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## REPORT

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EVALUATIONS  
on the implementation of the European Investigation Order (EIO)  
Report on Poland

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**EVALUATION REPORT ON THE  
10TH ROUND OF MUTUAL EVALUATIONS  
on the implementation of the European Investigation Order (EIO)**

**REPORT ON POLAND**

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## 1. EXECUTIVE SUMMARY

The 10th round of mutual evaluations focuses on Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters ('the Directive'). The aim of the evaluation is to consider not only the legal issues but also the practical and operational aspects linked to the implementation of the Directive. It provides a valuable opportunity to identify areas for improvement as well as best practices to be shared among Member States. The evaluation further promotes the effective implementation of the instrument and aims to enhance mutual trust among the Member States' judicial authorities.

The visit was very well prepared by Poland. The evaluation team appreciated the high number of practitioners participating in the evaluation and the detailed replies provided by the Polish authorities both in the questionnaire and during the visit. Furthermore, the evaluation team was particularly thankful for the open and welcoming atmosphere created by the Polish authorities, as it enabled the evaluation team to obtain a good overview of how the Directive is applied in Poland.

The evaluation team was able to establish that the European Investigation Order (EIO) generally works well in Poland and the evaluation team commends the Polish authorities for their flexibility and coordination when executing EIOs, and the level of specialisation of the practitioners (*see best practices Nos 2 and 3*). Nevertheless, the evaluation team identified some areas for improvement that need to be addressed at national level and at EU level (see Chapter 23).

With regard to the rights of victims, the evaluation team particularly welcomes the fact that Polish law goes beyond the requirements of Article 1(3) of the Directive and gives victims the right to ask for an EIO to be issued (*see best practice No 5*).

Poland's transposition of the Directive is characterised by a high level of communication between Polish law enforcement agencies and their counterparts in the executing Member States. This is required by the Polish national law and is considered a good practice by the evaluation team (*see best practice No 1*). On the other hand, the evaluation team would like to encourage the Polish authorities to inform the executing authority of this prerequisite in good time, since it does not apply in other Member States (*see recommendation No 1*).

Furthermore, the evaluation team identified some room for improvement regarding Poland's transposition of Article 11 (Grounds for non-recognition or non-execution) and Article 28 (Investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time) of the Directive (*see recommendations Nos 4 and 5*).

Lastly, the evaluation team is of the opinion that clarification at EU level is needed regarding the application of the speciality rule, the concept of 'interception of telecommunications' and the application of the Directive in relation to Article 40 of the Convention Implementing the Schengen Agreement (CISA) (*see recommendations Nos 21-23*).

## 2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997<sup>1</sup> ('the Joint Action') established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

In line with Article 2 of the Joint Action, the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS) agreed, after an informal procedure following its informal meeting on 10 May 2022, that the 10th round of mutual evaluations would focus on the EIO.

The aim of the 10th round of mutual evaluations is to provide added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also – and in particular – relevant practical and operational aspects linked to the implementation of Directive 2014/41/EU. This will allow shortcomings and areas for improvement to be identified, together with best practices to be shared among Member States, thus contributing towards ensuring more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the EU.

More generally, promoting the coherent and effective implementation of this legal instrument at its full potential could significantly enhance mutual trust among the Member States' judicial authorities and ensure better functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice. Furthermore, the current evaluation process could provide helpful input to Member States that may not have implemented all aspects of Directive 2014/41/EU.

Poland was the 20th Member State visited during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS<sup>2</sup>.

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<sup>1</sup> Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

<sup>2</sup> ST 10119/22 and WK 6508/23.



In accordance with Article 3 of the Joint Action, the Presidency drew up a list of experts the evaluations to be carried out. Pursuant to a written request sent to delegations by the General Secretariat of the Council of the European Union, Member States have nominated experts with substantial practical knowledge in the field.

Each evaluation team consists of three national experts, supported by one or more members of staff from the General Secretariat of the Council and observers. For the 10th round of mutual evaluations, it was agreed that the European Commission and Eurojust should be invited as observers<sup>3</sup>.

The experts entrusted with the task of evaluating Poland were Ms Tuuli Eerolainen (Finland), Mr Christian Lorenz (Germany) and Ms Lisette Vos (the Netherlands). The observers also present were Ms Tricia Harkin (Eurojust) and Ms Anastasia Pryvalova (General Secretariat of the Council).

This report was prepared by the team of experts with the assistance of the General Secretariat of the Council. It is based on the findings of the evaluation visit that took place in Poland from 22 to 26 January 2024 and on Poland's detailed replies to the evaluation questionnaire, along with its detailed answers to the follow-up questions.

The evaluation team had the opportunity to meet representatives from the Polish public prosecution service, the judiciary, the Polish Bar Association, the National School of the Judiciary and Public Prosecution, the National Revenue Administration, the Border Guard and the police. All the individuals present provided the evaluation team with a detailed explanation of their institution's role in the EIO process in Poland.

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<sup>3</sup> ST 10119/22.

### **3. TRANSPOSITION OF DIRECTIVE 2014/41/EU**

Directive 2014/41/EU was implemented by the Law of 10 January 2018 on the amendment of the Code of Criminal Procedure (CCP) and certain other laws (Official Gazette of 2018, item 210). The provisions entered into force on 8 February 2018.

Chapter 62c of the CCP deals with a request to a Member State of the EU and Chapter 62d deals with a request from a Member State of the EU. Other provisions of the CCP are being applied when needed, for instance Chapter 26 with regard to surveillance and telephone tapping.

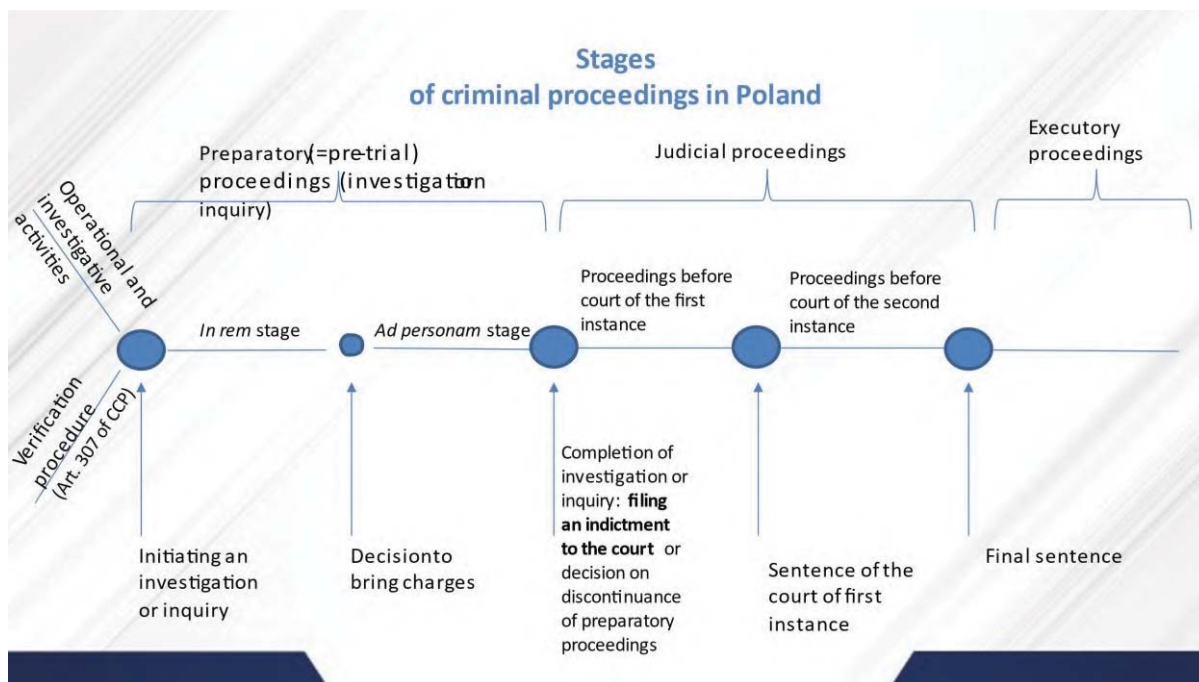
### **4. COMPETENT AUTHORITIES**

During the evaluation visit, it became clear that criminal proceedings in Poland have different stages. Poland allows a fairly large number of authorities to issue an EIO. Fewer authorities are responsible for executing incoming EIOs.

#### **4.1. Issuing authorities**

The arrangements for requesting that a Member State carries out investigative measures on the basis of an EIO are governed by Chapter 62c (Articles 589w to 589zd) of the CCP. Polish criminal proceedings can generally be separated into preparatory proceedings (pre-trial stage), consisting in an investigation or inquiry, and judicial proceedings (trial stage). An EIO may be issued by the public prosecutor or investigative authorities (or by a competent court in specific situations) during the preparatory proceedings, or by the court during the judicial proceedings. EIOs issued by an investigative authority need to be validated by a prosecutor or, in specific cases, by a court.

During the visit, the Polish authorities provided the evaluation team with a very useful visual overview of the stages of criminal proceedings in Poland:



### *Preparatory proceedings*

As part of the preparatory proceedings, an ‘investigation’ is used for more serious crimes and an ‘inquiry’ for less serious offences. Before this stage is formally opened, Polish law provides for the possibility of conducting special investigative activities, as well as a verification procedure.

At the stage of preparatory proceedings, the authority competent to issue an EIO is the public prosecutor conducting the proceedings, at district, circuit or regional court level, the national public prosecutor’s office or the Institute of National Remembrance (Article 589w § 1 of the CCP). The Polish Institute of National Remembrance is competent to investigate crimes against peace, crimes against humanity and war crimes.

The public prosecutor may delegate the investigation or inquiry in whole or in part to certain authorities, such as the police, the Border Guard, the Internal Security Agency, the Foreign Intelligence Agency or the Central Anti-Corruption Bureau (*Centralne Biuro Antykorupcyjne*, CBA) (Article 311 § 2 of the CCP).

Proceedings concerning tax offences may be delegated to the heads of tax offices or heads of customs and revenue offices, or the head of the National Revenue Administration (NRA), pursuant to Article 133 § 1 of the Fiscal Criminal Code (FCC).

The investigative authorities responsible for conducting the investigation or inquiry are competent to issue an EIO, which is subject to validation by the public prosecutor (Article 589w § 2 of the CCP).

The police or other services may carry out special investigative measures both in the course of the preparatory proceedings and before they are officially opened (Article 589w § 7 of the CCP). The EIO will then be issued by the authority conducting those activities. Before issuing an EIO, the Polish authorities are obliged by law to agree with the executing State on the duration of and conditions for carrying out the special investigative measures (Article 589w § 7 of the CCP).

For instance, when a cross-border investigation is to take place, the law enforcement agents will have to determine whether or not the required measure is possible in the other Member State before they draw up the EIO. Generally, this kind of EIO is validated by the public prosecutor. However, certain special investigative measures are overseen by a court or competent public prosecutor. In these cases, the EIO has to be validated by that court or public prosecutor.

This also applies to the stage before the preparatory proceedings. Special investigative activities or a verification procedure (Article 307 of the CCP) can be carried out at this stage. A verification procedure is conducted whenever there is doubt that a reported crime has actually been committed. Thus, the aim of the verification procedure is to confirm whether it is necessary to formally start an investigation. If international cooperation is needed at this stage, the law enforcement agents draw up the EIO (or letter rogatory in the case of cross-border surveillance), which subsequently has to be validated by the prosecutor. This is the case during operational and investigative activities. A prosecutor may also issue an EIO during a verification procedure.

With a view to identifying, preventing and detecting offences, the police and other law enforcement agencies are entitled to undertake operational and investigative activities, which are a separate system of undercover activities carried out independently of the criminal proceedings, but which serve the purposes of those proceedings. Operational and investigative activities which involve and are overseen by the public prosecutor or the court are operational control, controlled purchases, the controlled giving or receiving of a financial benefit, secretly supervised shipments and the obtaining of certain types of information, e.g. information covered by banking secrecy (see also Chapter 21).

The evaluation team is of the opinion that it is very useful for the law enforcement agencies concerned to be in contact with law enforcement agencies in the other Member State before issuing an EIO (*see best practice No 1*). The evaluation team is also of the opinion that it is very important for the other Member States to be aware that the Polish legal system requires law enforcement to reach an agreement beforehand with the executing State on the duration of and conditions for carrying out the special investigative measures. As the Polish legal system requires of law enforcement agencies to reach an agreement beforehand with the executing State on duration of and conditions for carrying out special investigative measures, the evaluation team would encourage the Polish authorities to inform the executing authority of this prerequisite in good time, since it does not apply in every Member State, especially the ones where the responsibilities regarding the use of covert investigation methods do not lay with law enforcement authorities. This will help to facilitate the smooth application of the EIO and to avoid possible delays (*see recommendation No 1*).

As mentioned above, EIOs require the approval of the competent public prosecutor on the basis of separate provisions, unless the measure is reserved to the jurisdiction of the court, in which case the competent court approves the EIO. In practice this means that a draft EIO is drawn up by the law enforcement agency and the formalities are checked by the public prosecutor. If a court order is needed, the prosecutor will ask the court for authorisation. After all validation requirements are met, the police remain the issuing authority.

EIOs concerning evidence that requires a court decision in order to be admitted, obtained or gathered, pursuant to Article 589w § 5 of the CCP, are issued by the court with jurisdiction under the applicable provisions:

- pursuant to Article 180 § 2 of the CCP, the court appointed to hear a case at first instance in matters concerning release from notarial, legal (lawyers and legal advisers), fiscal (tax advisers), medical, journalistic or statistical confidentiality, or the confidentiality of the Prosecutor General's Office;
- pursuant to Article 106b(1) of the Polish Banking Law, the district court with territorial jurisdiction in matters concerning consent to release information covered by bank secrecy;
- pursuant to Article 589w § 4 in conjunction with Article 329 § 1 of the CCP, the court appointed to hear the case at first instance for EIOs concerning the monitoring and recording of the content of telephone conversations and the recording by technical means of the content of other conversations or communications of information.

In general, the issuing authority will be the public prosecutor. Any necessary court orders/decisions will be requested before the EIO is sent and the requested measures will be included in the EIO.

