

# The CJEU Partially Excludes Bulgaria from Taking Part in Judicial Cooperation – an Absolute Order or a Balancing Act? The *Gavanozov II* Case

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*The European Investigation Order is a judicial decision issued for gathering evidence located abroad. Directive 2014/41/EU establishing the European Investigation Order applies the usual toolbox for giving effect to the principle of mutual recognition. The EIO majorly contributed to the system of judicial cooperation in criminal matters between Member States since it managed to extend the application of the principle of mutual recognition to investigative measures as well. This clearly increases the efficiency of cooperation. While the EIO Directive has the potential to hamper the protection of fundamental rights – as any legal instrument based on the principle of mutual recognition in the field of judicial cooperation -, arguably, it will indirectly contribute to the strengthening of the status of the individual in the EU since it provided the Court of Justice of the European Union with jurisdiction to rule on preliminary questions regarding questions of protecting fundamental rights in the investigation phase of the criminal procedure. One such example – and the first at that – is the Gavanozov cases where the CJEU took a road which was seemingly less travelled in its previous case law and excluded Bulgaria from issuing certain kinds of EIOs for the protection of the individual.*

*Key words: principle of mutual recognition, principle of mutual trust, European criminal law, European Investigation Order, procedural safeguards, right to an effective legal remedy*

## 1. Introduction

Scholars have already pointed out that the European Investigation Order (hereinafter referred to as EIO) may have far-reaching consequences for the protection of fundamental rights.<sup>1</sup> It is a procedural legal instrument based on the principle of mutual recognition, aiming to enhance judicial cooperation between Member States in criminal matters, specifically in the phase of investigation.<sup>2</sup> As such, it necessarily has a nature of constricting human rights to a certain extent.<sup>3</sup> This could be

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<sup>1</sup> Inés 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; Andrea Jánosi, *Az európai nyomozási határozat előzményei és vívmányai*. Publicationes Universitatis Miskolcensis Sectio Juridica et Politica 2015. p. 216; Krisztina Karsai, *Emberi jogok védelme és az európai nyomozási határozat*, Rendészet és emberi jogok, Vol. 3, No. 3, 2012. p. 27.

<sup>2</sup> Council and European Parliament Directive 2014/41, OJ 2014 L 130/1, Recital 7.

<sup>3</sup> As demonstrated in the case law guide of the ECtHR, during the investigation, evidence may be gathered against the

observed in the *Gavanozov I* and *II* cases brought before the Court of Justice of the European Union (CJEU) as well.<sup>4</sup> In this annotation, I argue that the CJEU continued its line of cases that started with the *Aranyosi* and *Caldararu* joined cases, and set out another standard of protection of fundamental rights – namely, one that is applicable in the investigation phase. Such a standard is a very welcome addition to the law of the EU's Area of Freedom, Security and Justice- In addition, the *Gavanozov II* case shows us that the CJEU once again drew on the case law of the European Court of Human Rights (hereinafter referred to as: ECtHR) which results in the further approximation of their practice.

## 2. Factual and Legal Background of Gavanozov I and II

Both cases brought before the CJEU were initiated based on a criminal procedure against I. D. Gavanozov, a Bulgarian individual who was accused of committing tax offenses in a criminal organisation. He was suspected of having imported, via shell companies, sugar into Bulgaria from other Member States, and of subsequently having sold that sugar on the Bulgarian market without assessing or paying value added tax. The accused forged documents according to which that sugar had been exported to Romania in an attempt to cover his conduct constituting the offenses.<sup>5</sup> In order to collect evidence located abroad, the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria) decided to issue an EIO requesting the Czech authorities to execute searches of home and business premises and seizure of certain items.<sup>6</sup> However, the Bulgarian court also decided to initiate a preliminary ruling procedure before doing so, since it found that the Bulgarian implementation of the EIO directive does not allow for challenging the substantive reasons of issuing an EIO if it concerned the above-mentioned investigative measures.<sup>7</sup>

In the *Gavanozov I* case, its question referred to preliminary ruling concerned if the Bulgarian implementation of the EIO directive precluding legal remedies challenging the substantive reasons of issuing an EIO in case of certain investigative measures (e.i. the search of home and business premises, the seizure of items and the hearing of witnesses) is in line with Art. 14 of the Directive concerning legal remedies. The Bulgarian judge also inquired whether Art. 14 of the Directive grants to the concerned party the right to challenge the court decision issuing an EIO, even if such a procedural step is not provided by national law.<sup>8</sup> The underlying issue is that the Bulgarian implementation regulates legal remedies regarding the EIO much like legal remedies provided in a similar domestic case, where the Criminal Procedure Act does not allow to challenge the issuing of any kinds of investigative measures but just a constricted number of them.

