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Verification in the Issuing State of Evidence Obtained on the Basis of the European Investigation Order

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Abstract: The aim of this article is to address the issue of the extent of incorporation and verification of evidence for purpose of the criminal trial as the evidence base for the judgement, namely the evidence that is obtained on the basis of the European Investigation Order, including the evidence obtained in various forms that may raise doubts in terms of the protection of individual rights.

The authors would like to focus on the analysis from the perspective of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters and Polish legislation, and consider what kind of possibilities the issuing state's authorities have to verify admissibility of evidence, especially the way in which the evidence is obtained when it has not been produced upon request but only delivered since it has already been in possession of the executing state's authorities.

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1. Introduction

The development of the modern world and the phenomenon of globalisation, manifested, among others, in establishing social and economic contacts between often distant parts of the globe, the widespread use of electronic communication techniques and the shift of entire spheres of activity and life into the digital world have an impact on the criminal process, too. Even in the proceedings having a purely national dimension, it becomes necessary to obtain evidence located abroad or the cooperation of foreign entities is necessary to obtain evidence for the purpose of the criminal proceedings. For this reason, it has become necessary to look for solutions aimed at improving the collection of evidence from abroad. The most advanced ones include the activities undertaken for several years in the European Union, to mention the European Evidence Warrant (2008),[1] European Investigation Order (2014)[2] or the recently adopted instrument – the European Production and Preservation Orders for electronic evidence in criminal matters (2023).[3]

The diversity of criminal procedures in the European countries, which is particularly visible in the sphere of evidence rules, causes that the question of the conditions on which the admissibility of foreign evidence depends is one of the most important problems in the sphere of the judicial cooperation in criminal matters. To a large extent, this problem would of course be solved by the harmonisation of the law of evidence in the European Union. However, as long as there is no real prospect for this to happen (the EU's competence for such harmonisation seems to be problematic), other solutions need to be sought. In fact, if the cross-border evidence collection is not to be completely abandoned, it is necessary to develop solutions that, on the one hand, take into account the diversity of national

[1] The Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJ L350, 30 December 2008).

[2] The Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters (OJ L130, 1 May 2014) – hereinafter Directive 2014/41/EU.

[3] The Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (OJ L191, 28 July 2023).

procedures, and, on the other hand, constitute effective mechanisms for dealing with this diversity and facilitate a smooth transfer of evidence.[4]

The cooperation based on the European Investigation Order, which is currently the basic instrument providing for the transfer of evidence between EU Member States, although it is founded on the principle of mutual recognition of judgements and undoubtedly in many aspects it allows to obtain foreign evidence more effectively than under the classical international legal assistance, is not free from problems. One of them is the problem of verifying evidence obtained on the basis of this instrument in the issuing country. The key question is to what extent the court examining the case in the issuing state should examine, when creating the factual basis for the judgement, the way the evidence has been obtained in another state on the basis of the EIO. A distinction should be made between the situation where the evidence has been obtained in the executing state at the request of the authority issuing the EIO and the situation where the evidence provided on the basis of the EIO has already been in hands of the authorities of the executing state.

To be specific, the second of the above-mentioned situations will be of particular interest in the further analysis. This is due to the fact that it involves a significant limitation of the influence of the issuing authority on the EIO execution procedure, which, in consequence, may also create problems at the stage of verification of evidence obtained in this manner. In this context, it should be noted at the outset that the assessment of the legality of issuing the EIO and the admissibility of evidence obtained on the basis of the EIO executed in another EU Member State and its use in the national proceedings are essentially separate issues. In this article, the emphasis will be on the latter one.

The assumption of this study is to present the indicated problem from two perspectives. Firstly, the regulations contained in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters will be analysed. Then, the issues elaborated upon will be presented in the context of the rules adopted in the national law, and therefore primarily on the basis

4 Sabine Gleß, "Grenzüberschreitende Beweissammlung," *Zeitschrift für die gesamte Strafrechtswissenschaft*, no. 3 (2013): 592.

of the Polish Code of Criminal Procedure,[5] although not only in relation to the provisions of Chapter 62c of the CCP, that govern the issues related to requesting the EU Member State to conduct investigative activities based on the EIO, but also taking into account the achievements of the doctrine and jurisprudence regarding Article 587 CCP, specifying the general conditions for the use of evidence obtained as a result of activities carried out by the authorities of foreign countries.

The indicated issues are of particular importance when it comes to the scope of verification of evidence that has been obtained by means of the instruments strongly interfering with the sphere of individual rights, including the use of tools facilitating secret acquisition of data. This issue has recently gained particular relevance due to the preliminary ruling question C-670/20 concerning the use in criminal proceedings of evidence obtained from EncroChat and submitted as part of the EIO.[6]

2. The Context of Directive 2014/41/EU

The issue of the admissibility of the use and assessment of evidence obtained on the basis of the EIO in criminal proceedings pending in the country where the EIO has been issued is not directly governed by the Directive 2014/41/EU. However, the provisions of the Directive are not without significance insofar as they govern the issue of the admissibility of issuing and executing the EIO, which is undoubtedly one of the key issues regarding the cooperation in obtaining evidence on the basis of the EIO.

This assumption is basically in line with the legislative trend regarding the regulation of the cross-border evidence collection, where individual instruments used for this purpose do not refer to the subsequent admissibility

5 The Code of Criminal Procedure of June 6, 1997, consolidated text: Journal of Laws 2022, item 1375, as amended – hereinafter CCP.

