

**Supreme Court, decision of 2 June 2022, case no. I KZP 17/21**  
**(Authority competent to issue the European Investigation Order)**

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**Theses:**

1. The public prosecutor conducting proceedings is an authority issuing the European Investigation Order (EIO) in the preparatory proceedings (Article 589w § 1 of the Code of Criminal Procedure in conjunction with Article 2 (a) (i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters - Official Journal of the European Union of 2014 L 130/1), unless the provisions of the Code of Criminal Procedure or a special act reserve the right to admit or take evidence to the competence of court, as acts of the court in preparatory proceedings. In such a case, that court is solely competent to issue the EIO.
2. In the *in rem* phase of the preparatory proceedings, the public prosecutor is the authority competent to take a decision on issuing an EIO concerning information covered by banking secrecy in relation to a bank established in another Member State of the European Union (Art. 589w § 1 of the Code of Criminal Procedure), who must obtain the consent of the competent regional court to access such information before issuing the EIO (Article 106b sec. 1 and 3 of the Banking Law, applied accordingly in connection with Article 589 (5), second sentence, of the Code of Criminal Procedure).

**JUSTIFICATION**

The Supreme Court, after examining a legal issue requiring a fundamental interpretation of the Act: *„Is prosecutor or regional court competent in the course of preparatory proceedings to issue pursuant to Article 589w §§ 1 and 5 of the Code of Criminal Procedure an European Investigation Order regarding the disclosure of information constituting banking secrecy concerning a bank established outside the territory of the Republic of Poland?“,* decided to refuse to adopt a resolution.

**1. Facts**

**1.1.** The presented legal issue emerged in the following procedural situation. The injured party filed a notification of committing a crime under Art. 286 § 1 of the Criminal Code (hereinafter: CC) consisting in extorting payment for goods ordered via the Internet. He attached to the files the printouts of the bank transfers to an account in an Irish bank. By order of 15 June 2021, an investigation was initiated into an unfavorable disposition of property in the amount of EUR 3,900 by misrepresentation as to the intention to fulfill the transaction of selling the vehicle through the advertisement portal, i.e. the offence set out in Art. 286 § 1 CC. Therefore, the prosecutor considered it necessary to establish, by means of a European Investigation Order (EIO), the details of the owner of the bank account, who could be a potential suspect. The public prosecutor, with the application of September 9, 2021, acting pursuant to Art. 589w §§ 1 and 5 of the Code of Criminal Procedure (hereinafter: CCP) and Art. 106b sec. 1 and 2 of the Banking Law, applied to the Regional Court for the issuance of a EIO regarding the disclosure of

information constituting banking secrecy in connection with the need to obtain and take evidence that is and may be carried out in Ireland, in the form of personal data of the owner of the bank account, and all information on the opening and maintenance of this account, as well as data on logging in to the account in the period specified in the application.

**1.2.** The Regional Court, considering the prosecutor's request, found that although the request was based on two legal grounds, it ultimately concerns only the consent to disclosure of information covered by banking secrecy. The content of the request – understood in this way – became the basis for a decision under which the Court did not accept the prosecutor's request.

The prosecutor lodged an interlocutory appeal against the above decision and alleged the judgement under appeal contempt of the provisions of the procedure having an impact on its content, namely Art. 589w § 5 CCP and Art. 106b of the Banking Law, consisting in the unjustified assumption that in these provisions (and therefore, as should be understood, indicated as infringed) were not applicable and it is not required to obtain the consent of the regional court to disclose information constituting banking secrecy and, consequently, it is sufficient to issue on this matter, the prosecutor's decision. By raising such an allegation, the prosecutor requested the challenged decision to be revoked and the case sent back to the Regional Court for reconsideration.

The Court of Appeal, while examining the interlocutory appeal, had doubts as to interpretation, which it formulated in the legal question quoted at the beginning.

