Judicial Cooperation and the Right to an Effective Remedy

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1. Preliminary remarks

When choosing the topic for this contribution I wondered what the best way would be to honour John Vervaele. A difficult task, as there are so many areas of criminal law where John has left a mark.

Eventually I decided to discuss an issue of judicial cooperation, mindful of John's crucial role in supporting the European developments that led to the creation of an area of freedom, security and justice. This chapter wishes to reflect on the right to an effective remedy in the context of judicial cooperation in criminal matters within the European Union (EU). Does judicial cooperation trigger such right and, if so, what shape does this right take on?

This contribution is part of a current project on judicial controls and scrutiny of the European investigation order (EIO).[1] It moves, however, beyond the EIO as it intends to tackle a more ambitious and transversal topic. Honouring John's legacy means to recognize his lesson to look at legal issues in a cross-cut fashion, without ever losing sight of the general principles and rights at stake.[2]

2. Introduction

Article 47 of the Charter of Fundamental Rights of the European Union (CFREU) grants the right to an effective remedy whenever rights and freedoms under EU law are violated. The provision mirrors Article 13 of the European Convention of Human Rights (ECHR).[3]

While it is undisputed that this right applies also in the field of judicial cooperation in criminal matters, there are still aspects that are less clear. One of these regards the question on whether, and when, cooperation violates a fundamental right: can cooperation as such violate fundamental rights independently from the underlying set of criminal proceedings? The crux is the relationship — or division of labour — between criminal proceedings and cooperation procedures, which are sometimes difficult to disentangle.

Some of these points are explicitly addressed in EU legislation. Pursuant to Article 14 of the Directive on the European investigation order (Dir. EIO)[4] and Article 33 of the Regulation on confiscation (Reg. Conf.),[5] legal remedies should be available against the recognition and execution of the order, but the substantive reasons for requesting the procedural activity can only be challenged in the issuing state. Although this rule seems to follow the logic embedded in mutual recognition (MR), it cannot be found in all MR instruments. An explicit rule on remedies is absent in the Framework Decision on the European arrest warrant (FD EAW),[6] or in the Framework Decision on mutual recognition of sentences, probation decisions,

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[1] MEIOR (Mould EIO Review) Project, EU Action grant, Grant Agreement n° 101046446.

[2] Because of the general nature of this brief contribution, many issues related to the availability of legal remedies regarding cooperation instruments will not be specifically addressed.

[3] For general commentaries on the Article see A. Pekka, H.C.H. Hofmann, L. Holopainen, E. Paunio, L. Pech, D. Sayers, D. Shelton, and A. Ward, 'Right to an Effective Remedy and to a Fair Trial', in: S. Peers, T. Hervey, J. Kenner and A. Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary*, London, Hart Publishing, 2014, pp. 1197-1276.

[4] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ* 2014, L 130, pp. 1-36.

[5] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *OJ* 2018, L 303, pp. 1-38.

[6] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, *OJ* 2002, L 190, pp. 1-20.

supervision and alternative measures.[7] Moreover, even where they are included, the rules on remedies are far from addressing all possible problems that could arise in the practice. The increasing number of claims concerning the right to an effective remedy raised before the European Court of Justice (ECJ) confirms this.

3. Different kinds of judicial cooperation in criminal matters

The first question to address is if cooperation affects, or whether it can affect a right, to the point that the violation it causes requires the granting of a legal remedy. What are the rights at stake in cooperation procedures? To answer this question a closer look into cooperation is required. The assessment is complicated as the cooperation procedures in criminal matters are inserted into ongoing national criminal proceedings. It may thus not always be easy to identify what violations stem from cooperation procedures as such, and what violations stem from the underlying set of criminal proceedings. For the European Arrest Warrant (EAW) the ECJ has identified a 'dual level of protection' of rights[8] — at national and cooperation/European level — which helps separate more clearly the cooperation phase from the underlying criminal proceedings. It is not clear, however, whether this dual level of protection is a general feature of cooperation in criminal matters or, at least, of MR instruments.

