**AREA OF FREEDOM, SECURITY, AND JUSTICE: JUDICIAL COOPERATION IN CRIMINAL MATTERS AND COMPLIANCE WITH FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION**

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**Summary:** 1) Introduction; 2) European Investigation Order Directive; 3) Execution Phase; 4) Compliance with Fundamental Rights; 5) Article 47 of the CFREU; 6) The Gavanozov Cases: a) Gavanozov I; b) Gavanozov II; 7) Article 48 of the CFREU; 8) Impact and other questions relating to the Protection of Fundamental Rights; 9) Conclusion.

**1. 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) in relation to judicial cooperation in criminal matters. Pursuant to paragraph 1 of that legal precept, the EU adopted Directive No. 2014/41/EU which creates and regulates the European Investigation Order (EIO).[[2]](#footnote-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 in accordance with this Directive”.[[3]](#footnote-3) In the words of Silvia Allegrezza “it introduces a new tool for cross-border investigations and for transnational gathering of evidence”.[[4]](#footnote-4) However, the execution of an EIO can be refused if one of the grounds set out 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.

This presentation aims to analyze the execution phase of a EIO in the light of fundamental rights, particularly Articles 47 (1) and 48 of the Charter of Fundamental Rights of the European Union which enshrine a right to an effective remedy as well as certain guarantees in criminal proceedings. 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.

**2. European Investigation Order Directive**

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]](#footnote-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 in accordance with national law”.[[6]](#footnote-6)

The national judicial authority issues an EIO to carry out one or more investigative measures in another EU Member State.[[7]](#footnote-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]](#footnote-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]](#footnote-9) On the one hand, the necessity principle “means that the execution of a state action such as an investigative measure requires it to be necessary to attain its goal”.[[10]](#footnote-10) The goal in 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]](#footnote-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]](#footnote-12) Nevertheless, the solution is criticized by the legal doctrine due to the fact that, in principle, the executing authority does not control the appropriateness and proportionality of the requested investigative measure.[[13]](#footnote-13) In addition, there is no definition of proportionality in the case law of the CJEU.[[14]](#footnote-14)

The EIO is then transmitted by the judicial authority of the issuing Member State to the judicial authority of the executing Member State in accordance with 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]](#footnote-15)

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.[[16]](#footnote-16) However, the directive and national implementing legislation regulate a limited set of exceptions that substantiate the non-recognition or non-enforcement of an EIO.[[17]](#footnote-17) 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.[[18]](#footnote-18)

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 on the basis of 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.[[19]](#footnote-19) 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 already in its possession without undue delay.[[20]](#footnote-20)

In addition to these five phases, the EIO Directive establishes specific provisions relating to certain investigative measures with a view to “strengthening and consolidating security in the EU area”.[[21]](#footnote-21) These refer to: temporary transfer to the issuing or executing State of persons held in custody for the purpose of carrying out an investigative measure; hearing by videoconference or other audiovisual transmission; 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.[[22]](#footnote-22)

**3.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[[23]](#footnote-23) and under the conditions that would apply if the investigative measure in question had been ordered by a national authority.[[24]](#footnote-24)

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:

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| “(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 the EIO; |

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| (b) | in a specific case the execution of the EIO would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; |

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| (c) | the EIO has been issued in proceedings referred to in Article 4(b) and (c) and the investigative measure would not be authorised under the law of the executing State in a similar domestic case; |

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| (d) | the execution of the EIO would be contrary to the principle of *ne bis in idem*; |

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| (e) | the EIO relates to a criminal offence which 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 offence in the executing State; |

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| (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 in accordance with Article 6 TEU and the Charter; |

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| (g) | the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in Annex D, as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years; or |

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| (h) | 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 offences or to offences punishable by a certain threshold, which does not include the offence 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 encompasses the three sources of EU fundamental rights that are enshrined in 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.[[25]](#footnote-25)

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).[[26]](#footnote-26) 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”.[[27]](#footnote-27)

