Revista JURÍDICA PORTUCALENSE

www.upt.pt

UNIVERSIDADE PORTUCALENSE
IJP
Instituto Jurídico Portucalense

Fundação
para a Ciência
e a Tecnologia

N.º 34 | Universidade Portucalense | Porto | 2023

https://doi.org/10.34625/issn.2183-2705(34)2023

Mário Simões BARATA

Case C-852/19, Gavanozov II: European Investigation Order and the Right to an Effective Remedy in the CFREU

DOI: https://doi.org/10.34625/issn.2183-2705(34)2023.ic-09

Secção I

Investigação Científica[*]

[*] Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

Case C-852/19, Gavanozov II: European Investigation Order and the Right to an Effective Remedy in the CFREU

O Processo C-852/19, Gavanozov II: decisão europeia de investigação e o direito à acção na CDFUE

Mário Simões BARATA[1]

ABSTRACT: The European Investigation Order (EIO) was established by Directive 2014/41/EU. In 2019, the Court of Justice of the European Union (CJEU) made its first ruling on this new mechanism for judicial cooperation in criminal matters in Case C-324/17, Gavanozov. However, legal experts criticized the decision because it didn't address Article 47 of the Charter of Fundamental Rights of the European Union (CFREU). The ruling left unanswered questions for the Bulgarian Court, which prompted a new preliminary reference on the lack of legal remedies to challenge investigative measures in the EIO under Bulgarian criminal procedure law. This led to Case C-852/19, Gavanozov II, where the CJEU was more attentive to fundamental rights and determined that an EIO cannot be issued without the ability to contest the grounds and necessity of the investigation. This article aims to analyze the legal dispute in the Gavanozov II Case, including the impact of the ruling on November 11, 2021, relevant doctrine, and the applicability of Article 47 of the CFREU.

KEYWORDS: European Investigation Order; Charter of Fundamental Rights of the European Union; Right to a legal remedy

RESUMO: A decisão europeia de investigação (DEI) foi adotada pela Diretiva 2014/41/UE. Em 2019, o Tribunal de Justiça da União Europeia (TJUE) proferiu a sua primeira decisão relativa a este novo mecanismo de cooperação judiciária em matéria penal no processo C-324/17, Gavanozov. A doutrina jurídica criticou a decisão, na medida em que não considerou a questão da aplicação do artigo 47º da Carta dos Direitos Fundamentais da União Europeia (CDFUE). A decisão acabou por não responder às dúvidas do Tribunal búlgaro, o que desencadeou um novo reenvio preliminar relativo à ausência de um recurso legal para contestar as medidas de investigação solicitadas na OEI no âmbito do direito processual penal búlgaro. O pedido deu origem ao Processo C-852/19, Gavanozov II, onde o TJUE foi mais sensível à aplicação dos direitos fundamentais e entendeu que uma OEI não pode ser emitida se não houver possibilidade de contestar os fundamentos materiais que lhe estão subjacentes e a sua necessidade. O presente artigo tem por objetivo analisar a controvérsia jurídica no âmbito do Processo Gavanozov II. Para o efeito, examina-se o impacto da decisão, proferida em 11 de novembro de 2021, e a doutrina relevante, bem como a aplicabilidade do artigo 47.º da CDFUE.

PALAVRAS-CHAVE: Decisão Europeia de Investigação; Carta dos Direitos Fundamentais da União Europeia; Direito à ação judicial

[1] https://orcid.org/0000-0001-8512-1650

Introduction

One of the objectives of the European Union (EU) set out in Article 3 of the Treaty on European Union (TEU) is to provide its citizens with “an area of freedom, security, and justice without internal borders, in which the free movement of persons is ensured, in conjunction with appropriate measures in terms of external border controls, asylum, and immigration, as well as crime prevention and combating this phenomenon”. This objective is further developed in Article 82 of the Treaty on the Functioning of the European Union (TFEU) about judicial cooperation in criminal matters. Under paragraph 1 of that legal precept, the EU adopted Directive No. 2014/41/EU which creates and regulates the European Investigation Order (EIO).[2]

An EIO is a “judicial decision which has been issued or validated by a judicial authority of a Member State (“the issuing State”) to have one or several specific investigative measure(s) carried out in another Member State (“the executing State”) to obtain evidence under this Directive”.[3] It introduces a “new tool for cross-border investigations and trans-national gathering of evidence”.[4] However, the execution of an EIO can be refused if one of the few grounds laid down in the directive is invoked. Specifically, the executing State may invoke obligations arising from compliance with Article 6 of the TEU and the Charter of Fundamental Rights of the European Union (CFREU) in order not to recognize or execute an EIO issued by another Member State.

1. Methodology

This article aims to analyze the execution phase of an EIO in the light of fundamental rights, particularly Article 47 (1) of the Charter of Fundamental Rights of the European Union which enshrines a right to an effective remedy. To this end, it resorts to the relevant legal doctrine and jurisprudence of the Court of Justice of the European Union (CJEU) relative to the EIO Directive, namely the Gavanozov I and II cases.

---

[2] *OJ* 2014 L 130, p. 1.