There are, further, many different forms of cooperation in criminal matters.[9] Not all of them necessarily entail an interference with — let alone, a violation of — a fundamental right: when authorities exchange documents, they might not affect fundamental rights at all (although the progressive expansion of human rights, particularly the right to privacy and protection of personal data, has reduced such occurrences). It could also be open to debate whether there is a violation of a fundamental right, when authorities consult each other on which of them is best placed to prosecute a case or to carry out certain measures.[10]

Another relevant difference is the one between active and passive side of the cooperation procedure. The different position of state authorities *vis-à-vis* the judicial cooperation in criminal matters raises different challenges with regard to the right to provide for an effective remedy. These challenges will be addressed in what follows.

4. Request of cooperation and right to legal remedy in the issuing state

From the active side of cooperation procedures, the issuing state requests the taking of a procedural activity outside of its territory. Is there a right to a legal remedy in the issuing state when a cooperation request is issued? For instance, in case of an EAW, should the person sought be granted an effective remedy against the issuing of the EAW? Similarly, if an EIO is issued to obtain evidence or to have an investigative activity performed, should the person concerned have a remedy against the EIO in the issuing state?

Some of these questions have been addressed by the ECJ. Regarding the EAW, the ECJ has stated that the principle of effective judicial protection enshrined in Article 47 CFREU

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[7] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *OJ* 2008, L 337, pp. 102-122 and Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, *OJ* 2009, L 294, pp. 20-40.

[8] ECJ, Judgement of 1 June 2016 in *Case C-241/15*, *Bob-Dogi* , § 46.

[9] I have attempted to give a similar overview in 'Is The Glass Half Empty or Half Full? Twenty Years of EU Cooperation in Criminal Matters', in: M. de Visser and A.P. van der Mei (Ed.), *The Treaty on European Union 1993-2013: Reflections from Maastricht*, Antwerpen, Intersentia, 2013, pp. 309-336.

[10] I have argued in 'Choice of Forum and The Lawful Judge Concept', in: M. Luchtman (Ed.), *Choice of forum in cooperation against EU financial crime*, The Hague, Eleven International Publishing, 2013, pp. 143-166 that under certain conditions defendants in Europe might have a right to a judge previously established by law in a clearly (and previously) identified jurisdiction.

presupposes that judicial review of the EAW — or of the underlying national warrant — must be available before the warrant is executed.[11] Offering the remedy in the issuing state only after the surrender of the person would be insufficient.[12] The ECJ, however, does not require the giving of a specific remedy against the sole issuing of the EAW, leaving it as one of the possible options for the states to offer effective judicial protection.[13] When an appropriate remedy is available against the national arrest warrant (in line with the provision of Article 5 § 4 ECHR), a separate remedy against the EAW is not needed. It is in fact that is the national decision that causes the restriction (and, if wrongly taken, the violation) of the rights of the individual. Cooperation alone—considered in a vacuum, separated from the underlying national warrant—does not entail an interference with, or a possible violation of, rights that would trigger the right to a remedy. It cannot be argued, therefore, that the sought individual enjoys a right that a request of cooperation not be made.

As repeatedly remarked by the ECJ, when deciding to resort to cooperation the issuing authority must check that conditions required by the FD EAW are given and decide on whether cooperation is proportional.[14] This proportionality test fundamentally differs from the one preceding the decision on the national arrest warrant. To issue the latter, the restriction of the individual liberty must be considered proportional with the investigative/procedural needs at stake, with this proportionality scrutiny intimately affecting the fundamental rights of the individual. Conversely, the proportionality check necessary to issue an EAW concerns the opportunity (with related costs) of asking foreign authorities for help. This evaluation does not affect the rights of the individual, judicial cooperation remaining, at its core, an issue of sovereignty.