6 See the request for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 24 October 2022 – the criminal proceedings against M.N. (Case C-670/22). Cf.: Thomas Wahl, "EncroChat Turns into a Case for the CJEU," *Eucrim*, no. 3 (2022): 197–198; Thomas Wahl, "Germany: Federal Court of Justice Confirms Use of Evidence in EncroChat Cases," *Eucrim*, no. 1 (2022): 36–37; Thomas Wahl, "Verwertung von im Ausland überwachter Chatnachrichten im Strafverfahren Zugleich Besprechung der EncroChat-Beschlüsse des OLG Bremen v. 18.12.2020 – 1 Ws 166/20, und OLG Hamburg v. 29.1.2021 – 1 Ws 2/21," *Zeitschrift fur Internationale Strafrechtsdogmatik*, no. 7–8 (2021): 452–461.

of evidence, as this issue is left to national regulations. Traditionally, taking evidence in the cross-border criminal proceedings is based on the rules of *locus regit actum* or *forum regit actum*, with possible modalities in their application. On the other hand, restrictions on the use of evidence provided by foreign authorities may result from the principle of speciality.[7] The latter issue, however, remains aside from this analysis because, as it is rightly pointed out, the principle of speciality is not referred to in the Directive 2014/41/EU.[8]

According to Article 9(2) of the Directive 2014/41/EU, without prejudice to Article 2, the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority, provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. This means that the Directive 2014/41/EU gives priority to the *forum regit actum* rule.[9] Undoubtedly, such a legal arrangement increases the probability that the evidence collected as part of the cross-border cooperation will be considered admissible in the country of issuing the EIO.[10] The executing authority may refuse to apply certain rules indicated by the authority issuing the EIO only if they are contrary to the fundamental principles of law of the executing State. It should be noted, however, that the *forum regit actum* rule is not fully compatible with the mutual recognition regime, which is geared towards the acts undertaken abroad to be recognised by the issuing State, as provided for by the national law of the executing State.[11]

Of course, it is debatable to what extent the current EU regulations governing the transfer of evidence actually implement the principle of mutual recognition, and in particular to what extent it is de facto conditional recognition. However, it is more important that the Directive 2014/41/EU does not provide for the possibility of the automatic refusal to execute the EIO

7 See: Sławomir Steinborn, „Ewolucja zasad współpracy karnej na obszarze Europy," in *Europejskie prawo karne*, eds. Agnieszka Grzelak, Michał Królikowski, and Andrzej Sakowicz (Warsaw: Wydawnictwo C.H. Beck, 2012), 84–86.

8 See: Martyna Kusak, *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami* (Warsaw: Wolters Kluwer Polska, 2019), 69.

9 Similarly Gleß, "Grenzüberschreitende," 590; Kusak, *Dowody zagraniczne*, 68.

10 See: Kusak, *Dowody zagraniczne*, 68.

11 Cf.: Kusak, *Dowody zagraniczne*, 68.

if the requirements for obtaining evidence indicated by the issuing state would violate the fundamental principles of the law of the executing state. This is because it is possible only in a situation where one of the grounds for the refusal of execution specified in Article 11 of the Directive 2014/41/EU actually occurs, which will not be so frequent. The Directive gives primacy to the execution of the EIO, which means that in a situation where specific rules of the law of the issuing state cannot be applied, the EIO should be executed, and thus the evidence will be obtained in accordance with the *loci regit actum* rule. This, in turn, reopens the problem of the admissibility of evidence obtained in this way in the issuing state. The adoption of the *forum regit actum* rule in the Directive 2014/41/EU has not given rise to an automatic rule, as it were, of the admissibility of evidence obtained in accordance with the law of the issuing state. Therefore, one should agree with the view that there is no guarantee of the admissibility of evidence in the issuing state, even in the case of taking evidence in accordance with the indications of the issuing state.[12] Finally – and what is particularly important in the context of this analysis – the *forum regit actum* rule does not solve the problem of the admissibility of evidence already existing in the executing state, when it is only transferred to the issuing state as a result of the execution of the order, or the admissibility of evidence obtained by means of the EIO, if it has been (onward) transferred to the EU Member State other than the issuing and executing state.[13]

From the point of view of verifying the admissibility of evidence obtained by means of the EIO, the problem is solved only to a limited extent by the reference made in Article 6(1) of the Directive 2014/41/EU in respect of the principle of proportionality and the rule that issuing a EIO is possible only if the investigative measure indicated in the EIO is admissible in the same domestic case under the same conditions. They are important for the sole admissibility of a given investigative measure but they do not solve the problem of the manner and mode in which this measure is carried out in the executing state, i.e. the conditions in which the specific evidence has been obtained. This indicates that their examination by the criminal court in the issuing state is inevitable. Moreover, it is difficult for this court

12 See: Kusak, *Dowody zagraniczne*, 68.

13 See: Kusak, *Dowody zagraniczne*, 68.

to deny such competence since it takes responsibility for the judgement it issues, and at the same time the standard of modern criminal procedures is that the court hearing the case on the merits has the possibility to assess the admissibility of any domestic evidence that would be taken before it. The mere fact that the evidence has been taken in accordance with the law of the executing state is not a sufficient argument for its admissibility in the issuing state. However, the problem of the criteria for such assessment in relation to the cross-border evidence is a separate issue.

