


## Obtaining Evidence Protected by Banking Secrecy through European Investigation Order in Preparatory Proceedings. Remarks from the Polish Perspective

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**Abstract:** The subject matter of considerations undertaken in the paper is the issue of obtaining evidence entailing banking secrecy under the European Investigation Order at the stage of the preparatory proceedings from the Polish perspective. The examination of the described evidence activity is often necessary to make key findings, for example, in the field of the data on bank accounts or bank transactions. Actions taken in this regard may concern the monitoring of banking operations and may also be used for establishing financial links between entities operating in different European Union Member States. The procedure for applying the European Investigation Order generates many problems in the analysed scope, in particular at the stage of the preparatory proceedings, starting from determining the authority competent to issue the European Investigation Order, to the need to consider legitimacy of obtaining the consent by the prosecutor to exempt from banking secrecy in order to further request for the required information. Against the background of the issues presented in the article, an attempt was made to analyse the normative institution of the European Investigation Order, used for obtaining evidence covered by banking secrecy, and to show the model that determines its optimal functioning in the face of existing problems in the application challenges related to the European cooperation in this area.

## 1. Introduction

Development of crime, in particular due to the continuous progress in the field of new technologies, has resulted in the gradual transformation of classic crime and its shift into the cyberspace,<sup>1</sup> which became particularly noticeable in the era of the COVID-19 pandemic, as it was pre-conditioned and closely related to a significant increase in human activity in the global network.<sup>2</sup> The category of a threat, and at the same time a factor exposing people to the risk of victimisation, should be perceived as a combination of tools used by standard users of computers and mobile devices as well as not only enabling, but sometimes even imposing from above, dealing with most matters via the network, digitisation of documents or widespread use of electronic banking, often in the absence of appropriate skills allowing for conscious and safe operation of specific applications. This state of affairs, in the face of intensified criminal activity, especially on the Internet, results in a high level of crime threat in the cyberspace, particularly including property offences.<sup>3</sup>

The Internet, due to the widespread accessibility of online banking, may be used to deposit funds from crime in accounts or to money-laundering using them. In practice the activity of organised criminal groups is often carried out through bank accounts set up by the so-called money mules<sup>4</sup>. Therefore, taking into account the fact that it is possible to access bank accounts online and the international nature of criminal organisations, their activities often involve a cross-border component, in particular when, for example, the account to which proceeds of crime were transferred was

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<sup>1</sup> Cf. Wiesław Pływaczewski, „Współczesne trendy przestępczości zorganizowanej w Europie (analiza wybranych zjawisk przestępczych z uwzględnieniem zadań Agencji Unii Europejskiej ds. Współpracy Organów Ścigania – Europol),” *Studia Prawnoustrojowe*, no. 52 (2021): 387.

<sup>2</sup> Cf. Marek Smarzewski, „Cyberprzestępczość a zmiany w polskim prawie karnym,” in *Reforma prawa karnego*, ed. Iwona Sepiolo-Jankowska (Warsaw: C.H. Beck, 2014), 262.

<sup>3</sup> Cf. Paweł Urbanowicz, Marek Smarzewski, „Bezpieczeństwo w cyberprzestrzeni a prawo karne,” in *Veritas in caritate*, eds. Marcin Tkaczyk, Marzena Krupa, and Krzysztof Jaworski (Lublin: Wydawnictwo KUL, 2016), 490–492; cf. also Dominika Skoczylas, „Rozwój teleinformatyczny państw Europy Wschodniej w kontekście cyberbezpieczeństwa. Zagrożenia a ochrona cyberprzestrzeni – wybrane zagadnienia,” *Prawo i Więź* 41, no. 3 (2022): 329–330.

<sup>4</sup> See: Agnieszka Gryszczyńska, “The Impact of the COVID-19 Pandemic on Cybercrime,” *Bulletin of the Polish Academy of Sciences. Technical Sciences* 69, no. 4 (2021): 6.

opened in another country. It may also be that these accounts are used to temporarily transfer funds, which are then withdrawn from ATMs abroad.

It should be noted that it is often a key issue to take prompt action by law enforcement agencies, aimed at obtaining evidence that would allow to identify the perpetrator and circumstances relevant from the perspective of the criminal proceedings at its early stage. At the same time – assuming there are premises in this regard – it is justified to take action as soon as possible to block the proceeds of crime, accumulated on a given account. In such cases, the fact that the information is often covered by banking secrecy, may prove difficult.

A significant problem in the cases involving a cross-border factor is not only the cooperation itself, but also its effectiveness measurable by a fast, automated, and often comprehensive action possible on the basis of existing legal instruments regulating the forms of the international cooperation. The institution which, as part of the cooperation between the EU Member States, is the main mechanism for obtaining and transferring evidence is the European Investigation Order (EIO), introduced into the Polish legal order in connection with the implementation of the 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>5</sup>

In its abstract approach, the EIO is the institution that allows for the establishment of the European cooperation in the field of conducting evidentiary proceedings. Against this background, however, certain doubts and questions arise that will be justified to be answered with the ongoing considerations.

Firstly, it should be considered whether the EIO meets the needs of effective evidence-gathering at an early stage of the criminal proceedings. Secondly, there are doubts to what extent the principle of mutual recognition of judicial decisions functions within EIO in a situation where obtaining of evidence requires the fulfilment of additional formal requirements, as is the case, for example, with reference to the information protected by bank secrecy. These doubts become all the more significant when it comes to obtaining of evidence in the area covered by banking secrecy at the stage

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<sup>5</sup> Official Journal of the European Union, L 130, 1 May 2014, p. 1–36; thereafter referred to as “EIO Directive”.

of the preparatory proceedings, which actually constitutes the subject matter of this study. As part of the subject matter, it is also necessary to specify the authority competent to issue the EIO in case when the exemption from banking secrecy under the Polish law lies within the competence of the locally competent regional court. The paper also highlights the issues regarding the admissibility of evidence obtained under the EIO and the legitimacy of applying the principle of specialty in this procedure.