[3] Article 1, section 1 of the EIO Directive.

[4] ALLEGREZZA, S. (2014). Collecting Criminal Evidence Across the European Union: the European Investigation Order Between Flexibility and Proportionality. In S. Ruggeri (ed), *Transnational Evidence in Multicultural Inquiries*, (pp. 51-67). Heidelberg: Springer. P. 51.

2. The European Investigation Order

The European Investigation Order was adopted by Directive Nº 2014/41/EU. According to the legal literature, it is possible to identify or carve out five phases in the life cycle of an EIO. Thus, the life cycle of an order encompasses the following phases: issuing; transmission; recognition; execution; transfer.[5]

The first phase of the life cycle of an EIO is related to the issuing of the investigative order. Depending on national legislation, the issuing authority in these matters may be a judge, a court, an investigating judge, or a public prosecutor that is legally competent in the case in question. The EIO Directive also states that "issuing authority" may mean "any other competent authority as defined by the issuing State, which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence under national law".[6]

The national judicial authority issues an EIO to carry out one or more investigative measures in another EU Member State.[7] To this end, the Directive regulates the types of proceedings for which the EIO can be issued as well as the content and form of the EIO (i.e., it must include information on the issuing authority and the persons concerned, the object and reason for it, the description of the criminal act and the investigative measures requested, as well as the evidence to be obtained).[8]

However, the EIO can only be issued under the following conditions: it must be necessary and proportionate to the objective pursued; the investigative measures indicated in the decision must be capable of being ordered in a similar domestic case.[9] On the one hand, the necessity principle "means that the execution of a state action such as an investigative measure requires it to

[5] See the EIO-LAPD project at www.eio-lapd.eu.
[6] See Article 2, line c), point ii) of the EIO Directive.
[7] The concept of the national judicial authority in the EIO Directive is the object of a recent decision by the Court of Justice of the European Union. See Court of Justice, Grand Chamber, judgment of the 8th December 2020, *Staatsanwaltschaft Wien/A. and Others*, case C-584/19. ECLI:EU: C:2020:1002. For an analysis of this particular case, see GUIMARÃES, A. P., CASTILHOS, D. S. & BARATA, M. S. *Autoridade de Emissão na Decisão Europeia de Investigação – Parte II*, in *Revista Jurídica da Portucalense*, 2021, 30, p. 24-26. DOI: https://doi.org/10.34625/issn.2183-2705(30)2021.ic-02.
[8] Articles 4 and 5 of the EIO Directive.
[9] See Article 6, section 1, of the EIO Directive.

be necessary to attain its goal".[10] The goal of an EIO is to gather evidence. On the other hand, the proportionality principle refers "to the required balance between the interests served by the measure and the interests harmed by introducing it".[11] This limitation can be found in point a) of section 1 of Article 6 of the EIO Directive which obliges the judicial authorities to consider "the rights of the suspected and accused persons".[12] Nevertheless, the legal doctrine criticizes the solution since the executing authority does not control the appropriateness and proportionality of the requested investigative measure.[13] In addition, there is no definition of proportionality in the case law of the CJEU.[14]

The EIO is then transmitted by the judicial authority of the issuing Member State to the judicial authority of the executing Member State under the means and conditions laid down in the Directive (i.e., "by any means capable of producing a written record under conditions allowing the executing authority to establish authenticity") and in the national legislation which transposed it.[15] [16]

Once the EIO has been received, the judicial authority of the executing State must recognize it if it has been issued according to the Directive without any further formality.[17] However, the directive and national implementing legislation regulate a limited set of exceptions that validate the non-recognition

---

[10] DEPAUW, S. (2016). A European evidence (air)space? Taking cross-border legal admissibility of forensic evidence to a higher level. *European Criminal Law Review*, 1, p. 89.
[11] *Idem.*
[12] For further considerations regarding the proportionality requirement in the EIO Directive, see ALLEGREZZA, S. *Collecting Criminal Evidence Across the European Union: the European Investigation Order Between Flexibility and Proportionality*, cit, p. 59-64.
[13] Cfr. ARMADA, I. (2015). 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*, 1, p. 15.
[14] Cfr., DANIELE, M. (2019). Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles. *New Journal of European Criminal Law*, 6, p. 187.
[15] Article 7, section 1, of the EIO Directive. In Portugal, the EIO Directive was transposed by Law No. 88/2017 into the domestic legal order. The legislative act was approved by the Assembly of the Republic (i.e., Portuguese Parliament) and published in the official journal (i.e., *Diário da República)* on August 21st, 2017. The Directive was not implemented within the deadline set by the European Union. On the contrary, the national legislation that implemented the EIO came into force three months after the deadline set by the Directive (i.e., 22 May 2017) and no official reason was given for the delay.
[16] For an analysis on the implementation of the Directive in Portuguese law see BARATA, M. S., GUIMARÃES, A. P. & CASTILHOS, D. (2023). The European Investigation Order in Portugal – Legal Analysis and Practical Dilemmas, in AMBOS, K., HEINZE, A. RACKOW, P. & SEPEC, M. (ed.), European Investigation Order: Legal Analysis and Practical Dilemmas of International Cooperation, Berlin: Duncker & Humblot, p. 87 and ff.
[17] Article 9, section 1, of the EIO Directive.

or non-enforcement of an EIO.[18] One of those impeditive reasons or grounds is related to the observance of fundamental rights. In addition to this ground, the Directive alludes to other causes that prevent the non-recognition or non-execution of the issuing decision.[19]

The fourth stage of the life cycle of an EIO concerns the execution of this instrument of judicial cooperation in criminal matters in the executing State. This phase takes place after recognition and concerns the fulfillment of the request by the issuing State based on the principle of mutual recognition and "in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State" unless the executing authority invokes one of the grounds for non-execution laid down in the EIO Directive.[20] The Directive also establishes time limits for the execution of an EIO.

