

The implications of the European Investigation Order for the protection of fundamental rights in Europe and the role of the CJEU

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This article focuses on the protection of fundamental rights in the framework of judicial cooperation in criminal matters between Member States, more specifically when applying the European Investigation Order (EIO), as there has been concerns regarding the protection of fundamental rights when applying the EIO since its scope is not properly circumscribed. The relevant directive does not provide a definitive list of investigative measures which can be requested in an investigation order; thus some authors argue that it violates the requirement of procedural legality. As opposed to their opinion this paper argues that the adoption of the legal instrument could result in a higher standard of fundamental rights protection in Europe as a result of the case-law of the Court of Justice of the European Union. Since its jurisdiction has been established over the legal instrument it can enforce principles protecting individuals from excessive state action already developed in the field of judicial cooperation in criminal matters. The author reviews the so-called Gavanozov cases in an effort to prove this thesis.

Keywords: AFSJ, judicial cooperation in criminal matters, EIO, fundamental rights, right to legal remedies, CJEU, Gavanozov II

1. Introduction

According to Directive 2014/41/EU of the European Parliament and the Council, the European Investigation Order (hereinafter: EIO) is a judicial decision issued or validated by a judicial authority in order to request one or several specific investigative measures carried out in another Member State or to obtain evidence already in possession of the competent authorities of the executing Member State.¹

This procedural legal instrument aims to enhance judicial cooperation between Member States in criminal matters. As set out above it provides a legal basis for competent judicial authorities to issue a decision that obliges competent judicial and law enforcement authorities of another Member State to carry out certain investigative measures with the aim to acquire evidence which then will be utilised in a criminal procedure in the issuing Member State. The novelty of the EIO directive is that it finally established the application of the principle of mutual recognition during investigation (i. e., the first stage of the criminal procedure).²

² This has been a long-standing aim of the European legislative. The European Commission proposed a framework decision for establishing the European Evidence Warrant (hereinafter: EEW) in 2003, more than a decade before

According to the directive, the EIO's scope shall cover any investigative measure with the aim to obtain evidence in a criminal procedure. However, its horizontal scope of application and the automatic process of validating and executing the order can be harmful for the protection of fundamental rights. Some authors argue that the definition of investigative measures that can be requested in an EIO violates the procedural legality requirement as set out in the case-law of the European Court of Human Rights (hereinafter: ECtHR) since it does not provide a definitive list of investigative measures which can be expected to be executed based on an EIO.³ However, one must take into account the safeguards established by the EIO directive aiming to avoid situations violating the principle of legality. For instance, an EIO may only be issued if it is necessary and proportionate for the purpose of the proceedings, not to mention that investigative measures may only be requested in it if they could have been ordered under the same conditions in a similar domestic case. The latter rule stands to avoid a reverse forum-shopping carried out by judicial authorities (instead of criminals). In addition, there is a rejection clause which forbids Member States to execute an EIO if the requested investigative measure does not exist, or it could not have been ordered in a similar domestic case in the executing Member State.⁴ Another important tool of fundamental rights protection is the right to legal remedies which will be elaborated below.

While analysing the right to legal remedies provided in the EIO directive I intend establish that the adoption of the directive does not only maintain the previous level of fundamental rights protection provided in the framework of mutual legal assistance in criminal matters, but even enhances it. The reason for this is that the directive finally involved criminal cooperation during investigation in the policy of judicial cooperation between Member States thus establishing the jurisdiction of the Court of Justice of the European Union as well (hereinafter: CJEU). The CJEU already delivered a preliminary ruling regarding the right to legal remedies provided in the EIO directive, another case which will arguably have greater impact on the current system of criminal cooperation is still pending. In this short review I will present these cases, known as the *Gavanozov I*⁵ and the *Gavanozov II*⁶ cases (stemming from the same criminal procedure brought against I. D. Gavanozov).