**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 (CFRUE). 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 when the authorities resort to technological means. Thus, we agree with Miguel João Costa and António Manuel Abrantes’ analysis when they warn of the possibility that new technological means (i.e., artificial intelligence) have the potential to violate several fundamental rights, namely rights of defense and the right to a fair and equitable trial and the presumption of innocence.[[28]](#footnote-28) Within the framework of the Charter, we consider that the observance of the right to a legal remedy and the guarantees in criminal prosecution are especially important in the phases referring to the recognition and execution of an EIO. Thus, it is imperative to analyze this matter in the light of articles 47(1) and 48 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, in the words of Maria José Rangel de Mesquita, a “right to an “effective judicial remedy”, or right to action, in the sense that individuals can judicially enforce the rights conferred upon them by the law. and corresponding right to judicial review”.[[29]](#footnote-29) 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”.[[30]](#footnote-30) 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”.[[31]](#footnote-31) It was articulated by the Court of Justice for the first time in the Johnston Judgment[[32]](#footnote-32), 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), in spite of the differences between the norms in the two instruments (i.e., Charter and the ECHR).[[33]](#footnote-33) Subsequently, the Court of Justice reiterated the principle in two other decisions: the Heylens[[34]](#footnote-34) and Borelli[[35]](#footnote-35) judgments. The “reparation 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.[[36]](#footnote-36)

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, in the words of Gaetano D’Avino “as embodying a direct means of ensuring the primacy and invocability of Community rules”.[[37]](#footnote-37) Consequently, the question relative to the applicability of Article 47 of the Charter “to a particular dispute is indistinguishable from the question of whether (pursuant to Article 51 of the Charter) the Charter applies in the first place”.[[38]](#footnote-38)

In sum, Herwig CH Hoffman states that “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*)”.[[39]](#footnote-39) Consequently, he defends that 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 the public authorities as well as effective judicial remedies in disputes between individuals.[[40]](#footnote-40)

**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 phase, the Bulgarian Special Criminal Court ordered, as part of an EIO, a series of searches and seizures at the headquarters of a company and at 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 made a request for 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,[[41]](#footnote-41) 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.[[42]](#footnote-42)

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.[[43]](#footnote-43) 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 carrying out a search, 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”.[[44]](#footnote-44)

The AG justifies this systemic reading of the EIO Directive considering the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union. He considers that “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 — recognised 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”.[[45]](#footnote-45)

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.[[46]](#footnote-46)

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”.[[47]](#footnote-47) 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 Directive and, consequently, the issue of fundamental rights.[[48]](#footnote-48) In light of these opposing readings regarding this novel instrument of judicial cooperation, one can only agree with Michele Simonato’s assessment that they clearly reflect different interests.[[49]](#footnote-49) 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.[[50]](#footnote-50) 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”.[[51]](#footnote-51)

The judgement 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 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”.[[52]](#footnote-52)

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.[[53]](#footnote-53)

The Court also notes that the issuing of an EIO for the purpose of carrying 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”.[[54]](#footnote-54) 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”.[[55]](#footnote-55) 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: “in order 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 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”.[[56]](#footnote-56) The Court then applies the same rationale to the issuing of an EIO for the purpose of hearing a witness by videoconference due to the fact that 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 requesting this specific investigative measure in accordance with Article 47 of the Charter.[[57]](#footnote-57)

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”.[[58]](#footnote-58)

In relation to 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 taking account the rights of 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 judgements and judicial decisions. The Court also states that the principle in question is itself based on mutual trust and on 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.[[59]](#footnote-59)

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”.[[60]](#footnote-60)

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

**7. Article 48 of the Charter**

Additionally, the State must assume that the accused is innocent and guarantee the rights of defence. This statement leads us to affirm that the observance of certain guarantees in a criminal procedure are especially important in the phases referring to the recognition and execution of an EIO. Thus, it is important to briefly analyze this matter in the light of Article 48 of the CFREU, given the material connection with the EIO Directive.