#### *Judicial proceedings*

The authority competent to issue an EIO is the court handling the proceedings (district, circuit, court of appeal or Supreme Court). Article 25 § 1 and Article 325b § 1 to § 3 of the CCP determine which court has jurisdiction over the case. The most serious offences (such as murder, rape and organised crime) are heard by the circuit court as court of first instance, while other, less serious offences are heard by the district court.

Polish law provides for exceptions to that principle. EIOs concerning the temporary surrender to Poland of a person deprived of liberty on the territory of the executing State are to be heard by the circuit court for the place in which the act is to be performed (Article 589z § 1 in conjunction with Article 589a of the CCP).

#### 4.2. Executing authorities

Circuit public prosecutors or district courts are responsible for executing EIOs issued by another Member State, but it is mostly the circuit public prosecutor who deals with an incoming EIO. The specific nature of the investigative measure to be carried out determines whether a district or circuit court is designated. For example, if the issuing authority requests that Poland conduct a hearing of a witness who is a minor under the age of 15, the hearing will be conducted by the district court, since Article 185b of the CCP provides that that court is competent to carry out such measures in accordance with national rules.

It is preferable to send one EIO containing all the different measures. Circuit public prosecutor's offices have specialised public prosecutors to deal with incoming EIOs. The evaluation team is of the opinion that it is very useful to have specialised public prosecutors at the level of circuit prosecutor's offices who coordinate the execution of incoming EIOs. It is therefore considered to be a best practice (*see best practice No 2*).

The circuit public prosecutor will coordinate the execution of the EIO by the different authorities or (if possible and/or necessary) will execute the incoming EIO themselves. The circuit public prosecutor has the authority to assess whether it is better for the case to delegate the EIO to the district public prosecutor or, for example to speed up proceedings, to execute the EIO themselves. This decision is taken on a case-by-case basis and, according to the Polish authorities, ensures efficient execution tailored to each individual EIO. In this way, the circuit public prosecutor acts to some extent as a central authority. If an EIO is sent to the wrong office, it will be forwarded to the right authority and the issuing State will be notified. The evaluation team is of the opinion that the flexible approach of these specialised public prosecutors at the circuit courts is commendable as a best practice (*see best practice No 3*).

### 4.3. Central authority

The central authority in Poland deals with EIOs only at the pre-trial stage. The central authority for EIOs issued in preliminary proceedings and received by Poland is the Bureau of International Cooperation of the national prosecutor's office. This office forwards EIOs received from the judicial authorities of other Member States to the circuit public prosecutor's office competent to execute them (after local jurisdiction has been determined), coordinates and in some situations monitors their execution, and provides support for contacts between the issuing and executing authorities. EIOs issued by the European Public Prosecutor's Office are sent via the Bureau of International Cooperation of the national prosecutor's office, as is material and other correspondence relating to their implementation (Article 615a § 1 of the CCP).<sup>4</sup>

During the visit, the Polish authorities explained that it is not mandatory for other Member States to send their EIOs to the Polish central authority. In fact, in most cases EIOs are sent directly to the circuit public prosecutor. Some Member States, however, wish to send their requests through the central authority, which will forward them to the competent circuit public prosecutor as mentioned above.

As mentioned, the central authority deals with EIOs only at the pre-trial stage. EIOs addressed to the Polish courts generally do not reach the central authority. Should the central authority receive such an EIO, it will forward it to the competent court.

During the visit, the Polish judges explained that although there is no central authority for the courts, there are judges who coordinate international cooperation at circuit court level. They can advise their colleagues in all matters regarding international cooperation, including the EIO. The evaluation team considers that Poland is to be commended for this approach (*see best practice No 4*).

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<sup>4</sup> After the visit, the Polish authorities informed the evaluation team that Article 615a § 1 of the CCP will be amended following the recent access of Poland to the procedure of enhanced cooperation for the EPPO.



#### 4.4. Right of the suspect/accused person/victim to apply for an EIO

In Poland, pursuant to Article 589w § 1 of the CCP, an EIO may be issued not only ex officio, but also if requested by the suspect or accused person and their defence counsel, or by the injured party and their representative. In practice, this means that the suspect or victim can submit a motion to gather evidence. They usually do not specifically ask for an EIO to be issued. The court will decide on the application keeping in mind the proportionality rule. For example, if the court decides that a witness should be heard at the trial stage, the court will send an EIO.

A party's request for an EIO is regarded as a request for the taking of specific evidence. It is subject to the rules governing the proper application of the procedures for obtaining evidence. If the public prosecution service or the court decides not to take account of an evidentiary motion submitted by the parties to carry out the specified evidence-gathering measure in the context of an EIO, in accordance with Article 170 § 1 of the CCP, the court or public prosecutor's office will issue a decision denying that motion. The decision denying the evidentiary motion is not open to appeal.

Nevertheless, a denied request for an EIO can be challenged in the review procedure against the decision to discontinue the investigation or inquiry, or in an appeal against a judgment delivered by the court of first instance.

The status of a victim differs in Polish criminal proceedings from stage to stage. In the preparatory phase, the victim is a party. In the trial phase, however, the victim has the status of a witness, unless the victim asks to be a party. In that case, the victim can appeal the judgment and question a witness. The victim can be represented by legal counsel. However, this is a right, not an obligation.

Motions to gather evidence at the trial stage are rare. They seem to appear more during the preparatory proceedings. However, a defence lawyer present during the visit confirmed that the bar is aware of the possibility. The bar organises trainings on criminal law, including training on international cooperation. These trainings are voluntary.

The evaluation team notes that the law in Poland provides for possibilities beyond the requirements of Article 1(3) of the Directive, as victims may also ask for evidence to be collected, if necessary, through an EIO. The evaluation team welcomes this legislation as it supplements victims' rights under Directive 2012/29/EU (*see best practice No 5*).

## **5. SCOPE OF THE EIO AND RELATION TO OTHER INSTRUMENTS**

Pursuant to Article 589w § 1 of the CCP, an EIO may be issued where it is necessary to take or obtain evidence and that evidence is located or may be taken on the territory of another Member State. In addition, pursuant to Article 589w § 3 of the CCP, an EIO may be issued for the preservation of traces and evidence of a crime to prevent the loss thereof.

An EIO may be issued in connection with ongoing criminal proceedings for a criminal offence or criminal tax offence, and in proceedings for a misdemeanour. An EIO may be issued in the course of a verification procedure (Article 307 of the CCP) or in the course of operational/investigative activities carried out on the basis of specific laws.

In accordance with the domestic legal order and the Directive, an EIO does not apply to the creation of a joint investigation team (JIT), or cross-border surveillance as referred to in the Convention implementing the Schengen Agreement (CISA). Furthermore, the EIO replaces the corresponding provisions of the conventions as mentioned in Article 34 of the Directive.

In practice, the Polish public prosecution service has not encountered difficulties in identifying the investigative measures for which an EIO may be issued, as either the issuing authorities or the executing authorities.

In the judicial practice of the national courts of first instance, no difficulties have been encountered in determining the activities to be carried out. Measures relating to obtaining information from databases, relevant documents from the case file and, where appropriate, copies of court decisions were mentioned in particular. EIOs have not gone beyond the 'collection of evidence'.

The Polish police have approached prosecutors with requests to issue EIOs with a view to securing ICT data (including lists of connections, logins, device IP addresses, SIM card numbers, user data and port numbers), questioning witnesses, presenting charges and questioning suspects, and securing documentation from individuals or companies.

The Border Guard has submitted requests for investigative measures to be carried out under an EIO, including obtaining data on telephone connections, data on telephone subscribers, bank account statements and details of account holders or contracts for the provision of banking services, and data on individuals engaged in an economic activity.

When carrying out its preliminary proceedings, the NRA has not encountered any difficulties in identifying the investigative measures for which an EIO may be issued. In practice, the NRA uses the list of measures indicated in Section C of the EIO form.

When Poland is the executing State, EIOs are executed in accordance with Polish law, taking account of the specific manner of execution of the measure indicated by the Member State concerned, provided that it is not contrary to the principles of the legal order. If the investigative measure specified in the EIO is not provided for under Polish law or would be inadmissible in a similar domestic case (Article 589zi § 2 of the CCP), the court or prosecutor informs the authority issuing the EIO, indicates a deadline for amending, supplementing or withdrawing the EIO and specifies potential feasible alternative measures. If such an alternative measure cannot be specified, execution of the EIO is refused.

On the other hand, when an EIO is received in which a listed offence is applicable but is not punishable under Polish law, the EIO is executed. During the visit, the Polish practitioners provided an example of a case of child abduction. Under Polish law, this is only an offence if the ‘abductor’ has no parental rights. In some Member States, the law is different and a person with (shared) parental rights can still be prosecuted for child abduction. In such cases, Poland would still execute an EIO from another Member State. Dual criminality is an optional ground for refusal and consideration is given to the use of the least invasive measure.

No alternative measure is carried out if evidence is in the possession of the public prosecutor's office or court concerned or if it is possible to retrieve it from available databases or registers. Furthermore, no alternative measure is carried out if the investigative measure requested by the Member State concerns the questioning of a person who is on Polish territory, regardless of their status. In addition, no alternative measure is carried out if the investigative measure indicated by the Member State does not require a decision to be issued. The measure is also subject to execution if the Member State requests the identification of a telephone subscriber or IP address.

Under Polish law, an EIO may not be used for purposes other than obtaining or taking evidence. The Polish public prosecution service has sent and received orders from other Member States' authorities to obtain copies of court judgments. EIOs have been sent for the purpose of obtaining copies of court judgments when a perpetrator's previous conviction influences the description and legal classification of the act of which the suspect stands accused, by establishing whether there has been a repeat offence. In such situations, a copy of the court judgment constitutes evidence in the case in question. In practice, a request for a copy of a court judgment is accompanied by a request for information concerning the statutory limitation period, how much of the sentence imposed by the requested judgment has been served and expungement of the conviction. These factors may constitute evidence in criminal proceedings conducted in Poland. Poland has not encountered any difficulties in this area, either as the issuing or as the executing State. In some cases, other Member States' authorities have sent EIOs to request information about the law, further to which the public prosecution service has directed them to the correct procedure for obtaining such information.

During the visit, it was notable that the Polish judges and prosecutors took a different approach to executing EIOs for the serving of documents without evidentiary purpose. On the one hand, the judges argued that such an EIO would be executed because it would simply be treated as an MLA request. The only difference is that with an EIO a formal decision to execute has to be taken, whereas with a letter rogatory this step is not necessary. On the other hand, the public prosecution service follows a stricter approach, arguing that serving documents does not fall within the scope of the Directive.

An EIO may be issued in the preliminary proceedings and in the judicial proceedings (trial and appeal). It may also be used for verification measures and during operational/investigative measures. In Poland, there are no obstacles to issuing or executing an EIO in the judicial stage of an enforcement procedure provided that, at that stage, it is necessary to obtain or take evidence and there are no grounds for non-execution of the order. In practice, the public prosecution service has no experience with such cases. In addition, an EIO may also be issued in proceedings initiated further to the lodging of a cassation appeal or an application for a retrial. There have been no difficulties as a result of other Member States' authorities taking a different position on what the trial stage encompasses in this context.

#### *EIO and EAW*

Regarding the relationship between the EIO and EAW, the Polish authorities noted that establishing the whereabouts of a person is not in itself an investigative measure and does not serve the purpose of taking evidence. Consequently, Poland would not issue an EIO in such cases. The whereabouts of a person are established by police channels or by means of other international cooperation instruments (for example with a SIS alert).

In practice, it is possible to send an EIO in order to establish the whereabouts of a person and subsequently carry out measures with their participation. Individual cases have been noted in which an EIO has been issued in order to establish the whereabouts of a person in another Member State with a view to sending a subsequent request. Similarly, occasional cases have been noted in which the effect of an EIO was intended to check whether a certain person was staying in Poland at the address indicated. In other cases, once the location had been confirmed and the material from the execution of the EIO had been sent, the requesting party sent an EAW with a view to detaining and surrendering the person.

Furthermore, as part of their practice, local Commissions for the Prosecution of Crimes against the Polish Nation (a separate organisational division of the public prosecution service) have issued EIOs for the purpose of establishing the whereabouts of a person or establishing whether a person is still alive. Since the individuals concerned were dead, no further action was needed. The EIOs in question arose from specific cases conducted by the local Commissions for the Prosecution of Crimes against the Polish Nation.

No measures of this kind have been taken by the Border Guard; similarly, no EIOs have been issued by the CBA as an auxiliary measure prior to sending an EAW.

#### *EIO and administrative decisions/authorities*

Within the Polish public prosecution service, no EIOs have been issued for the purpose of obtaining personal data necessary for the enforcement of an administrative decision. As the executing authority, the public prosecution service has received only one request on this matter and it concerned the personal data of the owners of motor vehicles. The police and Border Guard did not report any experience with this matter.

Under Polish law, it is possible to execute an EIO issued by an administrative authority of another Member State which is empowered to do so under its national law following confirmation of the order by a judicial authority of that State within the meaning of the Directive.

The execution of such EIOs is not subject to any special, separate procedure. The execution of measures under an EIO drawn up by an administrative authority and confirmed by a judicial authority may be carried out in person by a prosecutor from the circuit public prosecutor's office, entrusted to police authorities or another duly authorised service, or transferred to a district public prosecutor's office.

#### *Finding the correct instrument*

According to the Polish authorities, they have not encountered any problems regarding the use of the appropriate legal instrument as either the issuing or the executing authorities. If questions arise over whether an EIO or an order for the freezing of property should be applied to a given case, an assessment is made as to whether a given measure is evidential or whether its purpose is to freeze assets. No issues have been reported in the day-to-day work of the domestic criminal courts either.

Similarly, other national authorities involved in preliminary proceedings – including the police, the CBA, the Border Guard and the NRA – have had no cases in which problems have arisen over which legal basis and instrument to use, e.g. an EAW (for the temporary transfer of a person), the CISA or the EIO Directive (for cross-border surveillance).