The last phase of the life cycle of an EIO is related to the transfer of evidence. In this phase, the executing State transfers to the issuing State the evidence that has been collected under the EIO or is already in its possession without undue delay.[21]

In addition to these five phases, the EIO Directive establishes specific provisions relating to certain investigative measures to "strengthen and consolidate security in the EU area".[22] These refer to temporary transfer to the issuing or executing State of persons held in custody to carry out an investigative measure; hearing by videoconference or other audiovisual transmissions; hearing by telephone conference; information on bank and other financial institutions; information on banking and other financial operations; investigative measures implying the gathering of evidence in real time; covert investigations; interception of telecommunications with the technical assistance of another Member State; notification of the Member State where the subject of the interception is located from which no technical assistance is needed.[23]

---

[18] Article 11, section 1, of the EIO Directive.
[19] See Article 9, section 3, of the EIO Directive.
[20] Article 9, section 1, must be read in conjunction with Article 11, section 1, of the EIO Directive.
[21] Article 13, section 1, of the EIO Directive.
[22] TRIUNFANTE, L. L. (2019). *Manual de Cooperação Judiciária Internacional em Matéria Penal*. Coimbra: Almedina, p 175.
[23] See Articles 22 to 32 of the EIO Directive.

3. The execution phase

As we have already mentioned the execution of an EIO concerns the fulfillment of the request by the issuing State based on the principle of mutual recognition[24] and under the conditions that would apply if the investigative measure in question had been ordered by a national authority.[25]

However, the execution of an EIO can be refused. The refusal must be based on one of the reasons set out in the Directive. The limited list of grounds for refusal can be found in Article 11, section 1, of the EIO Directive and refer to:

a) "there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute an EIO;
b) in a specific case the execution of an EIO would harm essential national security interests, jeopardize the source of the information or involve the use of classified information relating to specific intelligence activities;
c) the EIO has been issued in criminal proceedings referred to in Article 4(b) and (c) and the investigative measure would not be authorized under the law of the executing State in a similar domestic case;
d) the execution of the EIO would be contrary to the principle of *ne bis in idem*;
e) the EIO relates to a criminal offense that is alleged to have been committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, and the conduct in connection with which the EIO is issued is not an offense in the executing State;
f) there are substantial grounds to believe that 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;
g) the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offenses or to offenses punishable by a certain threshold, which does not include the offense covered by the EIO".

Therefore, the executing State can invoke point f) of Article 11, section 1, of the EIO Directive if it has any fundamental rights objections. The legal provision in question refers to Article 6 of the TEU. Consequently, it comprehends the three sources of EU fundamental rights that are enshrined in

---

[24] For more considerations relative to the principle of mutual recognition in the EIO see RAFARICI, T. (2014). *General Considerations on the European Investigation Order*, in S. RUGGERI (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg: Springer, p. 37 and ff.

[25] For example, Article 19 of Law No. 88/2017 in Portugal regulates the issue of the national executing authority in Portugal. The general rule establishes that the EIO is executed by the national judicial authority with the competence to order the investigation measure in Portuguese territory, under the laws that govern criminal proceedings (i.e., the Criminal Procedure Code), the laws relating to the organization of the judicial system and the law governing the Public Ministry (i.e., Public Prosecution). In certain circumstances, an administrative entity may also execute an EIO. Finally, the national EUROJUST member can execute an EIO in certain circumstances.

that precept: the general principles of Union law based on the common constitutional traditions of the Member States; the European Convention for the Protection of Human Rights and Fundamental Freedoms; Charter of Fundamental Rights of the European Union.[26]

In sum, the general grounds for refusing to execute an EIO can be found in Article 11 of the EIO Directive. This list is completed by other grounds that render the execution of an EIO impossible (e.g. when the defendant does not consent to appear through a video link).[27] Yet, the provision relative to the specific ground referring to the observation or compliance with fundamental rights is particularly important and it refers to the Charter of Fundamental Rights of the European Union. The importance of this ground is underlined by the legal doctrine because it "represents a specific safeguard for the protection of fundamental rights in the AFSJ".[28]