The Directive 2014/41/EU also does not specify such criteria for verifying evidence obtained by means of the EIO. However, some hints can be found in its content. Point 11 of the recitals of the Directive 2014/41/EU stresses the need to verify whether the execution of an investigative measure covered by the EIO is proportionate, appropriate and applicable to the case. The issuing authority should therefore assess whether the requested evidence is necessary and proportionate for the purposes of the proceedings and whether the investigative measure chosen is necessary and proportionate to collect that evidence. The provision of Article 11(1)(f) of the Directive 2014/41/EU, on the other hand, gives the executing state the possibility to refuse if the execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligations under Article 6 TEU and the Charter. All the more, therefore, evidence obtained in a manner violating the guarantees anchored in Article 6 TEU and the Charter, including the principle of proportionality, should not be used in the trial.

In this context, it should also be noted that since the Directive 2014/41/EU is an instrument based on the principle of mutual recognition, it is impossible to derive from it the obligation for the authority conducting the national criminal proceedings in the issuing state to verify each time that the evidence action carried out meets all the requirements provided for in its national legal order. On the contrary, if the matter were to be reduced only to the principle of mutual recognition, the rule should be to give the effects of an evidentiary act performed in another EU Member State the same force as the effects of an analogous national evidentiary act. However, the cooperation based on the EIO does not have such an advanced nature. Therefore, it is appropriate to state that in a situation where the authority has doubts as to the recognition of a cross-border evidentiary

act (e.g. due to the possibility of a violation of fundamental rights), it will be obliged to consult the authority executing the EIO and apply for providing all the necessary information. In this context, the need to verify the manner of performing the activities, the participation of the defence lawyer or respecting the rights of other participants in the proceedings is indicated.[14]

Rightly, even in the context of the grounds for the refusal to execute the EIO set out in Article 11 of the Directive 2014/41/EU, it is indicated that the authority issuing the EIO is entitled – due to the national model of protection of the right to a fair trial – to consider such evidence inadmissible. It is argued that it is the court's duty to examine whether issuing a judgement on the basis of evidence that could not be obtained in purely domestic proceedings does not violate the fairness of the proceedings.[15]

In the light of the above, the need to verify, in certain situations, the manner of performing an investigative action and respecting procedural guarantees in the executing state should be assessed as justified, in particular through the prism of protecting the guarantees of the participants of the proceedings in the process of collecting evidence. The above also corresponds to the position of the CJEU expressed in the judgement under the Case C-584/19,[16] that Member States must ensure that in criminal proceedings in the issuing State the rights of defence and the fairness of the proceedings are respected when assessing the evidence obtained by means of the EIO.[17] It is rightly emphasised that the cross-border collection of evidence may not lead to a violation of the fairness of the proceedings within the meaning of Article 6 of the ECHR.[18] After all, the use of cross-border evidence may not infringe the right to participate in

14 See: Dominika Czerniak, *Europeizacja postępowania dowodowego w polskim procesie karnym: wpływ standardów europejskich na krajowe postępowanie dowodowe* (Warsaw: C.H. Beck, 2021), 392–403.

15 See also: Czerniak, *Europeizacja*, 392–403. Similarly: Hanna Kuczyńska, "Comment on Art. 589w," in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warsaw: Legalis, 2023), thesis 52.

16 CJEU Judgement of 8 December 2020, Criminal proceedings against A and Others, Case C-584/19, ECLI:EU:C:2020:1002, para. 62.

17 See also: Jakub Kosowski, „Europejski nakaz dochodzeniowy – zagadnienia wybrane," *Wiedza Obronna* 277, no. 4 (2021): 163–164.

18 The Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos 11 and 14 supplemented by

evidentiary actions (Article 6(3)(d) of the ECHR) or the principle of equality of arms.[19]

However, it cannot be overlooked that the criterion of the fairness of the trial is useful here only to a certain extent because pursuant to Article 6 of the ECHR there are no rules on the admissibility of specific, individual evidence, but the fairness of the proceedings as a whole is assessed.[20] The Court consistently points out that the admissibility of evidence is primarily the matter governed by the domestic law and, in principle, it is for the national courts to assess the evidence submitted to them. The task of the Court under the ECHR is not to determine whether the witness's statements have been properly declared admissible as evidence but rather to assess whether the entirety of the proceedings, including the taking of evidence, has been fair.[21] As a consequence, the question arises to what extent this criterion can be used at the stage of examining the admissibility of evidence and whether it is not more useful when assessing the entire procedure after it has been conducted. Undoubtedly, however, it allows the court examining a criminal case to eliminate a specific piece of evidence, even if it were to happen only before the judgement is passed.

Referring to the previous considerations, it should be noted that in the process of verifying the admissibility of evidence collected by means of the EIO, it is advisable to assess the standard of protection of the defence rights under Article 6(3) of the ECHR. As mentioned above, violation of the right to defence, including its formal aspect – the assistance of a defence lawyer, fundamental violations of the right to information or deprivation of the opportunity to prepare for defence should be classified as significantly influencing the subsequent assessment of the admissibility of evidence

Protocols Nos 1, 4, 6, 7, 12, 13 and 16, ETS No 5: ETS No 009, 4: ETS No 046, 6: ETS No 114, 7: ETS No 117, 12: ETS No 177 – hereinafter ECHR.

19 Czerniak, *Europeizacja*, 392–403. Similarly Kuczyńska, "Comment on Art. 589w," thesis 52. Cf. Inés Armada, "The European Investigation Order and the Lack of European Standards for Gathering Evidence: Is a Fundamental Rights-Based Refusal the Solution?," *New Journal of European Criminal Law* 6, no. 1 (2015): 18.

