TREIO
TRaining on European Investigation Order

Проект „Обучение относно Европейска заповед за разследване"

(TRaining on European Investigation Order —TREIO)

Споразумение за безвъзмездна помощ № 882068

Обучение на обучители

TREIO Материали

Допълнителни материали

Този проект е финансиран от програма „Правосъдие" на Европейския съюз (2014-2020 г.) по договор за безвъзмездна финансова помощ № 882068.

Съдържание

Този проект е финансиран от програма „Правосъдие" на Европейския съюз (2014-2020 г.) по договор за безвъзмездна финансова помощ № 882068.

В помощ на обучителите, които биха искали да задълбочат познанията си по различни аспекти на ЕЗР, подготвяйки се за евентуални въпроси от страна на участниците, се предоставят и допълнителни материали.

Тези допълнителни материали включват:

- резюмета на преюдициални запитвания и решения на Съда на Европейския съюз относно тълкуването на някои членове от Директивата за ЕЗР (актуални към м. април 2022 г.);
- кратък списък на релевантното законодателство на ЕС;
- кратък списък документи с информация и разяснения относно ЕЗР практиките в държавите-членки;
- кратък списък статии от академични издания, отнасящи се до различни аспекти на ЕЗР.

Резюмета на преюдициални запитвания и решения на Съда на Европейския съюз относно тълкуването на някои членове от Директивата за ЕЗР

Решения на Съда на Европейския съюз

Съдебен орган

Case C-584/19 *Criminal proceedings against A and Others*
Preliminary Reference: Case C-584/19 Request for a preliminary ruling from the Landesgericht für Strafsachen Wien (Austria) lodged on 2 August 2019 — Criminal proceedings against A***** and further unknown perpetrators

Question referred:

Are the terms 'judicial authority' within the meaning of Article 1(1) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters and 'public prosecutor' within the meaning of Article 2(c)(i) of the aforementioned Directive to be interpreted as also including the public prosecutor's offices of a Member State which are exposed to the risk of being directly or indirectly subject to orders or individual instructions from the executive, such as the Senator of Justice in Hamburg, in the context of the adoption of a decision on the issuance of a European investigation order?

Judgement:

Case C-584/19: Judgment of the Court (Grand Chamber) of 8 December 2020 - Criminal proceedings against A and Others. ECLI identifier: ECLI:EU:C:2020:1002

Operative part:

"Article 1(1) and Article 2(c) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order."

Reasoning:

In essence, the referring Court asks whether a public prosecutor's office satisfies the concepts of "issuing authority" and "judicial authority" if this office is in a legal relation of subordination to the executive of a State. This question is answered in the negative, meaning that the concepts of "judicial authority" and "issuing authority" include the public prosecutors' office regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that state and the exposure of that office

to the risk of being subject to instructions when adapting an European investigation order (para 75).

The Court notes that this question arises from an issue of applicability in regards to the case-law stemming from the judgments of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau) (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 90), and of 27 May 2019, PF (Prosecutor General of Lithuania) (C-509/18, EU:C:2019:457, paragraph 57). In these cases, the court excluded the public prosecutor's office from the meaning of "issuing judicial authority", within the meaning of Art. 6(1) of Framework Decision 2002/584 in the context of issuing an European arrest warrant (para 48). In its judgement, the Court recalls that in order to interpret provisions of EU law both the wording and the context, and the objectives of the provision must be considered (para 49). In regards to the wording, the court notes that Framework Decision 2002/584, in particular Art. 6(1) therefore, uses the concept of 'issuing judicial authority' without specifying the authorities covered by that concept, whereas Art. 2(c)(i) of the EIO Directive does (para 50). Furthermore, this provision expressly provides that the public prosecutor is included among these authorities, since the sole condition is that the authority in question has competence in the case concerned (para 51). Additionally, Art.2(c)(ii) also includes the public prosecutors' office as one of the "judicial authorities' ' empowered to validate an EIO. Based on these two provisions it can be observed that the classification as an "issuing" or "judicial authority" for the purposes of the EIO is not subject to there being no legal relation of subordination (para54). It is also worth noting that the combined reading of Art. 1(1) and Art.2(c)(i) and (ii) of the Directive render the issuing or validation of an EIO by a public prosecutor the status of a judicial decision.(para 55)