2. The right to legal remedies as set out in the EIO directive

Article 14 stipulates that Member States executing an EIO shall provide legal remedies equiva-

the adoption of the EIO directive. This was the first attempt to establish the application of the principle during the investigation. However, the EEW did not have much success. The Commission set out the goal of establishing a legal instrument based on mutual recognition and replacing altogether the system of mutual legal assistance – and the EEW too – in criminal matters in its Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility one year after the adoption of the framework decision in 2008. Soon after a group of Member States proposed the directive establishing the EIO making the framework decision obsolete. See M. C. Cian, *The European Evidence Warrant*, in C. Eckes – T. Konstadinides (Eds.), *Crime within the Area of Freedom, Security and Justice. A European Public Order*, Cambridge University Press, Cambridge 2011, pp. 229-230. and Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility /* COM/2009/0624 final */ 2. and 3.

³ Krisztina Karsai believes that by not providing a definitive list of investigative measures which may be requested in an EIO the directive violates Art. 8. Para. 2. of the ECHR since issuing investigative measures capable of constricting human rights does not have a clear legal basis without a formal list. See K. Karsai, *Emberi jogok védelme és az európai nyomozási határozat*, *Rendészet és emberi jogok*, Vol. 2, No. 3, 2012, p. 27. Inés Armada criticises the legal instrument for the same reason. See I. Armada, *The European Investigation Order and the Lack of European Standards for Gathering Evidence*, *New Journal of European Criminal Law*, Vol. 6, No. 1, March 2015, p. 18.

⁴ 2014/41/EU Art. 11. Para. 1. points (c) (h)

⁵ Case C-324/17, *Gavanozov* [EU:C:2019:892]

⁶ Case C-852/19, *Gavanozov II* [not yet decided]

lent to those available in a similar domestic case with regard to the specific investigative measure carried out according to the EIO. Equivalency must involve both effects and time-limits of legal remedies available in a similar domestic case.⁷ In addition, issuing Member States must provide the possibility for persons affected by the investigative measure to challenge the substantive reasons for issuing the EIO.⁸ The question is if such rules on legal remedies are capable of providing sufficient fundamental rights protection. The CJEU is currently occupied with answering this question in the above mentioned *Gavanozov* cases in which the latter rule on legal remedies was questioned by a Bulgarian court, the Spetsializiran nakazatelen sad (hereinafter: Specialised Criminal Court).

3. Facts of the case

Mr Gavanozov is accused of participating in a criminal organisation formed for the purpose of committing tax offences. According to the indictment, he imported sugar into Bulgaria from other Member States via shell companies, mostly from the Czech Republic. Subsequently he sold that sugar in Bulgaria, however he did not pay the value added tax due for the selling of that sugar. He submitted incorrect documents according to which the sugar had been exported to Romania to avoid his act being discovered.⁹

The Specialised Criminal Court of Bulgaria issued an EIO requesting the Czech authorities to carry out searches and seizures at the office of the shell company established in the Czech Republic used to commit the criminal acts and at the home of the representative of the shell company, Mr Y. In addition, the EIO also requested that Mr Y be examined as a witness through video conference.¹⁰

The Specialised Criminal Court referred the case (*Gavanozov I*) to the CJEU after it encountered difficulties in completing Section J of the form for issuing the EIO designed for indicating appeals lodged against the issuing of the EIO. As a result, the main reason for initiating the preliminary ruling procedure was to get proper guidance on what purpose Section J of the form has. Nevertheless, the court also noted that Bulgarian law does not allow for any legal remedy against decisions ordering a search of premises, seizure or the hearing of witnesses. The referring court correctly noticed that such rules on legal remedies constrict the right to legal remedies as regards the EIO directive since according to the Bulgarian implementation of the directive the substantive reasons of issuing an EIO can only be challenged if the investigative measure requested in it could be challenged in a similar domestic case as well. This compelled the court to ask the CJEU if national legislation and case-law were consistent with Article 14 of Directive [2014/41] in so far as they preclude a challenge, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing a European investigation order for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness.¹¹

4. From *Gavanozov I* to *Gavanozov II*

The CJEU decided to reformulate the question referred to it since it was apparent that the reference

⁷ 2014/41/EU Art. 14. Paras. 1. 4.