The Polish public prosecution service has had cases in which EIOs have been issued for the purpose of obtaining consent to use material previously sent to the Polish authorities within the framework of police cooperation, including, for example, information in the form of records from the EncroChat system, or the confirmation of information sent by a foreign anti-corruption service. In another case, an order was issued after the police had determined the whereabouts of a person to be questioned.

In one case, an EIO issued by the German side was received after a cross-border pursuit, for the purpose of forwarding CCTV footage from service stations. The order contained information about its preservation by the Polish police after receipt of the request from the German police.

According to the Polish authorities, if information is obtained through police-to-police cooperation before an EIO is sent, and they receive an EIO asking for permission to use the information as evidence, the EIO will be executed and generally permission will be given.

The evaluation team asked the Polish authorities to provide more information on the practice of hearing Polish citizens abroad through the Polish consulates or embassies instead of sending an EIO to the Member State where the person to be heard is located. The Polish authorities confirmed that they do use consular legal assistance for Polish citizens in certain cases. Pursuant to Article 586 § 1 of the CCP, the prosecutor or court may ask the Polish diplomatic mission or consular office to interview a person who has Polish citizenship as a defendant, witness, or expert. Reference was also made to Article 5(j) of the Vienna Convention on Consular Relations and bilateral consular agreements between Poland and individual EU Member States.

However, submitting a request for legal assistance to a Polish diplomatic mission or consular office is impossible if the host country does not consent to such a request. Among the countries that do not accept this are Czechia, Denmark, Finland, Malta, Norway and Sweden, as well as Germany in cases where the individual holds dual (Polish and German) citizenship.

On the other hand, when it is possible to submit a request for consular legal assistance but the Polish citizen to be interviewed does not attend, prosecutors will issue an EIO. According to the Polish authorities, the preference for consular legal assistance in the case of Polish citizens primarily stems from the desire to reduce the costs of executing the request.

#### *EIO and JIT*

According to the Polish authorities, the existence of a JIT does not preclude the use of material obtained from a non-participating State under an EIO before the JIT was created, once the consent of the State executing the EIO has been obtained. Poland has not experienced problems in practice when JITs have been in operation.



## 6. CONTENT AND FORM OF THE EIO

### 6.1. General challenges

#### *As the issuing State*

After the Directive had been transposed into Polish law, Polish practitioners experienced some practical problems in completing the EIO form. Over time, the practice of completing that form has developed in the public prosecution service.

Article 589y of the CCP describes the basic formal requirements. These requirements go beyond the ones described in Article 5 of the Directive. Article 589y of the CCP combines requirements from Annex A and general elements that are prescribed in domestic law, which is helpful for drafting EIOs since it gives a quick overview of all the necessary elements. However, it is important to mention that Article 589y of the CCP only applies to the issuing of EIOs by the Polish authorities. It does not impose additional requirements on incoming EIOs.

The public prosecution service reported encountering the following problems when issuing EIOs:

- data which are already included in places designated for that purpose are unnecessarily being duplicated in Sections C and G;
- there is no uniform interpretation as regards the completion of Sections C1, G and I of the form in terms of how to describe in detail the procedural requirements for each measure, or as regards Section J in terms of whether to describe the legal remedy briefly or whether to include details, e.g. address data or the name of the court with which any appeal should be lodged;
- some practitioners are of the view that the form is too long and unclear, and should it be decided to opt for an EIO in the form of a set of blank spaces to be completed, then the section concerning the description of the case should be made as small as possible;
- it has been requested that the EIO form be simplified by cutting it down to those sections that are essential to any given case, disregarding those sections that are irrelevant (e.g. Sections H1 or H2, which are not usually filled in).

In judicial practice, based on enquiries directed to the courts of first instance, there have been no reports of difficulties in completing Annex A (regional courts of Katowice, Gdańsk, Wrocław and Łódź).

The NRA has pointed out that it sometimes faces issues when completing Section E of the form. In the early stages of the investigation, information is provided concerning persons (such as witnesses) who merely act as the formal representatives of economic operators which are of interest to the law enforcement authorities. In the early stages of proceedings, the NRA is unable to identify the persons actually involved in illegal tax fraud. As a result, only those witnesses who have already been identified can be heard. In a situation like this, when only the formally registered witnesses are known (e.g. the formal owners of a company), they are heard to find out who is the real suspect. If these interviews lead to the identification of new witnesses, Polish practitioners believe it is best to send a new EIO for the hearing of those new witnesses. Even though it is possible to describe follow-up requests in the EIO, a new EIO is considered more appropriate. In the event of follow-up action (such as hearing a new witness), the law enforcement agency contacts the public prosecutor who is able to reach out to the executing State.

#### *As the executing State*

The public prosecution service executing orders originating from other Member States have reported EIOs whose content has been incomplete, inconsistent or inaccurate. The following shortcomings have been identified:

- EIOs have been issued for the hearing of Polish citizens as suspects, but without specifying a list of questions, or giving a description of the facts established in the relevant case;
- EIOs have included a request for a person to be heard, but without indicating that person's procedural status in the case, i.e. whether they are a witness or a suspect;
- in EIOs for the hearing of persons as suspects, no information has been provided regarding the time and place of the offence, the identity of the victim, or – in the case of offences against property – the amount of damage suffered by the victim, or some of the information has been lacking in detail;

- some sections of the EIO have been found to be incomplete in terms of their content and the annexes thereto, and there have been cases where, in Section G, the facts have not been described in sufficient detail, making it impossible to establish the basic facts and subsequently to ensure the proper execution of the measure in question;
- there have been instances of EIOs which do not contain any information about the penalty applicable to the offence in question;
- some EIOs have been accompanied by translations which have been incomprehensible or of insufficient quality to execute the request, or by a machine translation, in which case a proper translation has been requested;
- there have been cases where EIO forms transmitted for execution have not been signed by the issuing authority;
- EIOs have described in insufficient detail what was needed, with the result that they were transmitted to the wrong executing authority.

In each of the above situations, the Polish public prosecution service contacted the issuing authorities in order to consult with them and obtain either supplementary information or the text of the relevant EIO in full. The EIOs were then executed upon receipt of that information or the necessary documentation. The evaluation team would highly recommend that all Member States pay particular attention to providing a clearly structured and understandable description of the facts and the requested measures in the EIO, making an effort to keep the perspective of the reader and the necessity of an adequate translation into a foreign language in mind when completing the form (*see recommendation No 9*).

## 6.2. Language regime

The Polish authorities mentioned that when Poland has been the issuing State there have been difficulties in relation to the costs of requested translations, including as regards the need to translate handwritten medical records. Occasionally, the quality of translation has presented a problem. In one case, after an EIO had been transmitted to the executing State, together with a translation into English, the executing State requested that it be translated into its official language, despite indicating in the notification under the Directive that it also accepted translations of the EIO into English. In some public prosecutor's offices, there have been problems with the availability of translators into certain languages (for example Greek or Estonian), or with translators inflating the costs of translation.

When Poland has acted as the executing State, problems have arisen in connection with:

- the poor or unsatisfactory quality of the translation, or the failure to translate part of the text of the EIO;
- EIOs being transmitted together with a machine translation, in which case a proper translation has been requested.

Problems relating to the quality of the translation of EIOs issued or received for execution by the Polish public prosecution service have sometimes been resolved by sending a letter of clarification.

The NRA has been carefully monitoring the quality of the translation of documents transmitted under an EIO, which is one of the weakest elements of its execution. The specialised terminology relating to the institutions referred to in Polish tax and criminal law creates a number of problems for translators, and this is reflected in the quality of the translations. The fact that translators lack expert knowledge in the field of tax law, criminal law and criminal law in tax matters often makes it difficult for those conducting preliminary proceedings to understand the content of translations and to use the documents as evidence.

The evaluation team recognises that a good-quality translation is essential for the smooth execution of the EIO. On the other hand, it is difficult for the issuing State to know when the translation is not satisfactory. Therefore, the evaluation team recommends that all executing Member States provide substantial feedback if the translation of the EIO is of poor quality so that the issuing State can address any shortcomings properly (*see recommendation No 10*). At the same time, the evaluation team recommends that all issuing Member States attach the original version of the EIO to the translation if possible, as it could help the executing State whenever issues arise with the translated version (*see recommendation No 11*).

Poland accepts EIOs in Polish because Polish is the official language. The Polish authorities indicated they would accept English only in urgent cases. If an EIO in an urgent case is received in English, there is no need to send a translation in Polish afterwards. The Polish authorities will take care of the translation into Polish. Given that the EU currently has 24 official languages, there can be substantial problems in making sure that a proper translation is provided in the language of the requested country, especially when it comes to legal terminology. Therefore, the evaluation team encourages Poland and all other Member States to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language, in the spirit of Article 5(2) and recital 14 of the Directive (*see recommendation Nos 2 and 12*).

### **6.3. Multiple requests in one EIO, additional EIOs, splitting EIOs and conditional EIOs**

In Poland, it is possible to have more than one request in incoming or outgoing EIOs. When coordination of the execution is needed, this will be done by the public prosecutor of the circuit's prosecutor's office, who coordinates, even if there are different levels of the public prosecution service involved.

As the issuing State, the Polish public prosecution service has received EIOs with measures to be executed by different authorities in the executing State. In one case, Poland sent an EIO concerning banking information to the authority competent to execute the measure in question in the executing State, but was told that separate EIOs needed to be issued in respect of each bank account in the case and then transmitted to the relevant competent authority. In that case, Poland sent copies of the same EIO to the various public prosecutor's offices of the executing State, asking them to carry out the various measures referred to in Section C of the form.

In the case of cooperation with certain Member States, in the Polish practitioners' experience it is necessary to divide the EIO according to the territorial jurisdiction of the individual measures, especially where the executing authorities are located in different states within a federation. However, the Polish public prosecution service indicated that the division of a single EIO into several EIOs or the issuing of conditional EIOs is problematic where the execution of the investigative measure in question depends on the outcome of the execution of another investigative measure, and where different authorities are competent to execute those measures in the executing State, and there is no central authority. Those difficulties can usually be resolved by establishing direct contacts with the executing State.

When Poland has been the executing State, difficulties have sometimes been encountered with EIOs requesting the execution of measures at the same time but in different places within the territorial jurisdiction of separate public prosecutor's offices. This involves synchronising the activities of many different units and seeking agreement between them as to how to execute the request. If, in such a situation, the execution of some of the measures depends on the execution of another measure within the jurisdiction of a separate unit of the public prosecution service, direct contact will be established with the other Polish executing authority in order to determine the next steps.

Polish practitioners also mentioned examples of EIOs received from other Member States requesting, by way of an alternative, the instigation of criminal proceedings in Poland. In such cases, the Polish authorities execute what is ordered in the EIO, and with regard to the question of transferring proceedings, the relevant case file is requested to determine whether an investigation in Poland can be initiated.

#### **6.4. Orally issued EIOs**

The Polish authorities stated that EIOs issued orally will not be accepted. In practice, Poland has never encountered this. Where there is a need for the urgent execution of investigative measures, the forms are transmitted by fax or by email. In urgent matters, the Polish authorities could prepare to take action at the level of the police. However, a written EIO is needed as soon as possible.

### **7. NECESSITY, PROPORTIONALITY AND RECOURSE TO A DIFFERENT TYPE OF INVESTIGATIVE MEASURE**

Under Article 589x of the Polish CCP, issuing an EIO is not permitted if:

- this is not required by the interests of the administration of justice (this phrase refers to the principles of proportionality and necessity);
- Polish law does not permit the taking or obtaining of the evidence in question.

It is for the authority making the decision (court or public prosecutor) to examine and determine whether there is an interest for the administration of justice to issue an EIO in a specific case. It should be noted, however, that in case of EIOs for which validation is required, such an assessment would entail two steps: the relevant analysis should be carried out firstly by the authority issuing the EIO (for example the police) and then by the public prosecutor deciding whether to validate the EIO. The Polish authorities explained that in theory the public prosecutor could choose not to validate the EIO if there is disagreement on the proportionality of the EIO, but in practice this rarely happens and decisions are made in close cooperation between the public prosecutor and the police.

When the district public prosecutor decides an EIO needs to be issued, the EIO will be sent to the public prosecutor from the circuit prosecutor's office, who will check if the EIO complies with all the formalities and will advise if necessary. During the visit, the Polish authorities stated that the role of the prosecutor from the circuit prosecutor's office in this matter is of a purely advisory nature. In relation to judges, neither the prosecutor from the circuit prosecutor's office nor the central authority has a role, but as mentioned in Chapter 4, there are specialised judges at the circuit court who can advise their colleagues. These judges are not European Judicial Network (EJN) contact points but do use the Atlas.

In Poland, the principle of legality applies (Article 10 of the CCP), which can have an influence on the proportionality and necessity of issuing an EIO. However, there are exceptions to the legality principle. One exception is laid down in Article 11 of the CCP with regard to the efficiency of the proceedings, and another in Article 17 of the CCP allowing the proceedings to be discontinued if the offence is very minor.

In assessing whether there is an interest for the administration of justice, the Polish authorities consider the usefulness of the decision in the given case and the expected result. Account will also be taken of the time limit for the execution of the measure indicated in the EIO, so that it does not in any way affect the timing of the examination of the case in the main proceedings and thereby lead to any delays. In addition, account should also be taken of the costs of issuing the EIO, including translation costs, but also those related to the execution of the EIO.

The Polish issuing authority assesses 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. A different assessment of the proportionality of the EIO by the issuing and executing authorities in judicial practice cannot and does not constitute an additional ground for refusing to execute an EIO.



In practice, the factors guiding the Polish authorities in assessing the conditions of necessity and proportionality when issuing an EIO are:

- the necessity, importance and relevance (usefulness) of the evidence to achieve the objectives of the criminal proceedings, as well as whether the evidence can be obtained in another way without involving the authorities of the other Member State and whether national means of gathering evidence have been exhausted in this regard;
- the seriousness of the offence (type of act) that is the subject of the preliminary proceedings, taking into account the nature of the legal interests infringed, the rights of the victim and the suspect and the possibility of detection (real possibility of gathering evidence indicating that the person concerned has committed the offence);
- the threat of punishment in respect of the act that is the subject of the proceedings and the value of the damage, and whether issuing and sending the order will result in costs disproportionate to the seriousness of the act and the damage caused;
- whether the measure is permitted under national law.