It is clear that the above-mentioned investigative measures necessarily violate – or rather constrict – the right to respect for the private and family life of persons involved in the criminal procedure. However, such limitation of that fundamental right must further a legitimate aim, must be proportionate to the aim of the criminal procedure and must be necessary in a democratic society.<sup>9</sup>

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person's will who is subject to the investigative measure. See: Jeremy McBride, *Human Rights and Criminal Procedure. The case law of the European Court of Human Rights*, Council of Europe, 2018. p. 9.

<sup>4</sup> Case C-324/17 *Gavanozov I*, [EU:C:2019:892]; Case C-852/19 *Gavanozov II*, [EU:C:2021:902].

<sup>5</sup> Case C-324/17 *Gavanozov I*, paras. 10-11.

<sup>6</sup> Case C-324/17 *Gavanozov I*, para. 12.

<sup>7</sup> Case C-324/17 *Gavanozov I*, para. 14.

<sup>8</sup> Case C-324/17 *Gavanozov I*, para. 16 (1)-(2).

<sup>9</sup> For a thorough analysis of the necessity and proportionality requirements, see: ECtHR *Guide on Article 8 of the European Convention on Human Rights*. 2021. [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf) (4 April 2022)

Fulfilling these requirements is safeguarded by the right to effective legal remedy in cases when the intrusion of state actions into the private life of concerned persons is of a considerable nature capable of having adverse effects as well.<sup>10</sup>

It is clear, that an effective legal remedy is lacking in the case in question. This is not a Bulgarian speciality. The Hungarian transposition of the directive also applies the same rule on legal remedies regarding the issuance of an EIO. It only allows to challenge the lawfulness of issuing an EIO if the investigative measure requested in it could be challenged in a similar domestic case.<sup>11</sup> Thus, it also provides a somewhat limited scope of legal remedies in comparison to the scope of the EIO (however wider than its Bulgarian counterpart).<sup>12</sup> This brings us to the rather problematic conclusion that the right to legal remedies against the issuing of an EIO is of a varying nature according to which Member State issued it.

### 3. Judgement of the Court – Gavanozov I

Thus, the assignment for the CJEU was clear. It needed to decide whether the Bulgarian transposition is contrary to the Directive. Moreover, indirectly, the Court's judgement would have also defined the scope of legal remedies provided in the EIO Directive. However, the Luxembourg court avoided doing so in the *Gavanozov I* case by reformulating the question referred to it. Instead of delivering a judgement on whether the Bulgarian transposing legislation was in line with the directive, it decided that the referring court's question concerns Section J of the form where the available legal remedies do not need to be indicated if recourse to them did not take place.<sup>13</sup> Nevertheless, it should be noted that Advocate General Bot considered such national legislation transposing the EIO directive to be in violation of Art. 47 of the Charter (a Fundamental Rights), the right to an effective legal remedy.<sup>14</sup>

### 4. Comments on Gavanozov I

After a closer look at the case-law of the CJEU, it does not come as a surprise that the CJEU avoided answering the question. Since the principle of mutual recognition has only been applicable during the phase of criminal investigations for a couple of years by the time it needed to deliver the preliminary ruling in the *Gavanozov I* case (that is from 23 May 2017 to 24 October 2019), it did

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pp. 12-13.

<sup>10</sup> This is underpinned by the nature of the right to an effective legal remedy, it being a complementary tool which can only be violated if a state action constricting human rights cannot be challenged. See: ECtHR *Guide on Article 13 of the European Convention on Human Rights*. 2021. [https://www.echr.coe.int/Documents/Guide\\_Art\\_13\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf) (4 April 2022) p 8.

<sup>11</sup> Act CLXXX of 2012 on Criminal Cooperation between EU Member States §§ 50(1), 58(1).

<sup>12</sup> The Hungarian transposition of the EIO refers to the Criminal Procedure Act regulating legal remedies in connection to contesting investigative measures ordered in an EIO. The Act provides the possibility to challenge procedural measures only if they are issued in the form of an order. These procedural measures do include the search of home and business premises and the seizure of property; hence the scope of legal remedies is wider in the Hungarian criminal procedure than in the Bulgarian criminal procedure. See: Act XC of 2017 on the Criminal Procedure §§ 362(1), 369, 374.

<sup>13</sup> Case C-324/17 *Gavanozov I*, paras. 25, 38.

<sup>14</sup> Case C-324/17 *Gavanozov I*, Opinion of Advocate General Bot, delivered on 11 April 2019, [EU:C:2019:312] para. 82.

not yet establish case law on the underlying issue. Given the fragility of the system of criminal cooperation between Member States, based on the principle of mutual recognition, it is possible, that the Court saw an option for avoiding the need to – once again – provide a balancing act between the protection of fundamental rights and the efficiency of criminal cooperation and took it.

