

EUROPEAN INVESTIGATION ORDER – SELECTED PROBLEMS ON POLISH IMPLEMENTATION

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ABSTRACT

The paper presents selected key problems of Directive 2014/41/EU regarding the European Investigation Order in criminal matters within the context of its Polish implementation in 2018. The paper focuses on the concept of investigative measures, administration of justice and exclusionary evidence rules as a limitation of issuing a Polish EIO. Additionally, the study attempts to approximate the reduced procedural mechanism in the context of issuing the ECI.

Keywords: European Investigative Order, investigative measures, evidence, Polish criminal procedure

1. INTRODUCTION

On February 8, 2018, another amendment to the Code of Criminal Procedure of 1997 entered into force, introducing the institution of the so-called European Investigation Order. The amendment implemented Directive 2014/41/EU of the European Parliament of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Adding another ample, albeit necessary, legal instrument of evi-

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dence to Chapter XIII of Polish Code of Criminal Procedure once again prompts us to consider the need to introduce a separate act on international cooperation in criminal matters¹.

The substantive goal of the implementation was - as stated by the Polish legislator - to ensure an efficient and effective system of mutual legal assistance in criminal matters between EU Member States in the field of evidentiary activities by introducing the possibility of issuing a European Investigation Order. In addition, it was pointed out that the Directive creates a mechanism for the efficient transmission of requests for taking evidence and the return of the results of these activities, without imposing on the Polish authorities the obligation to take evidence unknown to the act or inadmissible in domestic cases.

The implementation of the solutions adopted in the Directive allows Polish courts or authorities conducting preparatory proceedings to submit applications to other EU countries for the taking of evidence located in that country, and to EU countries to apply to Poland for the taking of evidence located in the territory of the Republic of Poland². The adopted provisions of Art. 589w - 589zs k.p.k. introduce into Polish procedural criminal law a new instrument of evidence law in the form of the European Investigation Order, which, in the light of the classification of procedural acts adopted in Poland, will constitute a procedural decision in the form of an order to issue an EIO, on the one hand, in the event of a Polish procedural authority, and a decision on execution of the EIO issued by the Polish procedural authority at the request of the authorized procedural

¹ See art. 1 pkt 8 the Act of 10 January 2018 amending the Act - Code of Criminal Procedure and some other acts (Journal of Laws 2018, item 201). Sławomir Steinborn, "O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych," in *Reforma prawa karnego. Propozycje i Komentarze. Księga pamiątkowa prof. Barbary Kunickiej – Michalskiej*, eds. Jolanta Jakubowska-Hara, Jan Skupiński, and Celina Nowak (Warsaw: Wydawnictwo Naukowe Scholar, 2008), 436 and next; Arkadiusz Lach, "Europejski Nakaz Dochodzeniowy," in *Proces karny w dobie przemian. Przebieg postępowania*, eds. Sławomir Steinborn and Krzysztof Woźniewski (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2018), 509.

² See: Rządowy projekt ustawy o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw, Druk Sejmowy nr 1931 (Sejm VIII Kadencji), Governmental draft amendment to the code of criminal procedure of June 1, 1997, <https://orka.sejm.gov.pl/Druki8ka.nsf/0/A9ED16CA28149400C12581BD00426457/%24File/1931.pdf>.

authority of the EU Member State for the execution of the EIO issued by the authorized authority of the issuing State on the other³.

The EIO is one of the forms of international cooperation (legal assistance) in criminal matters aimed at obtaining evidence. The Council of Europe was the first international organization to lay the legal basis of a modern mechanism for providing legal aid in Europe⁴ and the European Union. The most important (also from the practical perspective) legal instrument is the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted on May 29, 2000 in Brussels.

Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility is essential for the genesis of the discussed legal instrument. The Introduction of this document rightly notes that the key to the effectiveness of the ongoing criminal investigations is closer cooperation in this field⁵. However, despite significant progress in the introduction of international sources and means of evidence instruments, in particular such as the EEW, there were still restrictions on the acquisition of certain relevant means of evidence⁶. Following an analysis of the usefulness of existing legal instruments for

³ Krzysztof Woźniewski, “Europäische Ermittlungsanordnung als Chance?,” in *Die grenzüberschreitende Informationsgewinnung und -verwertung am Beispiel der Zusammenarbeit der deutschen und polnischen Strafverfolgungsbehörden*, eds. Aleksandra Ligocka, Maciej Małolepszy, and Michael Soiné (Berlin: Logos Verlag, 2018), 95.