20 See: Arkadiusz Lach, *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego* (Warsaw: Wolters Kluwer Polska, 2018), *passim*.

21 See, *inter alia*: ECtHR Judgement of 10 May 2011, Case Jakubczyk v. Poland, application no. 17354/04, hudoc.int.

obtained in violation of those rights. When assessing the seriousness of violations, the nature of the evidentiary action should be taken into account. There should be no doubt that the refusal of a defence lawyer to participate in the examination of a witness in a situation where it is directly carried out by the authority of the executing state, and not by way of a videoconference or during a search, constitutes a form of violation of the defendant's procedural rights which is unacceptable under the ECHR, especially if this evidentiary action is of a unique nature and cannot be performed again during trial in the issuing state. Those aspects cannot be overlooked by the court assessing the admissibility of evidence obtained by means of the EIO.[22]

Even more problematic is the issue of verification of evidence that has already been collected in the state executing the EIO and is only to be transferred at the request of the authority of the state issuing the EIO. It should be taken into account here that although Article 1(1) of the Directive 2014/41/EU permits the issuance of the EIO in order to obtain evidence already in the possession of the competent authorities of the executing state, neither that provision nor the subsequent provisions of the Directive provide for differences in the procedure as regards evidence held by the executing state and ordered to be carried out by the issuing state. Meanwhile, there is no doubt that the influence of the authorities of the issuing state (as well as the participants in the main proceedings pending in that state) on the manner and conditions of obtaining evidence, that is already in the possession of the authorities of the executing state, is illusory. For

[22] More about reservations regarding the exercise of the defence rights in the EIO implementation procedures see: Martyna Kusak, „Obrońca a europejski nakaz dochodzeniowy," *Palestra*, no. 3 (2019): 29–38; Chloé Fauchon, "European Investigation Order Directive: What About Defence Rights?," *Vilnius University Open Series* (2021): 42–48; Regina Garcimartín Montero, "The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations," *Eucrim*, no. 1 (2017): 45–50; Laura Autru Ryolo, "European Investigation Order: The Defence Rights Perspective," in *Transnational Evidence and Multicultural Inquiries in Europe*, ed. Ruggeri Stefano (Springer, 2014), 107–109; Richard Vogler, "Criminal Evidence and Respect for Fair Trial Guarantees in the Dialogue Between the European Court of Human Rights and National Courts," in *Transnational Evidence and Multicultural Inquiries in Europe*, ed. Ruggeri Stefano (Springer, 2014), 181–192; Armada, "The European Investigation Order," 8–31; Alba Hernandez Weiss, "Effective Protection of Rights as a Precondition to Mutual Recognition: Some Thoughts on the CJEU's Gavanozov II Decision," *New Journal of European Criminal Law* 13, no. 2 (2022): 180–197.

obvious reasons, the *forum regit actum* rule cannot be applied here, and the issuing authority has no possibility to reserve the requirement to comply with certain procedural rules of its law when obtaining evidence in the executing state.

The rule that issuing the EIO is possible under the conditions specified in Article 6 of the Directive 2014/41/EU is of a general nature, and therefore the obligation to assess their compliance also applies to the authority issuing the EIO regarding evidence already in hands of the authorities of the executing state. The problem is that at the stage of issuing the EIO, the competent authority may have quite limited knowledge of how the evidence that is already in the possession of the executing state has been obtained. Protection of the guarantees of the parties to the proceedings in the process of collecting evidence at this stage will most often be illusory. The doubts signalled above are clearly visible against the backdrop of the EnchroChat Case.[23]

In view of the above, the fundamental question arises whether the issuance of the EIO to obtain evidence held by the executing authority should follow the general procedure or the procedure specific to the issuance of the EIO to obtain such evidence by the executing authority. From the point of view of the situation of the suspect (the accused), the mode in which the evidence is transferred to the country where the main proceedings are pending is of secondary importance, and the mode in which the evidence has been obtained is of more importance. Therefore, the doubt concerns whether the „original" method of obtaining the evidence should not determine the proper mode of issuing the EIO. In that regard, the Directive 2014/41/EU merely provides for the general condition that the issuing authority must ensure that, in a similar domestic case, ordering the investigative measure indicated in the EIO is admissible under the same conditions (Article 6(1)(b)) and ensures in the executing state that it is carried out in the same way and under the same procedures as if the investigative measure were ordered by an authority of the executing State (Article 9(1)), giving the executing authority the possibility to refuse recognition or execution on the grounds set out in Article 11. There seems to be no basis for

[23] See: the request for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 24 October 2022 – the criminal proceedings against M.N. (Case C-670/22).

differentiation under Article 6 of the Directive 2014/41/EU on the competence and conditions for issuing the EIO, depending on whether the EIO concerns the performance of an investigative measure or simply the transfer of evidence already in hands of the authorities of the executing state. Since both situations involve obtaining evidence for the purposes of domestic criminal proceedings, the conditions for the admissibility of such evidence provided for in the national law should be respected in each case. The mere fact that a given piece of evidence is already in the possession of the authority of a foreign state does not automatically mean that it is admissible in the proceedings pending in another state. This issue is settled by the law of that state.

In this context, it is worth recalling that the Council Framework Decision 2008/978/JHA on the EEW has already provided for the guarantee that a EEW should only be issued where, in a comparable situation, the relevant objects, documents or data could be obtained under the law of the issuing state.

