

## Findings of the MEIOR Research

### **Reflections on more efficient cooperation and effective fundamental rights protection**

**Italy**



Leuven, 25 March 2024

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**Legislative Decree 21 June 2017, n. 108  
(Implementation of Directive 41/2014)**

**Case-law of the “Court of Cassation”  
(Italian Supreme Court)**

## Scheme of Active Procedures



**Issuing Authority: Italian Public Prosecutor, independent from the executive power  
(more than required by the Court of Justice)**

**Issuing should be in accordance with the principle of proportionality**

**Searches, seizures:**

**issuing by Public Prosecutor in the pre-trial phase**

**ex post judicial control  
with “re-examination” before the Preliminary  
Investigation Judge**

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**Hearings by videoconference:**

**issuing by Public Prosecutor in the pre-trial phase**

**no ex post judicial control**

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**Interceptions of communications:**

**Issuing by Public Prosecutor,  
with ex ante authorization of  
Preliminary Investigation Judge**

**no ex post judicial control**

## The Elephant in the Room: Court of Justice, 11 November 2021, Gavanozov II



**The EIO directive  
and right to an effective remedy under Article 47 of the Nice Charter**

**preclude**

**legislation of a Member State which has issued an EIO**

**that does not provide for any legal remedy  
against the issuing of an EIO of searches and seizures  
or of hearing of a witness by videoconference**

# Active Procedures in the light of Gavanozov II



## Legal remedy requested by the Court of Justice?

### Searches, seizures:

issuing by Public Prosecutor in the pre-trial phase

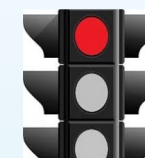
ex post judicial control  
with “re-examination”



### Hearings by videoconference:

issuing by Public Prosecutor in the pre-trial phase

no ex post judicial control



### Interceptions of communications:

Issuing by Public Prosecutor,  
with ex ante authorization of  
Preliminary Investigation Judge

no ex post judicial control

(Gavanozov II does not say anything about  
interceptions)



**Videoconference issue: no legislative change is currently on the agenda**

**Dr. Donata Costa, Italian Delegated European Prosecutor, in the Training Event of the MEIOR Project which was held in Padua on January 2024:**

***“Hearing witnesses by videoconference does not risk violating fundamental rights so important as to justify the legal remedy requested by Gavanozov II”***

# Active Procedures



## Issuing Authority:

Italian Public Prosecutor, independent from the executive power

### Searches, seizures:

issuing by Public Prosecutor in the pre-trial phase

**ex post judicial control  
with “re-examination” before the Preliminary  
investigation Judge»**

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### Hearings by videoconference:

issuing by Public Prosecutor in the pre-trial phase

**no ex post judicial control**

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### Interceptions of communications:

Issuing by Public Prosecutor,  
with ex ante authorization of  
«Preliminary Investigation Judge»  
**(ex ante judicial control)**

**no ex post judicial control**

# Inconsistency in Active Procedures



**Ex ante judicial control for interceptions**  
**Ex post judicial control for searches and seizures**

**However, in our digital world, some kind of searches (for example searches in digital devices) could be as intrusive as interceptions of communications**

**Therefore the Italian Unit of MEIOR Project suggested the following guide-line:**

***Introduction, through an appropriate legislative amendment, and also in relation to domestic cases, of a **uniform judicial review**, with the aim of reaching the same type of control (ex ante or ex post) for all measures that may have an impact on fundamental rights***

**However, **some Italian Public Prosecutors** said in a MEIOR event: «an ex ante judicial control for searches and seizures would be inappropriate, because it would slow down investigations and create mistrust of public prosecutors»**



# Scheme of Passive Procedures



## Executing Authority:

Italian Public Prosecutor, independent from the executive power

**Searches, seizures:**

**Recognition and Execution by Public Prosecutor**

**ex post judicial control  
with “opposition” before the Preliminary  
Investigation Judge**

**Hearings by videoconference:**

**Recognition and Execution by Public Prosecutor**

**ex post judicial control  
with “opposition” before the Preliminary  
Investigation Judge**

**Interceptions of communications:**

**Recognition and Execution by Public Prosecutor,  
with ex ante authorization of  
Preliminary Investigation Judge**

**no ex post judicial control**

# Ambiguity of Judicial Control in Passive Procedures



Is it only a Formal Control,

i.e. a control limited to formal aspects and the manner in which the investigative measure is carried out?

*for example, a control if, in application of lex loci, the suspect's lawyer is given the opportunity to participate in the gathering of evidence*

or

Is it also a Substantive control,

extended to the substantive reasons that justify the adoption of the measure?

