

## Gloss on the Judgement of the Polish Supreme Court of 2 June 2022, I KZP 17/21<sup>1</sup>

Jakub Kosowski

Dr., Assistant Professor, Faculty of Law and Administration, University of Maria Curie-Skłodowska, correspondence address: Pl. Marii Curie-Skłodowskiej 5, 20-031 Lublin, Poland, email: [jakub.kosowski@mail.umcs.pl](mailto:jakub.kosowski@mail.umcs.pl)

 <https://orcid.org/0000-0001-6888-5771>

### Keywords:

legal question,  
European  
Investigation Order,  
issuing authority,  
EU Member State,  
bank secrecy

**Abstract:** The article discusses the decision of the Polish Supreme Court of 2 June 2022, I KZP 17/21. The ruling of the Supreme Court was issued based on a legal question submitted by a common court in relation to the European Investigation Order (EIO). The Author refers to the ruling by discussing broadly both the issues of the legal question and the authority issuing the European Investigation Order within the framework of pre-trial proceedings. Of paramount importance are the characteristics of the subjective sphere, i.e. the authority empowered to issue a European Investigation Order from the point of view of legally protected confidential information, in particular bank secrecy constituting the subject matter that served the basis for the ruling of the Supreme Court being commented herein.

### 1. Theses

1. The authority responsible for issuing a European Investigation Order (EIO) within the framework of pre-trial proceedings is the prosecutor in charge of that particular procedure (Article 589w § 1 of the Criminal Procedure Code in conjunction with Article 2(a)(i) 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, OJ L from 2014 No. 130, p. 1; hereinafter referred to as Directive

<sup>1</sup> Polish Supreme Court, Judgement of 2 June 2022, Ref. No. I KZP 17/21, OSNK 2022/7/26, LEX no 3358653.

2014/41/EU), unless the provisions of the Criminal Procedure Code or specific legal regulations reserve the right to admit or take evidence for the jurisdiction of the court as acts of the court in pre-trial proceedings. In such an event, it is only the court that is competent to issue a European Investigation Order.

2. During the *in rem* phase of the pre-trial procedure, the authority empowered to issue a European Investigation Order concerning the information covered by bank secrecy with regard to a bank established in another Member State of the European Union is the public prosecutor (Article 589w § 1 of the Criminal Procedure Code) who must obtain the consent of the competent district court to access such information before issuing the order (Article 106b (1) and (3) of the Banking Law applicable *mutatis mutandis* in conjunction with the second sentence of Article 589 § 5 of the Criminal Procedure Code).

## 2. Selected Factual and Legal Grounds

The Supreme Court examined the case regarding the legal question submitted by the Appeal Court in (...) covering the following subject matter:

Is it the prosecutor or the district court that is the competent authority for the issuance of a European Investigation Order in the course of the pre-trial proceedings concerning disclosure of bank secrecy-covered information in respect of a bank established outside the territory of the Republic of Poland under Article 589w § 1 and § 5 of the Criminal Procedure Code?

The legal question was asked in connection with interpretation doubts raised by the Court of Appeal (...) in the course of examining the appeal subject matter by the Public Prosecutor who conducted proceedings in respect of the case of fraud (Article 286 §1 of the Criminal Code). The Public Prosecutor, acting under Article 589w § 1 and § 5 of the Criminal Procedure Code and Article 106b § 1 and § 2 of the Banking Law (Journal of Laws from 2021, item 2439), requested the District Court in Kielce to issue the European Investigation Order (EIO) for disclosure of information constituting a bank secrecy for the purpose of taking and examining evidence, in the form of personal data of the holder of the bank account and all the information concerning the opening and operation of the bank account, that is located and may be taken in Ireland.

When examining the prosecutor's request, the District Court in Kielce considered that although the request was based on two legal grounds, it ultimately only concerned the consent to the disclosure of the information covered by bank secrecy, and the content of the request thus understood became the basis for the decision by which the Court did not accept the prosecutor's request.