In regards to the context of the provision, it must be noted that the guarantees and procedures which govern the issuing or validation of an EIO are distinct to those governing the issuing of an European Arrest Warrant (EAW) (para 56). This can be particularly observed, since the issuing and validation of an EIO by a public prosecutor is accompanied by guarantees specific to the adoption of judicial decisions relating to the rights of a person concerned (para 56). In this regard, Art. 6(1) of the EIO Directive read together with Art. 2(c) and recital 11 of that directive, the issuing or validation is subject to two conditions:(1) that the measure is necessary and proportionate, and (2) that the investigative measure could be ordered under the same conditions in a similar domestic case (para 57). Hence, a

public prosecutor which issues or validates an EIO must comply with the national procedural guarantees, which must comply with the directives relating to procedural rights in criminal proceedings (para 58). This leads to the conclusion that a public prosecutor, which issues or validates an EIO must comply with the principle of proportionality and the fundamental rights of the person concerned, particularly those enshrined in the Charter, in addition to that the order must be capable of being subject to legal remedies equivalent to those available in a similar domestic case (para 63). In addition to the safeguards envisioned for the issuing authority, the Directive also envisions safeguards which must be complied with by the executing authority (paras 64-68) As a whole, Art. 1(1) and Art. 2(c) of the Directive are part of a normative framework consisting of a set of safeguards at both the stage of issuing or validation and of the execution of the EIO (para 69).

In regards to the objectives sought, the Directive aims to create a simplified and effective framework for judicial cooperation between Member States by ensuring mutual recognition (para 70). The EIO directive deals with provisional measures with only the view to gather evidence. It should also be noted that the EIO pursues a different objective to the European Arrest Warrant, as per Framework Decision 2002/584 (para 72). This is due to the fact that the EIO aims to request one or several specific investigative measures as part of a criminal investigation, while the purpose of the EAW is the arrest and surrender of a requested person (para 72). An additional difference, is that while an EIO may entail an interference with some of the rights of the person concerned, the EIO as such does not interfere with the right to liberty of the person enshrined in Art. 6 of the Charter (para 73).

In light of all of these differences noted, between the EAW and the EIO it can be noted that the interpretation of "issuing judicial authority, as per Article 6(1) of Framework Decision 2002/584 is not applicable in the context of the EIO Directive (para 74).

Case C-724/19 *Criminal proceedings against HP*
Preliminary Reference:
Case C724/19: Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 1 October 2019 — Criminal proceedings against HP
Questions referred:

1. Is a national law (Article 5(1)(1) of the Zakon za Evropeyskata zapoved za razsledvane (Law on the European investigation order; 'the ZEZR')), according to which, during the pre-trial stage of the criminal proceedings, the authority competent to issue a European investigation order for the provision of traffic and location data related to telecommunications is a public prosecutor, consistent with Article 2(c)(i) of Directive 2014/41 and the principle of equivalence, provided that in an identical domestic case the competent authority is a judge?

2. Does recognition of that European investigation order by the competent authority of the executing State (public prosecutor or an investigating judge) replace the court order required under the law of the issuing State?

Judgement:

Case C-724/19: Judgment of the Court (Fourth Chamber) of 16 December 2021 — Criminal proceedings against HP. ECLI Identifier: ECLI:EU:C:2021:1020

Operative part:

"1. Article 2(c)(i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters must be interpreted as precluding a public prosecutor from having competence to issue, during the pre-trial stage of criminal proceedings, an European Investigation Order, within the meaning of that directive, seeking to obtain traffic and location data associated with telecommunications, where, in a similar domestic case, the judge has exclusive competence to adopt an investigative measure seeking access to such data.

2. Article 6 and Article 9(1) and (3) of Directive 2014/41 must be interpreted as meaning that recognition, on the part of the executing authority, of an European Investigation Order issued with a view to obtaining traffic and location data associated with telecommunications may not replace the requirements applicable in the issuing State, where that European Investigation Order was improperly issued by a public prosecutor, whereas, in a similar domestic case, the judge has exclusive competence to adopt an investigative measure seeking to obtain such data."

Reasoning:

Essentially, the first question inquires whether Art.2 (c)(i) of the EIO Directive must be interpreted as precluding a public prosecutor from having the competence to issue an EIO where in a similar case the judge has the exclusive competence to adopt such an investigative measure (para 27). In this case the public prosecutor sought to issue an EIO during the pre-trial stage of criminal proceedings seeking to obtain traffic and location data associated with telecommunications (ibid). The Court answered this question in the affirmative, meaning that the public prosecutor must indeed be precluded from having competent to issue an EIO during the pre-trial stage, where in a similar domestic case only the judge has exclusive competence to adopt such an investigative measure (para 45).