⁴ European Convention on Mutual Assistance in Criminal Matters of April 20, 1959 and the Additional Protocol of March 17, 1978 (Journal of Laws 1999, No. 76, item 854; this Convention was amended by the Second Additional Protocol (Journal of Laws 2004, No. 139, item 1476), which entered into force for Poland on February 1, 2004).

⁵ GREEN PAPER on obtaining evidence in criminal matters from one Member State to another and securing its admissibility Brussels, 11.11.2009, COM(2009) 624 final, 2.

⁶ See: Green Paper, footnote 10, *Because of this limited scope of application, a European Evidence Warrant cannot be issued for the purpose of for example interviewing suspects or witnesses or obtaining information in real time, such as interception of communications or monitoring of bank accounts, as these types of evidence – although directly available – do not already exist. Nor can a European Evidence Warrant be issued for the purpose of for example conducting analyses of existing objects documents or data or obtaining bodily material, such as DNA samples or fingerprints, as these types of evidence – although already existing – are not directly available without further investigation or examination.*

obtaining evidence, the European Commission has asked Member States detailed questions on the future new legal tool for evidence.

Even though there has been a shift of the emphasis from the type of evidence obtained as part of international cooperation in criminal matters to the importance of the method of obtaining evidence as a criterion distinguishing ECI from a traditional application for legal aid, it should not be forgotten that this does not mean introducing such a significant change in international cooperation⁷.

In the dissenting ambiguous position submitted by Poland, it was stated that Poland generally supported the proposal to simplify and accelerate mutual cooperation in criminal matters, even by replacing existing evidence-gathering solutions with one instrument based on this principle, noting that further work should be preceded⁸. In addition, according to Poland, the need to start work on the new legal instrument is premature as not resulting from the practice of judicial cooperation but from the *a priori* assumptions. Moreover, Poland argued that in the case of further works on a new instrument, it should cover all types of evidence, including real-time evidence, such as the capture of information in information and communication systems and the monitoring of bank accounts. At the same time Poland raised doubts as to the option of developing one catalog of standards for all types of evidence without exception, irrespective of their specific characteristics and proposed to include two levels of catalogues. Level one would represent an overall set of standards common to all types of evidence, covering fundamental issues relating to human rights. Lev-

⁷ Compare: Anthony Faries, "The European Investigation Order: Stepping Forward with Care," *New Journal of European Criminal Law*, no. 4 (2010): 432. However, despite the fairly wide range of legal possibilities for investigating activities covered by the Directive, the main purpose of which was to find a way to organize and standardize the existing *ad unum* evidence gathering system, as aptly noted by Fabrizio Siracusano, this objective does not seem to have been pursued. See: Fabrizio Siracusano, "The European Investigation Order for Evidence Gathering Abroad," in *EU Criminal Justice. EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office*, eds. Tommaso Rafaraci and Rosanna Belfiore (Berlin/Heidelberg: Springer International Publishing, 2019), Kindle Edition, https://doi.org/10.1007/978-3-319-97319-7_6.

⁸ Sławomir S. Buczman and Rafał Kierzyńska, *Europejski Nakaz Dochodzeniowy. Nowy model współpracy w sprawach karnych w unii europejskiej* (Warsaw: C.H. Beck, 2018), 152.

el two would include common standards for specific groups of evidence. Level detail of the principle of obtaining evidence should be correlated with the depth and severity of interference with the civil rights sphere.

2. THE CONCEPT OF INVESTIGATIVE MEASURES

The discussed European directive on the European Investigation Order (hereinafter EIO) was implemented by provisions of chapters 62c and 62d of the Code of Criminal Procedure of 1997, which regulated respectively the Polish request to a Member State of the European Union for the execution of an investigative measure pursuant to European investigation order (62c) and request of a member EU state of the European Union for the execution of an investigative measure pursuant to EIO (62d)⁹.