The guarantees in criminal procedure are found in Article 48 of the Charter, which regulates the presumption of innocence and the rights of defence. Paragraph 1 provides that “every defendant is presumed innocent until his guilt has been legally proven” and Paragraph 2 establishes that “every defendant is guaranteed respect for the rights of the defense”. According to Flávia Loureiro and André Piton “two essential principles of guaranteeing the individual against the exercise of a certain repressive power are expressed in this article: the presumption of innocence and respect for the rights of defense”.[[61]](#footnote-61)

Anna Iermano states that the presumption of innocence consecrated in Article 48 of the Charter stems from Article 6, section 2, of the ECHR. It requires that “the accused/suspect to be treated as if he had not committed the crime until the State, through the authorities responsible for the prosecution, obtain sufficient evidence to convince an independent and impartial judge of his or her guilt”.[[62]](#footnote-62) This means that the members of a Court, in exercising their powers or functions, cannot part from a preconceived notion that the accused has committed the alleged fact. However, the scope of this presumption extends beyond the Court and applies to all State authorities (i.e., police, public prosecutors, and members of the executive branch). The principle also applies to the persons object of a European Arrest Warrant, investigations conducted by the European Anti-Fraud Office (OLAF), and procedures connected to the infringement of competition rules that imply the payment of fines and penalties. Furthermore, “the presumption of innocence commences from the moment in which a person is investigated or accused of having committed a crime or an alleged offense until the contrary is definitively established”.[[63]](#footnote-63)

Although the Charter does not define or concretize the concept of the “rights of defence”, Flávia Loureiro and André Piton (2012, 549) maintain that the legal precept must be read considering the provisions of the third paragraph of article 6 of the ECHR. Thus, the expression “rights of defense” encompasses, according to those authors as well as Anna Iermano, the following rights: the right to be notified of the accusation in a language that the accused/defendant understands in the shortest possible time; the right to have the time and resources necessary to prepare the defence; the right to have the assistance of a defender and, in case of financial insufficiency, the right to be assisted, free of charge, by an official defender; the right to cross-examine witnesses for the prosecution, as well as to summon and question witnesses presented by the defense under the same conditions as witnesses for the prosecution. Finally, the accused has the right to be assisted, free of charge, by an interpreter if he does not understand or does not speak the language used in the proceedings.[[64]](#footnote-64)

More recently, the rights associated with the concept of the “rights of the defence” have been concretized by European Union secondary law to guarantee a minimum level of protection, namely: Directive 2010/64/ EU on the right to an interpreter and a translator; Directive 2012/13/EU on the right to information; Directive 2013/48/EU on the right to a lawyer; Directive 2016/1919/EU on legal aid a state expenditure. In sum, Article 48 of the Charter and the directives adopted by the European legislator seek to strengthen the procedural guarantees of suspects and accused persons with a view to guarantee a fair criminal trial in the Union.[[65]](#footnote-65)

**8. Impact and other questions relating to the protection of fundamental rights**

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 second decision in the Gavanozov case, national judicial authorities will have to analyze their laws of 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 the judicial cooperation in criminal matters in the European Union or refrain from issuing an EIO. However, this last option is not inconsequential.

The right to a legal remedy is not the only fundamental rights question that is raised by the legal doctrine in relation to the EIO. Time will tell if other questions regarding the EIO and the Charter will be raised before the Court of Justice. From the perspective of the rights of the defense, there are authors who raise questions regarding the confrontation of witnesses and the right of the defence to participate in the execution of an EIO.

