Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law. *Utrecht Law Review*, vol. 9, n 4, 2014, p. 127-146.

<sup>18</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Official Journal of the EU L 130, 1.5.2014, p. 1–36

<sup>19</sup> It follows from the wording of the Directive's provisions that a remote hearing is permissible when it is not desirable or possible for the person concerned to appear in person in the territory of a Member State. This includes the questioning of witnesses, including expert witnesses, and defendants, and the consent of the defendant to take part in such questioning is necessary. On the other hand, the possibility of refusing an to take part in such a hearing exists only when conducting such a hearing in a particular case would be contrary to the fundamental principles of the law of the state conducting the hearing.

It is noted that some national implementation laws only allow the hearing of a suspected or accused person by videoconference if the person consents ('shall' refuse) while other national implementation laws are less rigid ('may' refuse). Furthermore, the Directive 2014/41/EU does not regulate any possibility for the suspect or the defendant to participate in the interrogation, during which the witness of defence or prosecution is questioned in the

Under the influence of international solutions and the needs of practice, as of July 1, 2015, the possibility of conducting video-hearings was expanded. This action now also includes defendants who were absent directly at the hearing (Article 177 (1a) and Article 377 (4), second sentence, of the CCP). In this situation, a video-hearing of a defendant involves the direct transmission of sound and vision. Since the activity can only be carried out in court, a court registrar, or a court assistant or clerk, takes part in the hearing at the defendant's location. In addition, the Polish legal system allows the use of video-hearings for anonymous witnesses (Article 184 (4) of the CCP) and witnesses who are at least 15 years old at the time of the hearing, when there is a reasonable fear that the direct presence of the defendant at the hearing could have an embarrassing effect on the witness and thus affect his or her testimony, or could have a negative impact on the witness's mental state (Article 185b (2) of the CCP)<sup>20</sup>.

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executing state according to the request of the issuing State, see JURKA, Raimundas; ZAJANČKAUSKIENĖ, Jolanta. Movement of evidence in the European Union: Challenges for the European Investigation Order. *Baltic Journal of Law & Politics*, vo. 2, 2016, p. 77, doi: 10.1515/bjlp-2016-0012. This is not the only controversy. It is not obvious that in light of Article 24 of the Directive 2014/41/EU, which allows the possibility for 'witnesses' or 'experts' to be heard by videoconference, the victim of the crime can also be interrogated. Although 'victims' are not explicitly mentioned and, according to some national legal systems, 'victims' are not 'witnesses', most Member States of the EU seem to accept that they fall within the remit of Article 24 of the Directive 2014/41/EU, see Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, June 2019, p. 12, [https://www.ejn-crimjust.europa.eu/ejnupload/news/2019-06-Joint\\_Note\\_EJ-EJN\\_practical\\_application\\_EIO\\_last.pdf](https://www.ejn-crimjust.europa.eu/ejnupload/news/2019-06-Joint_Note_EJ-EJN_practical_application_EIO_last.pdf) Finally, it should be pointed out that Directive 2014/41/EU has not been fully implemented in Poland, as it does not allow for a video conference with the suspect.

<sup>20</sup> LACH, Arkadiusz; KLUBIŃSKA, Maja; BADOWIEC, Renata. Conflicting interests of witnesses and defendants in a fair criminal trial - can a hearing by videoconference be the best instrument to reconcile them? *Revista Brasileira de Direito Processual Penal*, vol. 8, n. 3, 2022, p. 1188, <https://doi.org/10.22197/rbdpp.v8i3.737>. This special mode of hearing is also applied with regard to victims of offences against sexual freedom, who are at least 15 years of age at the time of an examination, special rules of hearing apply only to the victims of rape, sexual exploitation of insanity or helplessness and sexual exploitation of a relationship of dependence and critical situation (Article 185c § 1 and 1a of the CCP).

The Polish legislation, in Article 390 § 1 of the CCP, provides a general rule that the accused has the right to attend all evidentiary procedures. However, in exceptional circumstances, when there is a reason to fear that the presence of the accused might inhibit the explanations of a co-accused or the testimonies of a witness or an expert, the presiding judge may order that the accused should leave the courtroom for the duration of a given person's examination (Article 390 (2) of the CCP). Until April 8, 2015, there was only the possibility of the accused physically leaving the courtroom. After that date, due to a change in the law, the presiding judge was given the power to order a hearing by videoconference. In the case provided for in Article 390 § 2 of the CCP, the presiding judge may also carry out the examination with the use of technical devices allowing this procedure to take place remotely, with a simultaneous transmission of sound and vision. At the place where explanations or testimonies are provided, the procedure is attended by a court referendary, assistant of a judge or a court clerk.

Undoubtedly, in addition to the protection of the mental health of the witness and considerations of procedural efficiency, understood as the desire to eliminate the lengthiness of procedural activities, the COVID-19 pandemic played a significant role in the choice of the method of video-hearings. On the one hand, the COVID-19 crisis forced more frequent use of this form of hearings, including in the area of cross-border judicial cooperation in the EU, and on the other hand, it demonstrated how poorly judicial authorities were equipped and how incompatible the technologies used were.

### **3. REGULATION OF REMOTE HEARINGS IN POLISH CRIMINAL PROCEEDINGS**

#### **3.1. REMOTE HEARINGS BEFORE THE COVID-19 PANDEMIC**

The legal grounds for video-hearings that were in effect prior to the Covid-19 pandemic in Poland enabled the legislature to adopt remote hearing and remote detention hearing during the pandemic. The remote-hearing formula itself was not a novelty, as such a form of trial was first introduced into the Polish Code of Criminal Procedure by the

Act of August 31, 2011 as part of summary proceedings. This form of hearings was intended to ensure that the perpetrators of so-called stadium crimes associated with the 2012 European Football Championship could be adjudicated within a reasonable timeframe (UEFA EURO 2012). The aforementioned act contained provisions adopted for the duration of UEFA EURO 2012, which remained in force to this day, in a slightly modified form<sup>21</sup>. The remote form of summary proceedings is optional. Whether this form of trial is chosen depends only on the decision of the authority carrying out the preparatory proceedings (i.e., the Police) and technical conditions.

The essential feature of remote trials of perpetrators of so-called stadium crimes is the ability to conduct the trial while ensuring the participation of the defendant and/or his or her defense counsel via devices that allow for the direct transmission of sound and video (Article 517b (2) of the CCP)<sup>22</sup>. Most often, the defendants are in a detention center and can attend the trial from there. A court registrar or assistant judge employed by the court in whose district the perpetrators resides must be present at his or her location. In addition, if a defense attorney has been appointed in the case, he or she also participates in the remote hearing at the offender's location. In some situations, when the defendant is a foreigner with insufficient command of the Polish language, the participation of an interpreter is also necessary. The interpreter also takes part in the remote hearing at the defendant's location. The presence of a defense counsel and, if necessary, an interpreter at the defendant's location is intended to ensure an effective contact between the defendant and the defense counsel and to make the exercise of the right to defense

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<sup>21</sup> Currently, summary proceedings are allowed in cases in which an investigation is conducted (i.e. ones that involve offenses that are usually punishable by up to 5 years of imprisonment), if the perpetrator was caught in the act of committing the offense or immediately afterwards, arrested, and brought by the Police and handed over to the court within 48 hours with a request to hear the case in summary proceedings.

<sup>22</sup> See MORGALA, Dominik. Rozprawa odmiejscowiona jako środek do walki z chuligaństwem stadionowym? [Virtual Court as the measure to fight against football hooliganism]. *Czasopismo Prawa Karnego i Nauk Penalnych*, vol. 3, 2012, p. 171-131; KOSOWSKI, Jakub. Rozprawa „odmiejscowiona” [“Remote” court hearing]. *Prokuratura i Prawo*, vol. 1, 2012, p. 37-53

more realistic, in particular by ensuring the unhindered communication between the defendant and his or her counsel.

Since the hearing is held in two locations, during the court's activities in which the defendant participates using technical devices that allow these activities to be conducted remotely, other participants in the proceedings who are at the court may only submit motions and other statements orally into the record. The court is obliged to inform the defendant and his or her counsel at the next procedural action about the content of all pleadings that have been received in the case file since the referral to the court for trial. At the request of the defendant or the defense counsel, the court is required to read the contents of these pleadings (Article 517ea of the CCP). Sometimes, however, the defendant and his or her defense counsel are unable to send the pleading before the remote hearing begins. These pleadings can then be read during the hearing, and from the moment they are read, they have a procedural effect.

The institution of a remote hearing was opposed and criticized by law enforcement practitioners, judges, and attorneys<sup>23</sup>. Allegations were raised relating to the lack of technical preparedness of courts and the inability to observe and respect the basic procedural principles when the hearing is conducted remotely. This resulted in sporadic use of this solution in judicial practice.

### **3.2. LEGAL CHANGES DURING THE COVID-19 PANDEMIC REGARDING REMOTE HEARINGS**

The need for changes to the regulations applicable to remote hearings arose with the outbreak of the COVID-19 pandemic. Recognizing that the crisis caused by the SARS-CoV-2 coronavirus would not end quickly, on June 19, 2020 the Polish parliament passed an amendment to the Code of Criminal Procedure<sup>24</sup>. The amendment introduced remote hearings as

<sup>23</sup> See MORGALA, Dominik. Rozprawa odmiejscowiona jako środek do walki z chuligaństwem stadionowym? [Virtual Court as the measure to fight against football hooliganism]. *Czasopismo Prawa Karnego i Nauk Penalnych*, vol. 3, 2012, p. 171-131.