The Polish authorities explained that the assessment of the conditions of necessity and proportionality is carried out on a case-by-case basis, i.e. on the basis of a case's specific factual and legal situation.

Essentially, Poland has rarely encountered cases where an EIO issued or transmitted for execution was not necessary or proportionate. In the occasional case where such situations have occurred with Poland as the issuing State, the district public prosecutor's office refrained from issuing the EIO after consultation with the circuit public prosecutor's offices. In one instance, Poland sent an EIO to another Member State which was not executed. The executing State indicated that this was due to it not having sufficient resources to execute the EIO, which involved damages amounting to less than EUR 800.

In situations in which an EIO transmitted for execution by another Member State has raised questions for the Polish executing authority regarding the proportionality, the consultation procedure set out in Article 6(3) of the Directive was applied, resulting in the application of alternative measures.

## 8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACTS

In general, the Polish public prosecution service and courts have not encountered any difficulties in determining the authority competent to execute an EIO. The EJNI Atlas and its contact points are primarily used in this regard. The use of available online resources, the EJNI Atlas and the contact points were also highlighted by the Polish practitioners.

There are cases where help in determining the competent authority in the executing State is provided by the Polish central authority, the Polish desk at Eurojust or, occasionally, the diplomatic mission of the Member State concerned accredited in Poland. If the information in the EJNI Atlas proves not to be useful in a given case, prosecutors (as with judges) use available online databases, such as Germany's 'Justizportal des Bundes und der Länder'.

Despite using the EJNI Atlas when transmitting EIOs to other countries, some Polish EIOs have been returned by the executing State (including the central authority designated by a country, together with information that the data in the EJNI Atlas were incorrect). The evaluation team is of the opinion that it is very important to have the EJNI Atlas updated on a regular basis so that direct contact can be established between Member States. The evaluation team therefore considers this to be a recommendation for all Member States (*see recommendation No 13*).

Some organisational units of the public prosecution service follow a practice whereby, if the competent authority in the executing State cannot be identified and if no central authority exists for that state, a request is sent to an authority established in the capital of that state for onward transmission of the EIO. Practitioners also try to resolve these problems by including in the EIO a request for transmission by the receiving authority to another competent authority, if necessary.

In addition to available online databases and the Atlas network, working contacts and the spontaneous exchange of information play an important role for Polish practitioners in identifying the authorities competent to execute EIOs.

All units of the Polish public prosecution service have experienced requests in which several authorities of the other Member State were involved in the execution of the EIO. In connection with this, the following problems have been identified by Polish practitioners:

- Difficulties have arisen in coordinating actions aimed at the overall execution of the EIO, especially in the absence of a central authority in the executing State. In such a situation, there is no single authority that can be contacted to coordinate the activities covered by the EIO; the lack of a centralised coordination point means that some public prosecutors are in constant contact with the various authorities in the executing State.
- The involvement of several authorities of the executing State has sometimes led to an extension of the period for executing an EIO.
- In some cases, there was no information from the different authorities, resulting in incomplete execution of the EIO. In the absence of an acknowledgement of receipt of the EIO from the executing State, there have also been communication problems between the Polish issuing authority and the executing authorities. In cases of failure to execute the EIO in full, the executing State was directly requested to speed up its execution or to send information on the reasons for the non-execution of the EIO in the part concerned.

Poland does not need the original EIO on paper as long as it can assess that the EIO has been sent by a competent authority. It is also possible to transmit the EIO through the EJM contact point or Eurojust. The public prosecutors indicated the need to use security systems in this process and to encrypt the document electronically (e.g. with password protection).

According to the Polish practitioners, an EIO should be sent by post if the authority of the executing State does not acknowledge receipt of the electronically transmitted form within the required time limit or at all. Sending an EIO by post may be justified by the nature of the request, for example for the transmission of low-quality photographs, or by the need to transmit additional documentation, for example for presentation purposes.

Since December 2023, three circuit public prosecutor's offices with 33 subordinating district prosecutor's offices and two courts have been using the e-Evidence Digital Exchange System (e-EDES) in a pilot phase. This system has been developed to provide a secure online portal for sending EIOs in the EU. In the pilot phase, Poland has encountered some challenges within the system, such as a lack of a specific role for clerks. The Polish authorities aim to have e-EDES fully operational in 2027.

The Polish public prosecution service works with a case management system called PROK-SYS. This system includes all incoming and outgoing EIOs and letters rogatory and can be used to extract statistics. The courts do not have a general system. Case management is regulated separately in every court. The Polish public prosecution service generally communicates directly with authorities executing or issuing EIOs. Email is also used for this purpose. Communication through the national public prosecution service and the Bureau of International Cooperation takes place in particular when the authority carrying out the EIO contacts the Polish central authority. Once an EIO is issued, communication between the authorities of the issuing and executing State takes place through Eurojust or the EJM contact points, for instance in cases of urgent action or measures requiring coordination. Eurojust and the EJM contact points are also used in practice if the executing State has difficulties executing the EIO (a long delay on its part and a lack of reaction to enquiries addressed to it about the reason for the delay). In the judicial practice of national courts, communication also takes place directly.

In practice, the authority carrying out the preliminary proceedings (such as the CBA) also communicates directly with the authority executing the measure, similarly to what is done for national criminal proceedings.

## 9. RECOGNITION AND EXECUTION OF AN EIO AND FORMALITIES

Article 9 of the Directive has been properly transposed to Polish legislation in Articles 589ze § 6, 589zi § 1, 589zo § 1 to 2 and 589za § 1 of the CCP.

### *As the executing State*

A number of Polish public prosecutor's offices have faced situations in which the issuing authority failed to complete Section I (*Formalities and procedures requested for the execution*) of the form, which led to problems in complying with formal requirements. Sometimes data that should have been in Section I were put in Section C by the issuing authorities. Where Section I was not completed by the issuing authority, direct consultations with that authority were carried out or the measures were executed in accordance with the Polish procedure.

The evaluation team notes that compliance with formalities is essential for the admissibility of evidence in the issuing State. The evaluation team considers it crucial that the issuing authority clearly explains what formalities are requested while keeping in mind the perspective of the executing authority, which may have a completely different system. At the same time, the executing State should comply with the formalities unless they are contrary to the fundamental principles of law, in accordance with the Directive (*see recommendation No 14*).

As the executing authority, Poland has had no cases in which carrying out the formalities indicated in the EIO would be refused because they were contrary to fundamental principles of Polish law.

When the evaluation team asked if the Polish executing authorities require the issuing authority to attach the relevant authorisation to the EIO, they were told that this should not happen as Poland relies on mutual trust. In general, the Polish authorities do not examine whether the issuing authority has acted correctly. However, the Polish authorities did mention that there have been cases where the authorisation was requested by the Polish executing authorities and the execution of the EIO was made conditional on the issuing State attaching the relevant authorisation. The evaluation team is of the opinion that such a practice is not in accordance with the Directive, since it is up to the issuing State to assess whether the measures in the EIO have been ordered under the same conditions as in a similar domestic case. It therefore recommends that Poland and all Member States not require the issuing State to attach the relevant (court) authorisation to the EIO (*see recommendation Nos 3 and 15*).

If competence in the issuing State lies with a different authority than is usual in the EU, e.g. a house search is ordered by the police or a public prosecutor instead of by a judge/court, the Polish authorities believe it might be useful to note this in the EIO. However, if in doubt, the Polish authorities will make the necessary enquiries of the issuing State.

#### *As the issuing State*

There have been cases where Poland has issued an EIO and the executing authority has refused to comply with Polish formalities, namely to hear a witness pursuant to Article 183 § 1 of the CCP (containing information on the right to refuse to answer a question if doing so could expose the witness to criminal liability for a criminal offence or tax offence) because, under its national law, that person should have the status of a suspect. In EIOs issued by the Polish public prosecution service, the authorities of the executing State have sometimes refused to warn the witness about criminal liability for providing false testimony (Article 233 § 1 of the Criminal Code).

Lastly, the Polish authorities mentioned there have been cases where the questioning of suspects or other measures were not conducted as requested, without any explanation from the executing State.

The evaluation team is of the opinion that executing States should not change the status of the person to be heard without consulting the issuing State first, so as to avoid any negative impact on the proceedings in the issuing State (*see recommendation No 16*).

## **10. ADMISSIBILITY OF EVIDENCE**

The issues of admissibility are linked to the formalities (see above Chapter 9) requested by the Polish authorities in their EIOs. Failure to execute the EIO as requested might lead to the evidence being inadmissible in court in Poland.

The provisions regarding the admissibility of evidence in connection with the EIO can be found in Article 587 of the CCP. Under the general rules of admissibility set forth in Articles 389, 391 and 393 of the CCP, evidence received is admissible if the procedure is conducted in a manner that is not contrary to the legal order of Poland. Articles 389 and 391 concern the possibility of using the written testimony of the accused or witnesses, and Article 393 concerns the possibility of using other evidence, such as records of inspections, searches and seizures of objects, official documents submitted in preparatory proceedings, etc.

The major issue encountered by the Polish authorities is that the executing State often does not deliver the decision to bring charges to the suspect and have it signed by the suspect as requested by Poland. In such cases, courts often return the case to the public prosecutor as the suspect has not been duly notified and therefore cannot become a defendant under Polish law. The Polish public prosecutors have been advised by the central authority to very clearly explain the importance of this crucial formality in the EIO.

Another issue is when the authorities of the executing State do not comply with the obligation to make a record of the suspect's hearing after being charged. In addition, witnesses and suspects have not always been advised of their duties and rights, and official notes have been provided rather than minutes of the hearings of witnesses (or suspects).

In general, Poland has the principle of free assessment of evidence. Slightly different procedures do not cause problems in accepting the evidence. Polish judges would not, as a rule, investigate whether or not the rules in the other country have been followed. Professional expertise is usually requested with regard to electronic evidence and its authenticity.

## **11. SPECIALITY RULE**

There are no provisions in Polish law that address the speciality rule in the context of the Directive. The Polish authorities do not consider the Directive to have a general provision on this either (apart from the special provision on temporary transfer in Article 22(8) of the Directive).

However, as the issuing authority, the Polish public prosecution service usually requests the consent of the executing State if it wishes to use the materials obtained from the execution of the EIO in other proceedings. The Polish authorities base such requests on Article 19 (confidentiality) of the Directive.

As the executing State, Poland has granted issuing States' requests for consent to use the material obtained as a result of the execution of an EIO in other proceedings conducted in the issuing State. In such situations the Polish authorities consider whether an EIO in the new case could have been executed. The consent takes the form of a letter setting out the executing authority's position on the matter. The evaluation team was informed, however, that consent is rarely requested by other Member States. There have been no cases where Poland would not have given its consent if requested.

There have been individual cases where it was of interest to Poland, as the executing authority, to use evidence obtained as a result of the execution of an EIO. There have been two cases in which the Polish public prosecution service requested access to material obtained from the execution of EIOs issued by other Member States. Consent was obtained to use this material.



There have occasionally been cases where Poland, as the executing authority, has opened a new domestic case when the execution of an EIO revealed that a crime had been committed (accidental discovery). The issuing State was informed in these cases. In cases where the execution of the EIO led to the discovery of an offence committed on Polish territory, the requesting Member State was not informed of the opening of proceedings concerning the offence. According to the written answers given by Poland, whether such information was communicated to the issuing State depended on whether the information was deemed to be of use to proceedings conducted in that state. However, during the on-site visit one prosecutor said that consent would be requested in that situation as well. In order to avoid *ne bis in idem* situations, Poland consults the issuing State to make sure it has not also included the fact in question in its criminal investigation. The evaluation team believes it is important, in order to prevent possible harm to the investigation, for all executing States to inform the issuing State if a national investigation is started based on the EIO (*see recommendation No 17*).

The Polish authorities' assessment is that the rule of speciality is important for the protection of information, and the EU legislator should clarify its applicability in the context of the EIO. The evaluation team notes that Member States have different opinions regarding this matter. While some Member States assume it is a general principle in international cooperation, others interpret the absence of a specific provision in the Directive as permission to use the evidence for other purposes as well. The evaluation team agrees with the Polish authorities that it would be useful to clarify the application of the speciality rule in the context of the EIO (*see recommendation No 21*).

## 12. CONFIDENTIALITY

The Polish public prosecution service and the national courts have not encountered any problems relating to the rules on disclosure, and no situations in which a notification has been issued under Article 19(2) of the Directive have been reported by any other authorities authorised to carry out preliminary proceedings. Furthermore, there have been no reports of any Member State making use of that provision.

When Poland is the issuing State, depending on the stage of the proceedings under Polish law, an EIO must, in the same way as other material from the preliminary proceedings, be disclosed to the parties concerned – i.e. under general law, the suspect and the injured party – in accordance with Article 156 of the CCP and, as part of the final examination of the materials of the proceedings, on the basis of Article 321 of the CCP.

Article 156 of the CCP provides that, unless precluded by the need to ensure the proper conduct of the proceedings or to protect an important State interest, the parties as well as their defence counsel, attorneys, legal representatives and statutory agents may be permitted to examine the files pertaining to the case and to copy them. The decision on access to the file is issued, in the form of an order, by the public prosecutor during the investigation or inquiry. In judicial proceedings, the decision on access to the case file is taken by the court. After the indictment, the parties' access to the file is practically unlimited.

During the visit, the Polish authorities mentioned a case with Germany where the defence asked to see the EIO issued by Poland. The German prosecutor asked Poland for permission and it was given.

As the executing State, Poland takes the requirement in the Directive to keep an EIO issued in another Member State confidential seriously. If Poland receives an EIO to carry out a search and hear a witness, the Polish decision to execute the EIO for a search is served on the person concerned. However, the document does not specify that the search is about executing an EIO that also covers the hearing of a witness and only information on the house search is given. EIOs issued by another State will also not be forwarded to the person concerned.

When Poland is the executing State and information is required from banks, the banks are told that the measure is to be kept confidential. Poland has not encountered any problems with banks breaking confidentiality.