## **2. Essence of the European Investigation Order and Obtaining Information Covered by Banking Secrecy under the European Investigation Order in the Light of Provisions of the Directive 2014/41/EU and Provisions of the Code of Criminal Procedure**

According to Article 82(1) of the Treaty on the Functioning of the European Union,<sup>6</sup> the judicial cooperation in criminal matters in the EU is based on the principle of mutual recognition of judgements and judicial decisions and includes the approximation of provisions, inter alia, in the field of – as defined in 82(2)(a) of the TFEU – mutual admissibility of evidence between the Member States. The implementation of these assumptions is reflected in the EIO Directive. In the Polish legal order, the relevant regulations establishing the EIO have been implemented in chapter 62c and in chapter 62d of the Polish Code of Criminal Procedure.<sup>7</sup>

Within the meaning of Article 1(1) of the EIO Directive, the EIO is a judicial decision issued or validated by a judicial authority of one Member State (issuing the EIO) in order to request another Member State (executing the EIO) to carry out one or several specific investigative measures to obtain evidence. According to general assumption, the EIO is executed on the basis of the principle of mutual recognition (Article 1(2) of the EIO Directive).

Following the definition expressed in Article 2(c) of the EIO Directive, the “issuing authority” of the EIO is generally a judge, a court,

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<sup>6</sup> Official Journal of the European Union, C 326/67, 26 October 2012, p. 47–390; thereafter referred to as “TFEU”.

<sup>7</sup> Act of 6 June 1997; consolidated text: Journal of Laws 2022, item 1375, as amended; thereafter referred to as “CCP”.

an investigating judge or a public prosecutor competent in the case. The power to issue the EIO is also granted by the EIO Directive to any other authority as defined by the issuing State which, in the specific case, is competent to order the gathering of evidence in accordance with the national law. In the latter case, however, the EIO is subject to the validation of a judicial authority, i.e. a judge, a court, an investigating judge or a prosecutor in the issuing State.

On the plane determined by the selected issues of consideration, the logical point of reference is Article 589w of the CPP. In the provision of Article 589w § 1 of the CCP, the legislator provided for the powers to issue the EIO *ex officio* or upon a motion of a party, defence counsel or attorney – both for judicial and preparatory proceedings. This means that the court before which the case is pending is competent to issue the EIO in the meaning of the provisions of the CCP at the jurisdictional stage. On the other hand, in the preparatory proceedings, the authority issuing the EIO will be, in particular, a prosecutor conducting the proceedings. Article 589w § 2 of the CCP, however, stipulates that if the investigative or verifying proceedings referred to in Article 307 of the CCP are conducted by the Police or by the authorities referred to in Article 312 of the CCP (the agencies of the Border Guard, Internal Security Agency, National Tax Administration, Central Anti-Corruption Bureau, Military Gendarmerie and other agencies referred to in the special provisions), or if the preparatory proceedings are conducted by the authorities referred to in Article 133 § 1 and Article 134 § 1 of the Fiscal Criminal Code,<sup>8</sup> the EIO may also be issued by the authority conducting the proceedings. In such a situation, the EIO requires the approval of the prosecutor.

The effectiveness of execution of the EIO depends not only on its issuance by the competent authority, but also on the fulfilment of the conditions for admissibility of the EIO set out in Article 6(1) of the EIO Directive. It is crucial to carry out checks in this respect because both the issuance and execution of the EIO depends on the recognition of its necessity and proportionality for the purposes of the proceedings, taking into account the rights of the accused, and on the conclusion that in a similar domestic case ordering an investigative measure is admissible under the same

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<sup>8</sup> Act of 10 September 1999; consolidated text: Journal of Laws 2023, item 654, as amended.

conditions. It is necessary to point out that in the light of the Polish criminal procedural law, the possibility of issuing the EIO is conditioned by the existence of the interest of the administration of justice in this respect and the permissibility of examination or obtaining a given evidence (Article 589x of the CCP). Moreover, the EIO executing authority is obliged to assess the conditions set out in Article 6(1) of the EIO Directive, and in the case of doubts in this regard, it may consult the issuing authority on the purposefulness of the EIO.

In this context, it should be noted that while the EIO refers to the performance of specific investigative measures aimed at obtaining evidence, in the meaning of the EIO Directive and the national law, the EIO may cover any investigative measure, regardless of whether it is explicitly mentioned in the EIO Directive. Nevertheless, without attempting to precisely determine the catalogue of activities that can be carried out within the framework of the EIO, it is necessary to indicate that the content of the EIO Directive provides for detailed regulations regarding certain investigative measures. They relate respectively to: the temporary transfer to the issuing or executing State of persons held in custody for the purpose of carrying out an investigative measure (Article 22 and 23 of the EIO Directive); the hearing by videoconference or other audiovisual transmission (Article 24 of the EIO Directive); the hearing by a telephone conference (Article 25 of the EIO Directive); the information on bank and other financial accounts (Article 26 of the EIO Directive); the information on banking and other financial operations (Article 27 of the EIO Directive); investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (Article 28 of the EIO Directive); covert investigations (Article 29 of the EIO Directive); interception of telecommunications (Article 30–31 of the EIO Directive); provisional measures (Article 32 of the EIO Directive). At the same time, it should be noted that section C, annex A to the EIO Directive provides for the possibility of requesting the following evidence activities, in addition to those listed above: obtaining information or evidence which is already in the possession of the executing authority; obtaining information contained in the database held by the police or the judicial authorities; hearing; identification of persons holding a subscription of a specified phone number or IP address.