The importance of evidence for court proceedings is best reflected by the famous statement of the classic of the theory of evidence law, *Jeremy Bentham*, that “*The art of procedure is in reality nothing but the art of administering evidence*”¹⁰. This statement should, of course, be regarded as somewhat exaggerated. The taking of evidence must be integrated into every model of the criminal trial, because the main goal of the criminal procedure is to implement the norms of substantive criminal law. The latter, requires, inter alia, establishing the fact of committing a crime, the perpetrator and other circumstances that may affect their scope of responsibility. The observation of Bentham is still relevant in the preparatory proceedings, the results of which - at least in Polish practice - affect to a large extent the results of the court proceedings. The emergence of an additional legal instrument in the field of evidentiary proceedings applicable throughout all the EU MS should generally be assessed positively, however, few detailed theoretical and legal problems of significant practical importance should be analyzed.

⁹ Polish provisions of the Code of Criminal Procedure cited in the study use the translation made by Joanna Ewa Adamczyk, *Code of Criminal Procedure. The Code of Criminal Procedure* (Warsaw: C.H. Beck, 2018).

¹⁰ Etienne Dumont, ed., *A Treatise on Judicial Evidence Extracted from the Manuscripts of Jeremy Bentham, Esq.*, 1st ed. (London: Messrs. Baldwin, Cradock, and Joy, Paternoster-Row, 1825), 2, Book I, chap. 1.

The first issue that should be noted is the subject of this specific evidence decision. If it is necessary to examine or obtain evidence, which is located or may be examined in the territory of another Member State of the European Union, the Polish court before which the case is pending or the public prosecutor conducting preparatory proceedings may issue EIO *ex officio*.

The subject of that specific evidence decision, irrespective of the country of origin, is, in essence, a request for a specific ‘investigative action’ necessary to obtain evidence. It can be either new evidence or evidence which the competent authorities of the executing State already have at their disposal. Another important issue is the notion of investigative action, especially that the legislators apply the term in a broad sense. The central legal term of both the directive and its Polish implementation in Code of Criminal Proceedings (CCP) is the investigative measure, therefore it is necessary to clarify the legal meaning of this term.

The Directive in its glossary (Article 2) does not introduce a legal definition of investigative measure, neither does the CCP, yet there is no doubt as to its core meaning. The first meaning that comes to mind for a lawyer dealing with Polish criminal procedure is the concept of an action by an authority authorized to investigate certain facts related to a legal issue. In the context of criminal law, the question of criminal responsibility for the act committed is to be decided during the criminal proceedings (inquiry and judicial).

As mentioned above the investigative measures referred to in the Directive relate to preparatory and judicial proceedings, which means that there are no grounds to limit them only to investigations or inquiries.

In order to decode the legal meaning of the notion “investigative measures”, the most important is the purpose of the Directive, which is to gather evidence. This means that it covers all the activities of the procedural authorities including collecting, securing, consolidating the sources and the resulting evidence, and finally carrying out the evidence. Moreover, Chapter IV of the Directive, entitled “specific provisions on certain investigative measures”, enumerates a broad catalogue of permissible investigative measures of a primarily evidential nature (i.e. temporary transfer to the issuing or executing State of persons held in custody to carry out an investigative measure, hear by videoconference or other audiovisual

transmissions, hearing by telephone conference, information on bank and other financial accounts). Chapter V of the Directive also indicates certain acts of a strong evidentiary nature, such as interception of telecommunications with technical assistance or without the assistance of another Member State.

Similarly, the provisions of the CCP regulating the EIO indicate at the evidential nature of the grounds for the request to a MS of EU for the execution of an investigative measure. Provisions of Article 589w § 1 CCP defines that the substantive premise of issuing EIO is the need to examine or obtain evidence, which is located or may be examined in the territory of another MS of the EU. Therefore, acquiring (reliable) information about the evidence, which can be carried out means that the evidence can be obtained or carried out¹¹. However, there is also additional grounds for EIO i.e. the need to protect traces and evidence of an offence from disappearing, distortion or destruction (paragraph 3 of article 589w CCP). This is a self-standing and sufficient substantial grounds for the adoption of the procedural decision in question. Article 589y § 1(3) of the CCP, contains obligation for the issuing authority of the ECI to include a description of an investigative measure requested or the evidence to be obtained or the facts to be established as a result of the investigative measure. The subject of an EIO can be also telephone wiretapping by technical means and recording the content of other conversations or communications, including correspondence sent by e-mail. All this indicates the importance of evidential character of the subject of the EIO. According to Article 589w § 4 of the CPP, the order for the issue of an EIO on the control and recording of the content of discussions with similar substance is legally equivalent to the standard “Polish” provision on so-called procedural eavesdropping issued pursuant to Article 237 § 1 CPP.