Of course, the CJEU could have looked for inspiration in the case law of the ECtHR which dealt with a rather similar issue in a series of cases.<sup>15</sup> Among these cases, a landmark decision was delivered in *Posevini v. Bulgaria*<sup>16</sup> with a quite similar underlying criminal procedure where the same investigative measures have been applied. The defendants turned to the Strasbourg court since searches of their homes and business premises as investigative measures could not be challenged according to the Bulgarian Criminal Procedure Act.<sup>17</sup> The ECtHR found that such legislation violates the right to an effective remedy.<sup>18</sup> This is an obvious indication that the right to an effective legal remedy would be violated in the *Gavanozov* case, at least compared to the standards set out by the ECtHR.

## 5. Gavanozov II – a Slightly Modified Question

Since the CJEU avoided answering the question referred to it in the *Gavanozov I* case, the Bulgarian court initiated another preliminary ruling procedure with a slightly different question in the beginning of 2020:

‘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 and with Articles 47 and 7 of the Charter (of Fundamental Rights), read in conjunction with Articles 13 and 8 of the ECHR?’

Can a European Investigation Order be issued under those circumstances?’

While the *Gavanozov II* case was pending, I speculated in a previous annotation,<sup>19</sup> that the CJEU could arrive at two different conclusions. First, taking inspiration from the case law of the ECtHR, it could have found that the Bulgarian legislation indeed violated the right to an effective remedy. I also speculated that such a decision would have provided the possibility to apply the fundamental-rights-rejection-clause provided in the directive (note that according to the latest case law analysis regarding the legal instrument provided by the Eurojust in 2020, this rejection clause has yet to be applied).<sup>20</sup> However, such a preliminary ruling would have indirectly accepted the fact that criminal justice systems of Member States are unequal since the underlying issue is – as I have already

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<sup>15</sup> As we have seen recently, the CJEU does not shy away from even directly relying on ECtHR case law to fill gaps in EU law, as witnessed for instance by the judgment in Case 128/18 *Dorobantu* [EU:C:2019:857] For analysis of this aspect see Ágoston 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.

<sup>16</sup> *Posevini v Bulgaria* (App. no. 63638/14) ECtHR (2017).

<sup>17</sup> *Ibid.* para. 3.

<sup>18</sup> *Ibid.* As already explained, this specific fundamental right’s violation may be found in the context of violating another fundamental right, e.g. the right to respect for private life. Cf. footnote 10.

<sup>19</sup> István Szijártó, *The implications of the European Investigation Order for the protection of fundamental rights in Europe and the role of the CJEU*. Pécs Journal of International and European Law, Vol. 7, No. 1, June 2021, pp. 66-72.

<sup>20</sup> Eurojust: *Report on Eurojust’s casework in the field of the European Investigation Order*, 2020. <https://www.eurojust.europa.eu/publication/report-eurojusts-casework-field-european-investigation-order> (22 March 2021) p. 36.

referred to it – the varying nature of legal remedies provided by each Member State. Although significantly less probable, I anticipated, that the CJEU could have also found that the Bulgarian implementation of the directive was insufficient since it does not always provide the possibility to challenge the substantive reasons for (the lawfulness of) issuing the EIO which is stipulated in Art. 14(2) of the EIO directive. The latter assumption is in the judgement of the CJEU in the *Gavanozov II* case stating that Article 14 of the Directive merely sets out an equivalence clause. Article 14(2) of the Directive, stipulating that the substantive reasons of issuing an EIO can only be challenged in the issuing state, read in conjunction with the equivalence clause, cannot oblige Member States to provide additional legal remedies to those that exist in a similar domestic case.<sup>21</sup>

## 6. The Judgement of the Court in *Gavanozov II*

Essentially, the Court delivered a judgement which is in line with the AG's opinion,<sup>22</sup> i.e. the lack of legal remedies against the ordering of investigative measures applied in the underlying case indeed violates the right to an effective legal remedy as laid down in the Convention and the Charter and elaborated in the case law of the ECtHR.<sup>23</sup> Hence, national legislation which does not provide for any legal remedy against the issuing of an EIO, the purpose of which is the carrying out of searches and seizures as well as the hearing of witness by videoconference is precluded.<sup>24</sup>