## 13. GROUNDS FOR NON-EXECUTION

### 13.1. General

The grounds for non-execution of an EIO are set out in Article 589zj of the CCP, which distinguishes between **mandatory** (paragraph 1) and **optional** (paragraph 2) grounds for non-execution.

Non-execution is mandatory when:

- (1) the court or the public prosecutor has not obtained the necessary permission to carry out an investigative measure with the participation of a person indicated in the EIO;
- (2) a final and binding judgment has been passed in a Member State of the European Union against the prosecuted person concerning the same criminal acts as are indicated in the EIO and, if the judgment is a conviction, the prosecuted person is serving the penalty or has served the penalty or the penalty cannot be served in accordance with the laws of the state where the conviction was issued;

- (3) the execution of the EIO may expose to danger a public official performing investigative activities or a person assisting a public official in the performance of such activities;
- (4) the EIO requires a witness hearing to be conducted concerning circumstances whose examination is inadmissible under the law;
- (5) the execution of the EIO would violate human and citizens' rights and freedoms;
- (6) a requested measure would pose a threat to national security;
- (7) the EIO concerns the temporary transfer to the state where the judgment would be issued of a person held in custody and the execution of the EIO would result in the extension of the period of deprivation of liberty with respect to this person.

In subparagraph 1, 'person indicated' may refer to a notary, lawyer, legal adviser, tax adviser, physician, journalist, person bound by statistical secrecy or public prosecutor (Article 180 of the CCP). The court may give permission to hear the persons indicated. According to the Polish police representatives, the same rule applies to undercover police officers. In such a case the permission of the police is needed to hear them. Subparagraph 4 refers to Article 178 of the CCP, which concerns lawyers and priests.

Non-execution is optional where:

- (1) the act for which the EIO has been issued, with the exception of acts indicated in Article 607w of the CCP, does not constitute an offence under Polish law;
- (2) the act for which the EIO has been issued was committed, in whole or in part, on the territory of the Republic of Poland or aboard a Polish vessel or aircraft and is not an offence under Polish law<sup>5</sup>;
- (3) the execution of the EIO would result in the disclosure of confidential information acquired during the performance of investigative activities or in connection with their performance<sup>6</sup>;

<sup>5</sup> This ground is not compatible with Article 11(1), point (e), of the Directive, according to which the condition for refusal is, in addition to the crime having been committed wholly or partly in the executing State, that it was **not** committed in the issuing state. The latter condition does not appear in Polish law.

<sup>6</sup> This ground is not to be found in its entirety in the Directive.

- (4) under Polish law, the investigative measure indicated in the EIO cannot be carried out in connection with the offence for which the EIO has been issued;
- (5) under Polish law, the investigative measure indicated in the EIO cannot be carried out in the proceedings in which the EIO has been issued;
- (6) the EIO concerns the temporary transfer of a person held in custody to the Republic of Poland or to the state where the judgment will be issued, and the person does not consent to it;
- (7) the EIO concerns an examination by means of technical devices making it possible to carry out this procedure remotely with simultaneous transmission of video and audio, and the accused who is to be examined does not consent to it;
- (8) the EIO concerns an examination of persons referred to in Article 179 § 1 or Article 180 § 1 and 2 as to circumstances indicated in these provisions.

The evaluation team notes that Polish law has a number of mandatory grounds for refusal whereas the Directive only lists optional grounds (Article 11 of the Directive). During the visit, the Polish practitioners explained that the grounds for refusal are mandatory so that they are in accordance with domestic law, where in some cases gathering evidence is not allowed. Furthermore, the evaluation team notes that Polish law seems to have grounds that slightly surpass the text of the Directive. It is therefore recommended that Poland consider limiting the grounds for refusal in the way mentioned in the Directive and to make them all optional as provided for in the Directive (*see recommendation No 4*).<sup>7</sup>

In practice, cases of refusal to execute an EIO are rare according to the Polish authorities.

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<sup>7</sup> The Polish authorities have argued that, in accordance with CJEU judgments in European Arrest Warrant cases, which in their view should also be taken into account when implementing the EIO, regarding the optional grounds for refusal "when implementing that provision, the Member States have a certain margin of discretion" (CJEU judgment C 42/11 of 5 September 2012, João Pedro Lopes Da Silva Jorge paragraph 33). Therefore, in Poland's view, the issue on how to regulate the grounds for refusal of an EIO remains within the competence of the Member States. Poland has shared this view with the evaluation team after the visit.

As the issuing State, Poland has encountered the following situations in which EIOs were refused:

- the offence regarding which the EIO was issued was not of a criminal nature (e.g. failure to fulfil marital or parental obligations);
- the offence in question did not appear on the list set out in Annex D to the Directive;
- the EIO related to the release of medical records concerning psychiatric treatment;
- the EIO requested a judicial and psychiatric examination of a suspect, a Polish citizen residing in another Member State, but was refused due to the language barrier without any prior consultation;
- the EIO was addressed to the central authority instead of to the authority competent to execute it.

Regarding the final two examples, the evaluation team notes that the refusal of the Polish EIOs does not seem to be in line with the Directive. Therefore, it is recommended that all Member States refrain from refusing EIOs on grounds not mentioned in the Directive and always consult the issuing State beforehand (*see recommendation No 18*).

Where there has been a refusal to execute EIOs issued by the Polish public prosecution service, or the suggestion that execution might be refused, the executing authorities were consulted and information exchanged, including via Eurojust. There have, however, been situations in which the executing authority did not give any indication that it might refuse to execute an EIO and did not consult the Polish authorities, instead simply returning the orders with no action having been taken. The reasons for the refusal were established in subsequent correspondence between the issuing and recipient authorities.

As the executing State, Poland has encountered the following situations which led to a refusal to execute an EIO:

- failure by the issuing authority to provide, within the set time limit, the required information relating to agreement on the duration of and the conditions governing the execution of the special investigative measures set out in the EIO;
- expiry of the prescribed time limit for retention of telecommunications data;
- requests for information on criminal history or background checks in relation to persons who did not have the status of suspected persons in the issuing State.

When discussing the last case of refusal, the Polish authorities had different opinions on whether it should actually have been executed. The prosecution service argued that criminal records cannot be requested for a witness. On the other hand, the judges present at the visit stated they would execute an EIO requesting a witness' criminal record if the credibility of the witness needs to be established. The evaluation team notes that Member States asking Poland for the criminal record of a witness will have different results depending on whether the EIO is executed by a public prosecutor or by a court.

As explained more in detail in Chapter 20.2, Polish law does not allow suspects to be heard by videoconference at the pre-trial stage in national cases, and it is therefore not possible to issue EIOs for that purpose. However, according to what was said during the on-site visit, the Polish authorities are able to execute such EIOs from other Member States without any problems.

According to the Polish authorities, on every occasion where there was an indication that the Polish authorities might refuse to execute an EIO, the Polish public prosecutors consulted with the issuing authority – most often by email – in order to find a suitable solution, possibly by making additions or sending further information. The issuing authorities were informed that failure to provide additional information within the set time limit might lead to a refusal to execute the EIO. On one occasion, the issuing authority did not provide the information requested and did not enter into any correspondence. The evaluation team considers the Polish approach of always contacting the issuing State to find a solution and resolve any problems that may arise during the execution of an EIO to be a best practice (*see best practice No 6*).

### 13.2. Dual criminality

#### *As the executing State*

Polish public prosecutors have carried out the measures set out in EIOs issued by other Member States without applying the dual criminality test to the offences listed in Annex A. Also, Poland will not demand dual criminality if the measure requested concerns evidence already in the possession of the court or the public prosecutor, information obtained from registers and databases available to the court or the public prosecutor executing the EIO, the hearing of a person on the territory of Poland, or evidence which does not require a decision or the identification of a telephone subscriber or an IP address in order to be admitted, obtained or examined. Polish legislation is in accordance with Article 10(2) of the Directive.

If the investigative measure indicated in the EIO is not available under Polish law or would be inadmissible in similar domestic circumstances, the EIO as such will not be executed. However, in such cases Poland notifies the issuing authority, giving it the possibility to change, supplement or withdraw the EIO. In addition to this, Poland, when possible, indicates an alternative investigative measure compliant with the EIO's objective.

In situations where the measure cannot be carried out in connection with the offence described in the EIO, Poland tries to check if there is any relation to other crimes for which dual criminality exists, such as organised crime.

#### *As the issuing State*

There have been occasional instances where the Polish public prosecution service has issued an EIO and the authority in the executing State has applied the dual criminality criterion to the categories of offences listed in Section G of Annex A. In one of these cases, for example, the executing authority submitted that fraud is what is known as a 'split offence' under its national law, and that the type of offence is determined by the amount of the damage. After consultation with that authority, however, and in view of the fact that the Directive does not make a dual criminality test mandatory in the case of fraud, the requested measure was executed.



In judicial practice, meanwhile, there has been no report of situations in which the dual criminality test was invoked or applied in relation to the categories of offences set out in Annex D. Poland has not seen any cases, as either the issuing or the executing state, in which the dual criminality test was applied in relation to the investigative measures listed in Article 10(2) of the Directive.

### **13.3. *Ne bis in idem***

Pursuant to Article 589zj of the CCP, the Polish authorities must refuse to execute an EIO if a final and binding judgment has been passed in a Member State of the European Union against the prosecuted person concerning the same criminal acts as indicated in the EIO and, if the judgment is a conviction, the prosecuted person is serving the penalty or has served the penalty or the penalty cannot be served in accordance with the laws of the state where the judgment of conviction has been issued. This ground for refusal is mandatory, which contradicts the Directive.

Usually, information about a previous judgment is brought by a suspect or a witness. In such cases Poland would use the EJN to obtain official information from the State in question. The Polish authorities, or at least the central authority, check in their registers to see if the person is in their files when they receive an EIO.

Thus far Poland has not had any cases, as the issuing or the executing State, where execution has been refused because of *ne bis in idem*.

### **13.4. Fundamental rights (Article 6 TEU and Charter)**

The ground for refusal provided for in Article 11(1), point (f), of the Directive is implemented in Polish legislation in Article 589zj of the CCP, pursuant to which the Polish authorities must refuse to execute an EIO if the execution of the EIO would violate human and citizens' rights and freedoms.

According to the Polish authorities, when Poland acts as the issuing State, most problems arise in hearing a person as a witness in situations where the person would be considered a suspect in the executing State. There are big differences between Member States about the status of a person at the early stages of investigation. States where a person is a suspect from early on, based on mere suspicion, will give the person the rights of a suspect. In other states, including Poland, a person is to be considered a witness until enough evidence is gathered against them, and must therefore enjoy the rights of a witness.

In practice the differences have been overcome by hearing the person as a witness with the right not to answer questions, if that answer might expose the witness or their next of kin to liability for an offence or a tax offence (Article 183 § 1 of the CCP).

Where Poland has acted as the executing State, there have been no cases of refusal to execute measures on the grounds that they were contrary to the fundamental principles of Polish law.

#### **14. TIME LIMITS**

The time limits of the Directive have been implemented directly in the Polish CCP.

##### *As the executing State*

According to the Polish practitioners, Annex B is usually sent by email within seven days and the time limits are usually complied with. If complex cases cannot be executed within the time limits, such as cases concerning VAT fraud, the Polish executing authorities contact the issuing State to explain that more time is needed. Delays in executing EIOs have occasionally occurred as a result of objective obstacles, such as the complex nature of the EIO, the extent of the evidence to be gathered, failure to appear on the part of the person to be heard, and failure on the part of obliged entities to provide documents. The need to obtain supplementary information from the issuing State may also delay execution, according to the Polish practitioners.

### *As the issuing State*

Where EIOs have been issued by Polish public prosecutors, there have been cases where the time limits for the execution of measures were not complied with. In the majority of such cases, the executing authorities did not give the reasons for the delay or the estimated time necessary for the decision on the recognition and execution of the EIO to be taken, and did not react to reminders. Furthermore, it is Poland's experience that confirmation of receipt of the EIO is not always provided.

The evaluation team would like to note that Member States should strive to execute EIOs within the time limits provided for in the Directive and should in any case inform the issuing State of any delay in execution (*see recommendation No 19*).

### *Urgency*

The Polish authorities believe that the degree of urgency is to be assessed by the issuing authority in the light of both planned measures and those measures set out by the issuing authority itself. The factors determining urgency could include, for example, an imminent trial date, the severity of the offence, the need to preserve traces or evidence to prevent the loss thereof, and the possibility of apprehending the person or persons involved in the act of committing the offence in question, i.e. generally speaking, ongoing proceedings where the situation requires swift action.

There have been cases where urgent EIOs issued by Poland were handled in accordance with the standard procedure. Information on the reasons for any delays in their execution was not provided.

As the executing authority, the units of the public prosecution service generally comply with the time limits for executing urgent EIOs, and where this cannot be done, they are carried out as soon as is possible. Measures designed to avoid the potential destruction of data or loss of evidence are also implemented before the EIO is executed. The public prosecution service takes a decision as to the execution of urgent EIOs within 24 hours of their receipt. On many occasions, however, the execution of such EIOs sent in English because of the urgency is hampered (or delayed) by the lack of a Polish translation.

## 15. LEGAL REMEDIES

### *As the issuing State*

When Poland is the issuing State, there is no right of appeal against the issuing of an EIO as such. However, if an EIO concerns a measure that can be challenged in national cases, the decision to issue an EIO replaces the national decision to order the particular measure and the EIO may therefore be appealed against, for example with searches. As a national search warrant can be appealed against, the issuing of an EIO concerning a search may also be appealed against. When the Polish authorities issue an EIO for a search, they attach the domestic order which includes a description of how the person concerned can appeal against the measure in Poland. The domestic order will be delivered to the person in the other Member State. When handling the appeal, the court will check the proportionality and necessity of the measure. The right to appeal is dependent on the measure, which means that not all measures in the EIO can be appealed against.

Pursuant to Article 302 § 2 of the CCP, parties and persons who are not parties to the proceedings may appeal against procedures other than decisions and orders, if such procedures violate their rights. This means that e.g. a witness to be heard by videoconference may file a complaint against the issuing of an EIO.

