



Sławomir Steinborn
Dawid Świczkowski

Findings of the MEIOR Research:

Poland

www.en.ug.edu.pl

Leuven
25-26.03.2024





Findings of the MEIOR Research: Poland

Competence to issue EIO

1) during pre-trial proceedings:

- public prosecutor or Police (upon validation by the public prosecutor)
- public prosecutor upon authorization by the court
- the court

2) during trial:

- the court

Appeal

no appeal against the decision on issuing EIO unless appeal is admissible against investigative measure requested in the EIO



Findings of the MEIOR Research: Poland

Proportionality

Art. 6 sec. 1 Directive 2014/41

The issuing authority may only issue an EIO where the following conditions have been met:

- a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and
- b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

Art. 589x pol. CCP

The issuance of an EIO is not admissible if:

- 1) the interests of justice do not require it;
- 2) Polish law does not permit the performance or obtaining of the evidence in question.



Findings of the MEIOR Research: Poland

Gavanozov II judgement

Directive 2014/41/EU in conjunction with Article 47 of the Charter, preclude legislation of a Member State that does not provide for any legal remedy against the issuing of a European Investigation Order, the purpose of which is the carrying out of searches and seizures as well as **the hearing of a witness by videoconference**.

Issuing the EIO in such situation is precluded.

- what legal remedy against EIO regarding the hearing of a witness by videoconference?



Findings of the MEIOR Research: Poland

THE DEFENCE RIGHTS

1. Perspective of most interviewed judges and prosecutors:

there is no data indicating the special involvement of defence lawyers in procedures related to the issuance or execution of the EIO

basically, there were no cases of reservations regarding the exercise of the right to defense/participation of a defence lawyer or representative in activities carried out under the EIO

2. Perspective of some interviewed defence lawyers:

there were cases in which the defence lawyer appointed in the issuing State (in the main proceedings) was not able to participate in the activities carried out in the executing State, even though he had requested it

➤ in a few cases, a defence lawyer was appointed for activities carried out within the framework of the EIO or he was appointed by a person participating in the activities carried out.



Findings of the MEIOR Research: Poland

Assessment of compliance of activities carried out under the EIO with the law of the issuing State or executing State [in the view of the principles of mutual trust and mutual recognition]

- **Related case: Request for a preliminary ruling from the Landgericht Berlin (EncroChat) - Case C-670/22**

OPINION OF ADVOCATE GENERAL TAMARA ČAPETA:

48. However, under the EIO Directive, the issuing authority has no obligation, and indeed no right, to assess whether the activities leading to obtaining evidence were undertaken in the executing state in accordance with the law. When the issuing authority issues an EIO for the transfer of existing evidence, it is bound by the principle of mutual recognition, which underlies cooperation in criminal matters in the European Union. Unless the steps taken to obtain evidence are deemed unlawful in legal proceedings in France, **which the person concerned must have the opportunity to initiate**, the issuing authority has no competence to question their legality [...]

51. Although criminal law systems of Member States differ significantly, it does not mean that one system protects the fundamental rights of suspects and accused persons while another breaches them. Rather, EU judicial cooperation in criminal matters relies on the assumption that all Member States **respect fundamental rights**. While **that assumption may be overturned in a particular case before the competent court**, that cannot call into question the principle of mutual trust underlying the EIO and other instruments of cooperation in criminal matters.



Findings of the MEIOR Research: Poland

Strengthening the rules regarding EIO requested by the defense

- the (prosecutor's) decision to grant an EIO application must include a cost-benefit assessment, but refusal must be limited to cases of obvious immateriality or where the cost-benefit ratio is particularly low

Consulting the issuance of the EIO with the defence lawyer

- e. g. regarding questions to be asked to the witness during questioning, or allowing the defence lawyer to participate in activities abroad;
- the regulations do not directly guarantee such rights and whether the defence lawyer will actually be included in the issuance procedure order and how broadly the issuing authority will interpret Art. 1 (4) of Directive 2014/41 will depend largely on this authority