The introduction into Polish criminal procedure the EIO means equipping state authorities with another international legal instrument aimed to facilitate to prosecute criminal offences, when the evidence is or may be examined on the territory of another EU Member State. However,

¹¹ By obtaining the evidence it can be meant to take possession of evidence in kind for the purpose of inspecting or taking information on the personal evidence for the purpose of carrying out the interview.

the procedural benefits stemming from using the tool for the adequate authorities should be considered. The implemented instrument is also useful in the light of prosecution function of the criminal proceeding. This function refers to the procedural activity aimed at detecting and punishing a person guilty of a crime, including, inter alia, examination of evidence and establishing facts.

The first question to consider is whether the proposed material scope of the investigative measures, especially in terms of evidence, is adequate to the needs of law enforcement agencies? As mentioned above, the EIO allows to obtain and take evidence, secure traces and evidence against their loss, distortion or destruction. It can be achieved by conducting such activities as searches, control of correspondence, the transmission of information and parcels, control and recording conversations and even operational and reconnaissance measures.

3. INADMISSIBILITY OF THE EIO

3.1. Administration of justice

Taking into account the admissibility point of view, a crucial provision is art. 589x of the CPP imposing legal limitations on issuing ECIs by Polish procedural bodies i.e. firstly, if it is not in the interest of the administration of justice, secondly, the examination or obtaining of evidence is not permissible under Polish law.

Article 589x point 1 contains a general clause “administration of justice” in order to limit the situations when the order can be issued. This provision implements art. 6 sec. 1 lit. a of the Directive 2014/41/EU, which requires the application of the principle of proportionality when issuing the EIO¹². As a consequence, the authorities issuing the EIO are obliged to consider and weigh the benefits of issuing the order and the consequences of its execution. In this way the rule of “restrained application” related to

¹² Hanna Kuczyńska, “Komentarz do art. 589x k.p.k.,” in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (SIP LEGALIS).

the EAW is also implemented in case of EIO¹³. In practice, at the moment the general cause can also be applied in order to “evade” proper justification of the decision. With time, it is up to the jurisprudence to specify and explain the core meaning of the notion “administration of justice”.

The explanatory memorandum to the Polish implementation of the EIO did not refer at all to the interpretation of the notion “administration of justice”, which would exclude applicability of the EIO in petty cases (as was the case with the European Arrest Warrant). The practice of issuing such orders should be based on the principle of proportionality, because it is not profitable to initiate international cooperation in matters of less importance. Nevertheless, the current wording of the Polish provision does not justify the narrow interpretation, which has been criticized by Academia¹⁴. The literature indicates that the premise of the “administration of justice” remains “undefined” by the legislator¹⁵ and each time the authority must take into account the principle of proportionality balance the benefits of issuing an EIO and the consequences of its implementation¹⁶.

At this point it is not possible to formulate a full list of factors that may help to assess whether such negative premise to issue EIO as the lack of interest of the administration of justice exists. One of them could be whether given investigative measure is useful to fulfil the prosecution function of the criminal proceedings. In the context of the tasks of the preparatory proceedings (investigation or inquiry), it would mean assessment whether the requested evidence will significantly contribute to the clarification of the circumstances of the case and in consequence to determine whether a prohibited act has been committed and whether there are grounds for bringing an indictment. In case of court proceedings, this will involve

¹³ See: Barbara Nita-Światłowska, “Komentarz do art. 607b,” in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warsaw: C.H. Beck, 2018), 1505.

¹⁴ Moreover, the jurisprudence explicitly assumes that the clause of the interest of the judiciary with regard to the EIO should be interpreted similarly to the European arrest warrant (see: Appellate Court in Kraków, Judgment of 14 August 2018, Ref. No. II AKZ 403/18, KZS 2018, No. 9, item 42).

¹⁵ Nita-Światłowska, “Komentarz do art. 607b,” 1505.

