

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

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## ABSTRACT

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

Keywords: European Investigation Order, banking secrecy, preparatory proceedings

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

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

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

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

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

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

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

<sup>4</sup> Cf. Krzysztofciuk, G., 'Europejski nakaz dochodzeniowy', *Prokuratura i Prawo*, 2015, No. 12, p. 81.

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

<sup>6</sup> In the period 2018–2020 Polish prosecution offices sent 17,001 EIO applications in total: 3,716 in 2018, 6,702 in 2019, and 6,583 in 2020. The biggest number of EIOs were sent to Germany

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

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

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

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

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

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

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

<sup>7</sup> See Article 3 of Directive 2014/41/EU.

<sup>8</sup> Cf. Klimczak, J., Wzorek, D., Zielińska, E., *Europejski...*, op. cit., p. 27.

<sup>9</sup> See Kierzyńska, R., in: Buczman, S.R., Kierzyńska, R., *Europejski...*, op. cit., p. 201.

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

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

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

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

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<sup>10</sup> Klimczak, J., Wzorek, D., Zielińska, E., *Europejski...*, op. cit., p. 83.

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

<sup>12</sup> Cf. Krzysztofiuk, G., *Europejski...*, op. cit., pp. 81–82.

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

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

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

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

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<sup>13</sup> Cf. Janicz, M., in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 1413.

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

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

<sup>16</sup> Kosowski, J., 'Europejski Nakaz Dochodzeniowy – zagadnienia wybrane', *Wiedza Obronna*, 2021, Vol. 277, No. 4, p. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>21</sup> Cf. Klimczak, J., Wzorek, D., Zielińska, E., *Europejski...*, op. cit., pp. 141–142.

<sup>22</sup> See Article 180 CCP in conjunction with Article 329 § 1 CCP.

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

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

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

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

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

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

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

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

<sup>24</sup> This stance is highlighted in: Klimczak, J., Wzorek, D., Zielińska, E., *Europejski...*, op. cit., p. 39.

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

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

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

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

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

The same view regarding the powers of a prosecutor was expressed in the decision issued by the Appellate Court in Kraków on 23 October 2018, II AKz 524/18. It states: 'The right to request information constituting banking secrecy based on a decision issued by a Polish court cannot apply to foreign banking entities operating in the territory of a foreign country (...).'

Consequently, the Court clearly decided that: 'A prosecutor, not a court, is competent to issue an EIO at the investigation stage (...).'

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

<sup>25</sup> M. Janicz criticises this stance in: idem, Dudka, K. (ed.), *Kodeks...*, op. cit., p. 1421.

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

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

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

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

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

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

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

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<sup>27</sup> Król, A., 'Europejski...', op. cit., p. 144.

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

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

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

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

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

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

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

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

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

<sup>31</sup> See Article 311 CCP and Article 325a CCP in conjunction with Article 326 § 1 CCP.

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

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

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

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

## CONCLUSIONS

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

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

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

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

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