<sup>24</sup> Act of June 19 2020 on interest rate subsidies for bank loans granted to businesses affected by the effects of COVID-19 and on simplified proceedings for

an alternative way of conducting trials. It should be added that although remote hearings were introduced by an amendment adopted in connection with the COVID-19 pandemic, Article 374 (3-9) of the CCP does not specify conditions such as the occurrence of difficulties or threats related to an epidemic. This means that after meeting certain conditions, a remote hearing can be held in any case and for any procedural action, and this form of hearing was made a permanent part of the Code of Criminal Procedure. In this hearing form, the court is in the courtroom, and other parties participate remotely, being in a place other than the court at the same time.

It would seem that the remote hearing formula allows for a wide range of application. Nothing could be further from the truth, as it is possible only if the defendant is deprived of liberty (first condition). Any deprivation of liberty is acceptable, regardless of the legal grounds. It can result from either pre-trial detention or serving a prison sentence in connection with a conviction in another case. The condition for a remote hearing is no longer met when the defendant regains his freedom. The second condition for holding a remote hearing is related to the compulsory appearance for a hearing<sup>25</sup>, which may result: a) from a decision of the court or the presiding judge; b) from the law - in cases of crimes, but only in terms of the first hearing date, and c) from the decision of a defendant who is deprived of liberty and who has requested to be brought to the hearing<sup>26</sup>. If none of these three situations occur, then the condition of

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approval of an arrangement in connection with the occurrence of COVID-19 (Journal of Laws of 2020, item 1086). This Act took effect on June 24, 2020.

<sup>25</sup> In the Polish criminal procedure, the defendant has the right to participate in a hearing. The presiding judge or the court may deem his presence compulsory (Article 374 (1) of the Code of Criminal Procedure). Only in felony cases, which involve crimes punishable by imprisonment for at least three years, does the defendant have a statutory obligation to appear only at the beginning of the hearing (the first date of the hearing).

<sup>26</sup> This provision was added in connection with the implementation of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Official Journal of the UE L 315 of 14.11.2012. ŚWIECKI, Dariusz. In ŚWIECKI, Dariusz (ed.). *Komentarz do Kodeksu postępowania karnego* [Commentary to the Code of Criminal Procedure], Warszawa: Wolters Kluwer, 2108, p. 1500-1501.

compulsory appearance, which is required for a remote hearing, is not met for a defendant deprived of liberty.

The procedure for initiating a remote hearing is not precisely regulated in the provisions of the Code of Criminal Procedure. Article 374 (3) of the CCP stipulates that the prosecutor has to submit a request and, in addition, the presiding judge must give his or her consent. At the same time, the court's consent depends on the fulfillment of one condition: whether the technical considerations allow it. Therefore, when technical considerations do not stand in the way, the presiding judge is obliged to give consent to a remote hearing. The phrase "technical considerations" includes both obstacles of an organizational nature, such as the lack of suitable equipment or its malfunction, too little technical equipment, etc. The other parties to criminal proceedings can at most indicate the need for a remote hearing, and the presiding judge does not have to take a position on this issue in response to such indications. In other words, the judge can keep silent about such requests. Such a definition of the way of initiating a remote hearing puts the prosecutor in a privileged position compared to other parties and participants of the trial. The prosecutor's request to allow holding a remote hearing is binding on the court, which is an unjustified manifestation of the prosecutor's domination over the presiding judge. We believe that the preservation of equal positions for all litigants requires that each litigant have an identical opportunity to initiate a remote hearing. Only in this way can any claims be made as to the implementation of the principle of equality of the parties in choosing the form of their participation in the hearing.

In a remote hearing, the court is in the courtroom, while the other litigants can be in the party's room, which may be located inside or outside the courthouse. The defendant, on the other hand, may be in a detention center or in prison. With this hearing format, the participation of a defense counsel is not mandatory. If the defendant has a defense attorney, he or she is given the right to choose where to be during the remote hearing. Thus, the defendant's defense counsel can attend the hearing either at the defendant's location or in the court. If the defense counsel and the defendant are in different locations, the court, at the request of the defense counsel or the defendant, may order a recess to



allow the defendant to contact the defense counsel by telephone, “unless the filing of the request clearly does not serve the implementation of the right to defense and, in particular, aims to disrupt or unreasonably prolong the hearing” (Article 374 (7) of the Code of Criminal Procedure)<sup>27</sup>.

The literature rightly points out that the choice of the location of the defense counsel should be agreed with the defendant, who should at least have telephone contact his or her counsel<sup>28</sup>. However, it is worth noting that both options regarding the defense counsel’s location (in the courtroom or at the defendant’s location) during a remote hearing have their drawbacks. If the defense counsel is at the defendant’s location, difficulties may arise in meeting the requirements of an effective defense, especially when it is necessary to question witnesses who are in the courtroom, or to access documents that have also been filed in court. If the defense counsel is in the court, the defendant or the defense counsel may request a recess in the hearing to make telephone contact. Whether this request is granted depends on the decision of the presiding judge, who may consider that the recess will not serve the exercise of the right to defense and may thus refuse to order the recess.

The confidentiality of contacts between a defense counsel who is in court and a defendant who is in a prison or a detention center should be evaluated critically. According to Article 374 (5) of the Code of Criminal Procedure, a court registrar or an assistant judge, employed by the court, or a representative of the administration of a penitentiary or detention center, may be present next to the defendant. The question arises as to whether any of the designated persons will be present when the defendant wishes to contact his or her defense counsel by phone. The wording of Article 374 (5) of the Code of Criminal Procedure does not indicate that the person accompanying the defendant should leave the room while he or she is talking to his lawyer. However, it goes without saying that the relationship between the lawyer and his or her client should be based on mutual trust and understanding. The defendant’s

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<sup>27</sup> Pursuant to Article 96a added to the CCP, the above provisions on the participation of the parties in an online hearing may also be applied to sessions.

<sup>28</sup> KULESZA, Cezary. Remote Trial and Remote Detention Hearing in Light of the ECHR Standard of the Rights of the Accused, *Białystok Legal Studies*, vol. 26, no 3/2021, p. 215, DOI: 10.15290/bsp.2021.26.03

right to communicate with his or her lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society and follows from Article 6 (3) (c) of the Convention<sup>29</sup>. If a lawyer were unable to confer with his or her client and receive confidential instructions from him without such surveillance, his or her assistance would lose much of its usefulness.

The case law of the ECtHR, by accepting the conduct of a hearing in the remote form in exceptional situations (e.g., the protection of public order, the safety of witnesses and victims of crimes, as well as meeting the requirement of a “reasonable time” for the conduct of the case), requires that defendants be assisted by a counsel, receive audio and video of the hearing without interference, and themselves be seen and heard by the court and other participants in the hearing<sup>30</sup>. The case law of the ECtHR adds that if a defense counsel cannot confer with his or her client and receive confidential instructions without supervision, the legal assistance provided may lose much of its effectiveness, while the Convention is supposed to guarantee rights that are real and effective<sup>31</sup>. In particular, the right to effective legal assistance must be respected in all circumstances.

In order to guarantee the confidentiality of the defendant’s interactions with his or her defense counsel during a remote hearing, there should be a separate, two-way encrypted connection between the defendant and the defense counsel if the defense counsel is not at the same location as the defendant. It is also possible to appoint a separate, additional defense counsel to be present at the defendant’s location. This demand goes far beyond the minimum standard derived from the case law of the European Court of Human Rights. The ECtHR’s judgments in

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<sup>29</sup> See ECtHR judgment of 13 March 2007 in the case of *Castravet v. Moldova*, application no. 23393/05, § 49, <https://hudoc.echr.coe.int/fre?i=001-79767>.

<sup>30</sup> ECtHR judgment of 5 October 2006 in the case of *Marcello Viola v. Italy*, application no. 45106/04, § 67–69 and 75–77, <https://hudoc.echr.coe.int/eng?i=001-7724>; ECtHR judgement of 27 November 2007 in the case of *Asciutto v. Italy*, application no. 35795/02, § 68–72, <https://hudoc.echr.coe.int/eng?i=001-83511>.

<sup>31</sup> ECtHR judgment of 28 November 1991 in the case of *S. v. Switzerland*, § 48, <https://hudoc.echr.coe.int/eng?i=001-57709>.

cases *Viola v. Italy*<sup>32</sup>, and *Asciutto v. Italy*<sup>33</sup>, *Zagaria v. Italy*<sup>34</sup>, and *Gorbunov and Gorbachev v. Russia*<sup>35</sup>, unequivocally show that the difficulty of remote communication between the defendant and the court in a remote hearing should prompt the court to provide the defendant with a defense counsel, if the defendant does not have one, as well as to ensure the correct quality of video and audio to enable following the course of the hearing<sup>36</sup>.

In assessing the Polish model of remote hearings according to the ECtHR's standard, respect for the right to an interpreter is to be evaluated positively. If a defendant participating in a remote hearing is assisted by an interpreter because he or she does not have sufficient command of the Polish language (Article 72 (1) of the Code of Criminal Procedure), the interpreter must participate in the hearing at the defendant's location, unless the presiding judge orders otherwise (Article 374 (8) of the Code of Criminal Procedure).

### 3.3. A REMOTE COURT SESSION CONCERNING DETENTION ON REMAND

Remote sessions concerning detention on remand have been a part of the Polish legal system since June 24, 2020 (Article 250 (3b-3h))

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<sup>32</sup> ECtHR judgment of 5 October 2006 in the case of *Marcello Viola v. Italy*, application no. 45106/04, § 67–69 and 75–77, <https://hudoc.echr.coe.int/eng?i=001-7724>.

<sup>33</sup> ECtHR judgment of 27 November 2007 in the case of *Asciutto v. Italy*, application no. 35795/02, <https://hudoc.echr.coe.int/eng?i=001-83511>.

<sup>34</sup> ECtHR judgment of 27 November 2007 in the case of *Zagaria v. v. Italy*, application no. 58295/00, § 32–36, <https://hudoc.echr.coe.int/eng?i=001-83492>.