¹⁶ Similarly: Gwidon Jaworski and Aleksandra Sołtysińska, *Postępowanie w sprawach karnych ze stosunków międzynarodowych Komentarz* (Warsaw: Wolters Kluwer, 2010), 236–237.

an assessment whether the evidence or action is useful from the point of view of the jurisdictional function i.e. in order to judge if the accused is guilty of the offence charged to him. Of course, in both cases, procedural authorities should bear in mind the barriers related to a priori evaluation of evidence¹⁷. It follows from the doctrine of European law that it is also necessary to take into account the fact that the action requested by the Polish authority should be proportional to the gravity of the act, which may justify the application for coercive and more painful measures¹⁸. As a result, each authority has to decode this general clause on their own, which may lead to multiple interpretations and different decisions as the same act can be assessed differently in the light of administration of justice clause by the given authority. However, the interests of the judiciary cannot be equated with the objectives of criminal proceedings¹⁹.

Therefore, the obligation of the judicial authority to establish the substantive truth in criminal proceedings will not be decisive for the assessment of this premise²⁰.

¹⁷ In the justification of the proposal, the legislator also indicates the circumstances which, in its opinion, the authority should take into account when assessing the existence of the interest of the justice system (e.g. the possibility of establishing the factual circumstances with the help of evidence available in the country, possible extension of the proceedings related to the issuance and execution of the EIO, application for the issuing of an EIO by a party to the proceedings, as well as the possible possibility of charging the State Treasury with part of the costs of execution of the EIO (which is allowed by Art. 2 and 3 of Directive 2014/41 / EU).

¹⁸ Silvia Allegranza, "Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality," in *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, ed. Stefano Ruggeri (Berlin/Heidelberg: Springer, 2016), 62; see: Ariel Falkiewicz, "Interes wymiaru sprawiedliwości jako przesłanka pozytywna w międzynarodowej współpracy w sprawach karnych," *Europejski Przegląd Sądowy*, no. 5 (2018): 11.

¹⁹ See: Tomasz Ostropolski, in Sławomir Buczma, Michał Hara, Rafał Kierzyńska, Paweł Kołodziejcki, Andrzej Milewski, and Tomasz Ostropolski, *Postępowanie w sprawach karnych ze stosunków międzynarodowych* (Warsaw: C.H. Beck, 2016), 780.

²⁰ Kuczyńska, "Komentarz do art. 589x".

3.2. Evidence exclusionary rules

The second procedural negative premise for issuing the European Investigation Order by the Polish procedural body is related to evidence exclusionary rules i.e. legal norms that under certain conditions prohibit the examination of evidence or restrict obtaining evidence. The Polish literature indicates three types of inadmissible evidence:

- rules that prohibit proving certain facts,
- rules that prohibit using certain types of evidence,
- rules that prohibit using of specific methods of obtaining evidence (tortures)²¹.

It seems that in practice it is primarily about the evidence prohibitions falling into the second and third groups because they are most closely related to the rationale for the EIO Directive. However, it should be remembered that there are two types of the evidence exclusions belonging to the second group. Firstly, the ones unconditional in their nature, that cannot be rescinded (e.g. the prohibition of interrogating as a witness a defense counsel, lawyer or legal advisor who provides assistance to the detained, as to the facts which he found out while providing legal advice; interrogation of a clergyman as to the facts which he found out at confession; the prohibition of appointing certain people as experts, etc.). The second group of evidence exclusions are the conditional ones, depending on the will of the personal source of evidence (e.g. prohibition of questioning relatives as a witness, unless they agree to do it).

²¹ Our attention should not escape the fact that the Directive does not in any way regulate the rules and conditions for the admissibility of using evidence obtained under the EIO in domestic proceedings. This is the exclusive field of national law. However, it is intended to facilitate this admissibility by focusing on the method of obtaining evidence based on the warrant. But it must be admitted that thanks to the EIO it is not only easier for the Member States to obtain evidence in the other Member States, but also to allow it to a greater extent in their criminal proceedings (cf. Grzegorz Krysztofiuk, “Europejski Nakaz Dochodzeniowy,” *Prokuratura i Prawo*, no. 12 (2015): 76; Stefano Ruggeri, “Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues,” in *Transnational Evidence and Multicultural Inquiries in Europe Developments in EU Legislation and New Challenges for Human Rights – Oriented Criminal Investigation in Cross-border Cases*, ed. Stefano Ruggeri (Berlin/Heidelberg: Springer, 2014), 10.