Firstly, the EIO Directive is not very clear as to the right to confront witnesses in the executing State. Article 24 of the EIO disciplines the procedures of the interrogation using the videoconference or other audio-visual means of transmission. Yet, the EIO Directive “does not regulate any possibility for the suspect or the defendant to participate in the interrogation, during which the witness of defence or prosecution is questioned in the executing state” according to the request of the issuing State.[[66]](#footnote-66)

Secondly, the EIO Directive regulates the possibility of the suspect or the accused or by a lawyer on his behalf to request the issuing of an EIO to collect evidence. This possibility is welcomed by the legal doctrine since it can be seen as a way of concretizing the principle of the equality of arms between the prosecution and the defence.[[67]](#footnote-67) However, the directive does not discipline the rights of the suspect or his/her defence lawyer to participate in the execution of that request. This omission also extends to the collection of vindicating evidence or data. On the contrary, the EIO Directive leaves this question up to the legislation of the executing State. According to R. Jurka this is in divergence with the modern criteria relative to criminal procedure that contemplates the possibility for the defence to participate in the procedure.[[68]](#footnote-68)

In sum, these questions appear to substantiate the claim made by some authors that the EIO Directive “does not provide adequate protection of the prerogatives of the person under investigation, with a consequent imbalance in favor of the powers of the investigating authorities, but to the detriment of the defensive guarantees”.[[69]](#footnote-69) Therefore, it seems that the CJEU will have to take a harder look at the concept of the rights of the defence consecrated in the second paragraph of Article 48 of the Charter when evaluating the EIO Directive and its conformity with fundamental rights.

**9. 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 execution of this novel mechanism of judicial cooperation in criminal matters based upon the principle of mutual recognition and mutual trust. This means that every decision made in accordance with 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 of the Charter will probably not be the last case regarding the conformity of the EIO Directive with fundamental rights. As we pointed out there are several questions relating to Article 48 of the Charter that will probably be raised in the future and merit consideration by the CJEU. 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 European Investigation Order.

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**Abstract:** This article intends to present a brief overview of the European Investigation Order (EIO) Directive. It analyses the execution phase of an EIO and the question of compliance with fundamental rights, principally those that can be found in Articles 47(1) and 48 of the Charter. It also discusses the decisions of the Court of Justice of the European Union relating to this novel instrument regarding judicial cooperation in criminal matters (Case C-324/17, Ivan Gavanozov, of the 24th of October of 2019, and Case C‑852/19, Gavnozov II, of the 11th of November of 2021) from a fundamental rights perspective and assesses their impact. Finally, we conclude with our position on the possible need to amend the EIO Directive in the aftermath of the CJEU’s decisions to ensure a more effective protection of fundamental rights in the European Union.