Much more general are the provisions of the CCP concerning the issuance (Article 589w – 589zd of the CCP) and execution (Article 589ze – 589zt of the CCP) of the EIO. As a rule, they do not specify the procedure to be followed in the case of individual investigative measures, including the types of information that may potentially be obtained by the procedural organs through the EIO. It seems, however, that this is not necessary, since the analysis of the objective scope of the EIO determined by the EIO Directive and the provisions of the CCP should lead to the conclusion that the catalogue of investigative activities that may be requested and performed within the EIO is not closed.

Against the background of such generally presented issues, it can be argued that investigative measures concerning the information protected by banking secrecy play an important role in the criminal proceedings and, consequently, they can often be taken into account as subject of EIO. For this reason, it was logical solution to define in more detail the framework for their taking, whereas banking information is covered by protection and because of the fact that in this case obtaining evidence is subject to the fulfilment of additional conditions. Proper interpretation of the provisions of the EIO Directive in this respect is necessary not only due to the frequent use of banking information, but also due to the fact that obtaining such evidence and its admissibility in the criminal proceedings or conducting ongoing monitoring of financial operations, depend on the fulfilment of additional conditions, including in particular release of the institution from the obligation to keep secret information covered by banking secrecy.

According to Article 26(1) of the EIO Directive, the EIO may be issued in order to determine whether a person holds or controls one or more bank accounts and consequently obtain all the detailed information regarding the identified accounts. Similarly, Article 26(6) of the EIO Directive establishes the basis for undertaking identical investigative measures in relations to accounts in a non-bank financial institution. The issuing authority shall justify the reasons why it considers that the requested information is likely to be of substantial value for the criminal proceedings and on what basis it presumes that banks or non-banks financial institution in the executing state hold the account, and, to the extent available, which banks or non-banks institution may be involved in a given case (Article 26(5) of the EIO Directive).

The second group of banking information, that can be obtained under the EIO, indicated in Article 27(1) and (5) of the EIO Directive are those concerning the details of specified bank accounts and banking or non-banking operations which have been carried out during a defined period of time, including the details of any sending or recipient account. In the EIO the issuing authority must justify the reasons why it considers the requested information relevant for the purpose of the criminal proceedings concerned (Article 27(4) of the EIO Directive). At the same time it should be noted that the obligation to provide the requested information applies only to the extent that the information is in possession of the bank or non-banking institution (Article 27(3) of the EIO Directive).

Within the EIO, it is also possible to monitor of banking or other financial operations that are being carried out through one or more specified accounts. Obtaining the banking information in the indicated manner is acceptable when gathering of evidence requires the conduct of the aforementioned monitoring in real time, continuously and over a certain period of time (Article 28(1)(a) of the EIO Directive). In this context, the issuing authority should justify in the EIO that the requested information is relevant for the purpose of the criminal proceedings (Article 28(3) of the EIO Directive). Therefore, it must also demonstrate the legitimacy of conducting these activities in a certain way.

The common denominator of the activities undertaken in this context will, as a rule, be the fact that the information to which the procedural activities relates is covered by banking secrecy. This means that entering the scope of legally protected secret in issuing and executing EIO is subject to prior authorisation for such interference on the basis of the legitimate interests of the proceedings. Therefore, in particular at the stage of preparatory proceedings, a dilemma arises regarding the authority competent to issue the EIO decision, the subject of which is the information covered by banking secrecy.

### **3. Authority Competent to Issue the European Investigation Order and Exemption from Banking Secrecy as the Condition for Issuing the Order**

As it can be seen from the previous considerations, unlike the EAW – which, pursuant to Article 6 (1) of the Council Framework Decision of 13 June 2002



on the European arrest warrant and the surrender procedures between Member States,<sup>9</sup> requires a decision to be made by a judicial authority – in the case of the EIO, the authority conducting or supervising the criminal proceedings within the meaning of Article 2(c) of the EIO Directive in connection with Article 589w § 1 and 2 of the CCP is competent to issue a decision. This authority is determined depending on the stage of proceedings. Therefore, in the preparatory proceedings, the role of the prosecutor, as the authority issuing the EIO or approving the EIO issued by the authority conducting investigative or verifying proceedings, will be of key importance.

It is problematic when the EIO relates to the evidence, admission, obtaining or examination of which requires the issue of a prior decision. According to Article 589w § 5 of the CCP, the decision on the EIO replaces the required decision. At the same time, however, the CCP specifies that the provisions concerning determined actions and evidence shall apply accordingly. In such a normative environment, doubts arose in the doctrine and jurisprudence, in particular with regard to determining, firstly, which authority is competent to issue the EIO concerning the information on bank accounts and transactions or the EIO requesting monitoring of banking or financial operations carried out through specified accounts (Article 26–28 of the EIO Directive), and secondly, whether in the analysed case the EIO is conditioned to be a prior decision on the exemption from banking secrecy in the issuing state.

The protection of banking secrecy is guaranteed in the provisions of Article 104–106e of the Act of 29 August 1997 – Banking Law.<sup>10</sup> Due to the subject of considerations and the resulting need to determine the authority competent to issue the EIO on banking information, it is first necessary to refer to Article 106b of the BL, regulating the mode of exemption from banking secrecy. Following Article 106b(1) of the BL, apart from the circumstances specified in Article 105 and Article 106a of the BL,<sup>11</sup>

<sup>9</sup> OJ L 190, 18 July 2002, p. 34–51.

<sup>10</sup> Act of 29 August 1997; consolidated text: Journal of Laws 2022, item 2324, as amended; thereafter referred to as „BL“.

<sup>11</sup> Incidentally, it should be noted that Article 105 and Article 106a of the BL refer to the obligation to notify about the possibility of committing a crime especially in connection with the justified suspicion that the bank's activity is being taken advantage of for

in the preparatory proceedings, the prosecutor conducting criminal proceedings in the case of an offence or fiscal offence may request that the bank, persons employed in the bank or persons through whom the bank performs banking operations provide information entailing banking secrecy. However, the basis for such a demand is the decision of the locally competent regional court issued upon a motion of the prosecutor.