However, one cannot lose sight of the fact that the potential judicial protection at the stage of issuing the EIO seems to be limited to a minimum, especially if one takes into account that in most cases evidence is gathered at the stage of the preparatory proceedings – in the Polish reality conducted or supervised by the prosecutor, where the judicial control of the evidentiary actions at this stage of proceedings remains significantly limited. This is also clearly visible from the perspective of Article 14(2) of the Directive 2014/41/EU, that allows for questioning the substantive grounds for issuing the EIO only in the issuing state, which in practice of obtaining evidence already in the possession of the authorities of the executing state does not provide adequate guarantees of protection of the rights of participants in the proceedings at this stage. Here comes back the problem of the authority issuing the EIO having adequate information on how to obtain specific evidence. In more complex situations, a reliable assessment through the prism of the conditions set out in Article 6 of the Directive 2014/41 will in fact require obtaining detailed information on how to obtain the evidence before issuing the EIO.

Considering the above, judicial protection is of particular importance, which is associated with the assessment of the collected evidence by the court at the stage of the jurisdictional proceedings, in particular at

the stage of issuing a judgement. This protection, also with regard to evidence already in the possession of the executing state, seems to be directly anchored in Article 14(7) of the Directive 2014/41/EU. This provision requires Member States to ensure that in the criminal proceedings in the issuing state, the rights of defence and fair trial are respected when evaluating evidence obtained by means of the EIO. The Directive, followed by the Court of Justice,[24] therefore, binds those guarantees to the assessment of the evidence, which may take place only at the final stage of the proceedings, or – under the Polish legal order – may lead to the rejection of the evidence request at an earlier stage of the proceedings due to the fact that that it is inadmissible to have the evidence taken.

In the latter case, however, we are dealing with a situation in which the assessment of the admissibility of evidence should be carried out *ex ante* – before issuing the EIO, which does not solve the problem in the situation when the prosecutor is the authority competent to issue the EIO and the evidence obtained on the basis of the EIO constitutes the evidence basis for the prosecution and is only subsequently assessed by the court in the jurisdictional phase of the trial. It seems, however, that the Directive 2014/41/EU does not determine in any way the moment when the admissibility of using the cross-border evidence may be assessed – therefore, it may be *ex ante* or *ex post*.

An interesting perspective is presented by the questions for a preliminary ruling in the EncroChat Case. When asking about the legal consequences of obtaining evidence in a manner contrary to the EU law, the German court raised the question of whether, in the event of obtaining evidence on the basis of the EIO that was incompatible with the EU law, the prohibition on the use of evidence may have resulted directly from the EU principle of effectiveness or the EU principle of equivalence. Addressing the above question successfully depends on the circumstances in which the evidence was obtained in the executing state, while taking into account that the evidence in question could not have been ordered in a similar domestic case in the issuing state, and that evidence obtained by such an unlawful domestic measure would not be legally usable in the issuing state. The referring court also drew attention to the problem of whether a breach of the EU law

[24] See the above-mentioned judgement of the CJEU under the Case C-584/19.

in the course of obtaining evidence in the national criminal proceedings should have been taken into account in favour of the defendant at least at the stage of assessing the evidence or imposing a penalty.[25]

In the above context, it should be noted that while the prospect of referring to the EU principles of effectiveness and equivalence may indicate a prohibition on the use of evidence obtained in breach of the EU law, the tipping of the scales towards the national law may raise doubts as to whether in the case in which the court assesses the collected evidence, the exclusion of some of them – due to the doubts as to the protection of the rights of the individual in the proceedings – is fully justified.

Although the free flow of evidence, the guiding principle of which is the admissibility of evidence properly taken in one of the EU Member States, including other countries, too, is the simplest form of mutual recognition of evidence, the incorporation of procedural activities carried out under a given legal order into another system may in fact disrupt the balance of rights and obligations of the process participants. Therefore, where the authorities operate on the borderline between the regulations of two legal orders – the state issuing and state executing the EIO, and at the same time in the area only partially governed by the EU law, it is important that potential differences in the assessment of the admissibility of evidence in different EU Member States are not related to any decrease in procedural guarantees below the level of common standards for the protection of the rights of individual in the criminal proceedings. Irrespective of differences between the national legal orders, the use of evidence obtained abroad will then remain subject to a consistent assessment. As a consequence, the importance of common minimum standards of obtaining evidence is growing – mainly in terms of respecting the fundamental rights, especially defence rights, that are interfered with by investigative measures – whether applied following the issuance of the EIO or already in place.

3. The Context of the Polish National Law

Turning to the domestic law, it should first be pointed out that the national legislator, when constructing the rules on the admissibility of foreign

[25] See the request for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 24 October 2022 – the criminal proceedings against M.N. (Case C-670/22).

evidence, has three potential points of reference (patterns) that may be used when deciding whether evidence obtained in another country may be used in the domestic criminal proceedings. The first option is to assess it solely through the prism of the law of the country in which the evidence has been obtained (*lex loci*). However, in the case of large discrepancies between the rules of evidence in that country and the law of the requesting state (conducting the criminal proceedings), such a solution poses a risk of the so-called import of lower standard. The second option is to make an assessment through the prism of the law of the state in which the evidence is to be used (*lex fori*). However, this rule poses a risk that several pieces of evidence cannot be used due to the practical impossibility of strictly applying the law of that state when obtaining evidence in another state. The third option is to refer to the fundamental principles and human rights that set the basic procedural standards in the criminal trial. In such a case, the national legislator does not expect strict compliance with its own regulations when obtaining the cross-border evidence, however, it reserves the right to assess whether such evidence does not violate the fundamental principles of its law.