<sup>35</sup> ECtHR judgment of 26 June 2008 r. in the case of *Shulepov v. Russia*, application no. 15435/03, § 34–39, <https://hudoc.echr.coe.int/eng?i=001-87229>; ECtHR judgment of 1 March 2016 r. in the case of *Gorbunov and Gorbaczov v. Russia*, application no. 43183/06 and 27412/07, § 37–39, <https://hudoc.echr.coe.int/eng?i=001-160993>; see also LACH, Arkadiusz. *Rzetelne postępowanie dowodowe w świetle orzecznictwa strasburskiego* [Reliable hearing of evidence in the light of Strasbourg case law], Warsaw: WoltersKluwer, 2018, p. 104.

<sup>36</sup> ECtHR judgment of 2 November 2010 in the case of *Sakhnovskiy v. Russia*, application no. 21272/03, § 98, 102–104, <https://hudoc.echr.coe.int/eng?i=001-101568>.

of the Code of Criminal Procedure)<sup>37</sup>. The possibility of conducting electronic sessions concerning detention on remand is a recent occurrence in the Polish criminal process. Although this solution emerged during the Covid-19 pandemic and was related to the need to protect litigants from possible infection, it has since become a permanent feature of the Polish justice system.

The Code of Criminal Procedure does not specify the prerequisites that must be fulfilled for the court to be able to conduct a remote session. The Code points out that the court “may dispense with the forcible bringing of a suspect to the court if the suspect’s participation in the hearing, in particular the submission of explanations by the suspect, is ensured using technical devices that allow the session to be conducted remotely with simultaneous direct transmission of video and audio” (Article 250 (3b) of the Code of Criminal Procedure). At the same time, the Code rules out such a form of a session for a suspect who is deaf, mute, or blind (Article 250 (3f) of the Code of Criminal Procedure). This means that the new regulation applies to a suspect who is deprived of liberty. This includes both a detainee for whom the prosecutor has requested detention on remand and a detainee who is serving a concurrent prison sentence in another case. The final decision is made by the court at its own discretion. If the court considers that the suspect’s presence at the session is necessary, then it decides not to hold a remote session and instead chooses its standard form. The court’s decision is independent of the position of the suspect and his or her defense counsel. In principle, we this position should be approved of. The participant in the proceedings does not have the right to choose the form of the session: stationary or remote. It is not the form of the session that determines respect for the principle of due process and the guarantees of the defendant, but rather the shape of the session and the actual possibility of realizing the process guarantees<sup>38</sup>.

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<sup>37</sup> On the grounds for detention on remand) in Poland, see: SAKOWICZ, Andrzej. The impact of the case law of the Constitutional Tribunal on the standard of detention on remand in Poland, *Revista Brasileira de Direito Processual Penal*, v. 8, n. 1, 2022, pp. 58-64.

<sup>38</sup> Differently MISZAT, Piotr. E-arrest meetings under the terms of art. 250 § 3b–3h of the Code of Criminal Procedure. Postulates *de lege lata* and *de lege ferenda*. *Studia Prawnoustrojowe*, n. 54, 2021, p. 408-409, doi: 10.31648/sp.718.

The rule that governs remote sessions concerning detention on remand in Poland is that the suspect's defense counsel must be present at the defendant's location during the session. This is appropriate from the point of view of the implementation of the right to defense and the guarantee of the confidentiality of the contacts between the defense counsel and the suspect (Article 250 (3d) of the Code of Criminal Procedure). There are two exceptions to this rule. First, the defense counsel can decide for that he or she will appear in court rather than at the suspect's location. Second, the court may oblige the defense counsel after all to attend the session at the courthouse.

The literature indicates that this may occur when, for example, the appearance of a defense counsel at the suspect's location involves the risk of not resolving the motion for detention on demand before the expiration of the permissible period of the defendant's detention<sup>39</sup>. Allowing for such a situation, however, we believe that the legislature should stipulate the possibility of requiring the defense counsel to appear in court only in extraordinary situations. Until then, one can at most count on the fact that the court, in deciding to oblige the defense counsel to appear in court, notices that its decision restricts the suspect's right to defense, in particular, the suspect's right to unrestricted and confidential contact with his or her counsel. This is because a court registrar or an assistant judge employed by the court in whose district the suspect is staying, or a representative of the administration of the penitentiary or detention center, if the suspect is staying in a penitentiary or detention center, is present at the suspect's location (when it is, for example, a pre-trial detention facility).

In order to ensure the implementation of the right to defense, the law provides for ensuring the possibility of telephone contacts between the suspect and the defense counsel during the session when the defense counsel is in a different location than the suspect. In order to implement this right, the court, at the request of the suspect or the defense counsel, may order a recess in the session for a specified period

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<sup>39</sup> In Poland, the duration is a maximum of 72 hours after the person is arrested. See e.g. KULESZA, Cezary. Remote Trial and Remote Detention Hearing in Light of the ECHR Standard of the Rights of the Accused, *Białystok Legal Studies*, vol. 26, no 32021, p. 217, DOI: 10.15290/bsp.2021.26.03

of time in order for the suspect to call the counsel (Article 250 (3e) of the Code of Criminal Procedure). It seems that, in such a situation, it is necessary to give the suspect access to a telephone in order to enable him or her to call his or her defense attorney in a way that ensures the confidentiality of their conversation. However, the court may disregard such a request if granting it would interfere with the orderly conduct of the session or would create the risk of not considering the request for detention on remand before the expiration of the permissible period of the suspect's detention. Again, it should be noted that the possibility of a telephone contact between the suspect and his or her defense counsel is not an absolute requirement. As with respect to a remote hearing, it is up to the court to decide. Anyway, this contact is not fully confidential. A court registrar or an assistant judge employed by the court in whose district the suspect is staying, or a representative of the administration of the penitentiary or detention center, if the suspect is staying in a penitentiary or detention center, is present at the suspect's location (when it is, for example, a pre-trial detention facility). In our opinion, this solution, rather than the form of the session itself, significantly weakens the right to defense.

As with respect to a remote hearing, an interpreter is also allowed to participate in a session concerning detention on remand. If the suspect does not speak Polish, an interpreter may also attend the session at the suspect's location. However, this does not preclude the interpreter from being present in the courthouse.

It should be added that during the court's activities in which the suspect participates using technical devices that allow these activities to be conducted remotely, other participants in the proceedings may submit motions and other statements, as well as make process-related activities only orally into the record. The court is obliged to inform the suspect and his or her defense counsel of the content of all pleadings received in the case file since the request for detention on remand was submitted to the court. In addition, at the request of the suspect or defense counsel, the court is required to read the contents of these pleadings.

## 4. DIGITIZATION OF CRIMINAL PROCEEDINGS FILES

### 4.1. PRELIMINARY COMMENTS

The remote hearing formula alone is not enough for a smooth course of the hearing with a guarantee of the necessary procedural guarantees of the parties and other participants in the proceedings. A necessary element is the digitization of case files, the lack of which effectively prevents streamlining of the work of the justice system. Digitization of files itself is one thing, but remote access to the digitized files is another. It would be impractical for a defense counsel present next to the defendant at the place of his or her detention to rely on photocopies during a remote hearing. Remote access to digitized case files supports the effective implementation of procedural guarantees. The right of access to files, although not explicitly guaranteed in the ECHR, derives in principle from its Article 6(3)(b), which provides that anyone accused of committing an act punishable by law has at least the right to have adequate time and opportunity to prepare his or her defense<sup>40</sup>. One of the purposes of this provision is to ensure equality of arms between the prosecution and the defense by allowing the defendant to see the results of the investigation in order to prepare his or her defense<sup>41</sup>. The ECtHR points out that the ECHR is violated by a restriction of a defendant's access to at least a part of the evidence that may present circumstances favorable to the defendant, i.e., evidence ruling out or limiting the guilt of the defendant or at least having a mitigating effect on the penalty<sup>42</sup>. The practice of national authorities that involves withholding documents that may affect the defense of the defendant or suspect, especially when providing full access to these files to the prosecution, violates the principle of equality of arms, thus restricting the right to defense established in

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<sup>40</sup> Article 6, paragraph 3, letter b of the European Convention on Human Rights.

<sup>41</sup> Commentary to Article 6 of ECHR, In: NOWICKI, Marek A. (ed.), *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* [About the European Convention on Human Rights. A Commentary]. Warszawa: Wolters Kluwer Polska, 2021.

<sup>42</sup> ECtHR judgement of 14 December 1981 in the case of *Jespers v. Belgium*, application no. 8403/78, <https://hudoc.echr.coe.int/eng?i=001-95751>.

the Convention<sup>43</sup>. In some cases, the principle of equality of the parties may be violated if the defendant's access to the case file is just limited, even for reasons of public interest<sup>44</sup>. What is significant for the further considerations, the ECtHR has considered it sufficient for the defense counsel alone to be able to familiarize himself or herself with the file, while providing a possibility to discuss the evidence with the defendant<sup>45</sup>.

Similar regulations are contained in the International Covenant on Civil and Political Rights (ICCPR)<sup>46</sup>; according to its Article 14(3)(b), any person accused of a crime has the right, on a fully equal basis, to at least the following guarantees: to have adequate time and possibility to prepare his or her defense and to communicate with a defense counsel of his or her choice. The provisions of the EU Charter of Fundamental Rights are more limited in this regard and only indicate that every defendant is guaranteed the right to defense (Article 48(2)). At the level of the European Union, this matter is additionally regulated, among others, in Directive 2012/13/EU<sup>47</sup>. Its recitals note that access to evidence, in accordance with national law, should include access to materials such as documents and, where appropriate, photographs and audio and video recordings, whether advantageous or disadvantageous for the suspect or defendant, which are in the possession of the competent authorities in connection with the criminal case in question, and should be granted free of charge<sup>48</sup>. According to Article 7 of Directive 2012/13/EU, where

<sup>43</sup> ECtHR judgment of 19 April 2011 in the case of *Kwiatkowski v. Poland*, application no. 24254/05, <https://hudoc.echr.coe.int/fre?i=001-104543>.