### *As the executing State*

In general, the execution of an EIO may not be appealed against (Article 589ze § 7 of the CCP). However, if there is a specific provision concerning a decision to execute a measure in national law identical to that specified in the EIO and allowing for an appeal, appeal is possible. When appealing against a measure, the complainant may only request an examination of whether the decision to execute the EIO complies with Polish law and whether it was executed correctly. The issuing authority will be informed immediately of the lodging of an appeal and of the content of the decision reached following that appeal (Article 589ze § 8 of the CCP).

The time limit to file an appeal is seven days starting from the date of the notification. There is no suspending effect on transferring the evidence. However, the Polish authorities acknowledge when transferring the evidence that an appeal may be filed. Thus far Poland has had no appeals against the issuing of EIOs.

## **16. TRANSFER OF EVIDENCE**

During the visit, the Polish authorities explained that the way evidence is transferred depends on the nature and size of the evidence. Large objects can be picked up by the issuing State. When the issuing State is a neighbouring state, evidence can be handed over at the border. Documents are sent by post or by email and liaison officers can be used. Poland is also willing to send evidence electronically, depending on what works best for the issuing State. Poland looks forward to the full implementation of e-EDES, which will enable evidence to be transmitted securely by electronic means.

In general, the results of the execution of an EIO are sent to the requesting party by the prosecutor's office, that will also check the results before sending them when an EIO has been executed by the district public prosecutor's office. When the results have been sent, the public prosecutor from the circuit prosecutor's office informs the central authority, in case it was already involved in the monitoring of the execution of the EIO, that the outcome has been forwarded and the case is closed.

## **17. OBLIGATION TO INFORM – ANNEX B**

Like many other Member States, Poland finds that Annex B is quite often not sent in time or at all. In such situations, the executing State's authority is contacted to ask about the status of the order and request that the completed Annex B is sent. These queries and requests are sometimes sent via Eurojust or the EJM contact points, in particular if the executing State has not responded to an earlier reminder. In practice, it may be checked whether the EIO has in fact been delivered by the postal service.

On the other hand, Poland has experienced cases where Annex B was not sent but the time limit for executing the measures set out in the EIO was complied with.

The evaluation team was told that Polish prosecutors and judges always send Annex B first thing (and within the seven-day time limit) when they receive an EIO from another Member State. It is sent to the issuing authority mentioned in Annex A. No changes to Annex B were suggested by the Polish authorities.

The evaluation team notes that Annex B has an important function in letting the issuing State know its EIO has been received and taken care of. Annex B is also crucial to enabling direct contact between authorities. Therefore, the evaluation team recommends that all Member States improve the practice of sending Annex B in reply to all EIOs (*see recommendations No 20*).

## 18. COSTS

In the experience of the Polish practitioners, there have been no reports of foreign authorities being consulted as regards the allocation of the costs associated with the execution of an EIO. There has been one case in which Poland sent an EIO to another Member State for the purpose of hearing a national of that country detained in a psychiatric institution as a suspect and seeking an expert opinion on the question of that person's soundness of mind at the time the offence was committed. The executing State replied that the opinion could be commissioned only at the expense of the issuing State (Poland). Due to the cost of drawing up such an opinion, it proved impossible to meet that condition. As a result, the EIO was withdrawn, and the opinion was drawn up in Poland on the basis of psychiatric documentation and records. Poland mentioned that in a few other cases, the costs were shared between the issuing and executing States, following consultations, without complications.

At the same time, the Polish practitioners stated that costs which (grossly) exceed the expenditure had the measure been executed in Poland could be regarded as exceptionally high costs for the issuing State. Exceptionally high costs may be those which are manifestly disproportionate to the type of evidence obtained, according to the Polish authorities.

Another criterion that may be taken into account is if the costs associated with issuing an EIO would be several times the amount of the damage incurred. Some Polish practitioners indicated as a criterion an amount exceeding several thousand Polish złoty (e.g. more than PLN 3 000 or PLN 5 000). The highest costs are generated by the consultation of experts, in particular in cases of a rare specialism. The above criteria depend on the nature of the case and the type of investigative measure requested. The costs of appointing defence counsel, whose involvement in the case is mandatory, are not considered exceptionally high by Polish public prosecutors. No such cases have been reported in practice prior to the execution of an EIO.

In the judicial practice of the Polish national courts, the costs of expert specialist opinions – but not the costs of appointing defence counsel – are regarded as a criterion for designating costs as exceptionally high.

Negotiations with regard to costs are conducted by the specialised public prosecutors from the circuit prosecutor's offices. Sometimes an expert is needed to calculate the costs. The use of experts can be very delicate, since a defendant who is ultimately found guilty has to pay all the costs, including the costs of the expert. If an expert is needed for an incoming EIO, the public prosecutor's office has to pay the costs.

## **19. COORDINATION OF THE EXECUTION OF DIFFERENT EIOS IN DIFFERENT MEMBER STATES AND/OR IN COMBINATION WITH OTHER INSTRUMENTS**

According to the Polish authorities, in cases in which parallel or linked proceedings were ongoing in several Member States and searches and/or other investigative measures had to be executed simultaneously on a single day, any difficulties that arose were resolved by directly consulting the authorities of the other states. The support of Eurojust or EJM contact points has often been sought to coordinate measures, especially when the measures were to be carried out on a single day.

In these situations, the Polish authorities are aware of the fact that they can ask for a coordination centre to be set up within Eurojust. Poland has participated several times and found it very useful. These situations are reserved for the most serious crimes, handled by the units for organised crime and corruption. EJM's support has also proven to be very valuable in many cases. Poland has also taken part in several JTs.

## **20. SPECIFIC INVESTIGATIVE MEASURES**

### **20.1. Temporary transfer**

Article 22 and 23 of the Directive were transposed into Polish law by Chapters 62c and 62d of the CCP.

#### *As the issuing State*

Provisions on the temporary transfer of a person to Poland are stipulated in Article 589z of the CCP. These are applicable regardless of if a person is held in pre-trial detention or serving a final and binding sentence of imprisonment or confinement or is subject to a custodial measure.

Pursuant to Article 589z § 2 of the CCP, a temporarily transferred person is protected in general from any further prosecution, arrest or detention for an offence not specified in the EIO or committed before entering Polish territory. Furthermore, they will not have to serve a sentence imposed for such an offence.

Neither the Polish public prosecution service nor the national courts have reported any cases regarding the temporary transfer of a person held in custody to Poland.



If it is necessary to hear a suspect at the pre-trial stage, the Polish practitioners mentioned they would probably request a hearing abroad in the presence of Polish officials, especially if a transfer would be refused. A hearing cannot be conducted by videoconference in the investigative phase, as the possibility is not provided for in the Polish CCP. However, the courts could and most probably would resort to such measure if it became necessary during the trial phase.

#### *As the executing State*

If the requested person is deprived of liberty on the territory of Poland, in accordance with Article 589z § 4 of the CCP the competent circuit court must hear them beforehand to establish whether consent to the envisaged surrender will be given.

The necessary statement has to be taken in a court session upon request of the circuit public prosecutor's office. The person concerned is entitled to be represented by a lawyer, although this is not a general requirement. Article 79 § 2 of the CCP demands that a lawyer be appointed only under certain circumstances, such as if a lack of the financial means necessary to engage a lawyer, or poor health, would hinder the person's ability to make a sound decision without assistance from a lawyer.

Article 589zj § 2(6) provides that if consent to the transfer is not given, execution then may be refused, which allows the Polish authorities discretion to comply with such a request regardless of the absence of consent.

Therefore, in cases of a request for a temporary transfer where the presence of the person would serve solely to identify them, for example, the Polish practitioners stated that they might surrender the person concerned even without consent.

However, recourse to this legal instrument has so far been made only on rare occasions. At the pre-trial stage there has been only one case and there the suspect consented to his transfer in order to cooperate in identifying locations on the territory of the requesting country. At the trial stage, Poland has encountered one case and there the EIO was ultimately withdrawn by the issuing State.

## 20.2. Hearing by videoconference

Under Article 177 of the CCP, witnesses may be heard via videoconference in the course of the pre-trial stage. The same applies to expert witnesses under Article 197 § 3 of the CCP.

On the other hand, Polish legislation does not allow a suspect (i.e. suspects and accused persons) to be heard by videoconference at the pre-trial stage. The Polish authorities explained that Article 177 of the CCP is very specific in that it only relates to witnesses. This is why, as the issuing authorities, the Polish authorities cannot make use of this instrument to hear suspects via videoconference at the pre-trial stage. The underlying reason for this restriction is the concern that not all procedural safeguards ensuring the suspect's rights can be complied with, especially the need to properly notify the suspect of the charges being brought against them. However, the evaluation team is pleased to note that, when Poland is the executing country, this provision does not prevent the Polish authorities from complying with such a request from another Member State.

In opposition, at the trial stage, it is permissible under Polish law for an accused person to be heard via videoconference. Article 374 § 1 of the CCP entitles them in general to participate in the main trial. Furthermore, the presiding judge or the court can decide that their presence is mandatory. Hence Poland could issue a request to another Member State to hear an accused person via videoconference at the trial stage.

Article 376 of the CCP provides that if an accused person refuses to appear in court, they can be arrested and brought to court by force if their presence was made mandatory beforehand and was found indispensable.

If summoned, witnesses are generally obliged to appear and testify pursuant to Article 177 of the CCP. Article 285 of the CCP provides for disciplinary penalties if they fail to comply with such an order, ranging from imposing a fine to arresting them and bringing them forcibly to court in specific cases defined in Article 285 § 1 of the CCP.

Pursuant to the Polish transposition law (Article 589zj § 2(7)), there is an optional ground for refusal if the accused person does not consent to a hearing via videoconference. However, the Polish practitioners stated that the suspect or accused must give their consent to be heard via videoconference. In practice, the Polish authorities mentioned that there have been no cases with Poland as the executing State in which the suspect/accused did not consent to a hearing via videoconference.

Under Polish law, it is not possible to issue or execute an EIO in order to ensure the participation of the accused person throughout the main trial. The EIO is an instrument intended to gather evidence and cannot be used to ensure the participation of a party in the proceedings. However, during the visit, the replies from the practitioners were more nuanced and one of the Polish judges mentioned that she would order the execution of such an EIO. This gave the evaluation team the impression that different practitioners from the judiciary might have different views on this issue. In addition, the practitioners mentioned that they were awaiting the outcome of a case pending before the CJEU (Case C-285/23, *Linte*), where clarification was being sought on whether the hearing of a person via videoconference under the Directive may also be used to ensure the participation of the accused person in the trial. In the meantime, the CJEU has issued a judgment in which the Court ruled it will not decide on the requests for a preliminary ruling<sup>8</sup>.

Regarding the practical arrangements, both district public prosecutor's offices and circuit public prosecutor's offices have the necessary equipment to hold a videoconference. The same applies to the courts. A general platform called 'e-conference', hosted by a server belonging to the Ministry of Justice, is often used; the platform makes it easy to set up a videoconference because it requires only a laptop and a camera. It is equally easy for the other Member State to join in on an e-conference hearing. The evaluation team appreciates this easy-to-use tool, which makes it easy to hold hearings via videoconference between Member States (*see best practice No 7*). The units of the Polish public prosecution service have not identified any problems in relation to where a hearing via videoconference takes place, as either the issuing or executing authority.

Polish practitioners regularly make use of the EJN Atlas to identify the competent authority so that their request is properly delivered.

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<sup>8</sup> ECLI:EU:C:2024:462.

During the visit, an example was discussed where the Polish court, as the issuing authority, had to consider whether the EIO had been executed in accordance with Polish law. More specifically, the hearing in the executing State had been conducted by the police, whereas Polish law requires a judge to be present in that situation. In the end, the hearing in question was admitted as evidence in Poland, since it had been conducted on the basis of the corresponding legal provisions of the executing country. The evaluation team asked whether Poland had asked the executing State to execute the Polish EIO in the presence of a judge in order to fulfil the requirements. The judge present replied that they try to be more pragmatic and, based on the principle of mutual trust, accept the execution of an EIO in accordance with the law of the executing State.

Regarding the status of the person to be heard, the Polish public prosecution service and the courts generally have not encountered any problems, as either the issuing or the executing authority. However, an example was mentioned where a problem had arisen on the part of the Polish public prosecutor executing the EIO because of differing descriptions of the status of the person to be heard. The issuing State had described the person in question interchangeably as both a witness and a suspect in connection with the same EIO. No such situations have been reported in the practice of the Polish national courts.

If Poland, as the issuing State, hears a witness located abroad via videoconference, Poland still has jurisdiction to prosecute the witness in the event of perjury.

Poland, as the issuing or the executing State, has not experienced any cases where a hearing via videoconference was refused because it would be contrary to the fundamental principles of law.

### **20.3. Hearing by telephone conference**

Article 25 of the Directive has not been transposed into national legislation. Polish national legislation (Article 177 of the CCP) mentions image *and* sound and thus conducting a telephone conference is not possible. Polish practitioners do not see any pressing practical need to introduce such a provision into national law.

So far, Article 177 § 1a of the CCP, which provides for the examination of a witness by means of technical devices, to be carried out at a distance with simultaneous direct transmission of the image and sound, has proved sufficient to cater to practical necessities.

Up to now the Polish authorities have not encountered any EIOs concerning a telephone conference. If one were to be received, Polish practitioners would suggest to the issuing State that a videoconference be held instead.

### **20.4. Information on bank and other financial accounts and banking and other financial operations**

Article 105 of the Polish Banking Law implements Articles 26 and 27 of the Directive, on obtaining banking and financial information.

Article 105(2), point (c), of the Polish Banking Law provides that a court or a public prosecutor is entitled, in connection with carrying out an application for legal assistance made by a foreign State, to request the provision of information covered by banking secrecy, under a ratified international agreement binding the Republic of Poland.

The Polish authorities explained that the public prosecutor's office can demand the requisite information at the investigative stage without the need for authorisation from the circuit court, except where the investigation is still at the *in rem* stage, when authorisation from the circuit court is always necessary.

Poland has established a central bank register which makes it possible to verify if someone holds a bank account at any bank in Poland. Information can be sought regardless of whether it concerns a suspect, witness or company, as long as it is necessary for the investigation. To prevent any harm to the ongoing investigation, the bank is always ordered not to disclose the request to its customer.