The implementation of the provisions of the Directive 2014/41 has brought about, in principle, a simple shift of the regulations contained therein to the Code of Criminal Procedure. In this context, it is worth noting first of all that although Article 589w § 1 of the CCP generally allows for the issuance of a provision regarding the EIO „in the event of the need to take or obtain evidence which is or may be taken in the territory of another Member State of the European Union," however, of particular importance are the requirements set out in Article 589 in § 4 and 5 of the CCP, that provide for the replacement of the decision on the admission or taking of evidence with the decision on issuing the EIO. In the case of a decision to issue the EIO concerning telecommunication interception or obtaining correspondence, including those sent via e-mail, as well as a decision to issue the EIO regarding other evidence, admission and obtaining of which requires a decision – especially by a court, the basic problem remains therefore, whether the conditions under the national law for issuing the EIO by a competent authority (e.g. a court) must also be met when the EIO concerns the evidence already in the possession of the authorities of the executing state. Both the assumptions on which the Directive 2014/41/EU is

based and the systemic reasons for the admissibility of evidence in a criminal process support a positive answer to this question. Only the fulfilment of certain statutory prerequisites for the admissibility of evidence opens the possibility of obtaining it and using it in criminal proceedings. From the point of view of the objectives to be achieved by those conditions, especially limiting the activities of state authorities interfering with the sphere of rights and freedoms of an individual, it is not relevant whether a given evidence is yet to be obtained or whether it is already held by a specific foreign authority. Otherwise, the acquisition of foreign evidence, even of a deeply intrusive nature, would be deprived of any procedural control by an independent court. Different treatment of the indicated situations would give rise to the risk of evasion of the more restrictive requirements of the admissibility of evidence provided for in the national law.

The provisions of Chapter 62c of the CCP implementing the Directive 2014/41/EU do not provide for any rules regarding the examination of the procedure, under which the evidence has been obtained in the executing state, by the Polish authorities. However, it would be wrong to conclude that any evidence submitted by another EU Member State by means of the EIO issued by a Polish authority can automatically be used in the Polish criminal proceedings. This issue remains outside the scope of the provisions of Chapter 62c of the CCP, and therefore general principles should be referred to here.

In this context, attention should be paid to the relationship between the provisions of Article 589x Point 2 of the CCP, that assume the inadmissibility of issuing the EIO in a situation where the Polish law does not allow for taking or obtaining a given evidence, and Article 168a of the CCP, that provides that evidence cannot be considered inadmissible solely on the grounds that it has been obtained in violation of the provisions of the procedure or by means of a prohibited act, unless the evidence has been obtained in connection with the performance of official duties by a public official, as a result of: murder, deliberately causing damage to health or deprivation of liberty. Having in mind the specific nature of the proceedings conducted to obtain evidence on the basis of the EIO, it must therefore be taken into account that the Polish legislator has significantly extended the possibility of using evidence obtained contrary to the procedure in a criminal trial. The regulation provided for in Article 168a of the CCP is

the subject of much controversy. Without going into details, it can be pointed out that when assessing the effects of the violation of the prerequisites for the legality of evidentiary action, the purpose and nature of the prerequisites for the legality of the act and their importance from the point of view of the admissibility of evidence, the essence of the given evidentiary action should be taken into account. Therefore, in the event of a violation of the competence norm entitling a certain authority to conduct evidence proceedings, as well as the substantive premises of this action, it should be considered inadmissible, and therefore it cannot have procedural effects, and the evidence is to be excluded. On the other hand, violation of the competence of the authority performing the activities, exceeding the instructional deadlines, as well as various conditions defining the framework for the legality of the evidentiary action (e.g. participation in the proceedings of persons specified in the Act) do not disqualify the activities, and the assessment of the effects of this violation should be carried out at the stage of credibility's assessment of evidence obtained in this way and the impact of the violation on the content of the judgement. The exception applies only to violations of the right of access to a defence lawyer.[26]

However, even where a given piece of evidence has been obtained by means of the EIO issued after *ex ante* examination of the grounds for the admissibility of a given piece of evidence in accordance with Article 589w § 5 of the CCP, in fact the Polish authorities have quite limited possibilities of *ex post* verification of the correctness of obtaining evidence by the authority of the executing state. One cannot lose sight of the problem of substantive capacity of the court to assess the legality of the evidence obtained in another country and the correctness of taking evidence there.[27] Difficulties may relate to both obtaining appropriate information and sufficient competence to conduct such an assessment through the prism of foreign law. For this reason, among other things, it cannot be assumed that foreign law constitutes a suitable model for making such an assessment.

[26] See: Wojciech Jasiński, *Nielegalnie uzyskane dowody w procesie karnym* (Warsaw: Wolters Kluwer Polska, 2019), 561–562.

[27] See: Hanna Kuczyńska, „Zagadnienia dopuszczalności materiału dowodowego w sprawach karnych na obszarze Unii Europejskiej," *Przegląd Prawa Europejskiego i Międzynarodowego*, no. 1 (2012): 23–42; Czerniak, *Europeizacja*, 392–403.