The Public Prosecutor of the National Public Prosecutor's Office requested the adoption of a resolution as follows: "Pursuant to Art. 589w §§ 1 and 5 CCP, in the preparatory proceedings, at the *in rem* stage, the public prosecutor who is authorised to issue and prepare an European Investigation Order concerning information covered by banking secrecy, directs the EIO for enforcement to a European Union Member State without the need to obtain the court's consent to release the bank from secrecy."

## **2. Legal justification**

[...]

**2.1.1.** The legal question of the Court of Appeal does not meet the conditions for transferring a legal question to the Supreme Court and, as a consequence, adopting a resolution by that Court. It is true that it arose in the course of the appeal proceedings, but it is irrelevant for the examination of the case for two reasons. First of all, it should be pointed out that the incidental proceedings conducted in this case before the Courts remains redundant from the very beginning, because the institution of the European Investigation Order (EIO), introduced into the Polish legal system in connection with Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters (Official Journal of the European Union of 2014 No. 130, p. 1) does not apply to Ireland. [...] The Polish legislator explicitly excludes the possibility of initiating the procedure for issuing an EIO in a situation where it would be directed to a state where the EIO does not apply (Art. 589w § 1 *in fine* CCP).

**2.1.2.** Moreover, the factual and procedural circumstances of this case show that the question is irrelevant due to the lack of grounds for appeal in relation to the issue being the subject of the legal question. In the proceedings before the Regional Court, the prosecutor requested the

issuance of a EIO regarding the disclosure of information constituting banking secrecy, so he assumed that the Regional Court was the competent authority to issue the EIO. This court, in accordance with Art. 106b sec. 1 of the Banking Law, is competent to grant consent to disclose information constituting banking secrecy. While examining this request, the Regional Court noticed the duality of the legal grounds invoked by the prosecutor in his speech (Art. 589w §§ 1 and 5 CCP and Art. 106b sec. 1 of the Banking Law) and found - regardless of whether or not it was correct - that in reality it had deal only with a request for consent to disclose bank secrecy information.

The prosecutor's request – read in this way – was examined by the court of first instance but hadn't been accepted. [...] The public prosecutor neither questioned the way in which the Regional Court interpreted his request as relating only to consent to the disclosure of information constituting banking secrecy, nor alleged violation of Art. 589w § 1 CCP.

**2.2.1.** Regardless of the above, due to the importance of the problem and the effects of an incorrect interpretation of Art. 589 § 1 CCP, which may occur in practice, on the basis of the considerations made so far, it should be indicated that the legislator, following Directive 2014/41/EU, authorised the court, the prosecutor, and even - in certain cases - the police to issue a European Investigation Order or bodies authorised to carry out an investigation or screening (Art. 589w §§ 1 and 2 CCP, with the provision that in recent cases, the issuance of an EIO requires the validation by the prosecutor). These authorities have this competence in connection with the proceedings conducted before them (the court) or by them (the prosecutor, the police and other authorities), what - as a rule - limits the powers of these authorities depending on the stage of the criminal proceedings at which the case is conducted. However, not in all cases the prosecutor conducting or supervising an investigation will be entitled to issue (or validate) an EIO. This right will be excluded when taking evidence in the preparatory proceedings requires the issuance of a court decision.

**2.2.2.** This is mainly due to Art. 589 in § 5, first sentence CCP, which indicated that if the admission, obtaining or taking of evidence requires issuing a decision, the decision on issuing the EIO replaces the relevant evidence decision. It is a consequence of Art. 2 lit. c (i) of Directive 2014/41/EU, which states that the authority issuing the EIO is a judge, court, investigating judge or prosecutor competent in a case concerned. When decoding the content of the norm resulting from this provision, it should therefore be stated that the public prosecutor (prosecutor's office) may be the authority issuing the EIO, and the order issued by him in fact has the nature and effects - for the purposes of this institution - equivalent to a court's decision.