<sup>44</sup> ECtHR judgement of 27 April 2007 in the case of *Matyjek v. Poland*, application no. 38184/03, § 65, <https://hudoc.echr.coe.int/fre?i=001-80219>; ECtHR judgement of 9 December 2004 in the case of *Moiseyev v. Russia*, application no. 62936/00, § 217, <https://hudoc.echr.coe.int/eng?i=001-67849>.

<sup>45</sup> Commentary to Article 6 of ECHR, In: NOWICKI, Marek A. (ed.), *Wokół...*, and cited thereof: ECtHR judgement of 19 December 1989 in the case of *Kamasinski v. Austria*, application no. 9783/82, <https://hudoc.echr.coe.int/?i=001-57614>.

<sup>46</sup> International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>47</sup> European Parliament and of the Council, Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, Official Journal of the European Union, L 142, 1.6.2012, p. 1–10.

<sup>48</sup> Recitals 31, 34.



a person is arrested and detained at any stage of criminal proceedings, Member States shall ensure that detained persons or their counsels have access to documents in the possession of the competent authorities that are related to the specific case and are relevant for effectively challenging, in accordance with national law, the lawfulness of the arrest or detention. Access to the evidence must be provided in time for the effective exercise of the right to defense, but at the latest when the basis of the accusation is submitted to the court for evaluation. If the competent authorities come into possession of further evidence, access to it must be provided in a timely manner so that that evidence can be taken into account<sup>49</sup>. The Court of Justice of the European Union makes an assessment of whether there have been other violations of due process rights in the case, including, for example, the obligation to promptly inform suspects or defendants of their right to refuse to testify, dependent on proper access of a party to the records of the proceedings.<sup>50</sup>

Without fair rules governing defendants' access to case files, there can be no real possibility of implementing his right to defense. Such a process does not meet the requirements of a fair trial, including the principle of equality of arms in structural terms, which consists, among other things, of the right to participate in procedural activities, the guarantee of adequate time to prepare a defense, or precisely the right of access to the files of the proceedings<sup>51</sup>.

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<sup>49</sup> Article 7 (2) of Directive 2012/13/EU.

<sup>50</sup> Judgment of the Court of Justice of the European Union of 22 June 2023 in Case C-660/21, K.B. and F.S. (Relevé d'office dans le domaine pénal), ECLI:EU:C:2023:498

<sup>51</sup> CZERNIAK, Dominika. Europeizacja postępowania dowodowego w polskim procesie karnym. Wpływ standardów europejskich na krajowe postępowanie dowodowe [Europeanization of Evidence Proceedings in Polish Criminal Trials. *The Impact of European Standards on National Evidence Procedures*]. Warszawa: CH Beck, 2021, p. 134. See also cited thereof: WĄSEK-WIADEREK M., Proces karny a międzynarodowe standardy w dziedzinie praw człowieka In: HOFMAŃSKI Piotr (ed.), System Prawa Karnego Procesowego. Zagadnienia ogólne. Tom I, cz. 2, Warszawa: LexisNexis, 2013; HOFMAŃSKI, Piotr (ed.), System Prawa Karnego Procesowego. Tom I. Zagadnienia ogólne. Część 2 [System Prawa Karnego Procesowego. Tom I. Zagadnienia ogólne. Część 2 [System of Criminal Procedural Law. Volume I. General Issues. Part 2], Warszawa: Wolters Kluwer Polska, 2013.

#### 4.2. THE CURRENT STATUS IN THE EU AND POLAND

The European Commission indicates in its publications, that the use of information and communication technologies (ICT) can strengthen the Member States' justice systems and make them more accessible, efficient, resilient, and ready to face current and future challenges<sup>52</sup>. The European Commission regularly conducts annual overviews providing comparative data on the efficiency, quality, and independence of justice systems among the EU Member States<sup>53</sup>. These reports indicate the ability to carry out specific steps in a judicial procedure electronically as an important aspect of the quality of justice systems. The reports' conclusions indicate, among other things, that 26 Member States provide some online information about their judicial system, including websites with clear information on accessing legal aid, on court fees, and on eligibility criteria for reduced fees. The situation in this regard is improving, while an uneven development of EU countries is noticeable. Only 8 Member States have digital-ready procedural rules which allow fully or mostly for the use of distance communication and for the admissibility of evidence in digital format only. In this regard, the situation is also steadily improving<sup>54</sup>.

The EU Justice Scoreboard 2023 shows a significant difference between the introduction of such solutions in civil/commercial and administrative cases and in criminal cases. In 22 Member States, the possibility for clients to access the electronic file of their ongoing cases in civil/commercial and administrative cases has been established. In only 14 countries have digital solutions to conduct and follow court proceedings in criminal cases, where Defendants can access their ongoing case electronically<sup>55</sup>.

Due to the fact that this paper refers in part to Polish regulations, it should be pointed out that they were relatively highly rated in the EU Justice Scoreboard 2023. Introducing technological innovations in the

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<sup>52</sup> EU Justice Scoreboard 2023, Luxembourg: Publications Office of the European Union, 2023.

<sup>53</sup> *Ibidem*.

<sup>54</sup> EU Justice Scoreboard, p. 35.

<sup>55</sup> EU Justice Scoreboard, p. 36. Figure 46.

courts has been an important part of the Ministry of Justice's efforts for at least several years<sup>56</sup>. In the field of criminal proceedings, implementation is underway of, among other things, the National Prosecutor's Office's PROK-SYS system, which is expected to provide automatic access to databases for public and private entities as well as remote communication with all participants in proceedings, and allow procedural activities to be conducted remotely. Finally, the ongoing work also involves the digitization of documents and case files, which would lead to much easier access to process files and materials for all authorized entities<sup>57</sup>. For the above reasons, Polish regulations appear to be one of the valuable models for assessing the course of digitization of judicial processes in democratic law-abiding states. At the same time, despite Poland's high ranking in the EU Justice Scoreboard 2023, it cannot be said that Polish criminal proceedings are very digitized in terms of access to files. The current regulations in this regard are selective and usually only provide for the permissibility (not the obligation) to provide access to files in this form. Therefore, the remarks in this section of the paper are primarily of a *de lege ferenda* nature, unless explicitly stated otherwise that they pertain to the current legislation.

Thus, according to Article 156 (5) of the Code of Criminal Procedure, if there is no need to secure the proper course of the proceedings or to protect an important interest of the state, in the course of preparatory proceedings, parties, defense counsels, attorneys, and legal representatives must be given access to files, allowed to make copies, and issued certified copies against payment. According to that provision, prosecutors may provide access to files in electronic form. The provision provides no

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<sup>56</sup> Digital revolution in courts - next steps - Ministry of Justice - Gov.pl website ([www.gov.pl](http://www.gov.pl)). The important achievements presented by the Ministry include the implementation of the following state-of-the-art systems: Electronic Writ-of-Payment Proceedings, Electronic Land and Mortgage Registers, and e-KRS (electronic National Court Register), limited introduction of e-delivery (electronic equivalent of registered letter with acknowledgement of receipt), Electronic National Debtors Register supporting restructuring and bankruptcy proceedings, e-court payments, and digital registration of cases.

<sup>57</sup> It should be emphasized that as of the date of this paper going to print, the system does not have the functionality that would allow case files to be viewed in digitized form by litigants in all cases.

guidance in this regard and is technology-neutral, but shifts the burden of decision-making to the prosecutor. If files are made available in paper form, the decision can be made by anyone conducting the proceedings (not just the prosecutor). In addition, the Polish Code of Criminal Procedure also provides for the possibility (not an obligation) to provide an expert witness with access to selected documents from the case file in electronic form (Article 198 (1-2) of the Code of Criminal Procedure)<sup>58</sup>.

Last but not least, in the course of an investigation, if there are grounds for closing the investigation, at the request of the suspect or his or her defense counsel for a final disclosure of the materials of the proceedings, the investigator must notify the suspect and his or her defense counsel of the date of the final disclosure, advising them of the right to review the file in advance within a period appropriate to the gravity or complexity of the case, as determined by the authority conducting the process. Final disclosure of the case file in preparatory proceedings may involve the prosecutor providing access to the file in electronic form (Article 321 (1) of the Code of Criminal Procedure).

The current legislation does provide the possibility for a prosecutor to provide access to files via the nationwide ICT system of common organizational units of the prosecutor's office, namely the PROK-SYS, using the functionality available in the system<sup>59</sup>. The regulations generally provide for authorized persons to review case files during and after preparatory proceedings by providing access to paper files, files digitized in the PROK-SYS System - via the Internet, or digitized files in the reading room of the unit<sup>60</sup>. However, as indicated above, the PROK-SYS system is still being implemented, and it is impossible to speak of the widespread use of this method of providing access to criminal investigation files.

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<sup>58</sup> It should be pointed out that a similar procedure is provided for copies of traditional files.

<sup>59</sup> § 144 of the Regulation of the Minister of Justice of April 7, 2016 - Rules of internal office work of common organizational units of the prosecutor's office (consolidated text: Journal of Laws of 2023, item 1115, as amended).

<sup>60</sup> § 67 of the Order of the Minister of Justice of July 21, 2021 on the organization and scope of activities of secretariats and other administrative departments in common organizational units of the prosecutor's office (Official Gazette of the Ministry of Justice of 2021, item 170).