The Supreme Court noted that, due to the gravity of the subject matter and the possible practical consequences of misinterpretation of Article 589w § 1 of the Criminal Procedure Code, it should have been pointed out that the legislature, following the Directive 2014/41/EU, authorised the court, the public prosecutor and even, in certain cases, the police or bodies authorised to carry out investigation or verification proceedings (Article 589w § 1 and § 2 of the Criminal Procedure Code stipulated that in the two latter cases the issuing of the EIO required for the approval to be issued by a public prosecutor) in order for the European Investigation Order to be issued. Those authorities have such competence in connection with proceedings conducted before them (the court) or by them (the public prosecutor, the police, and other authorities), which, in principle, limits the competence of those authorities depending on the stage of criminal proceedings at which the case is being conducted. However, it will not always be possible for the public prosecutor conducting or supervising the investigation to issue (or approve) a European Investigation Order, which is the case when a decision is required to be made by a court in order to take evidence within the framework of pre-trial proceedings. This results, first of all, from the first sentence of Article 589w § 5 of the Criminal Procedure Code, according to which if the admission, acquisition or taking of evidence requires the issuance of a decision, the decision on issuing the EIO substitutes for the relevant evidence-taking decision. This is a consequence of Article 2(c)(i) of the Directive 2014/41/EU, which stipulates that the issuing authority of the EIO is a judge, a court, an investigating judge or a public prosecutor competent in the case concerned (with emphasis put on the Supreme Court). While decoding the content of the rule resulting from that provision, it must therefore be stated that a public prosecutor (a public prosecutor's office) may be the issuing authority for the European Investigation Order and that the order issued by it is, in its essence, of nature and effects equivalent to a judicial ruling. An important issue to

decide whether a particular public authority may be the issuing authority is the question if the authority concerned is empowered by the national law to undertake certain investigative measures.<sup>2</sup> In that judgement, the Court of Justice of the European Union has ruled that:

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.

To this end, as far as the question of issuing the European Investigation Order in respect of the information covered by bank secrecy as heard by common courts is concerned, it should be noted that four positions may be identified in the case law, which, albeit to a varied extent, divergently resolve the question of the authority’s competence to issue the European Investigation Order and the need for obtaining – from a Polish court – a permission to disclose the information covered by bank secrecy if that information were to be obtained from a bank established in another EU Member State. According to the first view, the power to issue the EIO in this regard is vested in the district court as a body entitled under the national law to exempt from the bank secrecy requirement (e.g. the decision of the Appeal Court in Gdańsk of May 23, 2018, Ref. No. II AKz 408/18). According to the second view, a district court’s decision made in the course of

---

<sup>2</sup> See the judgement of the Court of Justice of the European Union of 8 December 2020, C-584/19, Paragraphs 50 to 53 that govern the issue under consideration; by the way, under the case, that has given rise to the question that is referred to in respect of a preliminary ruling, the EIO had been issued by a public prosecutor’s office to provide for the access to bank statements, but under the Austrian law such an investigative measure needs to be approved by a court, without which that measure may not be carried out Paragraphs 19 to 20 of the substantiation for that ruling.

pre-trial proceedings substitutes for a decision on issuing the EIO in so far as it states that the conditions for granting the exemption from bank secrecy are met. In such a case, there is no need to issue a separate prosecutor's decision on issuing the EIO (as argued by e.g. the decision of the Appeal Court in Katowice of 29 January 2019, Ref. No. II AKz 53/19). The third group of rulings point out that the prosecutor has the power to issue such a decision within the framework of pre-trial proceedings, even in the case of the EIO issued in order to obtain the information covered by bank secrecy, with no need for the prosecutor to obtain any exemption from bank secrecy because the Polish court does not have the power to exempt banks operating in the territory of another Member State of the European Union from bank secrecy (as argued by e.g. the decisions of: the Appeal Court in Kraków of 23 October 2018, Ref. No. II AKz 524/18 and the Appeal Court in Łódź of 19 September 2018, Ref. No. II AKz 496/18; this position having been presented by the District Court in Kielce which adjudicated under this case at first instance). According to the fourth view, when at the pre-trial stage there is a need to issue a decision on the issuance of the European Investigation Order in respect of the information constituting bank secrecy, the authority empowered to issue such a decision is the public prosecutor who must priorly apply for and obtain the consent of the court to disclose such information (e.g. the decision of the Appeal Court in Katowice of 4 September 2018, Ref. No. II Akz 645/18).