**2.2.3.** An important issue in deciding whether a specific public authority may be the issuing authority is whether or not a specific authority is empowered by national law to carry out certain investigative measures (cf. judgement of the Court of Justice of the European Union of 8 December 2020, C-584/19, paras 50-53; by the way, in the case in which the question was referred, the EIO was issued by the prosecutor's office and concerned access to bank statements, whereby in Austrian law such an investigative measure ordered by the prosecutor's office requires the authorisation of the court, without the consent of which this activity cannot be performed – paras 19-20). In this judgement, the Court of Justice of the European Union assumed that: "Article 1 (1) and Article 2 (c) 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 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 the 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."

**2.3.** This competence of a specific authority in the case referred to in Art. 2 lit. c (i) of Directive 2014/41/EU, should be interpreted not in an abstract way as a competence to conduct or supervise a specific stage of the criminal proceedings, but specifically referring to the individual investigative steps to be carried out in the execution of the EIO. As emphasised by the Court of Justice of the European Union, under Art. 6 sec. 1 lit. b of Directive 2014/41 / EU, it follows that the issuing state may issue only an EIO where the investigative measure(s) referred to therein could have been ordered under the same conditions in a similar domestic case. Consequently, only authority which is competent to order such an investigative measure under the national law of the issuing State may be competent to issue an EIO (CJEU judgement of 16 December 2021, C-724/19, para 35). In the case, in which the question was referred for a preliminary ruling, an EIO was issued by the prosecutor's office in Bulgaria, where under the Bulgarian legal system the court was only authority competent to order the investigative measure specified therein. In such a situation, the Court found in that judgement that: "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".

**2.4.** From the above arguments, two significant legal consequences arise for the Polish legal system in the area of criminal proceedings (Art. 589w § 1 CCP).

**2.4.1.** Firstly, as a rule, the prosecutor is the authority empowered to issue the EIO, and its decision in this respect must, for the purposes of this institution, be considered *de facto* equivalent to a court decision (procedural decision replacing that decision).

**2.4.2.** Secondly, the public prosecutor's competence to issue an EIO covers only such evidentiary acts, the admission, conduct or obtaining of which depends on his decision, and therefore on the decision issued by him. If it falls within the competence of the court to admit or take evidence in an investigation, it also has the competence to decide on the EIO.

**2.5.** Therefore, in each case when it is necessary to consider the need to issue a decision on the EIO, the prosecutor (and the court – if the prosecutor has submitted a relevant request – Art. 35 § 1 CCP) should determine what investigative measure is meant and then examine to whom the law entrusts the competence to order admission and conduct such an action in the preparatory proceedings. Each of these authorities should bear in mind the presumption of legal competence of the prosecutor as the body conducting the preparatory proceedings (*dominus litis* at this stage of the criminal proceedings). The exception to this rule is the performance of activities at the stage of preparatory proceedings by the court (Art. 329 § 1 CCP), which exception - pursuant

to the *exceptiones non sunt extendendae* principle - is not subject to an extended interpretation. It is rightly argued in the doctrine that the scope of the court's evidentiary activities in the preparatory proceedings is very narrow and statutorily limited (cf. System of Criminal Procedure Law. Preparatory Proceedings, Volume X, Warsaw 2016, ed. R. A. Stefański, p. 1220). The court will have competence to issue an EIO only if, on the basis of its decision, evidence is admitted, conducted or obtained during an investigation. If, on the other hand, admitting or conducting or obtaining evidence falls within the scope of a prosecutor's decision, which basis or scope depends on the decision issued *ex ante* by the court, the public prosecutor remains entitled to issue the EIO.

**2.6.** With regard to the problem of issuing an EIO related to information covered by banking secrecy, it should be noted that in the case law of common courts four positions are to be indicated, which - albeit to a different extent - differently resolve the problem of the competence to issue the EIO and the need to obtain authorisation of the Polish court to disclose information constituting banking secrecy, if such information were to be obtained from a bank having its seat in the territory of another Member State of the EU.

**2.6.1.** According to the first position, the competence to issue an EIO in this respect rests with the regional court as an authority competent under national law to decide about access to banking secrecy (e.g. the decision of the Court of Appeal in Gdańsk of 23 May 2018, case no. II AKz 408/18).