4. Compliance with Fundamental Rights

As we have already mentioned, compliance with fundamental rights constitutes a basis for the non-recognition or non-execution of an EIO. Thus, any action or decision made by the authorities responsible for the recognition or execution of an EIO is limited by the duty to observe Article 6 of the TEU and the Charter of Fundamental Rights of the European Union (CFREU). This limit is particularly important in the context of an instrument for judicial cooperation in criminal matters that seeks to collect evidence related to the commission of crimes in general and especially when the authorities resort to technological means. Thus, we agree with the legal doctrine that warns us of the possibility that new technological means (i.e., artificial intelligence) have the potential to violate several fundamental rights, namely the rights of defense and the right to a fair and equitable trial, and the presumption of innocence.[29] Within the framework of the Charter, we consider that the observance of the right to a legal remedy and the guarantees in a criminal prosecution is especially important in the phases referring to the recognition and execution of an EIO. Thus, it is

---

[26] See SCHUTZE, R. (2021). *European Union Law, Third Edition*, Oxford, p. 452 and 453.
[27] Article 24, section 2, of the EIO Directive.
[28] BACHMAIER, L. (2015). Transnational evidence: towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters. *Eucrim: the European Criminal Law Associations' forum*, 2, p. 54.
[29] See COSTA, M. J. & ABRANTES, A. M. (2019). Os Desafios da Inteligência Artificial da Perspetiva Transnacional: A Jurisdição e a Cooperação Judiciária. In A. M. Rodrigues (coord.), *A Inteligência Artificial no Direito Penal*. Coimbra: Almedina, p. 206.

imperative to analyze this matter considering Article 47(1) of the CFREU, given the material connection with the EIO.

5. Article 47 of the Charter

The first paragraph of Article 47 of the CFREU provides that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article". The rule enshrines a "right to an "effective judicial remedy", or right to legal action, in the sense that individuals can judicially enforce the rights conferred upon them by the law. and corresponding right to judicial review".[30] Article 47 of the Charter also addresses the right to a "fair and public hearing" by "an independent and impartial tribunal previously established by law" and the right to "legal aid".[31] However, time and space preclude a more in-depth analysis of these three substantive elements.

The right to a remedy or the obligation of a State to provide a remedy comprehends: "the procedural right of effective access to a fair hearing, and the substantive right to adequate redress".[32] It was articulated by the Court of Justice for the first time in the Johnston Judgment[33], where it was understood as the "expression of a general principle of law that is at the base of the constitutional traditions common to the Member States" and sanctioned in Articles 6 and 13 of the European Convention on Human Rights (ECHR), despite the differences between the norms in the two instruments (i.e., Charter and the ECHR).[34] Subsequently, the Court of Justice reiterated the principle in two other decisions: the Heylens[35] and Borelli[36] judgments. The "reparation

[30] MESQUITA, M. J. R. (2013). Artigo 47º - Direito à ação e a um tribunal imparcial. In A. Silveira & M. Canotilho (coord.), *Carta dos Direitos Fundamentais da União Europeia Comentada*. Coimbra: Almedina, p. 538.
[31] See Article 47 (2) and (3) of the Charter.
[32] SHELTON, D. (2014). Art 47 – Right to an Effective Remedy. In S. Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary*. Oxford: Hart Publishing, p. 1200 and 1201.
[33] Court of Justice, judgement of the 15th of May 1986, *Johnston*, Case 222/84. ECLI:EU: C:1986:206.
[34] For an analysis of the origin of this right and the differences between Article 6 and 13 of the ECHR and Article 47 of the Charter, see D'AVINO, G. (2015). *Il diritto alla tutela giurisdizionale effettiva nell'art. 47 par. 1 della Carta dei diritti fondamentali dell'EU*, in *Rivista Freedom, Security & Justice: European Legal Studies,* 2, p. 155 and ff.
[35] Court of Justice, judgement of the 15th of October 1987, *Heylens*, Case 222/86, paragraphs 14 and 16. ECLI:EU: C:1987:442.
[36] Court of Justice, Fifth Chamber, judgement of the 3rd of December 1992, *Borelli*, Case C-97/91, paragraph 14. ECLI:EU: C:1992:491.

provided through an effective remedy should be proportional to the gravity of the violation and the damages suffered" and this can involve restitution, rehabilitation, satisfaction, and compensation for pecuniary and moral damages, and other forms.[37]

In addition, one cannot ignore the rationality subjacent to this right. The CJEU considered that the right to an effective remedy before a tribunal was needed to ensure the full and uniform application of EU law in the Member States. Thus, the right was understood "as embodying a direct means of ensuring the primacy and inviolability of Community rules".[38] Consequently, the question relative to the applicability of Article 47 of the Charter "to a particular dispute is indistinguishable from the question of whether (under Article 51 of the Charter) the Charter applies in the first place".[39]

In sum, remedies "need to be supplied to individuals that are suitable for ensuring that where there is a right under Union law, there is a remedy to ensure its enforcement (the principle known as *ubi ius ibi remedium*)".[40] Consequently, the right to an effective remedy entails that national legislation should not render the application of Union Law "impossible or excessively difficult". Therefore, Member State law must provide for effective judicial remedies in disputes between individuals and public authorities as well as effective judicial remedies in disputes between individuals.[41]

6. The Gavanozov Cases

a. Gavanozov I

The issue related to the right to a legal remedy is at the heart of the CJEU's first decision regarding the EIO Directive. Case C-324/17, Ivan Gavanozov, of 24th of October 2019, originates from a penal procedure relative to criminal association and tax evasion in Bulgaria. During the investigative

[37] SHELTON, D. (2014). Art 47 – Right to an Effective Remedy, cit, p.1201.