**Keywords**: Judicial Cooperation; Criminal Matters; European Investigation Order; Execution phase; Fundamental Rights

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2. *OJ* 2014 L 130, p. 1. [↑](#footnote-ref-2)
3. Article1, section 1 of the EIO Directive. [↑](#footnote-ref-3)
4. S. Allegrezza, *Collecting Criminal Evidence Across the European Union: the European Investigation Order Between Flexibility and Proportionality*, in S. RUGGERI (ed), *Transnational Evidence in Multicultural Inquiries*, Heidelberg, 2014, p. 51. [↑](#footnote-ref-4)
5. See the EIO-LAPD project at [www.eio-lapd.eu.](http://www.eio-lapd.eu.m) For an overview of the EIO Directive see L. Bachmaier, *Transnational evidence: towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters*, in *Eucrim: the European Criminal Law Associations’ forum*, 2015, 2, p. 47-59. [↑](#footnote-ref-5)
6. See Article 2, line c), point ii) of the EIO Directive. [↑](#footnote-ref-6)
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, judgement 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 A. P. GUIMARAES, D. S. CASTILHOS, M. S. BARATA, *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. [↑](#footnote-ref-7)
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9. See Article 6, section 1, of the EIO Directive. [↑](#footnote-ref-9)
10. S. Depauw, *A European evidence (air)space? Taking cross-bor-der legal admissibility of forensic evidence to a higher level*, in *European Criminal Law Review*, 2016, 1, p. 87. [↑](#footnote-ref-10)
11. S. Depauw, *A European evidence (air)space? Taking cross-bor-der legal admissibility of forensic evidence to a higher level*, cit, p. 89. [↑](#footnote-ref-11)
12. For further considerations regarding the proportionality requirement in the EIO see S. Allegrezza, *Collecting Criminal Evidence Across the European Union: the European Investigation Order Between Flexibility and Proportionality*, cit, p. 59-64. [↑](#footnote-ref-12)
13. See I. ARMADA, *The European Investigation Order and the Lack of European Standards for Gathering Evidence: is a Fundamental Rights-Based Refusal the Solution?*, in *New Journal of European Criminal Law*, 2015, 1, 2015, p. [↑](#footnote-ref-13)
14. See M. DANIELE, *Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles*, in *New Journal of European Criminal Law*, 2015, 6, p. 187-189. [↑](#footnote-ref-14)
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. [↑](#footnote-ref-15)
16. Article 9, section 1, of the EIO Directive. [↑](#footnote-ref-16)
17. Article 11, section 1, of the EIO Directive. [↑](#footnote-ref-17)
18. See Article 9, section 3, of the EIO Directive. [↑](#footnote-ref-18)
19. Article 9, section 1, must be read in conjunction with Article 11, section 1, of the EIO Directive. [↑](#footnote-ref-19)
20. Article 13, section 1, of the EIO Directive. [↑](#footnote-ref-20)
21. L. L. TRIUNFANTE, *Manual de Cooperação Judiciária Internacional em Matéria Penal***.** Coimbra, 2019, p. 175. [↑](#footnote-ref-21)
22. See Articles 22-32 of the EIO Directive. [↑](#footnote-ref-22)
23. For more considerations relative to the principle of mutual recognition in the EIO see T. Rafaraci, *General Considerations on the European Investigations Order*, in S. Ruggeri (ed), *Transnational Evidence and Multicultural Inquiries in Europe*, Heidelberg, 2014, p. 37 and ff..; S. Allegrezza, *Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality*, cit., p. 55 and ff. [↑](#footnote-ref-23)
24. For example, Article 19 of Law No. 88/2017 in Portugal regulates the issue of the national executing authority in Portugal. The general rule is found in paragraph 1 of article 19 and the legal precept establishes that the EIO is executed by the national judicial authority with the competence to order the investigation measure in Portuguese territory, in accordance with 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. [↑](#footnote-ref-24)
25. See R. SCHUTZE, *European Union Law*, Third Edition, Oxford, 2021, p. 452 and 453. [↑](#footnote-ref-25)
26. Article 24, section 2, of the EIO Directive. [↑](#footnote-ref-26)
27. L. Bachmaier, *Transnational evidence: towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters*, cit., p. 54. [↑](#footnote-ref-27)
28. See M. J. COSTA, A. M. ABRANTES, *Os Desafios da Inteligência Artificial da Perspetiva Transnacional: A Jurisdição e a Cooperação Judiciária*, in A. M. RODGRIGUES (coord.), *A Inteligência Artificial no Direito Penal*, Coimbra, 2019, pp. 163-218. [↑](#footnote-ref-28)
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30. See Article 47 (2) and (3) of the Charter. [↑](#footnote-ref-30)
31. D. SHELTON, *Art 47 – Right to an Effective Remedy*, in S. PEERS et al (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, 2014, p. 1200-1201. [↑](#footnote-ref-31)
32. Court of Justice, judgement of the 15th of May 1986, *Johnston*, case 222/84. ECLI:EU:C:1986:206. [↑](#footnote-ref-32)
33. For an analysis on the origin of this right and the differences between Article 6 and 13 of the ECHR and Article 47 of the Charter see G. D’AVINO, *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*, 2015, 2, p. 155 and ff. [↑](#footnote-ref-33)
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41. See T. WAHL, AG: *Bulgaria Not Allowed to Issue EIOs*, in *EUCRIM*, 2021, 2, pp. 104-105. Retrieved from: [eucrim issue 02/2021](https://eucrim.eu/media/issue/pdf/eucrim_issue_2021-02.pdf#page=38) [↑](#footnote-ref-41)
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50. 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, pp. 30–58. Retrieved from: <https://revistas.rcaap.pt/juridica/article/view/21652> [↑](#footnote-ref-50)
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