Hence, it may be doubtful whether the competence of the regional court to exempt from banking secrecy coincides with the power of this authority to issue the EIO, or whether in the preparatory proceedings the prosecutor will be competent to decide on the EIO. Considering this issue, Andrzej Sakowicz expresses the opinion, that the lack of the possibility for the prosecutor to obtain the information covered by banking secrecy without a prior decision of the competent regional court means that the possibility of issuing the EIO by the prosecutor is also excluded. The aforementioned author argues, *inter alia*, that if the action demanded by the prosecutor is dependent of the court's decision under the domestic law, then the functional competence of the court also includes the issuance of the EIO.<sup>12</sup> Barbara Augustyniak and Hanna Kuczyńska, in turn, have a different view on the problem under consideration, recognising that the decision on the EIO is issued by the prosecutor, but only after the exemption from banking secrecy by the locally competent regional court.<sup>13</sup>

It is reasonable to agree with the view of Barbara Augustyniak and Hanna Kuczyńska when making a general analysis of the provisions of the CCP and the EIO Directive. In relation to Article 2(c) of the EIO Directive by the issuing authority is understood as, *inter alia*, court, where EIO Directive refers to the court competent in the case concerned. On

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the purpose of concealing criminal actions or for the purposes connected with a fiscal offence. See: Jan Byrski, „Komentarz do Aricle 106b ustawy – Prawo bankowe,” in *Prawo bankowe. Komentarz*, eds. Konrad Osajda and Jacek Dybiński (Warsaw: C.H. Beck, 2023).

<sup>12</sup> Andrzej Sakowicz, „Komentarz do Aricle 589w Kodeksu postępowania karnego, in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warsaw: C.H. Beck, Legalis, Legalis, 2023).

<sup>13</sup> Barbara Augustyniak, „Komentarz do Aricle 589w Kodeksu postępowania karnego,” in *Kodeks postępowania karnego. Komentarz aktualizowany*, vol. II, ed. Dariusz Świecki, LEX/el.; Hanna Kuczyńska, „Komentarz do Aricle 589w Kodeksu postępowania karnego,” in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warsaw: C.H. Beck, Legalis, 2023).

the other hand, the locally competent regional court will not often be the court before which the case is pending, but only the court competent to release from banking secrecy pursuant to Article 106b of the BL. Under the preparatory proceedings – in particular in Article 589w § 1–2 of the CCP – the prosecutor is expressly provided for as the authority issuing or approving the EIO. The opposite approach could be supported by Article 589w § 5 of the CCP, stipulating that the decision to issue the EIO concerning evidence, whose admission, obtaining or examination requires the issue of a decision, replaces that decision. However, the competent regional court has only the power to exempt from banking secrecy and not to issue the EIO. Such a statement is justified, since during the preparatory proceedings, the exclusive competence of its authorities to take decision on EIO is envisaged. At the same time, it is important to emphasise the lack of the special provision for the determination of the jurisdiction of such a court at the stage of the preparatory proceedings. Then, there are no sufficient grounds for a different interpretation. Appropriate conclusions can be drawn against the background of the provision of Article 589w § 4 of the CCP, from which – in the context of the so-called surveillance and telephone tapping or recording – it follows the competence of the court – at every stage of the proceedings – to make a decision on EIO replacing the court's decision as to the consent to the control and recording conversations, referred to in Article 237 § 1 of CCP. Nonetheless, such a statement cannot be formulated in consideration of Article 237 § 5 of the CCP. For this reason, the prosecutor will be competent to issue the EIO, but after obtaining the prior exemption from banking secrecy, and thus after performing an act that determines the admissibility of demanding under EIO the information covered by the indicated secrecy legally protected under the national law.

The considered problem turned out to be so debatable that it became the subject of divergent interpretations in case-law. Differences in the sphere of interpretation concern not only which authority is competent to issue the EIO aimed at obtaining confidential banking information, but also whether it is necessary to release from the banking secrecy before issuing the EIO, since the Polish authority is not able to decide on a direct exemption from the secrecy in relation to a bank from another EU Member State. In the jurisprudence, four positions can be distinguished regarding

the determination of the authority competent to issue the EIO at the preparatory proceedings, when the subject of the EIO is information entailing banking secrecy.

In the first of the presented approaches, it was assumed that the authority competent to issue the EIO – pursuant to Article 106b(1) of the BL – is the locally competent regional court, which is at the same time authorised to exempt from the obligation to maintain confidential information constituting bank secrecy. This concept was adopted by the Court of Appeal in Gdańsk in its decision of 23 May 2018, expressing the acceptance of the direction of interpretation of Article 589w § 1 of the CCP, according to which, if the conduct of the action postulated by the prosecutor depends in domestic law on the decision of the competent regional court, then it is also the issuance of the EIO that falls under the competence of the given court.<sup>14</sup>

The second out of the positions expressed in the decision of the Court of Appeal in Katowice of 29 January 2019 boils down to the recognition that, since in order to obtain evidence covered by bank secrecy, it is necessary for the competent regional court to issue a prior decision to exempt it, the issuance of such a decision does not additionally result in the need to obtain a separate decision on the issuance of the EIO by the prosecutor. The Court of Appeal found that the exemption from banking secrecy granted by the competent regional court replaces the decision on the EIO.<sup>15</sup>

As part of the next direction of interpretation, the assumption was made, that at the stage of the preparatory proceedings, the prosecutor is authorised to issue the EIO concerning banking information. In this context, it is stated that the prosecutor does not have to apply to the regional court, before taking the decision on the EIO, with a motion to exempt from banking secrecy. Such a pattern of conduct is adopted by the courts, taking into account the fact that exemption from legally protected secrecy pursuant to Article 106b(1) of the BL does not affect banks that are not within the jurisdiction of the Polish courts. National courts do not have

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<sup>14</sup> See: Appellate Court in Gdańsk, Decision of 23 May 2018, Ref. No. II AKz 4018/18, LEX no. 2553721; see also in this context: Regional Court in Łomża, Decision of 11 June 2019, Ref. No. II Kop 15/19, LEX no. 2717015; Regional Court in Łomża, Decision of 11 June 2019, Ref. No. II Kop 16/19, LEX no. 2717011.