[38] D'AVINO, G. (2015). Il diritto alla tutela giurisdizionale effettiva nell'art. 47 par. 1 della Carta dei diritti fondamentali dell'EU, *Rivista Freedom, Security & Justice: European Legal Studies*, 2, p. 163.

[39] WARD, A. (2014). Art 47 – Right to an Effective Remedy. In S. Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (pp. 1197-1200). Oxford: Hart Publishing, p. 1199.

[40] HOFMANN, H. (2014). Art 47 – Right to an Effective Remedy. In S. Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (pp. 1211-1228). Oxford: Hart Publishing, p. 1214.

[41] Idem.

phase, the Bulgarian Special Criminal Court ordered, as part of an EIO, a series of searches and seizures at a company's headquarters and the domicile of its representative in the Czech Republic, as well as the questioning of a witness via video conference. However, the Court encountered some difficulties in completing section J of the form contained in the annex to the EIO Directive. This section refers to the obligation to inform about the existence of a legal remedy against the investigative measures requested by the judicial authority of the issuing State. However, no legal remedy exists under Bulgarian criminal procedural law. In the absence of an appeal, the Court requested a preliminary ruling under Article 267 of the TFEU.

The CJEU, based in Luxemburg, did not analyze the implications of Article 14 of the EIO Directive. It confined itself to deciding on the way the issuing Bulgarian authority should complete the EIO form[42], and having considered the wording of the legal precepts involved, concluded that there is no obligation on the judicial authority of the issuing State to provide, in section J of the form contained in Annex A to Directive 2014/41/EU, information about the legal remedies available to challenge the requested investigative measures.[43]

However, the most interesting aspect of the case is not related to the decision or the reasoning presented by the CJEU, but to the conclusions presented by the Advocate General (AG) of the Union Yves Bot.[44] According to AG Bot, the wording of Articles 13 and 14 of the EIO Directive points to an interpretation that is based on the existence of a remedy against the substantive grounds underlying the issuing of an EIO aimed at searching, the seizure of certain objects, and the questioning of a witness. Consequently, the AG sustained that

> "although Article 14(1) of that directive does not oblige the Member States to provide for legal remedies in addition to those available in a similar domestic case, it does oblige them, at the very least and through a 'mirror effect', to introduce remedies against the investigative measures indicated in an EIO which are equivalent to those available in a similar domestic case".[45]

[42] WAHL, T. (2021). AG: Bulgaria Not Allowed to Issue EIOs. *EUCRIM*, 2, 104-105. Retrieved from: eucrim issue 02/2021, p. 104 and 105.
[43] Court of Justice, First Chamber, judgement of 24 October 2017, *Ivan Gavanozov*, Case C-324/17. ECLI:EU: C:2019:892.
[44] Opinion of the Advocate General Bot, 11 of April 2017, Case C-324/17. ECLI:EU:C:2019:312.
[45] Opinion of the Advocate General Bot, 11 of April 2017, Case C-324/17, paragraph 55.

The AG justified this systemic reading of the EIO Directive by considering the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union. He considered that

> "the investigative measures ordered by the competent authorities in criminal investigations with the legitimate aim of gathering evidence may be intrusive and undermine the fundamental rights — recognized inter alia by the Charter — of the persons concerned. Furthermore, given the characteristics of criminal penalties, every aspect of procedures giving rise to such penalties must be accompanied by specific safeguards to ensure respect for the fundamental rights of the persons involved".[46]

The AG also noted that Bulgarian law does not provide for any remedy that would allow a witness to challenge the substantive grounds of investigative measures in the context of national proceedings, such as a search and seizure. This finding led the AG to draw two conclusions. Firstly, he considered that persons targeted in a criminal investigation have the right to defend themselves against any abuse or interference by the State. However, in Bulgaria, persons (natural or legal) when acting as witnesses are not able to defend themselves against any abuse or interference by the State to protect their privacy and other fundamental rights, which is in non-compliance with Article 14 of the Directive. Consequently, in the absence of these guarantees, the AG concluded, secondly, that the EIO cannot be issued under penalty of violating the first paragraph of Article 47 of the CFREU.[47]

Finally, the AG considered that

> "the EU legislature accompanied the implementation of the EIO with safeguards intended to protect the rights of persons subject to the investigative measures. Therefore, if a Member State chooses not to transpose Directive 2014/41 in that respect, not to introduce those safeguards and therefore not to respect the balance created by that directive between the intrusiveness of investigative measures and the right to challenge them, it cannot take advantage of the EIO mechanism".[48]

Consequently, the issuing State will have to guarantee a right to an effective remedy to allow a person targeted by an EIO to challenge the requested investigative measures, with a particular emphasis on those based on highly sophisticated and intrusive technological means.