**2.6.2.** According to the second view, in the course of the preparatory proceedings, the decision of the regional court, in so far as it states that there are grounds for granting consent for the access to banking secrecy, replaces the decision to issue an EIO. In such a case, there is no need to issue a separate decision on the issuance of the EIO by the prosecutor (e.g. the decision of the Court of Appeal in Katowice of 29 January 2019, case no. II AKz 53/19).

**2.6.3.** The third group of decisions indicates that the prosecutor is competent to issue such an order in the preparatory proceedings, even in the case of an EIO concerning access to information covered by banking secrecy, but it is not necessary for the prosecutor to obtain an court's authorisation for access to banking secrecy, as the Polish court has no competence to release banks operating in the territory of another Member State of the European Union from banking secrecy (e.g. the decisions of the Court of Appeal in Kraków of October 23, 2018, file ref. no. II AKz 524/18 and the Court of Appeal in Łódź of 19 September 2018, case no. II AKz 496/18; this position was presented by the Regional Court, adjudicating in the first instance in this case).

**2.6.4.** The fourth view assumes that in a situation where there is a need to issue an EIO in relation to information constituting a bank secrecy at the pre-trial stage, a public prosecutor is the authority competent to issue it, but - prior to issuing such an order - he must apply and obtain court consent to disclose such information (e.g. the decision of the Court of Appeal in Katowice of 4 September 2018,, case no. II AKz 645/18).

**2.7.1.** When resolving the analysed issue, the procedural authority should first of all determine whether the procedure for obtaining information constituting banking secrecy, as described in Art. 106b sec. 1 of the Banking Law, is - even respectively - applicable in the event of the need to obtain such information from a bank based outside Poland. If not, the public prosecutor

would remain competent to issue an EIO, who alone, without the need to apply first to a Polish court, could request certain information to be provided.

**2.7.2.** This position is opposed not so much by the regulations of the Banking Act itself, which are directly applicable to banks based in Poland (to a limited extent, the Act applies to the activities of foreign banks), including those related to the public powers exercised by courts in the scope of consent to disclose information constituting banking secrecy, but by the content of Art. 589 in § 5, second sentence, CCP read in conjunction with Art. 6 sec. 1 lit. b of Directive 2014/41/EU. The latter provision clearly states that one of the conditions for issuing an EIO is that in a similar domestic case the ordering of an investigative measure indicated to in the EIO could have been under the same conditions. In the Polish legal system, this requirement was fulfilled by indicating that the decision on issuing an EIO, which replaces the decision on the admission, obtaining or conducting of evidence, is governed - respectively - by the provisions relating to individual actions and evidence (Art. 589w § 5, second sentence, CCP). This means introducing to the procedure of issuing an EIO an element of equivalence for an action to be carried out in another Member State of the EU to an action to be performed in domestic proceedings pursuant to the requirements of the domestic law of a Member State of the EU.

**2.7.3.** Therefore, the procedural authority (irrespective of which authority *in concreto* it would be - the prosecutor, court, police or other authority conducting the proceedings), when taking decision on issuing the EIO, must comply with the conditions (applied in this procedure respectively), which he would have to follow in relation to the same act that would be carried out domestically (e.g. obtaining a specific consent to obtain evidence or access to secrecy for needs of taking evidence). Otherwise, if the view proposed in the final part of the suggested thesis of the resolution, contained in the final part of the position of the National Public Prosecutor's Office, was adopted, it would turn out that both of the indicated provisions (the Directive and the CCP) would in fact become redundant. Therefore, this would not only lead to violation of one of the basic prohibitions in the process of interpreting legal provisions (prohibition of interpretation *per non est*), but also to weakening the guarantee function of these regulations. Of course, under the order issued in accordance with Art. 106b §§ 1 and 3 of the Banking Law, if there is a need to issue an EIO and transfer it to another Member State of the EU, a foreign bank is not released from banking secrecy (if such secrecy is at all provided for in the legal system applicable to its seat), but only for the court to verify the scope and need to obtain such information by the prosecutor conducting the preparatory proceedings. If in the state in which the bank has its seat, bank secrecy is applicable and there is a procedure of releasing from the bank secrecy for the purposes of criminal proceedings conducted in that country, the executing authority may implement such a procedure (Art. 9 (1) of Directive 2014 /41/UE).