In the absence of sufficient regulations relating directly to the examination of the possibility of using evidence obtained by means of the EIO, attention should be paid to the provision of Article 587 of the CCP. Although it is included in Chapter 62 of the Code of Criminal Procedure, that deals with the traditional international legal assistance and cooperation within joint investigation teams, it seems to have a more general meaning. It has served the basis for the position, according to which compliance with the requirements of the Polish criminal procedure when performing a procedural act by a foreign state authority is not required, as long as the manner of its conduct is not contrary to the principles of the legal order in the Republic of Poland, i.e. rules of a more general and fundamental nature.[28] On the basis of the above provision, the Supreme Court expressed the position, according to which „the provision of Article 587 CCP is based on the principle of mutual recognition of evidence conducted in accordance with the law of the foreign state in which the evidence is taken (*lex loci*), even if these provisions do not faithfully correspond to the provisions in force in Polish law when taking a specific type of evidence."[29]

With regard to the telecommunication interception carried out by the authorities of a foreign state as part of the proceedings pending there, the Supreme Court indicated that:

> the legality of this interception should be assessed according to the provisions in force in the state in which the action is carried out, but a precondition for accepting that this action was not contrary to the principles of the legal order

[28] The principles of the legal order should be understood as rules of a more general nature, that will include constitutional guarantees as well as the basic principles of the criminal process, such as the right to defence, the right to refuse to give explanations, or the prohibition of obtaining evidence in conditions excluding freedom of expression – see: Polish Supreme Court, Judgement of 2 December 2019, Ref. No. III KK 505/19, OSNKW 2020, No. 4, item 11; Polish Supreme Court, Decision of 8 February 2006, Ref. No. III KK 370/04; Appellate Court in Kraków, Judgement of 30 November 2004, Ref. No. II AKa 234/04, unreported; Barbara Augustyniak, „Środki zapobiegawcze," in *Kodeks postępowania karnego. Komentarz*, ed. Dariusz Świecki (Warsaw: Wolters Kluwer Polska, 2022), 969; Piotr Hofmański, Elżbieta Sadzik, and Kazimierz Zgryzek, *Kodeks postępowania karnego. Komentarz* (Warsaw, 2012), 592; Sławomir Steinborn, "Comment on Art. 587," in *Kodeks postępowania karnego. Komentarz*, ed. Lech K. Paprzycki (Warsaw: Lex/el., 2015), thesis 3 .

[29] See: Polish Supreme Court, Judgement of 2 December 2019, Ref. No. III KK 505/19, OSNKW 2020, No. 4, item 11.

in the Republic of Poland, is consent to the use of interception or the subsequent approval of the legality of such interception by a judicial authority of that state (a court or a judge whose systemic features will meet the requirements set out in Article 45(1) of the Constitution or Article 6(1) of the ECHR, i.e. an independent and impartial tribunal established by law).[30]

In turn, the doctrine indicates the need to assess the admissibility of foreign evidence not through the prism of „non-contradiction with the principles of the legal order in the Republic of Poland" but on general principles, in a situation where there are no regulations relating to a specific type of evidence directly. At the same time, it is postulated that evidence should be assessed taking into account the provisions applicable to a particular piece of evidence both in the place where it has been obtained and in the Polish law.[31]

In the related literature it is also emphasised that compliance with the rules in force in the state taking evidence is, in principle, the pre-condition for the use of evidence in the requesting state. At the same time, it is noted that it is difficult to control this issue in this state, and at the same time unlawful taking of evidence in a foreign state does not automatically create a ban on evidence.[32] It is worth adding that the clause of the legal order, formulated in Article 587 of the CCP, cannot be treated as being reduced to the requirement to examine the compliance of activities carried out abroad with the provisions of the Polish law.[33]

The court's obligation to verify whether the manner of taking evidence by a foreign authority is inconsistent with the principles of the Polish legal order has thus far not been understood in a formalistic way, amounting to a detailed confrontation of the institutions operating in both national

30 See: Polish Supreme Court, Judgement of 2 December 2019, Ref. No. III KK 505/19, OSNKW 2020, No. 4, item 11.

31 See: Dobrosława Szumiło-Kulczycka, „Wykorzystanie w procesie karnym dowodów z podsłuchu stosowanego przez państwo obce. Glosa do wyroku SN z dnia 2 grudnia 2019 r., III KK 505/19," *Orzecznictwo Sądów Polskich*, no. 12 (2020): 46–53.

32 See: Barbara Nita-Światłowska and Andrzej Światłowski, „Odczytanie w postępowaniu karnym protokołu czynności dowodowej przeprowadzonej przed obcym organem," *Europejski Przegląd Sądowy*, no. 2 (2013): 6; Steinborn, "Comment on Art. 587," thesis 4a.

33 Cf. Steinborn, "Comment on Art. 587," thesis 4a.

legal systems. However, in the context of assessing the contradiction with the principles of the legal order in Poland, the need to take into account the principles that fundamentally shape the model of the criminal process, i.e. expressed in Article 45(1) of the Constitution of the Republic of Poland, the principle of the right to a fair trial and the principle of the right to defence at all stages of the criminal proceedings conducted against a given person has been strongly underlined.[34] Both of those principles also arise directly from Article 6(1) and 3(c) of the ECHR. When assessing the reliability of actions carried out by the authorities of a foreign state, it is necessary to analyse – to the appropriate extent – its criminal procedural law and the constitutional guarantees, and also to examine whether that state is a party to an international agreement containing guarantees regarding criminal proceedings or granting rights to individuals participating in such proceedings, e.g. the ECHR.[35] In the above context, it is assumed that „the legal order clause would conflict, for example, with taking evidence using methods prohibited by Polish law or taking evidence covered by an absolute prohibition of evidence under Polish law."[36] From the point of view of the effectiveness of the European judicial cooperation in criminal matters, it cannot be assumed that any difference between the regulations of the state where the evidence has been obtained and the regulations of the requesting state (where the criminal proceedings are conducted) is supposed to result in the inadmissibility of the evidence.