In view of the above, it should be acknowledged whose (prosecutor's or court's) decision serves the basis for obtaining and taking evidence concerning the information covered by bank secrecy in the course of pre-trial proceedings. Relevant in this respect is Article 106b(1) and (5) of the Banking Law in conjunction with Paragraph 3 of the same article. Pursuant to its content, it is solely the public prosecutor who is authorised in the *in rem* phase of pre-trial proceedings to demand from a bank, its employees and persons through whom the bank performs banking operations, to provide the information covered by bank secrecy. The Banking Law stipulates, however, that such a demand may be made only on the basis of a decision of a district court issued at the request of a public prosecutor, in which the court, giving its consent to provide the information, specifies its type and scope, the person or organisational unit to which it relates and the entity obliged to provide it (Article 106b (1) and (3) *in*

*fine* of the Banking Law). Neither the power to decide on the admission of evidence nor the power to take evidence has been included in the competence of the court, but only the power to find whether, and if so to what extent, it may be taken by a public prosecutor. Thus, it is still the prosecutor who decides whether to make a specific request to the bank after having obtained the court's consent (Article 106b(1) and (5) of the Banking Law) as well as on the scope of the requested information (although possibly only with the purpose of narrowing it in relation to the scope established in the court's decision). Thus a positive decision of the court has the dimension of authorising an action as well as determining its scope but the decision to take evidence (even upon the court's decision) is within the exclusive competence of the prosecutor.

There is a number of arguments for the competence (and obligation) to issue the European Investigation Order in respect of the information concerning specific bank accounts and bank transactions only upon a prior consent of a court. Firstly, since the Polish authority may only request for the measures permitted by the Polish law and only compliant with the applicable pre-conditions for carrying them out, the request for the access to bank information must also comply with the pre-conditions laid down in the Polish law. Requesting for the data covered by bank secrecy from another Member State without a prior consent of the court would be a case of "forum shopping", i.e. looking for a more lenient (for the competent authority) forum for obtaining evidence, which is not permitted by the Directive. Secondly, the Directive itself requires that the issuance of the EIO be carried out in accordance with the conditions required by the national legislation – the provision of Article 2(c) (ii) of the Directive 2014/41/EU cited above states that the issuing authority is the authority competent to order for the evidence to be gathered in accordance with the national law. The prosecutor is undoubtedly not entitled to independently order the measure to be conducted. Thirdly, the issuance of the EIO by a public prosecutor in contravention of the procedure required by the Polish law may cause the order to be overturned by the executing authority in accordance with Article 9(3) of the Directive in case the EIO, that has not been issued by the issuing authority referred to in Article 2(c), is submitted to the executing authority. Most countries have implemented this power of verifying the formal correctness of the issuance of the EIO in terms of

checking the competence of the issuing authority (in the case of the Polish legal order in Article 589ze § 6 of the Criminal Procedure Code). Nor is it an argument in favor of transferring that power to the public prosecutor that the Polish court cannot exempt from the bank secrecy in respect of a bank established in another Member State. The Polish court does not exempt from bank secrecy because this is done by a relevant authority implementing the order.

### 3. Commentary on Judicial Decision

The Supreme Court's decision in question relates to three fundamental legal issues. The first one concerns the legitimacy of submitting legal questions by the Appeal Court. The authority empowered to issue the EIO within the framework of pre-trial proceedings is another area of consideration. The third issue involves the problem of bank secrecy and the role of the court in issuing the EIO. As regards the first two issues, one has to agree with the decision of the Supreme Court, notwithstanding appropriately relevant comments. The issue of the role of the court and bank secrecy seems to be the most complicated one due to the inconsistent case law and doubts raised in the related literature. At this point, it is crucial to make polemical remarks to the ruling under review.