During the visit, the evaluation team drew attention to Article 28(1), point (a), of the Directive, which allows for the real-time monitoring of banking or other financial operations. The Polish authorities explained that they have not transposed this provision into national law, which means that monitoring bank accounts in real time is not possible in Poland, either in a domestic case or if requested in an EIO. The practitioners mentioned that, based on the Banking Law and the Money Laundering Act, banking information can be gathered on a data carrier and handed over to the issuing State. However, in the view of the evaluation team, money can move fast and it is very important to have the possibility of monitoring banking information in real time. That is why it is recommended that Poland implement Article 28 of the Directive in its national legislation (*see recommendation No 5*).

## **20.5. Covert investigations**

Polish law does not provide an explicit definition of what is to be understood as a covert investigation.

In general, the term encompasses all specific investigative measures taken by the police, as well as by bodies including the Internal Security Agency, the Border Guard, the NRA and the CBA, to collect and verify information pertaining to offences. These measures are used to instigate proceedings or as part of an already ongoing investigation.

The CCP allows EIOs to be issued and executed in relation to the special investigative measures listed therein. The police have not reported any problems with covert EIO investigations in the context of preliminary proceedings.

If a preliminary investigation is carried out by the police, the involvement of judicial authorities is only required if the conditions of Article 19 of the Police Act are fulfilled.

Article 19 of the Police Act provides for situations where the police want to use a specific type of covert measure. Article 19(6) of the Police Act defines three types of covert investigations:

- (1) checking the content of correspondence,
- (2) checking the content of parcels,
- (3) using technical resources which make it possible to obtain information and evidence in secret and record it, especially the content of telephone conversations and other information transmitted via the telecommunications networks.

These three measures together fall under ‘operational control’, which is the term the Polish authorities use to refer to the use of the three measures mentioned above. Operational control may only be ordered for specific crimes and where other means are ineffective or probably ineffective (Article 19(1) of the Police Act). The circuit court may order operational control, upon a written request from the Police Commander in Chief, submitted after obtaining the written consent of the general Public Prosecutor or a written request from the Voivodship Police Commander, submitted after obtaining written consent from the circuit public prosecutor with territorial competence.

Controlled delivery, therefore, is normally ordered by the regional/national head of police and approved by the competent circuit prosecutor. Replacement of illicit trafficked goods is possible as long as the transport itself can be monitored, but that often proves to be difficult, according to the Polish police. In a case where illicit trafficked goods are indeed replaced and it leads to a successful prosecution, under Article 13 § 2 of the Polish Criminal Code courts are permitted to mitigate the sentence being pronounced for the crime if they deem it appropriate.

During the visit, the Polish police explained that, even with thorough preparation and the allocation of ample resources, controlled deliveries often fail due to circumstances beyond the control of law enforcement authorities. In any case, the substance involved in the smuggling scheme has to be secured to establish its criminal nature and to perform e.g. a chemical analysis for the purpose of evidence, especially when it comes to drugs. In this regard Poland is often used as a transit country for transporting precursors designed to produce drugs.

In the practice of the Border Guard, ‘controlled purchases’ are carried out within the framework of special investigative measures and may consist of proposing to acquire, dispose of or seize objects originating from a criminal offence which have been forfeited, or whose manufacture, possession, transport or trafficking is prohibited, as well as receiving or providing a financial advantage. Such measures are executed by officials of the Undercover Border Guard.

If, in the course of operational control, evidence should be obtained facilitating the institution of criminal proceedings or significant to the criminal proceedings in progress, the Police Commander in Chief or the Voivodship Police Commander provides the competent prosecutor with any and all materials collected during operational control, if necessary, with the request for institution of criminal proceedings.

In addition to the covert measures explicitly mentioned in Article 19(6), points 1 to 3, of the Police Act, there are also many others which are ordered and approved only by the police, such as the deployment of an undercover agent. During the visit, the Polish authorities explained that the other covert measures available to the police are defined in confidential internal police documents. It was not possible to obtain more information on the nature of these other covert measures within the competence of the police.

The police practitioners did not report any practical problems while making use of the covert measures at their disposal. Their use is usually based on a bilateral agreement between the police authorities involved, which is why the EIO as a preparatory instrument is almost never applied.

Polish legislation does not allow a civilian to be used as a undercover agent. If a law enforcement agent from another Member State needs to be used for criminal proceedings, an EIO for special investigative measures may be issued. This can also be achieved by means of international police cooperation. In Poland, it is not necessary to issue an EIO in such situations; a reasoned request is sufficient.

Even though Polish law differentiates between covert investigations with and without judicial involvement, all incoming requests for legal assistance involving such measures have to be directed to the competent circuit public prosecutor’s office, which will send it on to the competent police authority for execution.



In any case, an incoming EIO should mention a previous agreement between law enforcement authorities on the way the requested measure is to be carried out. In line with Article 29(4) of the Directive, Polish law demands that if the EIO comprises a request for a special investigative measure, the relevant Polish services and the services of the issuing State must agree on the duration of and the conditions for carrying out the measure (Article 589zi § 6 of the CCP). The execution of the EIO may be refused if the information on the agreement is missing and the issuing authority does not provide this information within the time limit indicated by the court or the public prosecutor.

By respecting this procedure, the best way forward can be agreed upon at an early stage. In one case the Polish authorities received a request for observation measures, but after consulting with the issuing State it was decided that opening a Polish investigation would be more likely to ensure an efficient prosecution.

As Polish public prosecutor's offices receive a large number of EIOs for the use of covert measures, information on previous contacts between police authorities also helps them decide where to send the request for execution.

When Poland acts as the issuing State, the same procedure has to be observed. Furthermore, EIOs sent to other Member States asking for covert investigative measures to be used are usually drafted by the police and validated by the competent circuit public prosecutor's office before they are sent out. If, on the other hand, everything is handled solely by the police, no EIO is used. Because it is very possible that an EIO in relation to the use of covert investigative measures will be needed in the executing Member State, the evaluation team believes it would be helpful if the Polish police enquired beforehand whether an EIO is needed for the executing State to be able to execute the request (*see recommendation No 6*).

In the vast majority of the Polish public prosecution service, there have been no reports of differences in national law complicating the execution of an EIO with regard to covert investigative measures. In practice, only units within the remit of the Szczecin regional public prosecutor's office have encountered problems due to differences in national law relating to the transmission of correspondence and confidential (classified) material.

## 20.6. Interception of telecommunications

Interception of telecommunications is part of operational control as set out in Article 19(6), point 3, of the Police Act. It encompasses the use of technical resources which facilitate the obtaining of information and evidence in secret as well as the recording thereof, especially the content of telephone conversations and other information relayed via the telecommunications network. Thus, the provision is not limited to phone tapping but could also be used as the legal basis for other measures involving secretly monitoring and recording other forms of communication such as email correspondence or conversations between individuals. It therefore also includes other types of interception, such as car-mounted listening devices (vehicle eavesdropping), room eavesdropping devices and malware.

The prerequisites to be fulfilled before a court order can be issued when interception is to be applied during the course of the criminal proceedings, are laid down in Article 237, Article 589w § 4 and Article 589ze § 10 of the CCP (surveillance and telephone tapping). Surveillance and phone tapping are only allowed when the proceedings are in progress or if there is justified concern that a new offence might be perpetrated that consists in one of the crimes listed in Article 237 § 3(1) to (19) of the CCP. Article 237 § 3a provides that it is possible to disclose assets subject to forfeiture referred to in Article 45 § 2 of the CCP or Article 33 § 2 of the FCC. The measure can be ordered with regard to a person suspected of such a crime, an accused person, an aggrieved party or any other person whom the accused may contact or who may be connected with the offender or with the potential offence.

If interception has been ordered, in principle all conversations are initially recorded regardless of their content and participants. Afterwards they will be analysed by the police to assess whether they could serve as evidence. If it turns out that a conversation is protected under the Polish CCP, it cannot be used as evidence.

Due to the nature of interception as a very intrusive measure, Article 19(1), point 8, of the Police Act safeguards the rights of individuals, stipulating that it can be used only when other means appear ineffective or there is a significant probability of the other means being ineffective or useless. The national court also referred in this context to the exhaustion of other evidence as another criterion for assessing the necessity and justification of interception of telecommunications.

When Poland is the executing State, the Polish authorities assume based on the principle of mutual trust that the conditions for interception of telecommunications have been met in the issuing State and therefore do not demand any further explanation unless the description of the facts gives rise to concern.

In one case a practical problem arose as the number intended to be the subject of interception was outdated when the request was received. Although the Polish authorities are very flexible and can try to identify the new number at police level without an additional request, a new EIO will be needed if the new number is successfully identified and needs to be intercepted instead of the old one.

Notifications have regularly been received using Annex C in cases where the interception of telecommunications authorised by the competent authority of another Member State required no technical assistance and the communication address of the subject of the interception was used on Polish territory. In this respect the Polish authorities practice a very flexible approach and may also authorise interception within the scope of Annex C which may happen in the future.

As the issuing State, Poland has not encountered any cases asking for interception of telecommunications in which execution was refused because the measure was not available in a similar domestic case in the executing Member State.

The Polish practitioners reported that they do not make use of Annex C for phone tapping since the Polish telecommunications system limits interception to Polish territory only, due to technical reasons. Interception can therefore continue abroad only with technical assistance from the country which has the relevant phone logged in its system.

Under Polish law, Annex C is generally confined to phone tapping. Therefore, other measures demanding secret monitoring and recording should be requested using Annex A.

Nevertheless, the Polish authorities receive Annex C notifications from other Member States quite often in relation to the use of a GPS system to determine the location or route of a car. There was no unanimous view among practitioners as to how to respond to such requests. Some prosecutors would accept them in accordance with Article 31 of the Directive while others believe that Annex A should be used.

Furthermore, in such a scenario police cooperation under Article 40 of the CISA also comes into play. On the other hand, if the installation of a GPS device is linked to wiretapping, then the use of that device falls within the scope of interception of telecommunications. The evaluation team notes there are different views between Member States as to what exactly falls under the term ‘interception of telecommunications. A clarification from the EU legislator on this concept in the context of the EIO would be beneficial for the practical application of the Directive (*see recommendation No 22*).

In any case, if these measures are executed as part of special investigative measures covered by an EIO issued by another Member State, the execution of the EIO should be preceded by an agreement between the issuing State and the Polish authorities regarding the duration of and conditions governing the execution.

Under Polish law wiretapping is carried out in a restricted covert way. Only a specially certified police officer is entrusted with performing such a task. The conversations listened to are in fact intercepted in real time but cannot be made available immediately to the requesting country due to technical constraints. The only way to prevent a delay in the flow of information is to invite a foreign police officer to Poland, grant them one-off approval to access confidential information and then allow them to listen to the conversation in real time.

## **20.7. Cross-border surveillance**

In Poland, Article 40 of the CISA is used as a cooperation instrument by the police and other services that can conduct special investigative measures both during the preliminary proceedings and before they are officially opened (Article 589w § 7 of the CCP). In urgent situations, the request for assistance in controlled delivery/cross-border surveillance is issued by the authority conducting those activities. In such cases, the results of cross-border surveillance are usually obtained via SIENA (Secure Information Exchange Network Application).

In non-urgent situations and ongoing cases where operational cooperation has already been established, the Polish authorities argue that the competent authorities will agree on the scope of the request (including surveillance) that will be issued by means of an EIO. Before issuing the EIO, it is necessary to agree with the executing State on the duration of and conditions for carrying out this special investigative measure. In relation to investigative activities falling within the scope of the cross-border surveillance, the police (or other services) can issue an EIO, which will always be subject to approval by the competent court or prosecutor. This is also necessary in urgent cases. The same applies to activities carried out by the Polish authorities based on EIOs from other Member States, provided they are permissible in a similar domestic case and after prior agreement on the duration of and conditions for carrying out the activities between the Polish services and the services of the issuing state. The results of the cross-border surveillance are then documented as evidence in the feedback report, according to the Polish authorities.

The evaluation team argues that there is no clear approach in cases of cross-border surveillance. There are differences between Member States as to whether and to what extent the measure falls under police cooperation (Article 40 of the CISA) or judicial cooperation. In addition, within the judicial cooperation field different legal bases could apply as regards the Directive. This raises some questions as to the relationship between the Directive and the CISA (in particular Article 40), and the evaluation team therefore calls for clarification from the Commission in order to streamline the practice across Europe and avoid misunderstandings (*see recommendation No 23*).

## **20.8. Other investigative measures (e.g. house search)**

The conditions to be met for a house search in Poland are set out in Article 219 of the CCP. A search of premises may be carried out to locate objects which might serve as evidence in criminal proceedings, if there is good reason to suppose that the objects sought are to be located there. Hence the measure can affect suspects as well as ‘third persons’ as long as there is reason to believe that evidence can be retrieved.

Article 220 § 1 of the CCP stipulates that a search may be conducted by the state prosecutor, or, with a warrant issued by the court or the state prosecutor, by the police, and in cases specified in law, by another agency. Complaints against such orders have no suspensive effect.

If objects or documents to be seized are related to State, official, professional or other secrets protected by law, the procedural safeguards of Article 225 and 226 of the CCP have to be observed. If a member of the defence counsel or other person required to surrender objects, or whose premises are searched, declares that documents or other objects discovered in the course of the search relate to facts connected with the performance of the duties of the defence counsel, the agency conducting the search must leave the documents or objects with that person, without ascertaining their contents or appearance. If such a declaration gives rise to doubts, the documents or objects have to be submitted to the court, which will return them either in whole or in part to the person from whom they have been taken or will issue an order for their seizure for the purpose of the proceedings.

If the premises of a member of the bar are subject to a search, a member of the bar must be present to ensure that the search is carried out lawfully.

Permission can be granted for foreign investigators to be present during the execution of a search. Furthermore, the evidence collected can in principle be handed over directly on the spot.

According to the Polish authorities, problems may arise if an incoming EIO asks for searches to be conducted simultaneously in several locations within the territorial jurisdiction of separate public prosecutor's offices. In this case direct contacts between all executing authorities involved would have to be established in order to synchronise the requested activities.