<sup>15</sup> See: Appellate Court in Katowice, Decision of 29 January 2019, Ref. No. II AKz 53/19, LEX no. 2728416.

the power to release banks operating in another EU Member State from banking secrecy.<sup>16</sup> Therefore, it is sometimes argued that the prosecutor, in order to obtain evidence covered by banking secrecy, should apply directly with EIO to the competent authorities of another Member State, which have the exclusive competence to decide on a possible exemption and on the collection and sending of the requested information in the preparatory proceedings.<sup>17</sup>

Within the last of the concepts, there is the assumption that in the scope of the procedure for obtaining the information covered by banking secrecy through EIO, the prosecutor is competent to issue the EIO decision after obtaining the decision on the exemption issued by a locally competent regional court pursuant Article 106b of the BL. This approach was initially expressed in the decision of the Court of Appeal in Katowice of 4 September 2018.<sup>18</sup> Currently, it is confirmed by the latest jurisprudence of common courts<sup>19</sup> and, most importantly, the Supreme Court.<sup>20</sup> The presented position seems to be justified in the very essence of the EIO and in reference to Article 6(1b) of the EIO Directive. The condition for the issuance of the EIO is the admissibility of ordering an investigative measure under the same conditions as part of the national procedure. It should therefore be emphasised that in order to request for the bank information covered by banking secrecy through EIO, the prosecutor must first obtain the exemption from the obligation to maintain it. It is not important that this exemption will not affect the authority executing the EIO. It is made only for the purposes

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<sup>16</sup> See: Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, LEX no. 2601868; Appellate Court in Kraków, Decision of 23 October 2018, Ref. No. II AKz 524/18, LEX no. 2645341; Regional Court in Łomża, Decision of 25 January 2019, Ref. No. II Kop 42/18, LEX no. 2717014; Regional Court in Łomża, Decision of 28 March 2019, Ref. No. II Kop 7/19, Legalis no. 2238242; Regional Court in Łomża, Decision of 28 March 2019, Ref. No. II Kop 10/19, Legalis no. 2238562.

<sup>17</sup> Cf. Regional Court in Warsaw, Decision of 29 June 2018, Ref. No. VIII Kop 77/18, LEX no. 2729919.

<sup>18</sup> See: Appellate Court in Katowice, Decision of 4 September 2018, Ref. No. II AKz 645/18, LEX no. 2615563.

<sup>19</sup> Cf. Appellate Court in Kraków, Decision of 13 July 2022, Ref. No. II AKz 424/22, LEX no. 3389923.

<sup>20</sup> See: Polish Supreme Court, Decision of 2 June 2022, Ref. No. I KZP 17/21, Legalis no. 2707936.

of the procedure before the issuing authority and is *sine qua non* condition for issuing the EIO. At the same time, however, the compliance with the national procedures required to obtain a given evidence may turn out to be crucial for assessing whether the condition of equivalence of an investigative measure is fulfilled in the executing State.<sup>21</sup> The Supreme Court rightly pointed out in its decision of 2 June 2022 that the regional court, under the procedure set out in Article 106 of the BL, is not entitled to decide on admissibility of evidence or to examine it. Its role is limited to determining whether and, if so, to what extent a given evidence concerning bank information can be gathered by the prosecutor. Therefore, it is the prosecutor, subject to the relevant consent of the national court, who decides to apply to the executing authority with a request contained in EIO to obtain evidence covered by banking secrecy.

#### **4. Effectiveness of Obtaining Evidence Covered by Banking Secrecy through European Investigation Order Procedure**

It seems justified to put forward the thesis that the effectiveness of the EIO may be conditioned by the proper conduct of the procedure aimed at obtaining banking information already in the issuing country. Recognition of the EIO by the competent authority of the executing State does not, in principle, require any additional formalities. According to the EIO Directive, its execution should be ensured in the same way and under the same modalities as if the given investigative measure had been ordered by an authority of the executing state. Exceptions to this rule occur when the executing authority invokes one of the grounds for non-recognition or non-execution or one of the grounds to postponement (Article 9(1) of the EIO Directive).

It has already been established that the issuance of the EIO in order to obtain evidence, the content of which is banking information, will most often depend on a release from secrecy by the competent regional court, and the decision on the EIO itself is issued by the prosecutor. It is important from the perspective of Article 9(3) of EIO Directive, since it is envisaged that the EIO shall be returned to the issuing state in the case of

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<sup>21</sup> Cf. Ariadna Ochnio, „Głosa do postanowienia Sądu Apelacyjnego w Katowicach – Wydział II Karny z dnia 4 września 2018 r., II AKz 645/18,” *Orzecznictwo Sądów Polskich*, no. 7–8 (2021): 109–110.

transmission to the executing authority of the EIO that has not been issued by the issuing authority within the meaning of Article 2(c) of the EIO Directive. In addition, the completion of the national procedure is a key issue in the context of possible further examination of the so-called “double admissibility” of a given evidence by the EIO executing authority, taking into account the guarantee in the issuing state when assessing evidence obtained through EIO of the exercise of the rights of defence and the fairness of the proceedings (Article 14(7) of the EIO Directive).<sup>22</sup>