**2.8.** In view of the above, it should be determined on the basis of the decision of which authority (prosecutor or court), during the preparatory proceedings, evidence is obtained and carried out regarding information constituting banking secrecy. In this respect, Art. 106b sec. 1 and 5 of the Banking Law in connection with § 3 of this article are relevant. According to its content, the public prosecutor is the only authority competent in the *in rem* phase of the preparatory proceedings to request from the bank, its employees and persons through whom the bank performs banking activities, information constituting banking secrecy. The Law stipulates, however, that such a request may be made only on the basis of a decision of the regional court issued at the request of the public prosecutor, in which the court, when agreeing to disclose

information, specifies its type and scope, the person or organisational unit to which it relates and the entity obliged to provide it (Art. 106b sec. 1 and 3 *in fine* of the Banking Law). The court's competence does not include the power to decide on the admission of evidence or the competence to conduct it, but only the competence to determine whether, and if so, to what extent, it may be taken by the prosecutor. It is still the prosecutor who decides whether, after obtaining the court's consent, to submit a specific request to the bank (Art. 106b sec. 1 and 5 of the Banking Law), as well as on the scope of the requested information (though possibly only in the direction of narrowing it down in relation to the scope established in a court decision). Thus, a positive court's decision has the dimension that allows for the performance of an action and determines its scope, however, the decision to take evidence (even after the court has issued the decision) falls within the exclusive competence of the prosecutor.

**2.9.1.** A similar situation occurs when it is necessary to take evidence in the preparatory proceedings requiring prior release from the qualified professional secrecy (Art. 180 § 2 CCP, also in connection with Art. 226 CCP). In such cases, the authority conducting the preparatory proceedings is the only authority competent to admit and conduct evidence, and the court has exclusive competence in this respect only with regard to releasing the person from professional secrecy.

**2.9.2.** The Polish authority may issue an EIO to obtain evidence relating to any type of account having in a bank or other financial institution by a person under criminal proceedings, as well as to obtain information on specific bank accounts and bank transactions that have been carried out in a specific period as well as monitoring banking or other financial operations. The basis for such a request under Polish law is, as indicated, Art. 106b of the Banking Law, according to which, apart from the cases specified in Art. 105 and 106a of this Act, the public prosecutor conducting proceedings in relation to a fiscal crime or crime may require the bank, bank employees and persons through whom the bank performs its banking activities to provide information constituting banking secrecy, only on the basis of a decision issued at its request by the locally competent regional court. After examining the request, the court, by way of a decision, consents to the disclosure of information, specifying its type and scope, the person or organisational unit to which it relates, and the entity obliged to provide it, or refuses to grant consent to disclose the information.

**2.9.3.** As a result of the existence of such a regulation, it should be assumed that in order to be able to issue an EIO on obtaining information relating to banking secrecy information, it is necessary for the regional court to issue a decision pursuant to Art. 106b of the Banking Law. Thus, the prosecutor cannot, without the consent of the court, issue an EIO pursuant to Art. 589w § 1 CCP in order to obtain information constituting banking secrecy from another Member State pursuant to Art. 106b sec. 1 of the Banking Law. It is necessary that the locally competent regional court issues *ex ante* a decision on the subject in question. In a situation where the action requested by the prosecutor depends in domestic law on the decision of the competent regional court, such consent must also be obtained before the possible issuance of the EIO.