1. It is apparent from the facts presented above that the Appeal Court submitted a legal question in the context of determining which authority has the competence to issue the EIO for disclosure of the information constituting a bank secrecy in respect of a bank established outside the territory of the Republic of Poland within the framework of pre-trial proceedings. The Supreme Court based its opinion on arguments widely discussed in the related literature.<sup>3</sup> Given those arguments, it rightly pointed out that the procedure for issuing the EIO had been groundless from the outset, since the institution of the European Investigation Order (EIO), implemented into the Polish legal system in conjunction with the Directive 2014/41/EU, did not apply to Ireland. In accordance with Recital 44 of the Preamble to that Directive, and in accordance with Articles 1 and 2 and Article 4a (1) of

---

<sup>3</sup> For more detail, see: Ryszard A. Stefański, *Instytucja pytań prawnych do Sądu Najwyższego w sprawach karnych* (Kraków: Zakamycze, 2001), 254–261, 352–371.

Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, which is annexed to the Treaty of the European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU), Ireland is not taking part in the implementation of this Directive and is not bound by it or subject to its application. The position adopted must be accepted in its entirety. Therefore, the only way to obtain certain evidence will be to use the classical instruments of international legal assistance in criminal matters, broadly discussed in the substantiation of the decision being commented.

2. As regards the authority competent to issue the EIO within the framework of pre-trial proceedings, it should be pointed out to the clear linguistic interpretation of Article 589w § 1 of the Criminal Procedure Code in conjunction with Article 2(a)(i) of the Directive 2014/41/EU, which indicates the authority in charge of the pre-trial proceeding. As part of the implementation of that Directive into the Polish legal order, Article 589w § 1 of the Criminal Procedure Code points directly to the public prosecutor. This does not apply to a situation where a special provision confers powers on the court to conduct the measure in question within the framework of pre-trial proceedings. Then the court will be entitled to issue the EIO. However, the Supreme Court has pointed to the need for the court's consent to access to bank secrecy, which will be discussed later herein.

This position, which relates to the authority issuing the EIO at the pre-trial stage, deserves our full approval. This view is presented by most of the related literature on the subject<sup>4</sup> and the case law of the common

---

<sup>4</sup> See, among other things: Wojciech Kotowski, *Organ właściwy do wydania europejskiego nakazu dochodzeniowego (END)*, Legalis 2022, accessed July 10, 2023; Rafał Kierzyńska, „Komentarz do art. 589w k.p.k.,” in *Kodeks postępowania karnego. Komentarz*, ed. Dariusz Drajewicz, Legalis 2020, accessed July 10, 2023; Hanna Kuczyńska, „Komentarz do art. 589w k.p.k.,” in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka, Legalis 2023, accessed July 10, 2023; Barbara Augustyniak, „Komentarz do art. 589w k.p.k.,” in *Kodeks postępowania karnego. Komentarz, tom II, Komentarz aktualizowany*, ed. Dariusz Świecki, Lex 2023, accessed July 10, 2023; Ariadna Ochnio, „Głosa do postanowienia Sądu Apelacyjnego w Katowicach z dnia 4 września 2018 r., II AKz 645/18,” *Orzecznictwo Sądów*



courts.<sup>5</sup> The Appeal Court in Gdańsk, on the basis of the examination of the EIO case concerning bank information pointed out that, where the measure requested by the public prosecutor was subject to the decision of the competent district court under the national law, the possible issuance of the EIO also fell within the competence of that court.<sup>6</sup> It seems, however, that the Supreme Court in the decision being commented rightly pointed out that the power to issue the EIO within the framework of pre-trial proceedings was something else than the power to authorise access to banking information by the court before the EIO was issued. The decision of the Appeal Court in Gdańsk indirectly corresponds to the decision of the Appeal Court in Katowice<sup>7</sup> which has held that the decision of a district court, in so far as it states that there are pre-conditions for the exemption from bank secrecy, is replaced with the decision to issue the EIO and thus there is no power for the prosecutor to issue a separate decision to issue the EIO. This view contradicts the content of the Act on Banking Law.<sup>8</sup> According to Article 106b(1) and (5) of the Banking Law, it is the public prosecutor who is an exclusive authority authorised to demand from a bank, its employees and persons through whom the bank performs banking operations, to provide the information covered by bank secrecy within the framework of pre-trial proceedings. The Supreme Court has aptly observed, in the substantiation of the decision being commented, that the court's role is to focus on other issues, as the formula used in the Banking Law is of a two-stage nature, with a clearly defined competent authority.