In sum, the Court's decision relative to the completion of the EIO form avoided the larger question referring to the interpretation of Article 14 of the EIO

[46] Idem, Case C-324/17, paragraph 56.
[47] Idem, Case C-324/17, paragraph 90.
[48] Opinion of the Advocate General Bot, 11 of April 2017, Case C-324/17, paragraph 89.

Directive and, consequently, the issue of fundamental rights.[49] In light of these opposing readings regarding this novel instrument of judicial cooperation, one can only agree with the assessment that they reflect different interests.[50] On the one hand, the Court of Justice of the European Union opted for an interpretation of the EIO Directive in the first Gavanozov case that relied on the literal element and sought to speed up and facilitate judicial cooperation in criminal matters based on the principles of mutual recognition and mutual trust in the EU.[51] On the other hand, the Advocate General of the Union defended an interpretation of the EIO Directive based on the systemic element and in line with fundamental rights, which makes cooperation more difficult.

b. Gavanozov II

The Specialized Criminal Court in Bulgaria that was hearing the criminal proceedings brought against Ivan Gavanozov decided to make a new request for a preliminary reference concerning the interpretation of Article 1(4) and Article 14(1) to (4) of the EIO Directive as well as Articles 7 and 47 of the Charter of Fundamental Rights of the European Union. In its decision to refer to the CJEU the referring Court stated that Bulgarian Law does not offer any legal remedy against decisions ordering the execution or the carrying out of searches and seizures or the hearing of witnesses, or against the issuing of an EIO. Given this specific legal context the Court "asks whether Bulgarian law is contrary to EU law and, in such a case, whether it may issue an EIO seeking investigative measures".[52]

The judgment handed down by the CJEU sought to answer two questions. The first one related to

> "whether Article 1(4) and Article 14 (1) to (4) of the EIO Directive, read in the light of recitals 18 and 22 of that directive, and Articles 7 and 47 of the Charter (…) must be interpreted as precluding legislation of a

---

[49] See SZIJÁRTO, I. (2021). 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*, 1, p. 67.

[50] See M. SIMONATO, *Mutual recognition in criminal matters and legal remedies: The first CJEU judgment on the European Investigation Order*. *European Law Blog*, 1 April 2020.

[51] See D. CASTILHOS, F. PACHECO, M. S. BARATA, *Comentário ao Processo C-324/17, Gavanozov, 24 de outubro de 2019: O princípio do reconhecimento mútuo versus Direitos Fundamentais*, in *Revista Jurídica Portucalense*, 2020, 28, p. 30 and ff. Retrieved from: https://revistas.rcaap.pt/juridica/article/view/21652

[52] Court of Justice, First Chamber, judgement of the 11th of November 2021, *Gavanozov II*, Case C-852/19, paragraph 22. ECLI:EU: C:2021:902.

> Member State which has issued an EIO that 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 a witness by videoconference".[53]

The Court noted that when a Member States implements EU law, they are required to ensure compliance with the right to an effective remedy consecrated in the first paragraph of Article 47 of the Charter. Concretely, the procedure subjacent to the issuing and executing of an EIO is regulated by the EIO Directive. Therefore, the national implementing law falls under the scope of Article 51(1) of the Charter. Consequently, the Court states that Article 47(1) of the Charter is applicable and points to other decisions that applied the same reasoning.[54]

The Court also notes that the issuing of an EIO to carry out a search and seizure constitutes an interference "with the right of every person to respect for his or her private and family life, home, and communications, guaranteed by Article 7 of the Charter. Furthermore, the seizures are likely to infringe Article 17(1) of the Charter, which recognizes the right of every person to own, use, dispose of and bequeath his or her lawfully acquired possessions".[55] Hence, any person who is targeted by an EIO and wishes to invoke the protection conferred upon him or her by those provisions must be given, in the opinion of the Court. the right to an effective remedy (i.e., which is guaranteed by Article 47 of the Charter). From the Court's perspective, this specific right enables the persons to contest the need and lawfulness of an EIO as well as to "request appropriate redress if those measures have been unlawfully ordered or carried out".[56] Therefore, Member States must provide for these legal remedies in their domestic legislation.

These considerations lead the Court to sustain that its interpretation of Article 47 of the CFREU is in line with the interpretation given to Article 13 of the European Convention on Human Rights (ECHR) by the European Court of Human Rights and it concludes in this manner:

> "for the persons concerned by the execution of an EIO issued or validated by a judicial authority of that Member State, the purpose of which

[53] Idem, *Gavanozov II*, Case C-852/19, paragraph 24.
[54] Court of Justice, Grand Chamber, judgement of the 16th of May 2017, *Berlioz Investment Fund*, Case C-682-15, paragraph 50. EU: C:2017:373.
[55] Idem, *Gavanozov II*, Case C-852/19, paragraph 31.
[56] Idem, *Gavanozov II*, Case C-852/19, paragraph 33.