GUIDELINES:

- respecting the rights of the defence lawyer to participate in actions regarding investigative measures in accordance with the guarantees arising from national law (respecting also the right to submit a request for evidence)
- making a reservation when issuing an EIO to inform and allow the defence lawyer to take part in the taking of evidence in the executing State
- ensuring the defence lawyer's influence on the assessment of the admissibility of evidence obtained using the EIO



Findings of the MEIOR Research: Poland

The right of access to a lawyer during activities carried out on the basis of the EIO:

- ***in the context of the execution of the EIO*** under the law of the executing State and the lack of application in this respect of national provisions on the participation of a defence lawyer in carrying out the investigative measures
- the relationship between the guarantees of Directive 2014/41 on the EIO and those resulting from Directive 2013/48 on access to a lawyer in criminal proceedings and in EAW proceedings - the ***problem of a uniform standard of protection of rights*** and ensuring the enforceability of these rights, as well as contact between authorities in the executing State and lawyer from the issuing State

GUIDELINE:

- expressly indicate as the authority issuing an EIO to inform and allow the defence lawyer to take part in actions regarding investigative measure in the executing State (competences of the authority under Article 9(2) of Directive 2014/41; filling out Part I of the form as a solution consistent with Article 1(4) of the Directive)



Findings of the MEIOR Research: Poland

Guidelines for the Polish authorities issuing and executing EIOs - based on national research [THE DEFENCE RIGHTS]

- 1) When issuing an EIO, a reservation should be made to inform and enable the defence lawyer to participate in activities related to the investigative activity in the executing State, if this activity is not secret (competence of the authority pursuant to Article 9(2) of Directive 2014/41, completing Part I of the form as solution in accordance with Article 1(4) of the Directive)
- 2) Respect for the defence lawyer's right to participate in investigative activities in accordance with the guarantees under national law, if this activity is not confidential (respect also for the right to submit a request for evidence)
- 3) Submitting a reservation when issuing the EIO regarding informing and allowing the defense lawyer to take part in the taking of evidence in the executing State (if permitted under national law)
- 4) Ensuring the defence lawyer's influence on the assessment of the admissibility of evidence obtained through the EIO.

Thank you for your attention!

Department of Criminal Proceedings
Law and Criminalistics
University of Gdańsk

ul. Jana Bażyńskiego 6
80-309 Gdańsk

+48 58 523 28 79

<https://prawo.ug.edu.pl/wydzial/struktura-wydzialu/katedry-pracownie-zaklady/katedra-prawa-karnego-procesowego-i-kryminalistyki>



Authority competent for applying the measure

Type of measure	Pre-trial	Trial
Bodily samples	Prosecutor, Police <ul style="list-style-type: none">• no appeal	Court <ul style="list-style-type: none">• no appeal
Search of premises / Search of computers	Prosecutor, Police (in urgent cases, ex post authorisation of the PP) <ul style="list-style-type: none">• appeal to district court	Court <ul style="list-style-type: none">• appeal
Seizure	Prosecutor, Police <ul style="list-style-type: none">• appeal to district court Court or PP (in case of professional secrecy)	Court <ul style="list-style-type: none">• appeal



Authority competent for applying the investigative measure

Type of measure	Pre-trial	Trial
Interception of telecommunications	Court of first instance (ex ante authorisation) <ul style="list-style-type: none">• appeal Prosecutor (in urgent cases, max 5 days, ex post authorisation of the court)	Court <ul style="list-style-type: none">• appeal
Traffic and location data	Prosecutor <ul style="list-style-type: none">• appeal to district court	Court <ul style="list-style-type: none">• appeal
Banking information	Prosecutor (inf. reg. suspect – bank client) <ul style="list-style-type: none">• no appeal Regional court (inf. reg. other) <ul style="list-style-type: none">• appeal (?)	Court <ul style="list-style-type: none">• appeal
Data from social media	Prosecutor <ul style="list-style-type: none">• appeal to district court	Court <ul style="list-style-type: none">• appeal