The most controversial matter in this ruling of the Supreme Court is the question of bank secrecy and the court's involvement in this procedure.

---

*Polskich*, no. 7–8 (2021): 105–106. Cf. Andrzej Sakowicz, „Komentarz do art. 589w k.p.k.” in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz, Legalis 2023, accessed July 10, 2023.

- <sup>5</sup> See, among other things: Appellate Court in Katowice, Decision of 4 September 2018, Ref. No. II AKz 645/18; Appellate Court in Katowice, Decision of 29 January 2019, Ref. No. II AKz 53/19, LEX; Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis.
- <sup>6</sup> Appellate Court in Gdańsk, Decision of 23 May 2018, Ref. No. II AKz 408/18, Lex.
- <sup>7</sup> Appellate Court in Katowice, Decision of 29 January 2019, Ref. No. II AKz 53/19. Similarly: Sakowicz, „Komentarz do art. 589w k.p.k.”
- <sup>8</sup> The Act of 29 August 1997 Banking Law, consolidated text: Journal of Laws 2022, item 2324, as amended.

Two contradictory positions can be distinguished in relation to that subject matter. The first, that has received the recognition of the vast majority of the scholarly opinion and case law, presupposes that the authority empowered to issue the EIO is a public prosecutor who, before making such a decision, must seek and obtain a prior consent from the court to disclose such information.<sup>9</sup> The opposite view presupposes that it is not necessary for a prosecutor to obtain a judicial exemption from bank secrecy since the Polish court has no power to exempt banks operating in the territory of another Member State of the European Union from bank secrecy.<sup>10</sup>

Article 106b (1) of the Banking Law, applicable *mutatis mutandis*, vesting the discretionary power in the court to be invoked upon having obtained a request from a prosecutor, serves the legal basis for adopting the first conceptual framework as referred to above. However, a part of the case law and the related literature rightly highlight that the Banking Law has a strictly defined subjective scope and therefore foreign banks are not subject to the Polish jurisdiction.<sup>11</sup> Therefore, the application, even *mutatis mutandis*, of the legal basis cited above appears doubtful. Nor is it justified to compare the situation under consideration with the rules on secrecy exemption set

<sup>9</sup> See e.g. Appellate Court in Katowice, Decision of 4 September 2018, Ref. No. II Akz 645/18; cf. also an affirmative commentary on that ruling – Ochnio, „Glosa do postanowienia Sądu Apelacyjnego w Katowicach,” 104–117; Appellate Court in Krakow, Decision of 13 July 2022, Ref. No. II AKz 424/22, LEX; Kotowski, *Organ...*; Sakowicz, „Komentarz do art. 589w k.p.k.”; Kierzyńska, „Komentarz do art. 589w k.p.k.”; Kuczyńska, „Komentarz do art. 589w k.p.k.”; Augustyniak, „Komentarz do art. 589w k.p.k.”; Anna Błachnio-Parzych, „Organ uprawniony do wydania europejskiego nakazu dochodzeniowego w celu uzyskania informacji stanowiących tajemnicę bankową na podstawie art. 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): 33–41.

<sup>10</sup> Appellate Court in Krakow, Decision of 23 October 2018, Ref. No. II AKz 524/18, Legalis; Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis; District Court in Łomża, Decision of 25 January 2019, Ref. No. II Kop 42/18, Legalis; District Court in Łomża, Decision of 28 March 2019, Ref. No. II Kop 7/19, Legalis.