Arguably, instituting an autonomous remedy against the EAW, when a remedy against the national warrant already exists, would cause an unnecessary accumulation of remedies: this second remedy could only be invoked on the basis of the violation of the same fundamental rights for which already the national warrant can be challenged. This would negatively affect the efficiency of proceedings and the effectiveness itself of judicial protection.

This reasoning can largely be transposed to the field of the EIO. In the *Gavanozov II* judgement, the ECJ has held that national legislations must provide for a legal remedy against the issuing of an EIO requesting searches, seizures or the hearing of a witness by videoconference.[15] While the decision has clearly raised the level of common safeguards needed to foster MR,[16] it remains controversial in other respects, particularly in that the Court stretched the protection of Article 47 CFREU to procedural activities that do not entail an inherent restriction of fundamental rights, such as the hearing of witnesses by videoconference. Such a broad approach seem to make *Gavanozov II* of more general applicability: in fact, once the hearing by videoconference is included among the activities that require a remedy, it would seem sensible to conclude that the requirement applies to all investigative activities aimed at evidence gathering, with only few exceptions (such as, for instance, the exchange of information between the investigating authorities). For confiscation and freezing procedures the *Gavanozov II* requirements seem to be spelled out expressly by the law. The Reg. Conf. allows to refuse the execution of the freezing order if this would be incompatible with a relevant

[11] ECJ, Judgement of 10 March 2021 in *Case C-648/20*, *PI*, § 48.
[12] Ibid., § 55.
[13] See in this regard, ECJ, Judgement of 13 January 2021 in *Case C-414/20*, *MM* , § 68: 'Introducing a separate right of appeal against the decision to issue a European Arrest Warrant taken by a judicial authority other than a court is just one possibility'.
[14] ECJ, *Case C-414/20*, *MM*, § 64. Indirectly, ECJ, Judgment of 10 November 2016 in *Case C-477/16*, *Ruslanas Kovalkovas*, § 47; ECJ, Judgment of 10 November 2016 in *Case C-452/16*, *Kryzstof Marek Poltorak*, § 50.
[15] ECJ, Judgment of 11 November 2021 in *Case C-852/19*, *Ivan Gavanozov*, § 50.
[16] A. Hernandez Weiss, 'Effective protection of rights as a precondition to mutual recognition: Some thought on the CJEU's Gavanozov II decision', *NJECL*, vol. 13(2), 2022, pp. 180-197.

fundamental right under the CFREU, explicitly mentioning the right to an effective remedy (in the issuing state).

When requiring the existence of internal remedies against investigative measures, the ECJ seems to have ruled out the possibility that evidentiary challenges at trial in the issuing state (to exclude the evidence) constitute as an adequate remedy. However, the exact shape and the required degree of specificity of the remedy against each investigative measure remains unclear. Only few countries provide for specific and autonomous remedies against the single investigative activities aimed at gathering information such as the three mentioned in the judgment.

It is further unclear whether a legal remedy against the issuing of the EIO as such (or confiscation order) is needed. However, as with the EAW, a similar remedy seem unnecessary once the system of judicial protection against internal investigative measures is adequate. The question is rather whether a specific remedy against the EIO could compensate for inadequate internal remedies against the investigative measures. The ECJ has allowed this possibility for the EAW. Still, this position was unconvincing for the EAW and should equally be considered inappropriate for the EIO. If states intend to comply with the *Gavanozov II* ruling by introducing a legal remedy against the cooperation instrument alone,[17] this would create a strange imbalance between internal procedures (where remedies are lacking) and cooperation procedures (where remedies would be present). Moreover, basic practical reasons, such as the secrecy of investigations, might justify a suspension of the legal remedy until a later stage: if the remedy is against the issuing of the EIO, such a remedy would no longer be effective after the EIO has been executed.