## 21. STATISTICS

Poland was asked to provide statistics for the last five years. During the visit, the Polish authorities provided the evaluation team with the following statistics for the prosecution service.

**EIO Statistic**  
**common units of the Prosecution Service (2018-2022) table**

Data for year	EIO issued during the course of pretrial proceedings			EIO incoming Common units of Prosecution Service		
	Number of EIOs sent abroad	Number of EIOs executed by the requested Member State	Number of EIOs refused by the requested Member State	Number of incoming EIOs	Number of EIOs executed	Number of EIO refused
2022	6779	4864	26	4058	3242	29
2021	6750	5268	20	4100	3352	22
2020	6583	4033	18	4067	3308	27
2019	6702	3942	21	4358	3341	45
2018	3716	995	13	1905	1264	2
<b>Total Number</b>	<b>30530</b>	<b>19102</b>	<b>98</b>	<b>18488</b>	<b>14507</b>	<b>125</b>

In general, the Polish authorities noted that the numbers were stable from 2019 to 2022. The numbers have risen since then.

Unlike the prosecution service, the Polish courts do not have a central case management system. Nevertheless, the courts were able to provide the evaluation team with the following statistics.

## Court statistics for the first half of 2023

- Requests from state courts to Member States on the basis of an EIO approving special investigative measures – 25.
- Requests from a Member State of the European Union to a Polish state court – 26 received in total, of which 24 were processed.
- Requests from a Member State to a Polish district court – 71 EIOs received, of which 55 were processed.

The evaluation team is of the opinion that it would be very useful to have statistics from the courts in relation to EIOs. The evaluation team therefore recommends to Poland that the Polish courts should also collect statistics on EIOs (*see recommendation No 7*).

## 22. TRAINING

The central institution responsible for organising training and professional development for staff of the ordinary courts and the public prosecution service is the National School of the Judiciary and Public Prosecution (KSSiP), which was established pursuant to the Law of 23 January 2009 on the National School of the Judiciary and Public Prosecution (KSSiP Law). It opened on 4 March 2009.

KSSiP organises international, national and online training courses. In addition, KSSiP organises conferences, symposia and seminars. It is also involved in publishing. The training covers various aspects such as criminal law, criminal procedural law, civil, economic and family law, and other areas of law. The training is provided by qualified practitioners.

The training is open to judges, public prosecutors, assistant public prosecutors, court registrars, court assistants, public prosecutors' assistants, and officials of the courts and public prosecution service.

Training is not obligatory, but part of a lifelong-learning scheme. There is a calendar on the website and individuals can enrol if there are places available. Trainers and methods are evaluated based on questionnaires. The questionnaires have to be filled in by the course participants before they receive their certificate.



The procedure for selecting lecturers at KSSiP is regulated by Chapter 5 of the KSSiP Law.

Pursuant to Article 53 of the KSSiP Law, lecturers at KSSiP may include judges, prosecutors, academic teachers, and other individuals with specialised knowledge in a particular field, as well as retired judges and prosecutors whose knowledge and professional and teaching experience mean they can perform the role properly. Therefore, any practitioner or legal theoretician with specialised knowledge can declare their availability to give lectures as part of continuous education for judges or prosecutors, or declare their willingness to give lectures for trainee judges or prosecutors.

KSSiP's Programme Council reviews the candidates for lecturers based on the information provided by the school director. The Programme Council then issues a resolution approving or rejecting the candidates. The KSSiP director then submits the approved candidates to the Minister for Justice. The minister may object to the candidates within 21 days; failing to do so within the prescribed period means that the minister has no objection. The Minister for Justice does not justify the decisions. The Polish authorities did not provide the evaluation team with the reasoning behind conferring these powers on the Minister for Justice. However, candidates have the right to file a complaint based on administrative procedure regulations, which the competent provincial administrative court will review.

Training that involves a mix of public prosecutors and judges is considered very useful, since issues are addressed in different ways. However, not every topic is of interest to all the different professions.

It is mandatory for attorneys to attend training. This training is organised by the regional bar. There is a wide range of online and in-person courses available, including courses in relation to the EIO.

To date, 26 courses (a total of 66 sessions) have been held on the EIO, and a total of 3 458 people have been trained. Ten training courses on this topic have already been held in or are planned for 2023-2024.

It should be noted that Polish law enforcement does not have access to the training provided by KSSiP. Training on the EIO has been organised for the police in recent years but it did not seem to the evaluation team to be part of the standard training programme for the police. Given the important role of Polish law enforcement in the context of the EIO, the evaluation team recommends that Poland consider providing training on international cooperation to its law enforcement agencies (especially to the police) in a more structured manner (*see recommendation No 8*).

Since the EIO entered into force, KSSiP has organised 31 courses in which the EIO was addressed. These include courses devoted entirely to the EIO or where the EIO was included in a more general course on, for example, international cooperation in criminal matters. In addition, five courses addressing the EIO are planned for or have already been held in 2024. The evaluation team commends the Polish authorities for the large number of courses on the EIO and mutual legal assistance available to practitioners. It is considered to be a best practice and a good example for other Member States (*see best practice No 8*).

## **23. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES**

### **23.1. Suggestions from Poland**

In general, Polish practitioners view the EIO as an effective and efficient instrument for gathering evidence within the EU. The Polish authorities noted that the EIO is very commonly used and that it has greatly increased the speed with which evidence from another Member State can be obtained.

Nevertheless, the Polish practitioners did identify some practical issues they were faced with in relation to the day-to-day application of the EIO:

- issues relating to (vague) descriptions of the requested measures;
- issues relating to the translation of EIOs;
- failure to keep the EJN Atlas updated and, consequently, difficulties in determining the correct executing authority;
- non-compliance with certain formalities, creating problems for the admissibility of evidence;
- difficulties in establishing direct contact;
- failure to comply with time limits.

All in all, the Polish authorities believe the EIO works well in practice but there is room for improvement when it comes to the level of communication between the issuing and executing authorities, which is always key for successful international cooperation between Member States.

## 23.2. Recommendations

Regarding the application and implementation of the Directive, the team of experts involved in assessing Poland found the Polish system to be satisfactory.

The evaluation team sees fit to make a number of suggestions for the attention of the Polish authorities. Furthermore, based on the various good practices identified, related recommendations are made for the attention of the EU. Poland should conduct an 18-month follow-up to the recommendations referred to below after this report has been approved by COPEN.

### *23.2.1. Recommendations to Poland*

Recommendation No 1: Polish authorities are encouraged to inform the executing authority in time regarding the obligation for Polish law enforcement authorities to reach an agreement relating to the way the requested covert investigation methods are to be executed before issuing an EIO, since it does not apply in other Member States, especially the ones where the responsibilities regarding the use of covert investigation methods do not lay with law enforcement authorities. This will help to facilitate the smooth application of the EIO and to avoid possible delays (*Chapter 4.1*).

Recommendation No 2: To indicate another language which is commonly used in the Union in the declaration concerning the language regime, in addition to the official language, in the spirit of Article 5(2) and recital 14 of the Directive, also in non-urgent cases (*Chapter 6.2*).

Recommendation No 3: Not to ask the issuing State to send the underlying (court) authorisation as an attachment to the EIO (*Chapter 9*).

Recommendation No 4: To consider limiting the grounds for refusal in the way mentioned in the Directive and make them all optional as provided for in the Directive (*Chapter 13.1*).

Recommendation No 5: To fully transpose and implement Article 28 of the Directive (*Chapter 20.4*).

Recommendation No 6: Polish authorities are encouraged to enquire beforehand whether the executing State requires an EIO to be able to execute a request for the use of covert investigative measures (*Chapter 20.5*).

Recommendation No 7: To consider gathering court statistics in relation to the EIO (*Chapter 21*).

Recommendation No 8: To consider providing training on international cooperation to the law enforcement agencies (especially to the police) in a more structured manner (*Chapter 22*).

### *23.2.2. Recommendations to the Member States*

Recommendation No 9: Member States should pay particular attention to providing a clearly structured and understandable description of the facts and requested measures in the EIO (*Chapter 6.1*).

Recommendation No 10: Executing Member States should provide substantial feedback if the translation of the EIO is of poor quality so that the issuing State can address any shortcomings properly (*Chapter 6.2*).

Recommendation No 11: Issuing Member States should attach the original version of the EIO to the translation, if possible, as it could help the executing State with any issues with the translation (*Chapter 6.2*).

Recommendation No 12: Member States are encouraged to indicate another language which is commonly used in the Union in their declaration concerning the language regime, in addition to their official language, in the spirit of Article 5(2) and recital 14 of the Directive (*Chapter 6.2*).

Recommendation No 13: Member States should update the EIJN Atlas on a regular basis (*Chapter 8*).

Recommendation No 14: Issuing Member States should clearly explain the formalities that are requested while keeping in mind the perspective of the executing authority, which may have a completely different system. At the same time, the executing Member States should comply with the formalities unless they are contrary to the fundamental principles of law, in accordance with the Directive (*Chapter 9*).

Recommendation No 15: Executing Member States should not ask the issuing State to send the underlying (court) authorisation as an attachment to the EIO (*Chapter 9*).

Recommendation No 16: Member States should not change the status of the person to be heard without consulting the issuing State first, in order to avoid any negative impact on the proceedings in the issuing State (*Chapter 9*).

Recommendation No 17: Executing Member States should inform the issuing State if a national investigation is started based on the EIO (*Chapter 11*).

Recommendation No 18: Member States should not refuse EIOs on grounds not mentioned in the Directive and should always consult the issuing State (*Chapter 13.1*).

Recommendation No 19: Member States should strive to execute EIOs within the time limits provided for in the Directive and should in any case inform the issuing State about any delays in execution (*Chapter 14*).

Recommendation No 20: Member States should improve the practice of sending Annex B in reply to all EIOs (*Chapter 17*).

### *23.2.3. Recommendations to the European Union and its institutions*

Recommendation No 21: The EU legislator is invited to clarify the application of the speciality rule in the context of the EIO (*Chapter 11*).

Recommendation No 22: The EU legislator is invited to clarify the concept of ‘interception of telecommunications’ (*Chapter 20.6*).

Recommendation No 23: The Commission is invited to clarify the application of the Directive in relation to Article 40 of the CISA (*Chapter 20.7*).

### 23.3. Best practices

This section will include a list of best practices to be adopted by other Member States.

Poland is to be commended for:

1. always contacting the executing State before issuing an EIO, to agree on the duration of and conditions for carrying out special investigative measures, as provided for in national law (*Chapter 4.1*).
2. having specialised prosecutors dealing with incoming EIOs at every circuit public prosecutor's office (*Chapter 4.2*).
3. the flexible and tailored approach of the specialised circuit public prosecutors in deciding whether to execute the EIO themselves or delegate it to a district public prosecutor (*Chapter 4.2*).
4. having specialised judges at circuit court level who coordinate international cooperation and provide valuable advice to their colleagues on this matter (*Chapter 4.3*).
5. the possibility for victims to request that an EIO be issued (*Chapter 4.4*).
6. always contacting the issuing State to find a solution and resolve any problems that may arise during the execution of an EIO (*Chapter 13.1*).
7. creating and successfully applying an easy-to-use tool which facilitates organising hearings via videoconference between Member States (*Chapter 20.2*).
8. the large number of courses on the EIO and mutual legal assistance available to the judiciary and public prosecution service (*Chapter 22*).



ANNEX A: PROGRAMME FOR THE ON-SITE VISIT AND PERSONS INTERVIEWED/MET

**23 January 2024 – Ministry of Justice, Warsaw, Poland**

09:30 – 10:45	Welcome, introduction and short presentation on Polish criminal proceedings
10:45 – 11:00	Coffee break
11:00 – 14:00	Presentation and Q&A on: <ul style="list-style-type: none"><li>- competent authorities</li><li>- scope</li><li>- content and form</li><li>- necessity, proportionality and recourse to a different measure</li><li>- transmission and direct contacts</li></ul>
14:00 – 15:00	Lunch
15:00 – 16:00	Presentation and Q&A on: <ul style="list-style-type: none"><li>- recognition/execution and formalities</li><li>- admissibility of evidence</li></ul>
16:00 – 16:15	Coffee break
16:15 – 17:00	Presentation and Q&A on: <ul style="list-style-type: none"><li>- speciality rule</li></ul>

## 24 January 2024 – Ministry of Justice, Warsaw, Poland

09:15 – 11:00	Presentation and Q&A on: <ul style="list-style-type: none"><li>- confidentiality</li><li>- grounds for non-execution</li></ul>
11:00 – 11:15	Coffee break
11:15 – 14:00	Presentation and Q&A on: <ul style="list-style-type: none"><li>- time limits and grounds for postponement</li><li>- legal remedies</li><li>- specific investigative measures</li></ul>
14:00 – 15:00	Lunch
15:00 – 16:15	Presentation and Q&A on: <ul style="list-style-type: none"><li>- transfer of evidence</li><li>- obligation to inform – Annex B</li></ul>
16:15 – 16:30	Coffee break
16:30 – 17:15	Presentation and Q&A on: <ul style="list-style-type: none"><li>- costs</li><li>- coordination with different Member States</li></ul>

## 25 January 2024 – Ministry of Justice, Warsaw, Poland

09:30 – 11:00	Presentation and Q&A on <ul style="list-style-type: none"><li>- training</li><li>- statistics</li></ul>
11:00 – 11:15	Coffee break
11:15 – 13:00	Final Q&A
13:00 – 14:00	Lunch
14:00 – 15:00	Wrap-up meeting/presentation of preliminary findings by the evaluation team

## ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

<b>LIST OF ACRONYMS, ABBREVIATIONS AND TERMS</b>	<b>ENGLISH</b>
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CBA	Central Anti-Corruption Bureau
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
EAW	European arrest warrant
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network in criminal matters
FCC	Fiscal Criminal Code
FPP	Undercover Border Guard
JIT	Joint investigation team
KSSiP	National School of the Judiciary and Public Prosecution
MLA	Mutual legal assistance
NRA	National Revenue Administration
SIENA	Secure Information Exchange Network Application
SIS	Schengen Information System