All of the aforementioned solutions relate to the provision of criminal proceedings files in digital form at the pre-trial stage. Currently, the rules of criminal procedure do not provide for the disclosure of criminal case files to parties at the court stage.

Digitization of files involves creating a digital representation of the files, documents, and data collected in the course of criminal proceedings<sup>61</sup>. For this reason, digitization of case files is seen as an example of electronization of the criminal process, i.e., the introduction of electronic devices into the proceedings<sup>62</sup>. In this context, one can mention the creation of electronic files, with two types of such files being distinguished: primary electronic files (documents produced only electronically and, for example, bearing digital signatures) and secondary electronic files (traditional files produced in paper form and then, through digital reproduction, transformed into the form of an electronic document)<sup>63</sup>. The above process is not just about digitizing documents in paper form: it can refer to the creation of a digital reproduction of graphic images in the form of printouts, sketches, and drawings, sound recorded in analog form on VHS or cassette tapes, and most often a printout of the text contained in the indicated case files, and the transformation of the indicated content in its entirety into digital (binary) form<sup>64</sup>. Digitization of criminal proceedings files, understood in this way, is a process that

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<sup>61</sup> These issues are defined similarly in: Order of the Minister of Justice of July 21, 2021 on the organization and scope of activities of secretariats and other administrative departments in common organizational units of the prosecutor's office (Official Gazette of the Ministry of Justice of 2021, item 170).

<sup>62</sup> KOSOWSKI, Jakub, *Elektroniczne akta postępowania w świetle udostępniania akt sprawy karnej* [*Electronic Case Files in Light of Access to Criminal Case Files*], In: STEFAŃSKI Ryszard A. (ed.), *Srebrna księga jubileuszowa upamiętniająca XXV-lecie Wydziału Prawa i Administracji* [*Silver Jubilee Book Commemorating the 25th Anniversary of the Faculty of Law and Administration*], Warszawa: Uczelnia Łazarskiego. Oficyna Wydawnicza., 2022. p. 357.

<sup>63</sup> Ibidem.

<sup>64</sup> CZARNECKI Paweł, *Zasada elektronizacji (cyfryzacji) procesu karnego* [*The Principle of Electronization (Digitization) of Criminal Proceedings*], In: SZUMIŁO-KULCZYCKA Dobrosława (ed.), *W pogoni za rzetelnym procesem karnym. Księga dedykowana Profesorowi Stanisławowi Waltosowi*, [*In Pursuit of a Fair Criminal Trial. Book Dedicated to Professor Stanisław Waltos*] Warszawa: Wolters Kluwer Polska, p. 439-448, 2022.

does not create new content or information, but only changes the form of already existing content and information as well as the medium on which it is recorded.

Digitization of criminal proceedings files is not only a lengthy process, but also one that can ultimately lead to varying degrees of digitization of files. The legislature may opt for selective digitization (e.g., assuming the need to digitize only strictly defined materials from proceedings, such as minutes of sessions and hearings), partial digitization, or digitization of specific scopes (e.g., only court files or preparatory proceedings files), or comprehensive digitization of criminal proceedings files (ultimately leading to the creation of the original electronic files of proceedings in digital form).

Given the above, an analysis of the needs, opportunities, and risks associated with the progressive digitization of criminal proceedings files should be carried out with focus on the purpose that this process is intended to serve. The European Justice Scoreboard 2023 raised that “Digitalisation of justice is the key to increasing the effectiveness of justice systems and a highly efficient tool for enhancing and facilitating access to justice”. The objective, therefore, is to improve the efficiency of the justice system and to make it more accessible, efficient, resilient, and ready to face current and future challenges<sup>65</sup>. However, in terms of the fair trial principle, the key question is what objective we will adopt for digitizing criminal proceedings files from the perspective of the goals of the criminal proceedings themselves. The key objective in this regard should be considered the requirement to shape criminal proceedings so that the perpetrator of a crime is detected and held criminally responsible, and so that an innocent person does not bear this responsibility<sup>66</sup>. In

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<sup>65</sup> EU Justice Scoreboard, p. 32.

<sup>66</sup> The aim of criminal proceedings, as formulated in Article 2 of the Polish Code of Criminal Procedure, is to “shape criminal proceedings in such a way that: the perpetrator of the crime is detected and held criminally responsible, while the innocent person does not bear this responsibility; by the accurate application of measures provided for in criminal law and the disclosure of circumstances conducive to the commission of the crime, the objectives of criminal proceedings are achieved not only in combating crimes but also in preventing them and strengthening respect for the law and principles of social coexistence; the legally protected interests of the victim are taken into

addition to the issues of quality, efficiency, and accessibility of justice, the need for, and the opportunities and risks associated with, the progressive digitization of criminal proceedings files have been considered through the lens of that objective.

#### **4.3. THE OPPORTUNITIES ASSOCIATED WITH THE DIGITIZATION OF CRIMINAL PROCEEDINGS FILES**

The fundamental opportunity associated with the digitization of criminal proceedings files lies in the possibility of significantly enhancing and facilitating the accessibility of these files to the parties to the proceedings. As a rule, the place where traditional (paper) files are kept and made available is the office of the authority conducting the proceedings (usually a court or a prosecutor's office). Files in traditional form are mostly created in one copy, which only one participant can review at a time. This means that, first of all, such files are available only to one participant at a time (if the prosecutor or the court is currently reviewing them, the suspect or the victim, for example, cannot see them). In addition, reading the case file requires the physical presence of the participant in the authority's building. Taking into account the voluminousness of the case file - for example, in complex economic criminal cases - this activity usually takes many hours and not infrequently several days<sup>67</sup>. In addition, the opportunity to review the proceedings file is limited to office hours.

However, the case law of the European Court of Human Rights emphasizes that unrestricted access to the case file and unrestricted use of notes (and in some cases copies of the file) are important safeguards of a fair trial - their disregard leads to a violation of the aforementioned principle of equality of parties<sup>68</sup>.

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account while simultaneously respecting their dignity; the resolution of the case occurs within a reasonable timeframe”.

<sup>67</sup> For this reason, in these cases, the parties usually carry out a kind of digitization of the proceedings files on their own by taking photographs of them, as allowed by Polish regulations.

<sup>68</sup> See: ECtHR judgement of 24 April 2007 in the case of *Matyjek v. Poland*, application no. 38184/03, <https://hudoc.echr.coe.int/?i=001-80219> and ECtHR judgement of 15 January 2008 in the case of *Luboch v. Poland*, application

Digitization of criminal proceedings files eliminates these problems. Electronic proceedings files constitute a record of data that is easily reproducible (copied) and accessible. Access is then granted not so much to the medium on which the data is stored, but to the record of information, which is a digital reproduction of the files, documents, and data collected in the course of criminal proceedings. The same information can be made available to multiple participants in proceedings at the same time without limiting its availability to other participants and the authority conducting the proceedings. Finally - time does not limit the availability of the files. They can be made available to parties on media that allow them to be reproduced using a computer or other electronic equipment, or through remote, permanent access using data storage services based on the cloud computing model. In this context, the digitization of criminal proceedings files directly enhances the equality of parties in criminal proceedings and indirectly facilitates the implementation of the right to representation of a party in a process, including the right to defense.

Time savings reasonably lead to thinking about the potential cost savings that the digitization of files can provide. The possible savings can be considered in two aspects. First of all, a party using the assistance of a defense counsel (or an attorney in the case of a victim) often also uses his or her services to become familiar with the case file. The lack of the need to repeatedly appear at the premises of the authority conducting the proceedings to review files in traditional form reduces the cost of legal services for participants in the proceedings, which may indirectly contribute to an improved availability of attorneys' services for these participants. This is important because Article 6 (3) of the ECHR also recognizes the right of the defendant to be assisted by a public defender when he or she does not have sufficient funds to pay for a defense attorney and the interests of justice require it. The financial situation of the defendant is assessed at the time relevant to the case by the national court, which may, as part of this assessment, take into account, among other things, the reduced time that the defense counsel has to spent

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no. 37469/05, <https://hudoc.echr.coe.int/?i=001-84373>. ECtHR judgement of 18 March 2014 in the case of *Beraru v. Romania*, application no. 40107/04, <https://hudoc.echr.coe.int/?i=001-141910>.



on attendance at the premises of the relevant authorities, and thus the reduced costs of the defense<sup>69</sup>.

On the other hand, properly conducted digitization of criminal proceedings files can result savings for the state as well. Initially, digitization involves significant costs related to the need to purchase and use of appropriate hardware and software, as well as the involvement of personnel. However, one should also bear in mind that storing documents digitally is usually cheaper and requires less space than storing the same documents in paper form. Digitization can also reduce the costs associated with sending and copying of documents.

Another opportunity involves potential improvements in the efficiency and timeliness of criminal proceedings. Digitization of documents allows faster access to information, which can significantly expedite the adjudication of some criminal cases. It certainly helps avoid obstructions, which typically involve, for example, the need to provide access to proceedings files during the trial to other participants or, for example, to an expert witness, which sometimes prevents or impedes other procedural activities. Easier and faster exchange of documents between law enforcement agencies and courts can reduce the length of proceedings.

At the same time, according to Article 6 of the ECHR, everyone has the right to a fair and public hearing within a reasonable time. The purpose of the guarantee regarding hearing of a case within a reasonable time is to ensure that defendants do not have to continue be accused beyond the time necessary to carry out the relevant actions, and that the case is adjudicated as soon as possible after the crime is committed and a specific person is charged<sup>70</sup>. The principle of conducting criminal proceedings within a reasonable timeframe is also sometimes seen as a guarantee of reaching the material truth, which is the basis of adjudication

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<sup>69</sup> See: ECtHR judgement of 18 December 2001 in the case of *R.D. v. Poland*, application no. 29692/96 and 34612/97, <https://hudoc.echr.coe.int/eng?i=001-59992>.