**2.9.4.** Pursuant to the wording of Art. 589 § 1 CCP, in the course of preparatory proceedings, the EIO should be issued by the prosecutor, however, the EIO may apply to the relevant bank of another Member State for the provision of information covered by banking secrecy only after obtaining an appropriate court order issued on his request pursuant to Art. 106b of the Banking

Law. The court of first instance should proceed as in similar cases concerning applications submitted on the basis of only Art. 106b of the Banking Law, that is, first of all, examine whether there are any premises justifying the prosecutor's request for data covered by banking secrecy in the manner described in Art. 105 sec. 1 point 2 b) of the Banking Law, and then determine whether expressing consent in a manner consistent with the provision would not violate the guarantee functions of banking secrecy, including whether the requested information cannot be obtained in any other legally permissible manner.

**2.10.** There are a number of arguments in favor of the competence (and obligation) to issue an EIO relating to information on specific bank accounts and banking transactions only with the consent of the court.

**2.10.1.** Firstly, since the Polish authority may only apply for those activities that are permitted by the Polish Act and only in accordance with the applicable conditions for its implementation, the application for disclosure of banking information should also meet the conditions provided for in the Polish Act. A prosecutor's application to another country for disclosure of data covered by banking secrecy without the consent of the court would be a case of forum shopping, i.e. seeking a more favorable (for the procedural authority) forum for obtaining evidence, which is not allowed under the Directive.

**2.10.2.** Secondly, the directive itself requires that issuance and transmission of an EIO must be carried out in accordance with the conditions that must be met by national provisions - in the already mentioned provision of Art. 2 lit. c (ii) of Directive 2014/41/EU, it is indicated that the issuing authority is the authority that is competent in the case concerned to order the collection of evidence in accordance with national law. Undoubtedly, the prosecutor is not empowered to order this action himself.

**2.10.3.** Thirdly, issuing an order in such situations by a public prosecutor without the procedure required by Polish law may lead to the return of the order by the executing authority pursuant to Art. 9 sec. 3 of the Directive, in the case of transmission to the executing authority of the EIO, which was not issued by the issuing authority as specified in Art. 2(c), the executing authority shall then return the EIO to the issuing State. Most countries have implemented this competence to control the formal correctness of issuing an EIO with regard to checking the competence of the issuing authority (in the case of the Polish legal system, in Art. 589ze § 6 CCP).

**2.10.4.** The fact that the Polish court cannot exempt a bank established in another country from banking secrecy does not constitute an argument in favor of transferring this competence to the prosecutor. The Polish court does not release from banking secrecy, as it is done by the relevant executing authority (see the Code of Criminal Procedure. Commentary, edited by J. Skorupka, Warsaw 2021, Art. 589w - Point X. Investigative activities regulated in Directive 214/41/EU, thesis 4 and 5 and Section XI. Regulation of the investigative acts described in the directive in the Code of Criminal Procedure, thesis 3 - European investigative order issued to obtain data on bank accounts in the Code of Criminal Procedure).

**2.11.** The considerations presented above lead to the following conclusions:

**1.** The public prosecutor conducting proceedings is an authority issuing the European Investigation Order (EIO) in the preparatory proceedings (Article 589w § 1 CCP in conjunction with Article 2 (a) (i) of Directive 2014/41/EU of the European Parliament and of the Council



of 3 April 2014 on the European Investigation Order in criminal matters - Official Journal of the European Union of 2014 L 130/1), unless the provisions of the Code of Criminal Procedure or a special act reserve the right to admit or take evidence to the competence of court, as acts of the court in preparatory proceedings. In such a case, that court is solely competent to issue the EIO.

2. In the *in rem* phase of the preparatory proceedings, the public prosecutor is the authority competent to take a decision on issuing an EIO concerning information covered by banking secrecy in relation to a bank established in another Member State of the European Union (Art. 589w § 1 of the Code of Criminal Procedure), who must obtain the consent of the competent regional court to access such information before issuing the EIO (Article 106b sec. 1 and 3 of the Banking Law, applied accordingly in connection with Article 589 (5), second sentence, CCP).

Translated from Polish:

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