The third group of evidence prohibitions that prevent issuing an EIO by the Polish procedural authority includes evidence obtained by means of a crime; explanations, testimonies or statements made in conditions excluding freedom of expression; hypnosis; chemical or technical agents affecting mental processes or aimed at controlling unconscious reactions of the body due to the questioning²².

Therefore, it is not possible to request the European Investigation Order in a situation of absolute evidentiary prohibition in Polish procedure (e.g. for the purpose of taking evidence in order to reveal the circumstances of providing a crown witness with personal protection or assistance). Similarly, questioning of clergymen as a witness residing in another EU member state as to the facts about which he learned during confession is inadmissible. Another example is related to obtaining of witness statement of evidence with the use of unacceptable interrogation methods (i.e., for example, statements obtained through the use of coercion or an unlawful threat against the interrogated person²³). The evidentiary exclusion also concerns the use in one country of the accused's statements concerning the alleged offense if the statement was made before an expert or a doctor providing him with medical assistance - in another Member State. In this matter, one should share the view of H. Kuczyńska, who states that firstly, it should be unacceptable to evade the evidentiary exclusions established in the Polish criminal procedure by means of the EIO, and secondly, it should

²² An attempt by law enforcement agencies to apply the provision of art. 168a of the Code of Criminal Procedure, the current wording of which does not preclude the use of the results of e.g. illegal search or illegal wiretapping as evidence. However, it should be assumed that the request to carry out an investigative measure within the limits of Art. 168a of the Code of Criminal Procedure it will simply not be taken into account by the EU Member State to which such a request would be addressed by way of an EIO, but I assume that such an EIO will not simply be issued in Poland.

²³ In accordance with art. 170 § 5 sec. 1–2 of CCP it is prohibited to: influence the statements of the testifying person by means of force or illicit threat, use hypnosis, chemical substances or technical means in order to influence psychological processes in the body of the testifying person or allow control of the unconscious reactions of the body in connection with the examination. Explanations, testimonies and statements made in circumstances precluding freedom of speech or obtained against the prohibitions mentioned in § 5, may not constitute evidence. Therefore it is unthinkable to issue EIO concerning the evidence collected with infringement the above provisions.

be also unacceptable to circumvent the bans, e.g. in order to interrogate as a witness of a person who exercised the right to refuse to testify in Poland, in a situation where he has no such right in another Member State. Even if the order was issued in such a situation, the court should declare the evidence thus obtained inadmissible²⁴. However, it must not be forgotten that even if the evidence gathered under the EIO is also validated on the basis of Art. 587 of the Code of Criminal Procedure, according to which reports of inspections and interrogations prepared at the request of a Polish court or persons as accused, witnesses, experts or reports of other evidentiary activities carried out by courts or prosecutors of foreign countries or bodies acting under their supervision, may be read at the hearing on the terms specified in art. 389, 391 and 393, if the manner of carrying out the activities is not contrary to the principles of the legal order in the Republic of Poland²⁵. It is permissible to read at the trial to an appropriate extent, under the principles laid down in Article 391 of the Code of Criminal Procedure, minutes of witness testimony given by the witness in preparatory proceedings conducted by a prosecutor of a foreign State or an authority acting under his supervision or before a court of a foreign State, if the manner of conducting these actions is not contrary to the principles of the legal order in the Republic of Poland, even though these actions were not undertaken at the request of a Polish court or prosecutor (Article 587 of the Code of Criminal Procedure) or before taking over the prosecution (Article 590 § 4 of the Code of Criminal Procedure)²⁶. Therefore it must be all the more permissible to read the evidence obtained under the ECI.

4. REDUCED PROCEDURAL MECHANISM

The second characteristic feature of the regulations implementing the EIO Directive is related to the procedural mechanism of issuing a spe-

²⁴ Kuczyńska, “Komentarz do art. 589x”.

²⁵ Martyna Kusak, “Obrońca a europejski nakaz dochodzeniowy,” *Palestra*, no. 3 (2019): 36.