For this reason, the reference should be made to the grounds for the exemption from banking secrecy under Article 106b of the BL. It must be borne in mind that pursuant to Article 589x of the CCP, the issuance of the EIO is inadmissible, both when it is not required by the interest of the administration of justice and when the examination or obtaining evidence is not permissible under the Polish law. As part of the abstract model, it is therefore necessary first for the regional court to examine *casu ad casum* the grounds for the exemption from banking secrecy and to make a positive decision in this respect. Only then it is possible for the prosecutor to assess the premises for issuing the EIO regarding bank information, to the extent to which the exemption took place and within the limits set by the application of Article 589w and Article 589x of the CCP.<sup>23</sup>

Determining the reasons justifying the decision on the exemption from the obligation to maintain banking secrecy is important because in Article 106b(1) of the BL, the Act does not directly address to the court the prerequisites for obtaining bank information for the purposes of a criminal trial. According to Article 106b(1) in connection with Article 106b(2) of the BL, the prosecutor’s motion containing the demand to provide information entailing banking secrecy should include the following items: a description number or docket number of a case; a description of the offence, together with its legal qualification; the circumstances justifying the need to make the information available; an indication of the person

<sup>22</sup> Cf. Hanna Kuczyńska, “Admissibility of Evidence Obtained as a Result of Issuing an European Investigation Order in Polish Criminal Trial,” *Review of European and Comparative Law* 46, no. 3 (2021): 74; Martyna Kusak, “Mutual Admissibility of Evidence and the European Investigation Order: Aspirations Lost in Reality,” *ERA Forum*, no. 19 (2019): 399.

<sup>23</sup> Cf. Krzysztof Woźniowski, “European Investigation Order – Selected Problems on Polish Implementation,” *Review of European and Comparative Law* 46, no. 3 (2021): 152–157.

or organisational unit that the information concerns; specification of the entity obliged to provide information and related data; specification of the type and scope of information. It can be concluded that the legitimacy of the request in question depends on the prosecutor's demonstrating the existence of circumstances justifying the need to disclose information. Therefore, the decision to release from confidentiality should be conditional on the face that is taken in specific preparatory proceedings and it is to refer to the specific type and scope of information requested. This means that the consent cannot be general and blank and must be justified in the circumstances of a given case.<sup>24</sup> Thus, the prosecutor's motion seems to be justified only when it is impossible to obtain certain information entailing banking secrecy in any other way, and at the same time there is a real need to disclose the demanded information, necessary to achieve the objectives of the proceedings.<sup>25</sup>

Based on Article 106(3) of the BL the regional court, in the case of the positive recognition of the motion, issues the decision, expressing the consent for the confidential banking information to be available, specifying the kind and scope thereof, the person or organisational unit that it concerns, as well as the subject obliged to make it available. It is important insofar as the decision on the exemption from banking secrecy determines the subjective and objective scope of the related EIO. However, doubts may arise as to the manner in which the fact of issuing the decision on the exemption from banking secrecy under the EIO procedure should be formally reflected. It seems that as part of the EIO form attached to

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<sup>24</sup> Appellate Court in Katowice, Decision of 6 April 2011, Ref. No. II AKz 202/11, *Legalis* no. 340396; Appellate Court in Kraków, Decision of 7 January 2019, Ref. No. II AKz 673/18, *Legalis* no. 2233126; Anna Błachnio-Parzych, „Organ uprawniony do wydania europejskiego nakazu dochodzeniowego w celu uzyskania informacji stanowiących tajemnicę bankową na podstawie Aricle 106b ust. 1 Prawa bankowego – glosa do postanowienia Sądu Apelacyjnego w Łodzi z 19.09.2018 r., II AKz 496/18,” *Glosa*, no. 3 (2022): 36.

<sup>25</sup> Marcin Przestrzelski, „Postępowanie w sprawie wyrażenia zgody na udostępnienie informacji stanowiących tajemnicę bankową,” *Prokurator* 47, no. 3 (2011): 93; see also: Appellate Court in Kraków, Decision of 14 August 2018, Ref. No. II AKz 403/18, *Legalis* no. 1892295; Appellate Court in Wrocław, Decision of 22 February 2017, Ref. No. II AKz 70/17, *LEX* no. 2250041; Appellate Court in Rzeszów, Decision of 3 December 2013, Ref. No. II AKz 219/13, *LEX* no. 1400405; Appellate Court in Lublin, Decision of 22 October 2008, Ref. No. II AKz 508/08, *LEX* no. 477843.



the Regulation of the Minister of Justice of 8 February 2018 on specifying the template of the European Investigation Order form,<sup>26</sup> the relevant mention should be included in section C in the place devoted to describing the required assistance or investigative measures or in section G1 dedicated to a summary of the facts justifying the issuance of the EIO. It could also be considered whether the decision on the exemption from banking secrecy translated into the language of the executing state or another official language determined by that State should not be annexed to the EIO. It seems, however, that the notification of such a decision translated into a given language may become relevant only at the stage of possible consultations between the executing authority and the authority issuing the EIO.