<sup>70</sup> ECtHR judgement of 27 June 1968, in the case of *Wemhoff v. The Federal Republic of Germany*, application no. 2122/64, <https://hudoc.echr.coe.int/eng?i=001-57595>.

in a criminal trial<sup>71</sup>. This principle represents, among other things, the demand to reduce to a minimum the time that elapses from the moment of perpetration of a criminal act to the moment of its detection and the time necessary to identify the perpetrator and impose on him or her the appropriate criminal-law response measures<sup>72</sup>. Quick conduct of a case allows for better concentration of evidence and faster collection of evidence, thus also reducing the risk of its loss due to the passage of time (including, for example, misplacing, destroying, or distorting of evidence). This clearly contributes to the achievement of the objectives of criminal proceedings. On the other hand, the adjudication should take place as quickly as possible, since delayed justice is in fact a denial of justice<sup>73</sup>. Prolonged adjudication undermines public confidence in the effectiveness of the justice system and trust in the state as a whole<sup>74</sup>.

Also, the digitization of criminal proceedings files is a prerequisite for the introduction of any automation in adjudication activities, or for the use of, for example, artificial intelligence systems to support the work of judges and prosecutors. The use of artificial intelligence systems as a kind of assistant judge is a solution that is already being tested in some jurisdictions around the world<sup>75</sup>. No such tools will be able to be

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<sup>71</sup> WITKOWSKA, Krystyna. Znaczenie szybkości postępowania karnego oraz koncentracji czynności procesowych dla realizacji celów i zadań procesu karnego [Importance of penal procedure speed and con-centration of actions for meeting penal process goals]. *Prokuratura i Prawo*, n. 3, 2009, p. 73–86.

<sup>72</sup> KANIA, Agnieszka, Postulat szybkości postępowania karnego a ograniczenie jego formalizmu [*Demand for speedy criminal proceedings versus reduced formalism of the criminal proceedings*]. *Prokuratura i Prawo*, n. 6, 2017, p. 16–35.

<sup>73</sup> Commentary to Article 45, In: SAFJAN, Marek (ed.), BOSEK, Leszek (ed.), *Konstytucja RP. Tom I. Komentarz do art. 1–86 [Constitution of the Republic of Poland. Volume I. Commentary on Articles 1-86]*, Warszawa: CH Beck, 2016.

<sup>74</sup> *Ibidem*.

<sup>75</sup> PILITOWSKI, Bartosz (ed.); KOCIOŁOWICZ-WIŚNIEWSKA, Bogna (ed.), Sądy dostępne przez Internet, *Lekcje z Polski i 12 krajów świata*, Toruń: Fundacja Court Watch Polska, 2020 and cited thereof: Wenting, Zhou (China Daily). 2017. AI takes a look at legal evidence. [https://www.chinadaily.com.cn/china/2017-07/11/content\\_30064693.htm](https://www.chinadaily.com.cn/china/2017-07/11/content_30064693.htm) [access: 06.05.2020] Jiang Wei (China Daily). 2019. China uses AI assistive tech on court trial for first time <https://www.chinadaily.com.cn/a/201901/24/WS5c4959f9a3106c-65c34e64ea.html> [access: 06.05.2020]. For example, a pilot program was carried out in Shanghai as early as in 2019, in which, during hearings, the so-called

implemented without ensuring the digitization of criminal proceedings files. At the same time, equipping the authorities conducting proceedings, including judges and prosecutors, with specialized tools for analyzing files based on artificial intelligence can help better achieve the goals of criminal proceedings, especially in complex cases based on large evidence.

It is important to point out the significant opportunity to improve the security of criminal proceedings files as a result of their digitization. Electronic files can be better protected from damage, destruction, or loss than paper documents. The ability to use advanced encryption and access authorization methods can provide effective protection for sensitive information contained in files. In this regard, authorities conducting criminal proceedings should use good business practices, according to which all data should be backed up on a regular (or even ongoing) basis, which should be the responsibility of a person exclusively dedicated to this task<sup>76</sup>. Digitization of criminal proceedings files also helps protect them from accidental loss or intentional destruction, for example by participants in the proceedings to whom they are made available. Digitization of files will also allow the use of tools to secure the authenticity and integrity of the information contained in the files through the use of, for example, the blockchain technology<sup>77</sup>. According to the European Justice Scoreboard 2023, only 5 EU Member States make any use of distributed ledger technologies (including blockchain) in their justice systems<sup>78</sup>.

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System 206 was used. System 206 is software based on artificial intelligence that records the proceedings of a hearing in real time, while distinguishing the voices of the participants, responding to orders, and displaying the requested information on screens that are placed in such a way that any person in the courtroom - including the public - could use them. The system is also designed to analyze evidence in terms of its reliability and consistency, drawing the judge's attention to possible inaccuracies that could distort his assessment and lead, for example, to the conviction of an innocent person. The system "learns" to identify potential gaps in evidence by analyzing data from archived cases.

<sup>76</sup> NCUBUKEZI, Tabisa; MWANSA, Laban, Best Practices Used by Businesses to Maintain Good Cyber Hygiene During Covid19 Pandemic, *Journal of Internet Technology and Secured Transactions*, v. 9, n. 1, p. 714–721, 2021.

<sup>77</sup> WU, Hong; ZHENG, Guan. Electronic evidence in the blockchain era: New rules on authenticity and integrity, *Computer Law & Security Review*, v. 36, 2020.

<sup>78</sup> European Justice Scoreboard 2023, figure 42.

#### 4.4. THE RISKS ASSOCIATED WITH THE DIGITIZATION OF CRIMINAL PROCEEDINGS FILES FROM THE PERSPECTIVE OF THE PRINCIPLE OF ACCURATE CRIMINAL RESPONSE AND OTHER PRINCIPLES

Of course, the digitization of criminal proceedings files also involves some potential risks. The clear disadvantage of a systemic change intended to achieve full digitization of criminal proceedings files is the need to incur the costs associated with the development, implementation, and maintenance of the related information technology system. As indicated earlier, any technological change involves costs, but in this case one can also reasonably expect to save money, if only by changing the way files are stored and handled to provide access.

Any process of digitization of public life involves the risk of excluding the availability of state services for those who are less digitally educated. The term digital exclusion refers to the differences between those who have regular access to digital and information technologies and are able to use them effectively and those who do not have such access<sup>79</sup>. The transformation of the justice system through the introduction of the aforementioned electronic system for primary files, where all case documents are created and all files are kept only in digital form, may make access to such files difficult for those who do not have sufficient digital competence or tools to reproduce such files (e.g., when they are made available on a storage medium). While 87% of people (aged 16-74) in the European Union used the Internet regularly in 2021, only 54% possessed at least basic digital skills<sup>80</sup>. It should be emphasized that there are ongoing initiatives in the European Union aimed at digital inclusion<sup>81</sup>. At the same time, it is possible

<sup>79</sup> BATORSKI, Dominik. Wykluczenie cyfrowe w Polsce. [*Digital Exclusion in Poland*] *Studia Biura Analiz Sejmowych*, v. 19, n. 3, 2009, p. 223–249.

<sup>80</sup> The Digital Economy and Society Index (DESI), digital-strategy.ec.europa.eu, <https://digital-strategy.ec.europa.eu/en/policies/desi>. access: 23 march 2024.

<sup>81</sup> On 15 December 2022, President of the European Commission Ursula von der Leyen signed the European Declaration on Digital Rights and Principles, together with the President of the European Parliament Roberta Metsola, and Czech Prime Minister Petr Fiala for the rotating Council presidency. The signatories of the document committed to “a digital transformation that leaves nobody behind. It should benefit everyone, achieve gender balance, and include notably elderly people, people living in rural areas, persons with

to introduce a model in which the principle is to maintain and make available files in electronic form, while adopting exceptions to justify making digital files available in another form, such as the printed form.

It should be emphasized that, in principle, all conceivable disadvantages of the digitization of criminal proceedings files from the perspective of the objectives of the criminal process can be eliminated with the correct implementation of this solution, and are not immanent to the very idea of digitization of files. Thus, the doctrine argues, among other things, that work on the digitization of courts and court proceedings must also take into account the risk of a hacking attack on the court<sup>82</sup>. Of course, this is not an argument against the digitization of files in criminal proceedings, but rather an important factor that should be taken into account in the implementation of specific solutions. The process of digitization of files of criminal proceedings should be carried out taking into account the protection of the interests of the participants in the proceedings and the public interest, including, for example, the secrecy of the preparatory proceedings. Digitization of criminal proceedings files should be carried out in a way that ensures the security and integrity of the data and reduces as far as possible the risk of occurrence and the consequences of possible data leakage.

## **5. THE ACCEPTABILITY OF THE USE OF AUTOMATED TRANSLATION SERVICES IN THE CRIMINAL JUSTICE PROCESS**

In terms of the digitization of the justice system, the EU Justice Scoreboard 2023 does not address the use of the developing automated

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disabilities, or marginalised, vulnerable or disenfranchised people and those who act on their behalf. It should also promote cultural and linguistic diversity” (see: European Declaration on Digital Rights and Principles for the Digital Decade (2023/C 23/01)).

