



UNIVERSITÀ DI PISA

FUNDAMENTAL RIGHTS AT RISK AND REFUSAL TO COOPERATE:

‘SAFETY VALVE’ OR STYLE CLAUSE?

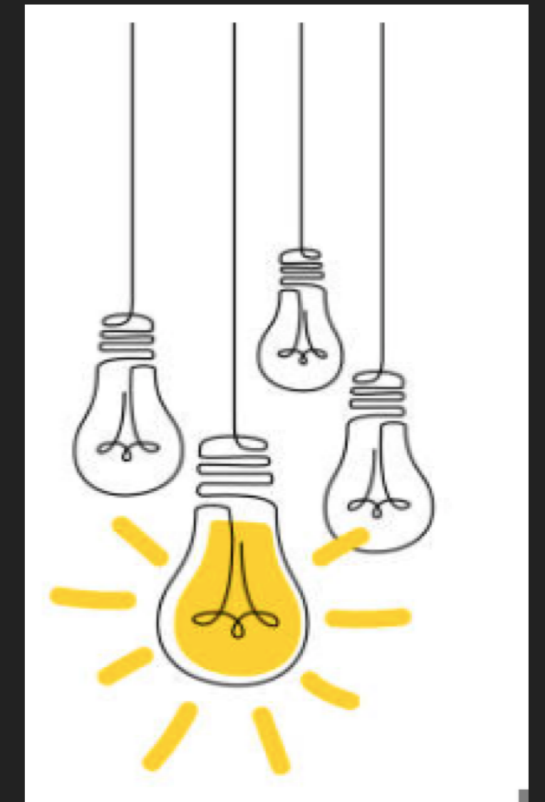
MEIOR Conference

“Judicial scrutiny in EIO proceedings”

25 – 26 March 2024 Leuven

ARTICLE 11 § 1(F) DIR. 2014/41/EU

“Without prejudice to Article 1(4), recognition or execution of an EIO may be refused in the executing State where (...) 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”



ARTICLE 8 § 1(F) REG. 2018/1805/EU

“The executing authority may decide not to recognise or execute a freezing order only where: (...) in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence”.

ARTICLE 16 § 5(F) REG. 2023/1543/EU

“The enforcement of the European Preservation Order may only be denied on the basis of one or more of the following grounds: (...) in exceptional situations, based on the sole information contained in the EPOC-PR, it is apparent that there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the European Preservation Order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in Article 6 TEU and the Charter. “

ISSUES

- What kind of violation may come into play?
- How should the executing authority act?
- What role should be accorded to defence?



CJEU CASE-LAW:

- “Macro failures” – absolute rights (Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*)
- “Macro failures” – non absolute rights (Case C-216/18 PPU, *LM*)
- “Micro failures” – non absolute rights (Case C-852/19, *Gavanozov I*)

REG. 2018/1805/EU, ARTICLE 8 § 1(F):

- right to an effective remedy
- right to a fair trial
- right of defence

REG. 2023/1543/EU, RECITAL 10:

- Respect for private and family life
- Protection of personal data
- Freedom to conduct a business
- Right to property
- Right to an effective remedy and to a fair trial
- Presumption of innocence and right of defence
- Principles of legality and proportionality
- Right not to be tried or punished twice in criminal proceedings for the same criminal offence

OUTCOME OF *GAVANOZOV II* (EXECUTING AUTHORITY)



Some “respondents (BE, EL, ES, IT, NL, SE) replied that, in principle, they will not request additional information on legal remedies and that missing information on legal remedies in the issuing Member State would not prevent them from executing an EIO. They relied on the principles of mutual recognition and mutual trust (‘all Member States are supposed to comply with EU law and fundamental rights’)“.

vs

“Several respondents replied that if the requested information on legal remedies is not received or is assessed as being insufficient, the execution of the EIO can be refused (BG, DE, EL, ES, FI, SK), but only based on one of the refusal grounds listed in Article 11 EIO Directive (EL), after exercising all necessary due diligence in order to obtain an answer (RO) and after requesting the intervention of Eurojust/EJN to obtain a response (PT)“.

OUTCOME OF *GAVANOZOV II* (EXECUTING AUTHORITY)

Blind trust



Shared obligation between the issuing and executing States



VS

👎 Aprioristic approach: similar to Recital 10 FD 2002/584/JHA

👍 Normative approach: Recital 19 Dir. 2014/41/EU and ECtHR, *Bivolaru and Moldovan v France*

👍 Practical approach: e.g. follow-up to ECtHR, *Brazzi v Italy*

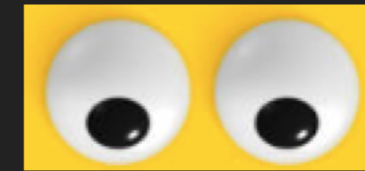
OUTCOME OF *GAVANOZOV II* (DEFENCE)

Blind trust =
only *ex post* remedy



- 👎 The burden of proof falls entirely on the defence
- 👎 Check intervenes only when the breach has already occurred and does not prevent the use of evidence (Art. 14 §§ 6 & 7 and Art. 13 § 2 Dir.)

Shared obligation between the issuing and executing States =
ex officio preventive control



VS

- 👍 *Ex officio* check: the defence “controls the controller”
- 👍 Check prevents the occurrence of the violation (and, thus, the transmission and use of evidence).

BUILDING TRUST STEP BY STEP: E.G. REG. 2023/1543/EU



- ▶ Art. 18 § 1 & 2: «Without prejudice to further legal remedies available in accordance with national law, any person whose data were requested via a European Production Order shall have the right to effective remedies against that order. Where that person is a suspect or an accused person, such person shall have the right to effective remedies during the criminal proceedings in which the data were being used». «The right to effective remedies shall be exercised before a court in the issuing State in accordance with its national law and shall include the possibility of challenging the legality of the measure, including its necessity and proportionality, without prejudice to the guarantees of fundamental rights in the enforcing State»
- ▶ Art. 10 § 4: «Where a ground for refusal is raised by the enforcing authority, if the data have already been transmitted by the addressee to the issuing authority, the issuing authority shall delete or otherwise restrict the use of the data or, in the event that the enforcing authority has specified conditions, the issuing authority shall comply with those conditions when using the data».

THANKS FOR YOUR ATTENTION!

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