⁸ 2014/41/EU Art. 14. Para. 2.

⁹ Case C-324/17, *Gavanozov*, para. 11.

¹⁰ Case C-324/17, *Gavanozov*, para. 12.

¹¹ Case C-324/17, *Gavanozov*, paras. 13-16.

took place due to the referring court's uncertainty on how to complete Section J. Hence the CJEU provided a preliminary ruling in the *Gavanozov I* case on how to complete Section J of the form for issuing an EIO.¹² Thus it in essence avoided answering the question referred to it. This is why the Bulgarian court in question made another reference to the Luxembourg court in the *Gavanozov II* case (now pending) with a slightly different question below:

“Is national legislation which does not provide for any legal remedy against the issuing of a European Investigation Order for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41/EU 1 and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 of the ECHR?”¹³

As it can be seen the Bulgarian court specified its question. It made references to the EU Charter of Fundamental Rights and the European Convention on Human Rights as well, specifically to the right to respect for private and family life and the right to an effective remedy.¹⁴ The right to respect for private and family life is necessarily violated (or restricted) during the criminal procedure by certain investigative measures, for example by an order of search of residential and business premises. Above all the requirement of necessity and proportionality and the right to an effective remedy safeguards the right to private and family life during the criminal procedure. On the other hand, the right to an effective remedy does not have an independent existence. Instead, it complements other fundamental rights. According to the case-law of the ECtHR it cannot be violated in itself, but only if a state action constricting human rights cannot be challenged.¹⁵ As such the CJEU's most important task will be to decide if the right to an effective remedy is violated if an investigative measure violating the right to private and family life cannot be challenged.

5. Possible outcomes and their implications for EU criminal law

It must be noted that the CJEU's case-law does not provide any guidance on this specific question since before the adoption of the EIO directive it did not have jurisdiction over criminal cooperation of Member States during the investigation phase. This makes it highly possible that the CJEU will seek guidance in the case-law of the European Court of Human Rights. The *Posevini v. Bulgaria* case is readily available for this. This case is very similar to the *Gavanozov* cases. The Bulgarian criminal procedural law does not allow to challenge the (substantive reasons of) issuance of house searches and seizures of items. The Strasbourg court found that the right to an effective remedy was violated since the accused could not contest the lawfulness of the searches and seizures carried out during the investigation.¹⁶

If the CJEU found Bulgarian law preventing the accused (and the person affected by the investigative measure) from challenging the issuance of the EIO to be in violation of either the right to private and family life or the right to an effective remedy it would open the possibility to apply the fundamental rights rejection clause incorporated into the EIO directive. This would be a significant development in the practice of EIOs since from the beginning of the application of the legal instrument there was not a single case where the fundamental rights rejection clause was applied in spite

¹² Case C-324/17, *Gavanozov*, paras. 23 and 28.

¹³ Case C-852/19, *Gavanozov II*

¹⁴ Charter of Fundamental Rights of the European Union Arts. 7, 47. European Convention on Human Rights Arts. 8, 13.

¹⁵ European Court of Human Rights: Guide on Article 13 of the European Convention on Human Rights. 2020. p. 8.

¹⁶ *Posevini v. Bulgaria* (App. no. 63638/14) ECtHR (2017) para. 3.

of the fact that the EIO by definition and purpose can result in restricting fundamental rights of persons.¹⁷ However, I am inclined to believe that such a decision is highly unlikely. Although we have seen examples for halting criminal cooperation of Member States in case of serious fundamental rights violations in the *Aranyosi* and *Caldararu* joined cases,¹⁸ the *LM* case¹⁹ and the *Dorobantu* case²⁰ – all of which were initiated in connection with the European Arrest Warrant (EAW) – it must also be noted that the EAW and the EIO are different in their purpose. The CJEU emphasised in its *Staatsanwaltschaft Wien* judgment that the EIO is of a less restricting nature regarding fundamental rights than its counterpart.²¹ In addition, if such a decision was delivered in the *Gavanozov II* case, it would indirectly accept the difference between criminal justice systems of Member States, since the underlying issue is the (varying) nature of legal remedies provided in each Member State.²² Until now there has not been any case in which the CJEU would have accepted the fact that the criminal justice systems of Member States were unequal. Thus, it seems rather improbable that the CJEU will apply the same mechanism as was seen in the above-mentioned cases.