<sup>11</sup> As in: Appellate Court in Krakow, Decision of 23 October 2018, Ref. No. II AKz 524/18, Legalis; Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis; Bernard Smykła, „Komentarz do art. 1,” in *Prawo bankowe. Komentarz*, ed. Bernard Smykła, Lex 2011, accessed July 10, 2023.

out in the Criminal Procedure Code since they are clearly and precisely enshrined in the law, both in objective and subjective terms.<sup>12</sup>

The provisions of the Directive 2014/41/EU itself account for the second argument analysed in the related literature and case law. In Article 2(c) (ii), the Directive stipulates that the issuing authority is the authority with competence to order for evidence to be gathered in accordance with the national law. However, it should be noted that the Directive has been implemented in the Polish legal order by amending the Criminal Procedure Code but the banking law has not been amended and no related executive regulations allowing for the proper application of the provisions of the Directive have been enforced, either. Neither are there any grounds for direct implementation of directives. Article 589 of the Criminal Procedure Code, pointing to the public prosecutor as the authority to issue the EIO during pre-trial proceedings, constitutes the binding provision in this respect.

The third argument is to refer to the wording of Article 589w § 5, second sentence, Criminal Procedure Code in conjunction with Article 6(1)(b) of the Directive 2014/41/EU. The Directive provides that one of the pre-conditions for the issuance of the European Investigation Order is that the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case. In the reasons for the decision, the Supreme Court considered that requesting for the data covered by bank secrecy by a prosecutor from another Member State without a prior consent from the court would be a case of “forum shopping”, i.e. looking for a more lenient (for the competent authority) forum for obtaining evidence, which is not permitted by the Directive. However, it is important to bear in mind the scope of application of the provisions of the Directive and its implementation into the Polish legal order. The Appeal Court in Łódź pointed out that the Criminal Procedure Code laid down the relevant legal framework.<sup>13</sup> If the legislature’s intention were to expand and broaden the scope of the secrecy protected by the Criminal Procedure Code, it would have made an appropriate amendment.

Article 589w § 5 sentence 2 of the Code of Criminal Procedure points out that “the provisions on particular actions and evidence shall be applied

---

<sup>12</sup> Differently, but without broader substantiation: Kotowski, *Organ...*

<sup>13</sup> Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis.

accordingly.” However, it should be stipulated that this provision applies to actions and evidence specified in the law which contains the relevant provision, i.e. the Code of Criminal Procedure. It is not possible for this regulation to cover other actions referred to in an unspecified number of legal acts. This is because it should be kept in mind that the specific bank secrecy regulations are not contained directly in the Code of Criminal Procedure but in Article 106b(1) of the Banking Law. It is this provision of special legislation, and not the Code itself (as in the case of the confidential information directly governed by Article 180 of the Code of Criminal Procedure), that sets out bank secrecy, but first of all its scope. As I have mentioned above, this scope does not include foreign banking institutions. Therefore, in my opinion, it is not possible to adopt the construct of application *mutatis mutandis* of the provisions of the Banking Law by extending the scope of application of bank secrecy to entities that are not subject to the Polish jurisdiction.

This issue cannot be considered in the context of the limitation of procedural guarantees. It should be borne in mind that the execution of the EIO in another EU Member State is carried out according to the rules in force in the Member State concerned.

The last key argument is to point to the formal verification exercised by the authority executing the EIO in terms of the competence to issue the EIO. The above statement is accompanied by the conclusion that the issuance of the EIO by an irrelevantly competent authority may lead to the refusal to execute it. Scholars in the field, when arguing for the view that judicial approval is necessary, point out that the consent is merely the implementation of the national procedures.<sup>14</sup> The Supreme Court has rightly stated in its reasoning that a Polish court may not exempt a bank based in another Member State from bank secrecy, as this is done by the relevant authority executing the order.<sup>15</sup>

---

<sup>14</sup> Ochnio, „Głosa do postanowienia Sądu Apelacyjnego w Katowicach,” 109.

<sup>15</sup> As in: CJEU Judgement of 8 December 2020, Criminal proceedings against A and Others., Case C-584/19, EU:C:2020:1002, Paragraphs 65 and 75. However, the analysis of the authorities authorised to exempt from bank secrecy in all the EU Member States goes beyond the scope of this study.