Against this background, an important question arises about the role of the decision of the competent regional court on the determination of the grounds for the exemption from banking secrecy under the domestic law, namely whether it has, and if so, what significance, for example in the perspective of assessing the fulfilment of the conditions for the admissibility of the EIO, in accordance with Article 6 of the EIO Directive. As it has already been indicated, when granting permission to waive banking secrecy, the national court, as part of recognising the existence of conditions of Article 106b of the BL, states both the necessity and the proportionality of the exemption from the secrecy to a certain extent for the purposes of the proceedings. In relation to the outstanding issue formulated in this way, one can refer to the axiological foundations of the functioning of the EIO, i.e. the principle of mutual recognition, as well as to the trust in relations between Member States, which is necessary for the effectiveness of the EIO. The principle of mutual trust should, as a rule, result in the acceptance that the requirements for the execution of the EIO are met, provided that the EIO fulfils the formal conditions and there are no legal reasons for refusing its recognition or execution. Such an approach is rationally justified from a legal and practical perspective. It should be noted that formally there is a possibility of requesting the state issuing the EIO for appropriate explanations or supplementing information, as part of the consultations referred to in Article 6(3) of the EIO Directive,

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<sup>26</sup> Journal of Laws 2018, item 366.

if the information available so far is not sufficient to make a decision on executing the EIO. Consequently, if the essence of the EIO aimed at obtaining legally protected banking information is the existence of a prior court's decision exempting from the obligation to keep it, this means that, on the basis of the mutual recognition and mutual trust, executing authorities may in principle state the existence of factual grounds for the admissibility of the EIO.<sup>27</sup>

It seems justified to state that as regards the assessment of admissibility by the executing state, the EIO should function relatively automatically, bearing in mind the need to execute it as soon as possible. Exceptions may

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<sup>27</sup> See with reference to the mutual recognition of the decision on detention in the context of the EAW procedure: Polish Supreme Court, Decision of 26 June 2014, Ref No. I KZP 9/14, Legalis no. 966597. In this context it should be noted that in accordance with the *forum regit actum* principle regulated in Article 9(2) of the EIO Directive, the EIO executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in the EIO Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. In order to outline a broader context, it is necessary to consider the doubts raised in the doctrine as to whether the principle of *forum regit actum* remains consistent with the philosophy based on the mutual trust. Differences between the procedures of individual EU Member States may result, first of all, in situations where, even if the state executing the EIO complies with the requests of the issuing state, the evidence requested for gathering may turn out to be inadmissible in the issuing state. Moreover, the *forum regit actum* principle applies only in the relationship between the issuing State and the executing State. See: Martyna Kusak, "Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters," *European Journal on Criminal Policy Research*, no. 23 (2017): 338–339; Martyna Kusak, „Reguły *forum regit actum*, *locus regit actum* oraz zasada specjalności,” in *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami* (Warsaw: Wolters Kluwer Polska, 2019), LEX/el.; Gert Vermeulen, *Free Gathering and Movement of Evidence in Criminal Matters in the EU. Thinking beyond Borders, Striving for Balance, in Search of Coherence* (Antwerp–Apeldoorn–Portland: Maklu, 2011), 41–43. The solution to the existing problems in the indicated scope could be the introduction of common standards for the admissibility of evidence in the European Union. See in this context: *ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings. Draft Legislative Proposal of the European Law Institute* (Austria: European Law Institute, 2023), accessed August 30, 2023, [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Proposal\\_for\\_a\\_Directive\\_on\\_Mutual\\_Admissibility\\_of\\_Evidence\\_and\\_Electronic\\_Evidence\\_in\\_Criminal\\_Proceedings\\_in\\_the\\_EU.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Proposal_for_a_Directive_on_Mutual_Admissibility_of_Evidence_and_Electronic_Evidence_in_Criminal_Proceedings_in_the_EU.pdf).

be generated in situations where there are grounds for the refusal to recognise or execute the EIO listed in Article 11(1) of the EIO Directive. In the context of the analyses of the information entailed bank secrecy, noting that in this respect it is the prosecutor who is the authority issuing the EIO, the potential impact of this circumstance on the effectiveness of the cooperation should be considered. In particular, pursuant to Article 11(1)(f) of the EIO Directive, the recognition or execution of the EIO may be refused if there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 of the Treaty on European Union<sup>28</sup> and the Charter of Fundamental Rights of the European Union.<sup>29</sup>

The problem arose in the connection with the procedure for execution of the German EIO – containing a request for the transfer of copies of various documents relating to a bank account for a specified period – by Austria. The Regional Court for Criminal Matters in Vienna, examining the issue of granting access to the requested information, noted that the German Public Prosecutor's Office is at risk of being subject, directly or indirectly, to instructions or individual orders from the executive and, according to the position of the CJEU, it could not be considered as a judicial authority under the EAW.<sup>30</sup> The Austrian court argued that the same kind of reasons could be made in order to refuse the execution of the EIO issued by the German Public Prosecutor's Office. The court further clarified that the requirement of independence of the authority issuing the EIO is important because the EIO often entails interference with fundamental rights when it covers all investigative measures. The doubts raised by the executing authority resulted in the request to the CJEU for a preliminary ruling regarding the possibility of treating the German Public Prosecutor's Office as an authority within the meaning of Article 1 (1) and Article 2 (c) of the EIO Directive due to the risk of being subordinated to the Minister of Justice. The CJEU responded to the question, ruling that the notion of a judicial authority and an issuing authority in the EIO Directive should

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<sup>28</sup> Official Journal of the European Union, C 202, 7 June 2016, p. 1–388.

<sup>29</sup> Official Journal of the European Union, C 326, 26 October 2012, p. 391–407.

<sup>30</sup> CJEU Judgement of 27 May 2019, Case C-508/18 OG and C-82/19 PI, ECLI:EU:C:2019:456.

be interpreted as included the public prosecutor of the Member State or 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 EIO.<sup>31</sup>

It is indisputable that the cited CJEU judgement is also important from the Polish perspective. However, in the light of the concept already presented – approved by the Supreme Court – regarding the procedure related to the decision on the determination of the grounds for the exemption from banking secrecy by the competent regional court, before issuing a decision on the EIO by the prosecutor, it should be noted that this perspective is different than the German one. The main difference lies in the fact that the jurisprudence has prevailed the approach guaranteeing the participation of the court in determining the existence of the grounds for the exemption from banking secrecy. The court's decision thus allows us to conclude that the condition of the possibility of obtaining such evidence under the Polish law is met.