However, a much more important question was how to reconcile a situation where the national law violates the right to an effective legal remedy (or any other fundamental right) with the system of criminal cooperation based on the principles of mutual recognition and mutual trust. I speculated that this could open the possibility to apply the fundamental-rights-rejection-ground of the EIO.<sup>25</sup> However, the AG as well as the Court went further in this regard. In his opinion, AG Bobek argued that the full responsibility of finding the unlawfulness of an EIO cannot rest on the executing Member State. On the contrary, the issuing Member State must make sure that its legislation is in line with the standards of protection of fundamental rights as derived from the Convention, the Charter and the case law of the ECtHR. Failing that should exclude the Member State in question from taking advantage of the system of judicial cooperation in criminal matters.<sup>26</sup> In its judgement, the Court also noted that issuing an EIO for the purpose of carrying out investigative measures which cannot be contested is *a fortiori* in violation of fundamental rights. Consequently, the application of the fundamental-rights-rejection-ground in the EIO directive would become automatic in such cases – a practice which would not be compatible with the principles of mutual trust and sincere cooperation, and the very nature of the rejection ground itself, which is devised to be applied on a case-by-case and exceptional basis.<sup>27</sup>

To resolve this contrast between the above-mentioned principles and the national legislation which does not uphold the standards of protection of fundamental rights, the CJEU concluded that an EIO ordering investigative measures which cannot be contested according to the national legislation of

<sup>21</sup> Case C-852/19 *Gavanozov II*, para. 26.; Advocate General Bobek also notes that a grammatical and taxonomic interpretation of Article 14 of the Directive leads to the conclusion that the equivalence clause binds both the issuing and the executing Member States. See: Case C-852/19 *Gavanozov II*, Opinion of Advocate General Bobek delivered on 29 April 2021, paras. 32-38. [EU:C:2021:346] .

<sup>22</sup> *Ibid.*

<sup>23</sup> Case C-852/19 *Gavanozov II*, para. 34.

<sup>24</sup> *Ibid.* para. 50.

<sup>25</sup> Szijártó 2021, p. 69.

<sup>26</sup> Case C-852/19 *Gavanozov II*, AG Opinion, paras. 89-91.

<sup>27</sup> Case C-852/19 *Gavanozov II* case, para. 59.

the issuing Member State cannot be issued at all.<sup>28</sup>

## 7. Comments on Gavanozov II

By excluding the possibility to issue an EIO which orders the carrying out of investigative measures, the lawfulness of which cannot be contested, the Court seemingly adopted a very different approach from the line of cases concerning the protection of fundamental rights starting with the *Aranyosi* and *Caldararu* joined cases. Instead of a balancing act, it could be perceived that the Court delivered an absolute order where there is no place for correction. However, after taking a closer look, it is arguable that this was its only option, since the wording of the Directive did not allow space for finding that the Bulgarian transposing legislation is in breach of EU law. Even if we assume that the Bulgarian transposing legislation could be modified so it would provide a legal remedy against the issuing of an EIO, without modifying the national legislation, it would result in a situation where persons subject to an investigative measure ordered in an EIO are better protected than persons subject to investigative measures carried out in purely national criminal procedures.

In addition, the fact that the EIO in question is *a fortiori* in breach of the right to an effective legal remedy makes the reconciliation procedure (one that would be similar to the *Aranyosi* test) obsolete in terms that the very nature of the violation of the fundamental right results in a situation which cannot be mitigated since its based on the Bulgarian criminal justice system. Last, but not least, the possibility to turn to a mitigating procedure like the *Aranyosi* test is still available in the fundamental-rights-rejection-ground which should be applied only on an exceptional basis as emphasised by the Court.

In conclusion, the effects of the judgement of the Court in the *Gavanozov II* case have the potential to be far-reaching. It sets a substantial standard of protection of fundamental rights in connection to criminal cooperation in the phase of investigation, i.e. that Member States are obliged to provide legal remedies to persons subject to investigative measures even if that measure is considered less restrictive of fundamental rights, such as the hearing of witnesses.<sup>29</sup> By excluding Member States from taking part in judicial cooperation in criminal matters – an exclusive club, so to say – if their legislation does not uphold this, or other standards of protection of fundamental rights, the Court created a forceful stimulus for those Member States to modify their criminal justice system – hopefully – resulting in the overall strengthening of the status of the individual in the criminal procedure.

Taking into consideration the legal issues which could be encountered in the process of judicial cooperation in criminal matters – including the one introduced in this annotation –, minimum harmonisation of the core concepts and instruments of criminal procedure seems more important than ever. The *Gavanozov* cases demonstrate that minimum harmonisation is needed regarding the right to legal remedies both in terms of the EIO and investigative measures on a national level. Such harmonisation could take place under Art. 82(2)b TFEU providing a legal basis to adopt directives harmonising the rights of the individuals in the criminal procedure, beyond those already adopted on certain procedural aspects.

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<sup>28</sup> Ibid. para. 62.

<sup>29</sup> Case C-852/19 *Gavanozov II* case AG Opinion, para. 97.