The secrecy of investigations poses new challenges for the EIO (and possibly confiscation orders) compared to the EAW, which might interfere with the right to a judicial remedy. Hence, it seems untenable to believe that the legal remedy against the investigative measure in the issuing state needs to be available before the request for cooperation is issued to, and executed by, the executing state. Moreover, with regard to cooperation in relation to investigative activities (such as in EIO situations) it remains unclear whether a general remedy, allowing to challenge the lawfulness of all measures at the end of the investigations would suffice, or whether specific remedies should be provided for each coercive investigative activity. In any case, it is clear from the *Gavanozov II* judgments that the remedies in the issuing state should be construed also to accommodate effectively the position of third parties. It remains to be seen how MS will react to the *Gavanozov II* judgement and whether they will be ready to block cooperation when the existing legal remedies in the issuing MS are insufficient.

5. Request of cooperation and right to legal remedy in the executing state

As for the remedies to be granted in the execution phase of a cooperation request, two main procedural moments must be distinguished. First, the competent authority must decide whether to accord cooperation (*exequatur* or recognition decision). Second, if this decision is in the positive, procedural activities of execution of the request will follow (execution). However, the temporal relationship between these two moments is not always as clear-cut: for the EAW, the initial deprivation of liberty may occur before its recognition, while the recognition entails a green light for the surrender.

As argued regarding the issuing phase, if the procedural activity to be executed does not involve a restriction of rights, a legal remedy is unnecessary, at least from the perspective of Article 47 CFREU. If instead the activity entails such a restriction (e.g. the

[17] This appears to be the choice of some countries in reaction to the *Gavanozov II* ruling: see, in particular, 'The impact of the judgment of the CJEU in Case C-852/19 (Gavanozov II) - Questionnaire and compilation of replies by Eurojust and the European Judicial Network (EJN)', Brussels, 14 February 2022 (6052/22), pp. 38-39.

extradition/surrender of a suspect/accused/convicted, the search of a place, the seizure of evidence), a legal remedy should be granted to the person affected (the suspect or the third person) in the executing state. There may also be a third category of cases, in which activities do not involve an inherent restriction of rights —which might justify the absence of legal remedies in the issuing phase — but that in specific circumstances may lead to a violation of a fundamental right. Even a witness hearing or certain scientific examinations might lead to a violation of rights – if, for instance, excessive or unnecessary coercion is used to obtain the attendance of the witness, or to ensure that they speak the truth, or if an unnecessary restriction of privacy rights is caused. A legal remedy should be provided in the executing MS for these occurrences, though it can hardly be a separate and autonomous remedy, conceived only around those cases.

For the execution phase the question arises on whether there should be a single remedy at the end of the execution phase, or also a separate one already at the moment of recognition. The existing provisions on remedies remain rather vague. Article 14 Dir. EIO refers to legal remedies in general. Article 33 Reg. Conf. states instead that remedies should be granted against recognition *and* execution, though it remains unclear whether two separate remedies are required.

In this scenario, too, the point could be made that, as the decision of recognition regards the opportunity to grant cooperation, it is a matter of state sovereignty, and it does not in itself interfere with fundamental rights. Article 47 CFREU would thus not be triggered: if the decision to recognize is not preceded by some form of execution, there should be no legal remedy against this decision. In the execution phase this reasoning must, however, be revisited. The recognition decision — or the classic *exequatur* — has the effect of formally allowing in the executing state the taking of procedural activities that entail a restriction of rights which would otherwise not be possible. By checking the existence of the conditions for cooperation and, for MR instruments, by checking the absence of possible grounds for refusal, the recognition decision becomes the formal basis for such a restriction. Hence, this decision should be amenable to be challenged under Article 47 CFREU, e.g. in cases of a recognition in violation of the principle of double criminality, or of a recognition of a judgment passed in violation of *ne bis in idem*.

It is not necessary, though, that the executing state always provides for two separate possibilities to file a remedy (even despite the literal wording of provisions such as Article 33 Reg. Conf.). One remedy could suffice provided it is effective to counter (and redress) the different possible violations. As the execution normally follows the recognition, all challenges could be concentrated in that moment. However, for activities that can significantly affect fundamental rights, the national law of the executing state might — rightly — provide for a remedy before the execution, to prevent the violation altogether.