<sup>82</sup> KARDAS, Piotr; GUTOWSKI, Maciej, Epidemia a digitalizacja działalności prawniczej – czyli o korzyściach i szkodach przyspieszonej cyfryzacji polskiego wymiaru sprawiedliwości [Digitalisation of the legal world through the prism of epidemic-related change – on the opportunities and threats of fast digitalisation of the Polish justice system], *Palestra*, 6 April 2020. <http://127.0.0.1:9511/e-palestra/16/2020/epidemia-a-digitalizacja-dzialalnosci-prawniczej-czyli-o-pozytkach-i-szkodach-przyspieszonej-cyfryzacji-polskiego-wymiaru-sprawiedliwosci>, access: 23 March 2024.

translation technologies. However, the issue appears to be extremely important in the context of ensuring the accessibility of justice. According to information made available by the European Commission, there are 23,800,000 citizens of countries other than EU Member States residing in the European Union, which accounts for 5.3% of the total population of the EU<sup>83</sup>. The percentage is increasing due to international crises. Following Russia's military invasion of Ukraine on February 24, 2022, 4.2 million registrations for Temporary Protection in the EU+ were made by February 6, 2024<sup>84</sup>. Therefore, it is not controversial to say that the demand for translation services in the justice system is increasing. Consequently, there is an obvious temptation to take advantage of the developing technologies, including for example, artificial intelligence systems based on the Large Language Models (LLMs) technology<sup>85</sup>. Research shows that while LLMs are not explicitly trained for translation tasks, they can still demonstrate strong performance and outperform previously available software in this area<sup>86</sup>. Studies demonstrate that minimal fine-tuning of an off-the-shelf pre-trained LLM enables competitive simultaneous translation results without advanced training techniques<sup>87</sup>. An important question that arises in this regard is whether machine translation systems should be

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<sup>83</sup> Statistics regarding migration to Europe - European Commission, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life/statistics-migration-europe\\_pl](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life/statistics-migration-europe_pl), access: 23 March 2024.

<sup>84</sup> Migration management: Welcoming refugees from Ukraine, [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/migration-management-welcoming-refugees-ukraine\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/migration-management-welcoming-refugees-ukraine_en), access: 23 March 2024.

<sup>85</sup> Language models (LMs) are computational models that have the capability to understand and generate human language and Large Language Models (LLMs) are advanced language models with massive parameter sizes and exceptional learning capabilities, see: CHANG, Yupeng (among others), A Survey on Evaluation of Large Language Models, *Journal of the ACM*, v. 37, n. 4, p. 111–156, <https://doi.org/10.1145/3641289>.

<sup>86</sup> *Ibidem*.

<sup>87</sup> FENG, Zhaopeng, ZHANG, Yan; LI, Hao (among others), Improving LLM-based Machine Translation with Systematic Self-Correction, arXiv preprint arXiv:2402.16379, 2024., <https://arxiv.org/abs/2402.16379v2>, access: 23 March 2024.

used in the justice system from the perspective of achieving the goals of criminal proceedings and the guarantees to their participants.

The right to an interpreter is presented as a natural complement to the other process guarantees enjoyed by defendants under the ECHR. Without that right, exercising the other rights provided for in Article 6 of the ECHR would be downright impossible in a situation where the defendant does not speak the language spoken in the country where the proceedings are conducted - it ensures the equality of the chances of the defense of a defendant who does not speak the official language and the defense of defendants who do speak it<sup>88</sup>. According to Article 6(3)(e) of the ECHR, anyone accused of a criminal act has the right to the free assistance of a translator or interpreter if he or she cannot understand or speak the language used in the court. The scope of the obligation to provide translation services also includes translation or interpretation of all documents or statements in criminal proceedings if their understanding is necessary for the defendant to exercise his or her right to a fair trial<sup>89</sup>. This should be interpreted as a requirement to ensure that such documents are understood, rather than the requirement to provide a written translation of every document in the case<sup>90</sup>. The

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<sup>88</sup> Commentary to Article 6 of ECHR, In: GARLICKI, Leszek, HOFMAŃSKI, Piotr; WRÓBEL, Andrzej, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*. T. 1, *Komentarz do artykułów 1-18*, [Convention for the Protection of Human Rights and Fundamental Freedoms. Vol. 1, Commentary on Articles 1-18], Warszawa: CH Beck, 2010, and cited thereof: ECtHR judgement of 1 March 2006 in the case of *Sejdovic v. Italy*, application no. 56581/00, <https://hudoc.echr.coe.int/eng?i=001-72629>.

<sup>89</sup> See: ECtHR judgement of 28 November 1978 in the case of *Luedicke, Belkacem and Koc v. Germany*, application no. 6210/73; 6877/75; 7132/75, <https://hudoc.echr.coe.int/eng?i=001-57530> and ECtHR judgement of 18 October 2006 in the case of *Hermi v. Italy*, application no. 18114/02, <https://hudoc.echr.coe.int/eng?i=001-77543>, ECtHR judgement of 14 January 2003 in the case of *Lagerblom v. Sweden*, application no. 26891/95, <https://hudoc.echr.coe.int/eng?i=001-60884>.

<sup>90</sup> The above indicates that oral language assistance from a translator may be sufficient to meet the requirements of the Convention. See: ECtHR judgement of 18 October 2006 in the case of *Hermi v. Italy*, application no. 18114/02, <https://hudoc.echr.coe.int/eng?i=001-77543> and ECtHR judgement of 19 December 1989 in the case of *Kamasinski v. Austria*, application no. 9783/82, <https://hudoc.echr.coe.int/?i=001-57614>.

ECHR also points at the need to control the quality of the translation - the services of a translator or interpreter are intended to provide the defendant with effective assistance in conducting his or her defense and the quality of these services should contribute to the fairness of the trial<sup>91</sup>.

This matter is regulated similarly by Article 14(3)(f) of the ICCPR, according to which any person accused of a crime has the right, on a basis of full equality, to the free assistance of an interpreter if he or she does not understand or speak the language used in the court. That provision is interpreted as including only the right to interpretation, without the need to give the defendant a translation of the documents used in the proceedings<sup>92</sup>.

Title VI of the EU Charter of Fundamental Rights<sup>93</sup> concerning the justice system does not contain provisions on the right to a translator or interpreter. However, Directive 2010/64/EU provides important guidance on that assistance<sup>94</sup>. According to Article 2 (1) of Directive 2010/64/EU, EU Member States (including Poland) are obliged to provide suspects or defendants who do not speak or understand the language of the criminal proceedings with interpretation services during criminal proceedings before law enforcement and judicial authorities<sup>95</sup>. In addition,

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<sup>91</sup> Failure by national courts to examine the reliability of a translator's or interpreter's assistance provided in certain situations may be considered a violation of Article 6(3)(e) of the ECHR. See: ECtHR judgement of 24 January 2019 in the case of *Knox v. Italy*, application no. 76577/13, <https://hudoc.echr.coe.int/eng?i=001-189422>.

<sup>92</sup> Commentary to Article 14 of ICCPR, In: GLISZCZYŃSKA-GRABIAS, Aleksandra, SĘKOWSKA-KOZŁOWSKA, Katarzyna; SOBCZAK, Witold, WIERUSZEWSKI Roman (red.), *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych. Komentarz [International Covenant on Civil and Political Rights. Commentary]*, Warszawa: Wolters Kluwer Polska, 2012.

<sup>93</sup> Charter of Fundamental Rights of the European Union, 18 December 2000, Official Journal of the European Communities, C 364/1, 18 December 2000.

<sup>94</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7.

<sup>95</sup> This right is also valid during interrogation by the police, all court hearings, and any necessary sessions. Member States must make sure that, where necessary to ensure the fairness of the proceedings, interpretation is available of the communications between suspects or defendants and their defense counsels that are directly related to any questioning or provision of explanations



the subsequent provisions of Directive 2010/64/EU impose an obligation to make available to defendants within a reasonable period of time a translation of all documents relevant to ensuring his or her ability to exercise his or her right to defense and to guaranteeing the fairness of the proceedings (Article 3(1)). In addition, it should be noted that Article 5 of Directive 2010/64/EU, which discusses the quality of translation or interpretation, indicates the need to ensure the right quality of translation or interpretation by ensuring that it is carried out by suitably qualified independent human translators or interpreters<sup>96</sup>. Since Directive 2010/64/EU draws attention to the need to establish registers of independent translators and interpreters, it would be contrary to its intent and purpose to allow only automated translation services to be used for the translation and interpretation services it cover.

*De lege lata*, it should be noted that current Polish solutions regarding the right to a translator or interpreter in criminal proceedings are in compliance with the standard established in Article 6(3)(e) of the ECHR and EU legislation (in general<sup>97</sup>), which stipulate that the defendant has the right to use the gratuitous assistance of a translator or interpreter

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during the proceedings or to the filing of appeals or other procedural requests (par. 2)

<sup>96</sup> Once created, such a register or registers is made available, where appropriate, to the defense counsel and the relevant authorities.

<sup>97</sup> In the same context, it should be noted that in Polish legal doctrine it is rightly pointed out that Directive 2010/64/EU has not been fully implemented, as Polish regulations have not been properly supplemented to include the possibility for the defendant to file a complaint in which they could demand the examination of the validity of decisions regarding: the refusal to provide an interpreter, the refusal to change the interpreter due to insufficient quality of translation, and the refusal to translate important documents from the case files as requested by the defendant (see: FINGAS Maciej. Prawo oskarżonego do tłumaczenia ustnego oraz pisemnego w polskim procesie karnym w świetle unormowań dyrektywy Parlamentu Europejskiego i Rady 2010/64/UE z 20.10.2010 r. [The Defendant's Right to Oral and Written Translation in Polish Criminal Proceedings in Light of the Provisions of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010], *Przegląd Sądowy*, nr 6, 2019, p. 107-123); KOTZUREK, Magdalena. Die Richtlinie 2010/64/EU zum Dolmetschen und Übersetzen in Strafverfahren: Neues Qualitätssiegel oder verpasste Chance? *Eucrim* vol. 4, 2020, pp. 314-321, <https://doi.org/10.30709/eucrim-2020-027>

if he or she does not have sufficient command of Polish. A translator or interpreter must be “called in” for activities involving such a defendant, particularly for the purpose of enabling the defendant to communicate with his or her defense counsel. Thus, current Polish regulations include requirements for interpreting (for activities with the participation of the defendant and, in some cases, contacts with the defense counsel) and translating some of the documents produced in the course of criminal proceedings<sup>98</sup>. Recognizing these circumstances, it is necessary to take the position that current Polish regulations refer to the concept of “calling in” a translator or interpreter, which clearly involves a person performing the duties of a translator or interpreter, as opposed to software developed to translate documents.

