

EIO violating human rights: between automatic refusal of cooperation and individualized harmfulness assessment

Mutual recognition of judicial decisions

Mutual trust

Presumption of respect of
fundamental rights

Presumption of respect of fundamental rights



The presumption of respect of fundamental rights is **rebuttable**. According to art. 11.1 *f* Directive 2014/41/EU, «[...] recognition or execution of an **EIO may be refused in the executing State** where: [...] (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**».

Art. 6 TEU

- Charter of Fundamental Rights of the European Union
- ECHR in the interpretation given by the ECtHR
- Fundamental rights as they result from the constitutional traditions common to the Member States

Obviously, in this framework, the *content of single fundamental rights* is not easy to identify. However, thanks to the so-called **correspondence clause** between Charter's rights and those contained in the ECHR (**art. 52.3 Charter**), we can say that this latter, in the interpretation given by the ECtHR, represents the **minimum standard of protection of fundamental rights in the EU**.

CJEU case law on judicial cooperation and respect of fundamental rights



In order to understand how the protection of fundamental rights is accorded within the EIO framework, it is useful to broaden the perspective to include case law on different judicial cooperation instruments, such as the EAW. Despite being aware of the differences characterizing various cooperation mechanisms, it is beneficial to examine the CJEU case law, in order to compare the solutions employed by the Court with regard to the protection of fundamental rights.

Protection of fundamental rights in judicial cooperation – CJEU case law



It seems possible to derive two approaches:

- *rigid*

- *flexible*

Protection of fundamental rights in judicial cooperation – rigid approach (EIO)



« [...] the **issuing of an EIO** in respect of which there are **substantial grounds to believe that execution would lead to an infringement of Article 47 of the Charter** and the **execution of which should therefore be refused** by the executing Member State in accordance with Article 11(1)(f) of that directive, is **not compatible with the principles of mutual trust and sincere cooperation**.

[...] the **execution 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**, the **lawfulness of which cannot be contested before a court of the issuing Member State**, is such as to entail an **infringement of the right to an effective remedy** enshrined in the first paragraph of Article 47 of the Charter.

[...] 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» (C-852/19 *Gavanozov II*, points 60-62).

Protection of fundamental rights in judicial cooperation – rigid approach (EIO)



Positive aspect: protection of human rights is a *prerequisite* of judicial cooperation

Negative aspect: excessive sacrifice of cooperation needs

Protection of fundamental rights in judicial cooperation – flexible approach (EAW)



Risk assessment

« [...] where the **judicial authority of the executing Member State** is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter [...], that judicial authority **is bound to assess the existence of that risk** when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment» (C-404/15 *Aranyosi and Căldăraru*, point 88).

Protection of fundamental rights in judicial cooperation – flexible approach (EAW)



2-step test

- *general evaluation*: «To that end the executing judicial authority must, initially, rely on *information* that is *objective, reliable, specific* and *properly updated* on the detention conditions prevailing in the issuing Member State and that demonstrates that there are **deficiencies**, which may be **systemic or generalised**, or which may affect certain groups of people, or which may affect certain places of detention». (C-404/15 *Aranyosi and Căldăraru*, point 89).» (C-404/15 *Aranyosi and Căldăraru*, point 89).
- *specific evaluation*: «Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, **specific and precise**, of *whether there are substantial grounds to believe that the individual concerned will be exposed to that risk* because of the conditions for his detention envisaged in the issuing Member State» (C-404/15 *Aranyosi and Căldăraru*, point 92).

Protection of fundamental rights in judicial cooperation – flexible approach



Positive aspect: individualized assessment based on the specific circumstances of the case

Negative aspect: risk of heterogeneous and unpredictable outcomes.

How is such protection of fundamental rights **granted** in the EIO framework?

According to a recent CJEU jurisprudence the most crucial mechanism for ensuring the protection of fundamental rights is represented by **judicial control** in the issuing State.

- **as subjective guarantee:** right to effective remedy as provided in art. 47 Charter (C-852/19, *Gavanozov II*, point 28 ff.)
- **as objective guarantee:** requisite of lawfulness of the issuance of EIO (C-724/19, *HP*, point 27 ff.)

Typologies

ex ante

ex post

Verification of the need to provide for judicial control



Is this control **always** required?

Following *Gavanozov II* judgement (especially point 62), the answer seems *positive*, as, according to such decision, every investigative act would be to some extent capable of infringing individual rights. However, this would jeopardize the judicial cooperation system, potentially excluding from the EIO system Member States which do not provide judicial control on every investigative act. So, a different approach is indispensable.

Verification of the need to provide for judicial control



- **coercive measures** (such as searches, seizures, interceptions): judicial control (either *ex ante* or *ex post*) is **always** required.
- **non-coercive measures** (*recital* 16 and art. 10.2 Directive 2014/41/UE): judicial control depends on the **harmfulness** of the measure.

Judicial control on coercive measures

The provision of judicial control on coercive measures represents a sort of ‘entry requirement’ in the EIO system (Opinion of AG Bobek in C-852/19, *Gavanozov II*, point 89), to which Member States have to comply in order to be considered legitimate issuing States. So in case of a coercive measure issued by an ‘illegitimate’ issuing authority, the executing authority should *automatically* refuse to cooperate.

Judicial control on non-coercive measures

Judicial control is not required for any infringement to the individual sphere, but only in case of a measure capable of *violating EU fundamental rights* (such as the presumption of innocence, the right to an effective remedy, the right to remain silent, the privilege against self incrimination, physical or psychological safety of the witness).

Verification of the need to provide for judicial control



Example

- issuing of an EIO for a hearing of a vulnerable witness in the territory of the executing State
- if the executing authority suspects that the hearing in presence of the witness could compromise psychological safety of the witness, such authority should verify if the EIO has been issued with a judicial decision explaining the reasons that would require the hearing in presence
- if the hearing in presence has been authorized by a judicial decision and this latter is adequately reasoned, then the EIO should be executed
- if there isn't a judicial authorization, the executing authority could consult the issuing authority and propose a less intrusive measure (ex: videoconference)
- in case of failure of such consultations, the executing authority should refuse to cooperate as the EIO violates fundamental rights.

Verification of the need to provide for judicial control



Non-coercive measures implying minor infringements

For investigative acts implying minor infringements the absence of judicial control is *acceptable*, as long as there are *other sufficient and adequate guarantees*.

Verification of the need to provide for judicial control



Non-coercive measure not requiring judicial control Example

If we take into consideration the hearing of a witness, his/her obligation to answer (and to answer truthfully), which is considered to have significant consequences for the person concerned, according to Gavanozov II, could be counter-balanced with the provision of previous warning that he/she could be held criminal responsible in case of reticence and false statements.

Verification of the need to provide for judicial control



Combination of the *rigid* approach (Gavanozov II) with regard to coercive measures and *flexible* approach (Aranyosi) with regard to non-coercive acts.

Verification of the need to provide for judicial control



Obviously, employing a flexible approach, even if exclusively for non-coercive measures, may lead to a lowering of procedural guarantees, but this risk could be mitigated, if the following conditions are fulfilled:

- respect of the **principle of proportionality**
- decision must be **reasoned**

THANK YOU FOR YOUR ATTENTION

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