To summarise those deliberations, it must be concluded that the arguments set out in the commented decision of the Supreme Court concerning the court's role, as far as the subject matter at issue is concerned, cannot be accepted. It seems that convincing arguments are those set out above, which indicates a deliberate decision of the legislature when implementing the provisions concerning the EIO into the Polish legal system. After all, the related literature provides arguments from the ruling of the ECJ which concluded that only the authority competent to order a given investigative measure under the national law of the issuing state could be competent to issue the EIO.<sup>16</sup> This seems to be a key axis of the dispute, i.e. the place of the public prosecutor in the national procedure as the EIO issuing authority, and of the court under the Banking Law. As A. Ochnio has rightly pointed out, the EIO executing authority will have to initiate the procedures applicable in its national legal system in order for such evidence to be taken, including, for example, the bank secrecy exemption by a court in the EIO executing state or the approval of providing the information covered by bank secrecy, as issued by that court.<sup>17</sup> A similar decision will have to be taken by the Polish court with regard to the execution of the EIO. It is therefore important to bear in mind the intention behind implementation of the Community instruments of the cooperation between Member States in criminal matters, namely speeding up the proceedings. The requirement for the consent from the Polish court as imposed along with the duplication of that action in the EIO executing state would contribute to the increased length of the proceedings and could also lead to a situation in which a Polish court has given its consent while a court in the EIO executing state has not given its consent on the basis of the same facts. Nevertheless, it should be postulated that the legislature intervene in order to fully eliminate the doubts that have only been deepened by the substantiation of the decision of the Supreme Court, which has referred to this issue only incidentally, looking at the subject matter of the case in respect of which it was issued.

---

<sup>16</sup> Błachnio-Parzych, „Organ uprawniony do wydania europejskiego nakazu dochodzeniowego,” 39; CJEU Judgement of 16 December 2021, Criminal proceedings against HP, Case C-724/19, EU:C:2021:1020.

<sup>17</sup> Ochnio, „Glosa do postanowienia Sądu Apelacyjnego w Katowicach,” 110.

## References

- Augustyniak, Barbara. „Komentarz do art. 589w k.p.k.” In *Kodeks postępowania karnego. Komentarz, tom II, Komentarz aktualizowany*, edited by Dariusz. Świecki, Lex 2023. Accessed July 10, 2023.
- Błachnio-Parzych, Anna. „Organ uprawniony do wydania europejskiego nakazu dochodzeniowego w celu uzyskania informacji stanowiących tajemnicę bankową na podstawie art. 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): 33–41.
- Kierzyńska, Rafał. „Komentarz do art. 589w k.p.k.” In *Kodeks postępowania karnego. Komentarz*, edited by Dariusz Drajewicz, Legalis 2020. Accessed July 10, 2023.
- Kotowski, Wojciech. *Organ właściwy do wydania europejskiego nakazu dochodzeniowego (END)*, Legalis 2022. Accessed July 10, 2023.
- Kuczyńska, Hanna. „Komentarz do art. 589w k.p.k.” In *Kodeks postępowania karnego. Komentarz*, edited by Jerzy Skorupka, Legalis 2023. Accessed July 10, 2023.
- Ochnio, Ariadna. „Glosa do postanowienia Sądu Apelacyjnego w Katowicach z dnia 4 września 2018 r., II AKz 645/18.” *Orzecznictwo Sądów Polskich*, no. 7–8 (2021): 105–106.
- Sakowicz, Andrzej. „Komentarz do art. 589w k.p.k.” In *Kodeks postępowania karnego. Komentarz*, edited by Andrzej Sakowicz, Legalis 2023. Accessed July 10, 2023.
- Smykła, Bernard. „Komentarz do art. 1.” In *Prawo bankowe. Komentarz*, edited by Bernard Smykła, Lex 2011. Accessed July 10, 2023.
- Stefański, Ryszard A. *Instytucja pytań prawnych do Sądu Najwyższego w sprawach karnych*. Kraków: Zakamycze, 2001.