

# Where to place legal safeguards in the EIO procedure? Controversies over issuing an EIO regarding information covered by banking secrecy in Poland

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**Recital 11** The EIO should be chosen where the execution of an investigative measure seems **proportionate, adequate and applicable to the case in hand.**

The issuing authority should therefore ascertain **whether the evidence sought is necessary and proportionate for the purpose of the proceedings, whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence concerned, and whether, by means of issuing the EIO, another Member State should be involved in the gathering of that evidence.** The same assessment should be carried out in the validation procedure, where the validation of an EIO is required under this Directive.

The execution of an EIO should not be refused on grounds other than those stated in this Directive. However the executing authority should be entitled to opt for a less intrusive investigative measure than the one indicated in an EIO if it makes it possible to achieve similar results.



## Where to place legal safeguards in the EIO procedure?

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**Recital 12** When issuing an EIO the issuing authority should **pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter of Fundamental Rights of the European Union (the Charter). The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice.** Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others.

**Recital 22** **Legal remedies available against an EIO should be at least equal to those available in a domestic case against the investigative measure concerned.** In accordance with their national law Member States should ensure the applicability of such legal remedies, including by informing in due time any interested party about the possibilities and modalities for seeking those legal remedies.

## Article 6

### Conditions for issuing and transmitting an EIO

1. 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.
2. The conditions referred to in paragraph 1 shall be assessed by the issuing authority in each case.

Primary role of the issuing authority / secondary role of the executing authority - may perform alternative investigative measure, less intrusive/consult the issuing authority/ultimately refuse to execute EIO.

## Article 589w CCP

**§ 1.** If it is necessary to conduct or obtain evidence that is located or may be conducted on the territory of another Member State of the European Union, referred to in this Chapter as the "executing state", the court before which the case is pending or the public prosecutor conducting the pre-trial proceedings may issue, ex officio or at the request of a party, defense counsel or attorney, a European Investigation Order, referred to in this Chapter as the "EIO", unless the EIO is not applicable in that state.

**§ 5.** The decision to issue an EIO regarding evidence, the admission, obtaining or execution of which requires the issuance of an order, shall replace this order. The provisions regarding specific measures and evidence shall apply accordingly (including rules on remedies)

## Article 589x CCP

Issuance of an EIO is not permissible if:

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

## Article 106b(1) Banking Law

In addition to the cases specified in Articles 105 and 106a, a public prosecutor prosecuting a criminal or fiscal offense may demand that the bank, persons employed by the bank and persons through whom the bank performs banking activities provide information covered by banking secrecy only on the basis of an order issued at his or her request by the competent regional court (*information regarding the persons not having a formal status of suspect in the investigation*)

## Article 105(1)(2)(c) Banking Law

The bank is obliged to provide information covered by banking secrecy at the request of a court or prosecutor in connection with the execution of a request for legal aid, coming from a foreign country that, under a ratified international agreement binding the Republic of Poland, has the right to request information covered by banking secrecy.

## I. The prosecutor should issue an EIO without referring the case to the regional court

### Order of Regional Court in Warsaw of 29.06.2018, VIII Kop 77/18

Polish court has jurisdiction only within the territory of the Republic of Poland, and only with respect to this territory can it the provisions of Banking law. The activities of banking institutions in the Federal Republic of Germany, on the other hand, are not regulated by the aforementioned law, and the laws adopted by the German Legislature will apply. Also in a different course of proceedings (applicable on the territory of the Federal Republic of Germany) than regulated by Polish legislation, exemption from bank secrecy may take place. The Polish court is not authorized to interfere with foreign regulations and the competence of German authorities with its rulings. Therefore, the Prosecutor should apply directly to the German authorities to obtain the requested evidence.

See also:       Orders of Regional Court in Łomża of 25.01.2019 r. II Kop 42/18, of 28.03.2019 r., II Kop 7/19, of 28.03.2019 r., II Kop 10/19,  
Order of Court of Appeal in Cracow of 23.10.2018, II AKz 524/18,  
Order of Court of Appeal in Łódź of 19.09.2018 r., II AKz 496/18.

## II. The regional court is competent to issue an EIO (either replacing the order lifting the banking secrecy or issued separately)

Order of the Court of Appeal in Gdańsk of 23.05.2018, II AKz 408/18

Order of the Court of Appeal in Katowice of 29.01.2019, II AKz 53/19

## III. The prosecutor should issue the EIO, however after obtaining an order of the regional court lifting banking secrecy

Order of the Court of Appeals in Katowice of 4.09.2018, II AKz 645/18

This interpretation is in compliance with the wording of Article 589x CCP, which de facto implements Article 6(1)(b) of Directive, and which indicates as one of the negative prerequisites for the issuance of an EIO the inadmissibility of conducting or obtaining evidence under Polish law. Indeed, the issuance of an order is not possible when the authority assesses that procedural guarantees, which secure the legality of gathering evidence, would be violated in the process of order's execution.



## The position of the Supreme Court - Order of the Supreme Court of 2 June 2022, I KZP 17/21

**The authority authorized to issue the EIO is the prosecutor. However, before issuing such an order the prosecutor must apply for and obtain the regional court's order lifting the banking secrecy.**

The Supreme Court referred to:

**1) Judgment of the Court (Fourth Chamber) of 16.12.2021, Spetsializirana prokuratura v HP C-724/19**

Article 2(c)(i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters must be interpreted as precluding a public prosecutor from having competence to issue, during the pre-trial stage of criminal proceedings, an European Investigation Order, within the meaning of that directive, seeking to obtain traffic and location data associated with telecommunications, where, in a similar domestic case, the judge has exclusive competence to adopt an investigative measure seeking access to such data.

**2) Article 6(1)(b) of EIO Directive and Article 589w § 5 CCP**

## CONCLUSIONS:

- 1) Some Polish courts overlooked the complex character of the regional court's order lifting the banking secrecy.
- 2) They treated this decision solely as a technical one allowing the bank to reveal information covered by banking secrecy; therefore they claimed that such a decision should be taken in the executing state.
- 3) What the overlooked is the necessity and proportionality test included in this decision of the Polish regional court; the motion to this court serves also to verify whether information covered by banking secrecy is in fact needed in the investigation; according to the Directive this test has to be done in the issuing state.
- 4) The necessity and proportionality test should be done by an independent body (as in domestic investigations), as the investigating authority having a direct interest in the results of the investigation may not be impartial.
- 5) The necessity and proportionality test should also be exercised by the executing authority and moreover at trial in the issuing state while assessing the admissibility of evidence, however the test executed by the issuing authority is of primary importance, also from the perspective of effectiveness of defence rights.



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