*For example, the presence of factual reasons for its adoption, such as sufficient evidence of the commission of the offence*

## Literal arguments in favour of a mere formal control

*Art. 14 § 2 EIO directive:*

«The **substantive reasons for issuing the EIO** may be challenged **only** in an action brought **in the issuing State**»

*Art. 696 quinquies italian criminal procedure code:*

«As a rule, the national judicial authority recognises and executes the decisions and judicial measures of other Member States **without reviewing their substantive reasons**»



*Italian Court of cassation, 24 September 2020, n. 30885*

«the system of protection in the executing State **can never** cross the borders of the review concerning the **substance of the measures requested**, which is **exclusively a matter for the jurisdiction of the issuing State**»

## The End of Hope for a Substantive Control in the Executing State?



**Court of Justice, 21 December 2023, G.K.**

**In cross-border EPPO cases, the EPPO Regulation «must be interpreted as meaning that the **review** conducted in the Member State of the assisting European Delegated Prosecutor **may relate only to matters concerning the execution of that measure, with the exclusion of matters concerning the justification and adoption of that measure**; the latter matters must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor”**

## What about the duty of the execution State to respect fundamental rights?

### Objection to mere formal control:

If the investigative measure, in the issuing State, is ordered without a solid justification, there is the risk of violation of fundamental rights if the measure is executed in the executing State!

We must remember that the executing State has a specific duty to respect fundamental rights provided for by ECHR and Nice Charter:

Art. 1 § 4 EIO Directive

Art. 9 § 2 EIO Directive

Art. 14 § 2 EIO Directive

Art. 11 § 1 f EIO Directive (refusal of execution if there are «substantial grounds to believe» that the execution of the investigative measure would be “incompatible” with the duty to respect fundamental rights)

## What about the duty of the execution State to respect fundamental rights?



### Reply of the Court of Justice:

**You can't eat your cake and have it too!**

**Efficient cooperation means that the really important judicial control is the one in the issuing State only**

**As a rule, the executing State has to trust the judicial control of the issuing State**

## What about the duty of the execution State to respect fundamental rights?



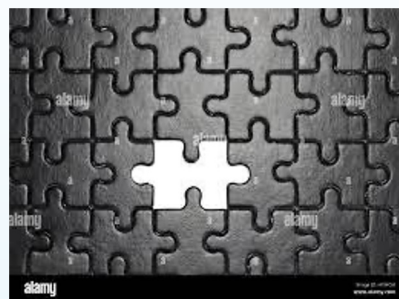
As Humphrey Bogart would say:

*«that's the press mutual recognition, baby!  
And there's nothing you can do about it»*



## Imagining a step forward

If the real important judicial control is the one in the issuing State, there is a piece missing in the puzzle of EIO system:

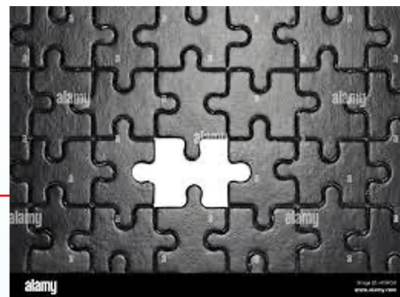


Absence of solid rules of exclusion, in the trial conducted in the issuing State, of evidence collected abroad in violation of fundamental rights and principle of proportionality

For example: rules prohibiting the use of things seized or interceptions ordered on the basis of an arbitrary justification



# Imagining a step forward

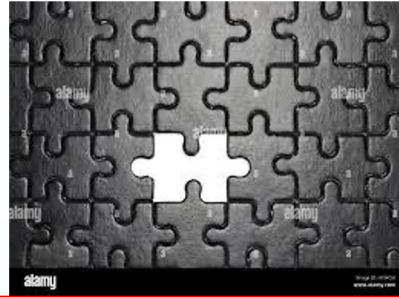


**Art. 14 § 7 EIO directive leaves the matter to national States**

**(“without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO”)**

**Every State has its own rules of exclusion,  
But this is not enough!**

**Maybe it's time for a Gavanozov ruling also for the rules of exclusion of evidence:  
an **harmonization** imposed by the Court of justice, likewise the legal remedy requested by  
the Court in the issuing State in relation to the issuing of an EIO**



Opinion of **Advocate General Tamara Čapeta** on the question referred to the Court of Justice for a preliminary ruling in the Encrochat case:

“EU law does not, at this stage of its development, regulate the admissibility of evidence collected by way of an EIO issued contrary to the requirements of the EIO Directive. The admissibility of evidence is a matter of national law, which, however, needs to comply with the requirements of the rights of the defence in Articles 47 and 48 of the Charter”

This is a matter of discussion.....

I have the feeling that, at the moment, the EIO system is not yet well balanced; we have to make sure that in the issuing State all goes well: not only in the issuing phase, but also in the phase of the use of evidence in the national trial

## Three very useful readings about the exclusionary rules issue

**Michele Panzavolta and Elise Maes**, *Exclusion of evidence in times of mass surveillance. In search of a principled approach to exclusion of illegally obtained evidence in criminal cases in the European Union*, in *The International Journal of Evidence & Proof* 26(3), 2022

**Sławomir Steinborn and Dawid Świeczkowski**, *Verification in the Issuing State of Evidence Obtained on the Basis of the European Investigation Order*, in *Review of European and Comparative Law* 54(3), 2023

**European Law Institute** *Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings*, 8 May 2023, in [europeanlawinstitute.eu](http://europeanlawinstitute.eu)