²⁶ Cf Polish Supreme Court, Statement of 28 March 2002, Ref. No. V KKN 122/00, OSNKW 2002, no. 7–8, item 60.

cific procedural decision on the EIO. This mechanism consists of the procedural bodies authorized to issue the decision and the procedure for initiating the action.

The authorities authorized by law to issue an EIO include the court before which the case is pending, the public prosecutor conducting preparatory proceedings and the Police, as well as the authorities of the Border Guard, the Internal Security Agency, the National Revenue Administration, the Central Anticorruption Bureau, the Military Police (in scope of their competence) and other authorities enumerated in special provisions. The EIO in this case will require the approval of the prosecutor (art. 589w § 2 of the CCProcedure²⁷) issued after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1.

Noteworthy are solutions reducing the formalism relating to evidence activities that may be the subject of an EIO. For example, according to the Art. 589w § 4 of the CCP the EIO can be issued instead of the court's consent (normally obtained on the basis of Art. 237 § 1 of the CCP) to control and record the content of telephone conversations and recording, using technical means, the content of other conversations or transmissions of information, including correspondence sent by e-mail. However, this provision also contains a reference to the provisions of Chapter 26 of the Code of Criminal Procedure, which means that the Polish authority may issue a European Investigation Order for the purpose of applying in the state of control and recording only the content of telephone conversation, i.e. the order must concern only the prosecution of

²⁷ Cf. art. 2 lit.c (ii) EIO Directive 2014/41. Polish regulation concerning that issue is fully compatible with the meaning of this provision (see: CJEU Judgment of 8 December 2020 (Grand Chamber) according to: Article 1(1) and Article 2(c) of Directive 2014/41/EU regarding the European Investigation Order in criminal matters must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

the crimes described in this chapter and the persons referred to in art. 237 § 4 CCP. An interesting competence problem arises concerning the provisions of Chapter 26 CCP, as to the authority who decides on the use of wiretapping in the so-called urgent cases. So, according to art. 237 § 2 CCP in urgent cases, the surveillance and telephone tapping may be ordered by the public prosecutor who is obliged to request the approval of the court within three days. In the context of EIO Directive and Article 237 § 2 CCP, two interpretations have emerged concerning the question whether the EIO issued by prosecutor must be validated by the court or the prosecutor is fully empowered to issue such a decision itself.

According to the first, neither the EIO Directive nor the Polish law provides for the possibility of subsequent approval of the investigative order issued by the prosecutor, because it will not apply in international cooperation conducted on the basis of the EIO. The subsequent approval within the EIO procedure is not required even if it could be applied within the proceedings on Polish territory, it would be a foreign order should be issued only after its “subsequent approval” by the court, and thus de facto issued by the court²⁸.

The second possible interpretation is the following: since the decision to issue an EIO replaces the decision of the court referred to in Art. 237 § 1 of the CPP, it may mean that the prosecutor is competent to issue EIO in urgent cases without consecutive court authorizations. This interpretation is based on the correct assumption, that since the communication control order is subject to appropriate regulations in the executing state, and at the same time it is assumed that there is mutual trust in the guarantee procedures, the participation of the Polish court in issuing such an EIO is unnecessary²⁹. In my opinion, the second interpretation, is more practi-

²⁸ See: Buczma and Kierzyńska, *Europejski*, 218.

²⁹ Such an interpretation would be consistent with the assumptions of the concept of mutual recognition of judgments in the European Union: Buczma and Kierzyńska, *Europejski*, 219. However, the indicated authors rightly point out the doubts arising from the guarantees contained in the Polish constitution regarding the right to the protection of private life (Article 47 of the Constitution of the Republic of Poland (Journal of Laws 1997, No. 78, item 483, as amended). Moreover, they propose an intermediate solution, according to which the EIO in question would be issued by a Polish prosecutor and addressed directly to the competent authority of the executing State (without the partici-

cal and should be applied without violating the axiology of the EIO Directive and the guarantee functions of the relevant provisions.