Finally, given that the execution phase is when fundamental rights are normally jeopardised and the necessity to provide remedies seems here uncontested, the issue is whether the remedy should have a suspensive effect towards the cooperation. The possibility of a suspensive effect is expressly provided for by the EIO Dir.,[18] and by the Reg. Conf. for confiscation orders,[19] while, as the ECJ affirmed in *Jeremy F.*, the FD EAW does not always contemplate such a possibility (particularly referring to remedies against the extension of the warrant beyond the specialty rule) and in any case this should not affect the time-limits for surrender.[20] The suspicion surrounding appeals with suspensive effect can be understood from the perspective of the efficiency of MR. Nevertheless, it is precisely this suspensive effect that usually makes the remedy effective against a violation.

[18] See Art. 13 and 14 EIO Dir. Compare and contrast in particular Art. 13(2) with Art. 14(6).
[19] See Art. 33(1) Reg. Conf.
[20] ECJ, Judgement of 30 May 2013 in *Case C-168/13 PPU*, *Jeremy F.*, § 37 and 65.

6. Concluding remarks

This contribution intended to reflect on the application of the right to a legal remedy enshrined in Article 47 CFREU in the context of judicial cooperation in criminal matters. Generalizing a statement of the ECJ about surrender procedures,[21] the right to an effective remedy is vital in cooperation. It both enhances fundamental rights protection and fosters mutual trust. To prevent greater uncertainty and decreased efficiency, duplication or unnecessary accumulation of remedies must be avoided. It is therefore necessary to clarify what the exact requirements stemming from Article 47 CFREU are, before existing provisions on remedies (when they exist) are considered.

Many problematic issues regarding, among others, the exact timing of some remedies in the issuing state (particularly in EIO and confiscation cases), the structure of remedies, or possible suspensive effects of remedies in the executing state, remain open. While Article 47 CFREU grants a right to a legal remedy, it does not provide for a specific design of those remedies (besides the requirement that the remedy be effective). The exact shape of the remedy is ultimately left to the procedural autonomy[22] of the MS, to their procedural arrangements and constitutional traditions.

Nonetheless, in its recent jurisprudence, the ECJ has manifested a tendency to address the right to a legal remedy in conjunction with other rights, particularly the right to judicial supervision and the right to a judicial decision taken by independent authorities.[23] The overlapping of topics has, however, blurred the debate without contributing to optimal understanding and protection of the right to a legal remedy. The approach to allow for compensation between safeguards, or even to replace one with the other,[24] must be criticized: the right to a legal remedy and the right that judicial decisions on the merits of the case and on the restriction of personal liberties be issued by independent judicial authorities are two separate safeguards. The right to a remedy requires the initiative of the individual, while the right to an independent decision-maker should not be dependent upon such initiative. Moreover, the right to a legal remedy requires that an effective action is available every time there is a violation, even when that violation is caused by a decision of an independent court.

[21] 'As in extradition procedures, in the surrender procedure established by the Framework Decision the right to an effective remedy, set out in Article 13 of the Convention and Article 47 of the Charter, which is at issue in the main proceedings, is of special importance', ECJ, *Case C-168/13 PPU*, *Jeremy F*, § 42.

[22] On national procedural autonomy, see J. Vervaele, 'Guest Editorial', *Eucrim*, 2014, pp. 45-46.

[23] A. Martufi, 'Effective Judicial Protection and the European Arrest Warrant: Navigating Between Procedural Autonomy and Mutual Trust', *Common Market Law Review*, vol. 59, 2022, pp. 1371-1406.

[24] Since the *Case C-168/13*, PPU, *Jeremy F*. See also, ECJ, Judgement of 27 May 2019 in *Joined Cases C-508/18 and C-82/19*, *OG&PI*.