> is the carrying out of searches and seizures, to be able effectively to exercise their right guaranteed by Article 47 of the Charter, it is for that Member State to ensure that those persons have a remedy available to them before a court of the same Member State that enables them to contest the need for, and lawfulness of, that EIO, at the very least having regard to the substantive reasons for issuing such an EIO".[57]

The Court then applies the same rationale to the issuing of an EIO to hear a witness by videoconference because it may adversely affect the person concerned. Consequently, that person must have a legal remedy available to him or her to contest the decision that ordered an EIO to request this specific investigative measure under Article 47 of the Charter.[58]

According to the CJUE, the second question asked by the Bulgarian Court refers to

> "whether Article 1(4) and Article 14(1) to (4) of Directive 2014/41, read in the light of recitals 18 and 22 of that directive, as well as Articles 7 and 47 of the Charter, (…), must be interpreted as precluding the issuing, by the competent authority of a Member State, of an EIO, the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference, where the legislation of that Member State does not provide any legal remedy against the issuing of such an EIO".[59]

About this question, the Court recalls the two conditions that must be considered when an EIO is issued (i.e., proportionality and necessity) and observes that Article 6 of the EIO Directive does not mention considering the rights of the person concerned by the investigative measure indicated in the investigative order. However, the Court notes that this mechanism of judicial cooperation falls within the scope of Article 82 of the TFEU which is based on the principle of mutual recognition of judgments and judicial decisions. The Court also states that the principle in question is itself based on mutual trust and the rebuttable presumption of compliance by other Member States with Union law including fundamental rights. Therefore, the primary responsibility to comply with fundamental rights, within the context of an EIO, lies, according to the Court, with the issuing Member State and one must presume that they are complying with European Union law and the fundamental rights conferred by that law. It then goes on to cite the case law in this matter.[60]

[57] Idem, *Gavanozov II*, Case C-852/19, paragraph 34.
[58] Idem, *Gavanozov II*, Case C-852/19, paragraphs 42 to 50.
[59] Idem, *Gavanozov II*, Case C-852/19, paragraph 51.
[60] Court of Justice, Grand Chamber, judgement of the 23rd of January 2018, *Piotrowski*, Case C-367/16, paragraph 50. EU: C:2018:27.

Nevertheless, if it is impossible to contest, in the issuing Member State, the need and lawfulness of an EIO or the substantive reasons for its issuing, this constitutes a violation of the right to an effective remedy consecrated in Article 47 of the Charter. Consequently, the Court answered the second question in the following manner:

> "In the light of all the foregoing considerations, the answer to the second question is that Article 6 of Directive 2014/41, read in conjunction with Article 47 of the Charter and Article 4(3) TEU, must be interpreted as precluding the issuing, by the competent authority of a Member State, of an EIO, the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference, where the legislation of that Member State does not provide any legal remedy against the issuing of such an EIO".[61]

As a result, the CJEU's second decision in the Gavanozov case signals a departure from its initial position regarding the EIO Directive, which was much more sympathetic to the cause of judicial cooperation, mutual recognition, and European integration than fundamental rights.

7. Impact

The Gavanozov case(s) will have a tremendous impact on the application of the EIO Directive at the Member State level in the European Union in the coming years. In the aftermath of the CJEU's decision in the Gavanozov II case, national judicial authorities will have to analyze their laws relative to criminal or penal procedure and verify if they consecrate a right to a legal remedy when an investigative measure is ordered, especially if it is deemed to be intrusive or coercive. If no legal remedy is provided in the domestic legal order an EIO cannot be issued. Consequently, Member States like Bulgaria have two options: they can modify their national legislation and align it with the Charter and thus benefit from judicial cooperation in criminal matters in the European Union or refrain from issuing an EIO. However, this last option is not inconsequential.

Conclusion

In conclusion, Member States and national judicial authorities are bound to the Charter of Fundamental Rights of the European Union when adopting legislation and taking decisions relative to the issuing, recognition, and

[61] Court of Justice, First Chamber, judgement of the 11th of November 2021, *Gavanozov II*, Case C-852/19, paragraphs 52 to 62.

execution of this novel mechanism of judicial cooperation in criminal matters based upon the principles of mutual recognition and mutual trust. This means that every decision made under the domestic normative acts that transposed the EIO Directive must comply with the fundamental rights consecrated in the Charter. In our opinion, this is the main legacy of the Gavanozov cases. However, the dispute over the right to an effective remedy consecrated in Article 47 (1) of the Charter will probably not be the last case regarding the conformity of the EIO Directive with fundamental rights. Therefore, it is up to the Union legislator to monitor this "unstable equilibrium" between the facilitation of judicial cooperation and compliance with fundamental rights, and eventually intervene if it considers that there is a lack of effective protection of the latter within the framework of the EIO.

REFERENCES

ALLEGREZZA, S. (2014). Collecting Criminal Evidence Across the European Union: the European Investigation Order Between Flexibility and Proportionality. In S. Ruggeri (ed), *Transnational Evidence in Multicultural Inquiries*, (pp. 51-67). Heidelberg: Springer.

ANTUNES, M. J. (2017). *Direito Processual Penal*. Coimbra: Almedina.

ARMADA, I. (2015). 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*, 1, 8-31.

BACHMAIER, L. (2015). Transnational evidence: towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters. *Eucrim: the European Criminal Law Associations' forum*, 2, 47-59.