Another manifestation of the reduced formalism of intra-EU cooperation in criminal proceedings is normative equivalence, because under the provision of Art. 589w § 5 CCP the decision to issue the EIO concerning evidence, in case of which admission, obtaining or examination requires the issue of a decision, replaces that decision. A. Sakowicz aptly points out that the provisions on the EIO break the practice of issuing two decisions: “substantive” related to procedural action at national level and “technical” related to applying for the execution of a “substantive” decision to a Member State of the Union. Article 589w § 5 of the Code of Criminal Procedure is the exemption from the rule to issue two separate decisions, as the decision to issue an EIO replaces the decision to take evidence³⁰.

The instrument devoted to investigative measures must not fail to regulate operational activities. It should be noted that the Polish implementation (art. 599w § 7 CPP) takes into account two modes of taking decisions regarding classified evidence. The first – an autonomous mode i.e. issued by the authorities of preparatory proceedings (and without the participation of judicial authorities³¹) The second mode includes the decisive participation of court when the decision on operational control is issued by a competent court at the request of a competent police authority previously approved by a public prosecutor. The second mode is applied in case of operational control of covert measures such as: the content of interviews conducted with the use of technical means, including using telecommunications networks; recording images or sound of people in interiors, means of transport or places other than public places; obtaining and recording the content of correspondence, including correspondence carried out by means of electronic communication; obtaining and recording data

pation of a Polish court). At the same time, the prosecutor would include in the warrant a request that the request for control and recording of communication be examined by the court of the executing state (ibidem).

³⁰ Andrzej Sakowicz, “Komentarz do art. 589w k.p.k.,” in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (LEGALIS, 2020).

³¹ It regards to such under cover measure as covert acquisition, sale or seizure of objects from crime, forfeited, or whose production, possession, transport or trade are prohibited, accepting or giving financial benefits.

contained in IT data carriers, telecommunications terminal devices, IT and tele-information systems; gaining access and controlling the content of shipments.

Both described modes fall within the scope of regulation of Art. 589w § 7, which stipulates that the EIO requires the approval of the public prosecutor competent according to separate provisions, unless the admission or obtaining of the evidence is reserved for the court. In that case, the issuance of the END requires the approval of a court competent on the basis of separate provisions.

However, there is also another possibility: an agreement between respective procedural bodies in MSs on the conditions for the execution of the order and the duration of the actions requested. The CPC does not specify the form of such arrangements, so it should be assumed that they can be concluded in any form, e.g. by exchanging letters, also by electronic means, without the need to conclude formal agreements, cooperation agreements, etc³².

The formal side of the decision on the EIO does not seem complicated and the key element of this decision is to identify the requested investigative measure subject to the EIO or the evidence to be obtained, or the circumstances to be established as a result of the investigative measure, together with a description of the facts of the case. The EIO may be issued both *ex officio* and at the request of a party, defense attorney or representative. This means that the parties are granted significant evidentiary right, and taking into account the subject of a possible request in the light of the provisions on the EIO, we are practically dealing here with a quasi-evidence application. However, it seems that the grounds for refusing to issue an EIO in this case will be, not based on Art. 170 of the Code of Criminal Procedure (specifying the grounds for dismissing an evidentiary application), but the previously indicated prohibitions of evidence and the interest of the administration of justice, which, in a way, consume the grounds for dismissing an evidentiary application. From a theoretical point of view, allowing the parties to show an evidence initiative in this regard should be assessed positively, hoping that the requests coming from the parties would

³² Buczma and Kierzyńska, *Europejski*, 222.

not be perceived by the procedural authorities as “worse” and as a result the authority will refuse to take them into account.

5. CONCLUSION

1. After the entry into force of the amendment to the Code of Criminal Procedure, implementing the ECI Directive in the Polish evidence law, there appeared a procedural solution that significantly facilitates taking evidence in the framework of intra-EU international cooperation.
2. The broad scope of the investigative measures with prevailing element of evidentiary activities will enable the authorities in preparatory proceedings to effectively carry out their statutory tasks in the field of collecting, securing and, if necessary, preserving evidence for the court.
3. The above will be achieved on the basis of formal decision-making mechanism adequate to the needs of the process and guarantee functions of the criminal procedure.³³
4. The effective system of evidence exclusions in the Polish criminal procedural law certainly cannot be considered as a factor that limits the opportunities created by the evidence instrument discussed here.

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³³ On this point, I do not share the too strict assessment of the EIO formal mechanism expressed by Grzegorz Krysztofiuk, “Europejski Nakaz Dochodzeniowy,” 97.

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