The lack of a legal basis in the current Polish procedure for the use of software for automatic translation of documents or statements of participants in criminal proceedings does not mean that such a way of exercising the right to translation or interpretation should be ruled out. In our opinion, the use of software for automatic translation of content in criminal proceedings can bring a number of benefits; in particular, it can improve the timeliness of translation or interpretation and cover more documents. The purpose of the right to translation or interpretation is to ensure that the defendant understands his or her legal standing, actively participates in the process activities, and challenges the decisions made in the process<sup>99</sup>. This purpose can be fulfilled even now to a significant degree through the use of machine translation, at least with regard to documents served to a defendant who does not speak the official language. One of the biggest advantages of automated translation is its ability to translate large amounts of text instantly. In the context of a criminal process,

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<sup>98</sup> An order on the presentation, supplementation, or change of charges, an indictment, and a decision subject to appeal or terminating proceedings must be served to a defendant with a translation; with the consent of the defendant, the translated decision terminating proceedings may only be announced, if it is not subject to appeal.

<sup>99</sup> According to Directive 2010/64/EU, interpretation and translation must be of sufficient quality to guarantee the fairness of the proceedings, in particular by ensuring that suspects or defendants understand the charges and evidence against them and are able to exercise their right to defense (see Article 5 (1) and Articles 2 (8) and 3 (9) of the Directive).

where time is of the essence, the ability to quickly obtain a translation of minutes (e.g., questioning of witnesses), rulings (e.g., judgments), or even summonses issued by the authorities conducting the proceedings can significantly expedite criminal proceedings. The cost of using automatic translation programs, which will be significantly lower compared to the cost of using professional translators and interpreters in proceedings, may also be an important consideration.

However, the introduction of widespread use of software for automated translation of content in criminal proceedings and thus the replacement of the services of professional translators and interpreters involves significant risks. One of the primary concerns relates to the risk of inaccurate translation and the communication problem associated with the defendant's failure to understand the translated content. Automated translation, despite significant technological advances, still suffers from problems of inaccuracy, especially with complex legal texts or specialized terminology related to the criminal process. Despite the significant advances in the machine translation technology, studies still indicate, for example, that while Neural Machine Translation (NMT) represents the leading approach to Machine Translation (MT), the outputs of NMT models still require post-editing translation to rectify errors and enhance quality under critical settings<sup>100</sup>. However, such a translation is better than no translation (which is often a problem that even leads to the need to suspend criminal proceedings). Nevertheless, it does not seem reasonable to recommend accepting a reduction in the quality of translation services intended to provide a thorough defense for the defendant in the name of ensuring the timeliness of the proceedings. Inaccurate translation can lead to misunderstandings, misinterpretation of evidence, testimony, explanations, and, as a result, to an erroneous (inconsistent with the intentions of the defendant or resulting from a misunderstanding of the evidence) taken position by the defendant, which in turn can significantly affect the outcome of the proceedings, thus undermining its fairness. With interpreting, a human interpreter can adjust and correct the translation

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<sup>100</sup> RAUNAK, Vikas, SHARAF, Amr, WANG, Yiren (among others), Leveraging GPT-4 for Automatic Translation Post-Editing. 2023, <http://arxiv.org/abs/2305.14878>, access: 23 March 2024.

immediately in response to feedback from both the speaker and the recipient of the interpretation. In the case of automated translation, this is not possible.

## 6. CONCLUSION

The Covid-19 pandemic has accelerated the technological changes taking place in the Polish criminal justice process, particularly through the use of devices that enable remote communication during process activities. The possibility has expanded to conduct remote hearings, and a remote hearing concerning detention on remand has been introduced. This modernization aims to increase efficiency and accessibility but is currently limited to specific conditions, primarily involving defendants who are deprived of liberty. There is no doubt that the very idea of creating such legal solutions is good, since they meet the needs of the justice system. However, we think that introducing this possibility only when the defendant is deprived of liberty is a conservative step. We believe that remote hearings should also be conducted in situations where the defendant is at liberty. Taking into account the fact that in the Polish criminal process (as a rule) participation in a hearing is optional, the remote form could be more suitable for defendants, for example, due to time savings.

The existing solutions for remote hearings and remote sessions concerning detention on remand are not free from shortcomings. It is a mistake to make telephone contact between a defense attorney who is in court and a defendant who is in a place of detention conditional on the court's assessment of whether or not it will serve the purpose of exercising the right to defense, or whether or not it will unreasonably prolong the hearing. This is an example of the legislature's restriction of the right to defense. This limitation and the procedural requirements highlight an imbalance favoring the prosecutor, making it crucial to ensure equality among all litigants. The lack of guarantee of confidentiality of the conversation between the defense counsel and the defendant should be criticized. The right to effective legal assistance must be respected in all circumstances, including during process activities carried out in remote form. While remote hearings offer practical solutions during crises, their

successful implementation requires careful attention to safeguarding procedural rights and ensuring the effectiveness and confidentiality of legal counsel.

The arguments presented above lead to the conclusion that the digitization of criminal proceedings files can contribute to better implementation of the goals of the criminal process. Digitization of criminal proceedings files is likely to improve the quality, efficiency, and accessibility of the justice system. Facilitating access to files in this form reinforces the fair trial principle. The possible savings associated with the storage of criminal proceedings files and the better chances of protecting them from destruction for a sufficiently long period of time are also not insignificant. Finally, the digitization of criminal proceedings files is a prerequisite for the implementation in the justice system of modern solutions based on artificial intelligence systems, which could make it easier for judges and prosecutors, for example, to analyze large criminal proceedings files. At the same time, the potential drawbacks of digitization of criminal proceedings files, including concerns about the accessibility of electronic files to digitally excluded persons and fears of hacking attacks, appear to be minimized by the proper implementation of a system of digitized criminal proceedings files. An additional issue that should be taken into account in the process of implementation of these solutions is the possibility of adopting an interoperable system not only for criminal proceedings files, but a single system used in all courts (and by authorities conducting preparatory proceedings). It seems that the implementation of a single consistent system can then facilitate the exchange of data between proceedings of different types. Such a need is not uncommon, for example, when the perpetrator is tried for a crime in a criminal court and the victim seeks compensation from the perpetrator in a civil court in separate proceedings. In such situations, files are often lent between courts, thus slowing down the proceedings. Consistent digitization of files in the justice system (including criminal proceedings) would also help avoid these problems.

The provisions of the ECHR, Directive 2010/64/EU, and the Polish and other legislation analyzed herein do not allow for the replacement of the presence of an interpreter by the authorities' use of software designed for automated translation of content, including the

statements of participants in the proceedings. The purpose of calling in a human translator or interpreter is not just to translate the content, but to provide assistance to the person in question, including, for example, ensuring that the defendant fully understands his or her legal situation and the legal steps and procedural decisions that affect him or her. This purpose would not be fulfilled by machine translation alone, which could lead to a weakening of the position of such persons in the proceedings.

The above does not completely preclude the use of machine translation in criminal proceedings. However, given the importance of translation services in this area, it makes sense at this stage to preserve the human factor in the translation of content by at least requiring a final assessment of the quality of translation by a suitably qualified human translator. In this regard, an analogous solution could be applied as the one used in connection with the content of Article 22 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (GDPR)<sup>101</sup>. Article 22 of the GDPR is understood to establish the right to human intervention in the process of automated decision-making and to clarification with regard to significant or legally binding decisions made automatically and without human participation<sup>102</sup>. Therefore, it can be advocated to introduce regulations that allow automatic translation of documents produced or collected in the course of criminal proceedings, while ensuring the right of the defendant to receive adequate explanations

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<sup>101</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88, (the “GDPR”). This provision stipulates that a data subject has the right not to be subject to a decision that is based solely on automated processing, including profiling, and that produces legal effects or affects that person to a similar extent.

<sup>102</sup> Thus, for example, under Polish law, banks may, for the purpose of assessing creditworthiness and analyzing credit risk, make decisions based solely on automated processing, including profiling, provided that the person affected by the automated decision has the right to receive an adequate explanation of the grounds for the decision made, to obtain human intervention for the purpose of making a new decision, and to express his or her own position (see Article 105a of the Act of August 29, 1997 - Banking Law, Journal of Laws, no. 140, item 939).

of the content of the translated documents or to obtain human intervention to improve the translation. Such a solution would be acceptable from both the perspective of both the purpose of the regulation imposing the obligation to provide the assistance of a translator or interpreter and the perspective of other guarantees related to a fair criminal trial.

In conclusion, the digitization of criminal proceedings files presents a significant opportunity to enhance the efficiency, accessibility, and overall functionality of the justice system. By allowing remote access to digitized files, the justice system can ensure defense counsels have timely access to necessary documents, promoting equality of arms as guaranteed by Article 6(3)(b) of the ECHR. Additionally, digitization can lead to cost savings and support the timeliness principle by expediting the adjudication process and the integration of advanced technologies like artificial intelligence can further assist judges and prosecutors in managing complex cases more efficiently. However, at least in Poland, the digitization process is still in its early stages. Despite the lack of technological barriers, institutional resistance and habits pose challenges. This resistance hinders the achievement of process goals that digitization would facilitate. Addressing risks such as digital exclusion and cybersecurity threats through comprehensive security measures and alternatives for those lacking digital literacy can make the digitization process more inclusive and secure.

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