BARATA, M. S., GUIMARÃES, A. P. & CASTILHOS, D. (2023). The European Investigation Order in Portugal – Legal Analysis and Practical Dilemmas. In AMBOS, K., HEINZE, A. RACKOW, P. & SEPEC, M. (ed.), *European Investigation Order: Legal Analysis and Practical Dilemmas of International Cooperation* (87-104). Berlin: Duncker & Humblot, p. 87 and ff.

CANOTILHO, J. J. G. (2003). *Direito Constitucional e Teoria da Constituição, 7ª edição*. Coimbra: Almedina.

CASTILHOS, D., PACHECO, F. & BARATA, M. S. (2020). Comentário ao Processo C-324/17, Gavanozov, 24 de outubro de 2019: O princípio do reconhecimento mútuo versus Direitos Fundamentais. *Revista Jurídica Portucalense*, (28), 30–58. https://revistas.rcaap.pt/juridica/article/view/21652

COSTA, M. J. & ABRANTES, A. M. (2019). Os Desafios da Inteligência Artificial da Perspetiva Transnacional: A Jurisdição e a Cooperação Judiciária. In A. M. Rodrigues (coord.), *A Inteligência Artificial no Direito Penal* (pp. 163-218). Coimbra: Almedina.

DANIELE, M. (2019). Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles. *New Journal of European Criminal Law*, 6, 179-194.

D'AVINO, G. (2015). Il diritto alla tutela giurisdizionale effettiva nell'art. 47 par. 1 della Carta dei diritti fondamentali dell'EU, *Rivista Freedom, Security & Justice: European Legal Studies*, 2, 151-242.

DEPAUW, S. (2016). A European evidence (air)space? Taking cross-border legal admissibility of forensic evidence to a higher level. *European Criminal Law Review*, 1, 82-98.

GUIMARÃES, A. P., CASTILHOS, D. & BARATA, M. S. (2020). O conceito de "autoridade judiciária de emissão" a partir dos Processos apensos C-508/18 e C-82/19 PPU (Caso Parquet de Lübeck) e eventuais ecos na Decisão Europeia de Investigação em Portugal. *Revista Jurídica Portucalense*, (28), 4–29. https://revistas.rcaap.pt/juridica/article/view/21638

HOFMANN, H. (2014). Art 47 – Right to an Effective Remedy. In S. Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (pp. 1211-1228). Oxford: Hart Publishing.

LOUREIRO, F. N. & PITON, A. (2013). Artigo 48º - Presunção de inocência e direitos de defesa. In A Silveira & M. Canotilho (coord.), *Carta dos Direitos Fundamentais da União Europeia Comentada* (545-552). Coimbra: Almedina.

MESQUITA, M. J. R. (2013). Artigo 47º - Direito à ação e a um tribunal imparcial. In A. Silveira & M. Canotilho (coord.), *Carta dos Direitos Fundamentais da União Europeia Comentada* (545-552). Coimbra: Almedina.

QUADROS, F. (2013). *Direito da União Europeia, 3ª edição*. Coimbra: Almedina.

RAFARACI, T. (2014). General Considerations on the European Investigations Order. In S. Ruggeri (ed), *Transnational Evidence and Multicultural Inquiries in Europe* (pp. 37-44). Springer.

RAMOS, V. C. (2018). Meios Processuais de Impugnação da Directiva Europeia de Investigação – Subsídios para a Interpretação do Artigo 14º da Directiva com uma Perspectiva Portuguesa. *Revista Anatomia do Crime*, 7, 113-173.

SCHUTZE, R. (2021). *European Union Law, Third Edition*, Oxford.

SHELTON, D. (2014). Art 47 – Right to an Effective Remedy. In S. Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (pp. 1200-1211). Oxford: Hart Publishing.

SIMONOTO, M. (2020, April 1). Mutual recognition in criminal matters and legal remedies: The first CJEU judgment on the European Investigation Order. *European Law Blog*. https://europeanlawblog.eu/2020/04/01/mutual-recognition-in-criminal-matters-and-legal-remedies-the-first-cjeu-judgment-on-the-european-investigation-order/

SZIJÁRTO, I. (2021). 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*, 1, 66-72.

TRIUNFANTE, L. L. (2019). *Manual de Cooperação Judiciária Internacional em Matéria Penal*. Coimbra: Almedina.

TRIUNFANTE, L. L. (2018). Admissibilidade e Validade da Prova na Decisão Europeia de Investigação. *Julgar Online*, Abril, 1-34.

WAHL, T. (2021). AG: Bulgaria Not Allowed to Issue EIOs. *EUCRIM*, 2, 104-105. Retrieved from: eucrim issue 02/2021

WARD, A. (2014). Art 47 – Right to an Effective Remedy. In S. Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (pp. 1197-1200). Oxford: Hart Publishing.

Data de submissão do artigo:30/07//2023

Data de aprovação do artigo: 27/12/2023

Edição e propriedade:

Universidade Portucalense Cooperativa de Ensino Superior, CRL

Rua Dr. António Bernardino de Almeida, 541 - 4200-072 Porto

Email: upt@upt.pt