The last problematic issue that may affect the assessment of the effectiveness of the EIO is the possibility of evidentiary use of the information obtained through EIO covered by banking secrecy for the purpose of the proceedings other than the one for which the EIO was executed. It is debatable whether the specialty rule applies in EIO proceedings. It should be emphasised that the decision to waive banking secrecy, whether for the purposes of the procedure in the issuing State or already in the executing State, is taken in the context of and for the purposes of the criminal proceedings in question. Consequently, it is made against the background of a specific factual state, because in the realities of a given case, and besides, it refers to specific offences. It should be noted that the EIO Directive does not regulate the principle of specialty. Nevertheless, there are voices in the doctrine that this principle applies to the cooperation within the framework of the EIO, as well as opposing opinions that are in favour of excluding the application of this rule in the analysed scope. Ultimately, a binding

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<sup>31</sup> CJEU Judgement of 8 December 2020, Case C-584/19, ECLI:EU:C:2020:1002.

resolution of the raised issue does not seem possible. However, it would not be right to completely exclude the application of this principle. It is possible to imagine using the lack of regulation to abuse cooperation in such a way that, for example, the requested evidence obtained through EIO for a given proceedings would be used in a way that contradicts the grounds for refusing recognition or execution of EIO. In similar cases, the principle of speciality should undoubtedly apply, and evidence in the context of these proceedings could be questioned.<sup>32</sup>

## 5. Conclusions

The EIO is one of the key legal remedies for the purposes of the criminal proceedings, in those cases where significant arrangements and activities must be made in cooperation with other EU Member States. The EIO, at least from a legal theoretical perspective, is an instrument that allows for the effective obtaining of evidence, even in the face of a perceived crisis in the mutual trust and mutual recognition of judgements. This is largely due to the positioning of the EIO in the horizontal model as an intermediate mechanism between the traditional international cooperation and the automatism resulting from the principle of mutual recognition.<sup>33</sup>

The main advantage of the EIO is the fundamental possibility of its use by the authorities conducting the proceedings at a given stage, which are to the greatest extent able to identify the steps necessary to make the relevant findings. In addition, it is plausible to state that the EIO procedure seems to be sufficiently guaranteeing, since it refers to the examination of proportionality and the admissibility of carrying out a given investigative measure both in national law and in the executing state. In the context of

<sup>32</sup> Cf. Júlio Barbosa e Silva, “The Speciality Rule in Cross-Border Evidence Gathering and in the European Investigation Order – Let’s Clear the Air,” *ERA Forum*, no. 19 (2019): 492–499. In the practice of cooperation within EIO, there have been cases where the executing state required an additional declaration that the documents or evidence provided under EIO will be used only for a given proceedings. Joanna Klimczak, Dominik Wzorek, Eleonora Zielińska, *Europejski nakaz dochodzeniowy w praktyce sądowej i prokuratorskiej – ujawnione problemy i perspektywowy rozwoju* (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2022), 172.

<sup>33</sup> András Csúri, “Towards and Inconsistent European Regime of Cross-Border Evidence: The EPPO and the European Investigation Order,” in *Shifting Perspectives on the European Public Prosecutor’s Office*, eds. Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij (Hague: Springer, 2018), 146.

the decision on the recognition or execution of the EIO, it is also important to evaluate it from the point of view of, *inter alia*, respect for fundamental rights.<sup>34</sup>

Against this background, one may wonder whether the approach to the proceedings in order to obtain evidence covered by banking secrecy through EIO, shaped in the case-law of the Supreme Court, is optimal. Prior to the issuance of the EIO, the need to consent to the exemption from banking secrecy by the competent regional court extends the path to obtaining evidence. Sometimes, in such cases, quick action can be crucial. Therefore, the question may be raised whether it would not be preferable to have the prosecutor issue the EIO without the prior authorisation of the court. When addressing the outstanding issue presented in this way, it is necessary to take into account the issues related to the assessment of the admissibility of evidence from the perspective of the competent authority within the national procedure, and, on the other hand, the fact that it is the decision of the judicial authority that determines the limits of the request contained in the EIO. The concept, which found its support in the decision of the Supreme Court of 2 June 2022 appears to be correct, as it is an expression of a guarantee approach. This seems particularly important for assessing the fairness of the proceedings in the issuing state.<sup>35</sup>

In conclusion, it should be emphasised that at the stage of the preparatory proceedings, obtaining banking information is one of the most frequently undertaken investigative measures within the EIO. The conducted research shows that the activities of prosecutors aimed at obtaining bank documentation, determining financial flows or the link between entities in Poland and abroad are important particularly in matters relating to the so-called VAT carousels.<sup>36</sup> Taking into account the specificity of today's crime, including the often occurring cross-border factor in the scope of trading

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<sup>34</sup> Cf. Fabrizio Siracusano, "The European Investigation Order for Evidence Gathering Abroad," in *EU Criminal Justice*, eds. Tommaso Rafaraci and Rossana Belfiore (Cham: Springer, 2019), 98.

<sup>35</sup> Cf. Tomasz Stępień, „Organ właściwy do wydania europejskiego nakazu dochodzeniowego w postępowaniu przygotowawczym w fazie in rem w zakresie informacji objętych tajemnicą bankową. Uwagi na tle postanowienia Sądu Najwyższego z 02.06.2022 r., I KZP 17/21, OSNKW 2022/7/26,” *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 50, no. 2 (2023): 56–60.

<sup>36</sup> See: Klimczak, Wzorek, Zielińska, *Europejski nakaz dochodzeniowy*, 141–142.

funds as part of or in connection with criminal activity, it should be assumed that obtaining information entailing banking secrecy through EIO will often be the key evidentiary activity in individual proceedings for making significant factual findings. For these reasons, it is necessary to improve and deepen the cooperation in the analysed scope.

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