There are a few other aspects worth taking account of regarding the *Gavanozov II* case. First it should be pointed out that the CJEU may find that Bulgaria implemented the EIO directive incorrectly. The Bulgarian court asked in the *Gavanozov I* case if Art. 14 Para. 2 of the directive provides to the concerned party the right to challenge the issuance of an EIO even if national law does not provide such a procedural step (the referring court referred here to the principle of direct effect of EU law). If the CJEU delivered a preliminary ruling finding that Bulgaria did implement the EIO

¹⁷ Report on Eurojust's casework in the field of the European Investigation Order. 2020, p. 36. https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_EIO-Casework-Report_CORR_.pdf (22 March 2021).

¹⁸ The CJEU for the first time found that international criminal cooperation can be suspended if a real risk exists for a requested person (via a European Arrest Warrant, hereinafter: EAW) to suffer inhuman and degrading treatments in the issuing State. If the court, responsible for executing the EAW perceives such a risk *in abstracto* it needs to gather additional information with the aim to dispel concerns regarding the protection of fundamental rights. If the concerns cannot be dispelled the extradition must be postponed. See A. Martufi & D. Gigengack, *Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings*, New Journal of European Criminal Law, Vol. 11, No. 3, August 2020, pp. 283-284.

¹⁹ After the *Aranyosi* and *Caldararu* joined cases the CJEU found in case C-216/18, PPU. *LM* [EU:C:2018:586] that the suspension of international criminal cooperation can occur in case of violations of fundamental rights other than the prohibition to subject someone to torture or other cruel, inhuman or degrading treatment. See Bárd P. & W. van Ballegooij, *Judicial independence as a precondition for mutual trust? The CJEU in Minister of Justice and Equality v. LM*, New Journal of European Criminal Law, Vol. 9, No. 3. September 2018, p. 360.

²⁰ In Case 128/18, *Dorobantu* [EU:C:2019:857] the CJEU examined detention conditions in connection with the prohibition of torture or other cruel, inhuman or degrading treatment. Of course the question referred to preliminary ruling concerned the possibility to reject the execution of an EAW. Since EU law does not provide uniform requirement for detention conditions the CJEU decided to apply a test created by the ECtHR in the *Mursic v. Croatia* case. See Á. Mohay, *The Dorobantu case and the applicability of the ECHR in the EU legal order*, Pécs Journal of International and European Law, Vol. 5, No. 1. May 2020, pp. 86-87.

²¹ In Case 584/19, *Staatsanwaltschaft Wien* the CJEU found that the EIO is of less restricting and intrusive nature to fundamental rights than the EAW since their aim differs and the EIO directive provides more safeguards such as the requirements of necessity and proportionality, rejection clauses aiming to avoid forum-shopping and proper (?) legal remedies with the obligation to properly inform concerned persons. See Case 584/19, *Staatsanwaltschaft Wien* [EU:C:2020:1002] paras. 57-62.