It seems that the rules on the use of foreign evidence developed on the basis of Article 587 of the CCP should also apply to evidence obtained on the basis of the EIO. There are no rational reasons why this evidence cannot be subject to such assessment, and on the other hand, that it should be subject to different rules than those resulting from Article 587 of the CCP. This issue seems particularly relevant with regard to evidence

34 See: Polish Supreme Court, Decision of 28 March 2002, Ref. No. V KKN 122/00, OSNKW 2002, issues 7–8, item 60.

35 See: Polish Supreme Court, Decision of 28 March 2002, Ref. No. V KKN 122/00, OSNKW 2002, issues 7–8, item 60.

36 See: Barbara Nita-Światłowska, „Zachowanie wymogów, od spełnienia których zależy dopuszczalność odstąpienia w postępowaniu karnym od zasady bezpośredniości (art. 389, 391 i 393 k.p.k.)," in *System Prawa Karnego Procesowego. Tom VIII. Dowody, cz. 2*, ed. Jerzy Skorupka (Warsaw: 2019), 1628.

already in the possession of the authorities of the executing state. From the perspective of constitutional and international guarantees, it is only important that foreign evidence used in criminal proceedings meet the basic standards of protection of individual rights and freedoms, especially as regards the manner of obtaining them.

Taking into account the assumption that the Polish Criminal Code of Procedure does not preclude the use of evidence obtained abroad *in genere*, and at the same time does not require such evidence to be taken strictly in accordance with the requirements of the Polish law, it must be stated that there are no grounds for *a priori* rejection of certain evidence just because they have been obtained in a foreign state and through the operation of its authorities. In the absence of regulations directly relating to this type of evidence, the admissibility of using foreign evidence in a Polish criminal trial must be assessed on general principles, including the rules arising from Article 587 of the CCP and Article 168a of the CCP.

4. Conclusions

Taking into account the European and national perspective with regard to the issue of assessing evidence obtained by means of the EIO, leads to several basic conclusions.

First of all, the scope of the control of evidence obtained in the discussed mode seems to be important, especially when one takes into account that even in the case of taking evidence in accordance with the indications of the issuing state, there is no guarantee of the admissibility of evidence in the state issuing the EIO. The conclusion, that the manner and mode in which the evidentiary action has been carried out in the executing state (conditions or circumstances in which the specific evidence has been obtained) should be examined by the court examining the criminal case in the issuing state, seems to be fully justified.

In this context, the problem of the criteria for such an assessment is of importance, however, there should be no doubt that the reference point should be the guarantees anchored in Article 6 of the TEU and the Charter, including the principle of proportionality, and evidence obtained in violation of those guarantees should not be used in criminal proceedings pending in the country where the EIO has been issued. In the event of a justified suspicion of a violation of fundamental rights in the procedure

of obtaining evidence by the authorities of the executing state, special attention will be required to verify the manner of performing the investigative action and respecting procedural guarantees in the executing state, in particular through the prism of protecting the individuals' guarantees in the process of collecting evidence.

As for procedural guarantees at the stage of applying to the authorities of another EU Member State to obtain evidence found there, it should be stated that there are no grounds for differentiating the question of the competence and conditions for issuing the EIO depending on whether the EIO concerns the conduct of an investigative action or the transfer of evidence already in hands of the authorities of the executing state. The conditions under the national law for the issuance of the EIO by a competent authority (e.g. a court) are also met in a situation where the order concerns evidence that is already in the possession of the authorities of the executing state.

In this context, it should be taken into account that the mere fact that a given piece of evidence is already in the possession of an authority of a foreign state does not automatically mean its admissibility in proceedings pending in another state. This question should be settled according to the law of that state. It should be emphasised that the assessment of the admissibility of the cross-border evidence may – in the absence of different provisions in the Directive 2014/41/EU – be *ex ante* or *ex post*. As a consequence, it is of great importance to establish common minimum standards for obtaining of evidence – mainly in terms of respecting the rights of the defence and fundamental rights that are interfered with by investigative measures – whether applied following the issuance of the EIO or at an earlier stage.

At the same time, taking into account the limited possibilities of ex post verification of the correctness of obtaining evidence by the authority of the state executing the EIO, it remains important that, while maintaining constitutional and international guarantees, foreign evidence used in criminal proceedings should meet the basic standards of protection of the rights and freedoms of an individual, especially as regards the manner of obtaining it.

In view of the above, it should be clear that any difference between the regulations of the state where the evidence has been obtained and

the regulations of the state where the criminal proceedings are conducted cannot result in exclusion of evidence, especially if the assumption of the effectiveness of the European judicial cooperation in criminal matters is considered. At the same time, it should be remembered that in the absence of regulations directly relating to specific evidence, the admissibility of using foreign evidence in a Polish criminal trial must be assessed on general principles, including the rules arising from Article 587 of the CCP and Article 168a of the CCP.

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