²² The varying nature of legal remedies provided in connection with the substantive reasons of issuing an EIO can be best highlighted by comparing the relevant legislation of two Member States. While the Bulgarian criminal procedural code does not allow for challenging a decision on conducting search of home and business premises the Hungarian criminal procedural code does so. Both Member States tied the right to challenge the lawfulness of issuing an EIO to national rules applicable in a similar domestic case. See XC. Act of 2017 on criminal procedure Art. 362. para. (1) points 10-11; While Hungarian legislation is also not perfect it provides a wider scope of legal remedies than what can be seen in Bulgarian criminal procedure. The core problem with the implementation of the directive stems from this very issue. It shows that concerned persons can challenge EIOs on different terms in different Member States.

directive insufficiently in this matter it would dispel concerns regarding the violation of the right to effective remedy. Nevertheless, it would result in other issues to be dealt with. For instance, it could be brought up that the right to contest the issuance of an EIO regardless of what investigative measure was requested by it could result in inequality between persons involved in purely domestic criminal procedures and in criminal procedures having a transnational element. Such a distinction could only be avoided if the right to contest the issuance of an EIO concerned the substantive reasons for issuing the legal instrument. According to the directive, these are the requirement of necessity and proportionality.

At this point we must separate the necessity and proportionality of the investigative measure requested by the EIO and the necessity and proportionality of issuing an EIO, hence initiating international criminal cooperation in a criminal procedure. The former can only be adjudged according to national criminal procedural law, but the latter may be assessed by the principle of proportionality as a general principle of EU law – containing the necessity aspect as well.²³ Therefore assessing the necessity and proportionality of issuing an EIO should become a twofold examination in order to avoid a situation where the right to an effective remedy has a different substance due to the fact that each Member State has a slightly different criminal justice system which is reflected in the right to legal remedies as well. Issuing authorities should not only take into account the necessity and proportionality of executing a certain investigative measure, but also the necessity and proportionality of issuing an EIO.

6. Conclusion

The CJEU is tasked with deciding on two important questions in the *Gavanozov II* case: is the right to an effective remedy violated by Bulgarian law not providing the right to challenge the issuance of an EIO requesting search of business premises and home and the seizure of items? If it is, then what is the proper solution for this situation? There are two possible outcomes as outlined above. The Luxembourg court may either decide to apply a mechanism similar to what has been established in the *Aranyosi* and *Caldararu* joined cases, or it may find that Bulgaria implemented the EIO directive incorrectly since it provides the right to legal remedy in a constricted manner in relation to the scope of an EIO.

In my opinion the first option could be realised as easily as the second one since it would be enough to refer to the fundamental rights rejection ground in relation to the violation of the right to an effective remedy so as to create a mechanism protecting fundamental rights in international criminal cooperation of Member States. On the other hand, the CJEU may find that the efficacy of judicial cooperation and the protection of fundamental rights can be better reconciled with each other by finding that the directive provides a direct right to contest the issuance of any EIO regardless of what investigative measure is requested in it. If such a preliminary ruling is delivered, specific criteria according to which an EIO could be challenged will have to be ascertained later as well, since for now it is not a generally accepted practice to apply the proportionality principle of EU law to mutual recognition tools of judicial cooperation between the Member States. Instead, the necessity and proportionality of issuing an EIO is adjudged according to national criminal procedural laws

²³ It can be noted here that there have been examples for the application of the principle in such manner in connection with the EAW even though the EAW framework decision does not establish the applicability of the principle. See M. Sokołowska Chudy, I. Szymańska & F. Szymański, *The Principle of Proportionality in the Directive on European Investigative Order and its Influence on the Principle of Mutual Recognition of Judicial Decisions*, p. 6. https://www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_Poland_1.pdf (8 April 2021); W. Sauter: *Proportionality in EU Law: A Balancing Act?* Cambridge Yearbook of European Legal Studies, Vol. 15, 2013, pp. 447-448. <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S1528887000003128> (8 April 2021)

resulting in 27 slightly different sets of criteria – a solution that does not support a uniform application of the relevant rules of the EIO directive.

To sum up the, CJEU's jurisdiction was established over the investigation phase of international criminal cooperation between Member States, making it possible to adjudge questions arising specifically in that phase. Even though it cannot be directly perceived yet, the CJEU's jurisdiction will arguably result in a higher standard of protection of fundamental rights regardless of the content of the judgement to be delivered in the *Gavanozov II* case.