The Court based its reasoning on the context and purpose of Art. 2(c) of the EIO directive, which defines the concept of "issuing authority" (para 31). In regards to the context of this provision, the Court cities Art. 6(1)(a) of the directive, read in conjunction with recital 11 of and Annex A, which imposes an obligation on the issuing authority to assess the necessity and proportionality of the investigative measure, having regard to the purpose of the proceedings and the rights of the accused or suspected person (para 32). Additionally, the Court also notes that in certain circumstances the issuing authority is required to offer additional explanations (para 33). Thus, in order to assess the necessity and proportionality of an investigative measure and to provide those additional explanations, the issuing authority must be the investigative authority competent to gather such evidence in accordance with national law (para 34). Another requirement for the issuing of an EIO, based on Art.6(1), is that the investigative measure in question could be ordered under the same conditions in a similar domestic case. This suggests that only an authority competent to order such a measure under national law may be competent to issue an EIO (para 35). In regards to the purpose, the Court states that the purpose of the directive is to replace a complicated and fragmented framework for the gathering of evidence in criminal cases with a cross-border dimension. Moreover, the Directive also intends to facilitate and accelerate judicial cooperation which has as its basis a high level of trust between Member States (para 36). Following this line of reasoning, Art. 10 of the Directive best explains that the issuing authority is best placed to decide which investigative measure is to be used (para 37). Based on these considerations, the Court considers that the issuing authority is thus identified as the investigative authority in the proceedings concerned is competent to order the gathering of evidence in accordance with

national law. A potential dissociation between these roles would risk complicating the system of cooperation jeopardizing the purpose of the Directive (para 38).

In this case it is apparent that Bulgarian law designates the public prosecutor as the authority competent to issue such an EIO, but that it is not competent to order the gathering of traffic and location data in a similar domestic case (para 40). Thus the public prosecutor cannot be competent to issue an EIO requesting this investigative measure. The Court also adds that Art.15(1) of Directive 2002/58, read in the light of Arts. 7, 8 and 11 and Art. 52(1) of the Charter of Fundamental Right must preclude national legislation that confers to the public prosecutors office the power to authorise access of a public authority to traffic and location data for the purposes of a criminal investigation, when such an office is tasked to direct the criminal pre-trial stage and to bring subsequent proceedings. Hence, an EIO which aims to obtain traffic and location data cannot be issued by a public prosecutor where it directs the pre-trial procedure and also brings the subsequent criminal proceedings. (para 42).

The second question refers to whether Art.6 and Art.9(1) and (3) of the Directive must be interpreted as meaning that recognition of the EIO by the executing authority may replace the requirements applicable in the issuing state, where an EIO was improperly issued (para 46). This question was answered negatively, meaning that recognition, on the part of an executing authority, may not replace the requirements applicable in the issuing state where an EIO was improperly issued by a public prosecutor, whereas in a similar domestic case, the judge has exclusive competence to adopt such an investigative measure (para 55).

The Court notes, in this regard, that Art.6(1) lays down the conditions for issuing and transmitting an EIO. Additionally, Art.6(3) states that where an executing authority has reason to believe that the conditions for issuing have not been met, it may consult with the issuing authority (para 47). Moreover, Art.9(1) provides that the executing authority must recognise an EIO, transmitted in accordance with the Directive, without any further formality unless that authority decided to invoke one of the grounds for non-recognition, non-execution or postponement provided by the directive (para 48). Based on these provisions, the Court concludes that the executing authority cannot remedy non-compliance with the conditions as per Art.6(1) (para 50). This interpretation is further supported by the objectives of the Directive (para 51). Citing recitals 2,6 and 19 of the Directive, the Court recalls that the EIO is an instrument falling within the scope of judicial cooperation in criminal

matters, based on the principle of mutual recognition of judgments and decisions. Furthermore, the Court further emphasizes that this principle is itself based on mutual trust, and on the presumption that other Member States comply with EU law and fundamental rights (judgment of 8 December 2020, Staatsanwaltschaft Wien (Falsified transfer orders), C-584/19, EU:C:2020:1002, paragraph 40) (para 51). Following this, recital 1 reinforces that the execution of an EIO should not be refused on grounds other than those stated in the Directive (para 52). It is based on this that the division of competencies between issuing and executing authority are an essential part of mutual trust (para 53). If an executing authority could, by means of recognition, remedy non-compliance with the conditions for issuing an EIO, the whole system of mutual trust would be called into question (ibid). This is because, in such a scenario, the executing authority would have the power to review the substantive conditions for issuing an EIO (ibid). For this reason, execution of an improperly issued EIO, does not replace the requirements applicable in the issuing state (para 55).

Case C-66/20 *Criminal proceedings against XK*

Preliminary reference:

Case C-66/20: Request for a preliminary ruling from the Procura della Repubblica di Trento (Italy) lodged on 24 January 2020 — Criminal proceedings against XK

Question referred:

In so far as it provides that "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", may also be regarded as an issuing authority, but also provides that, in that case, "before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State", is Article 2(c)(ii) of Directive [2014/41] to be interpreted as allowing a Member State to exempt an administrative authority from the obligation to have the EIO validated by defining it as a "judicial authority for the purposes of Article 2 of the Directive"?'

Judgement:

Case C-66/20: Judgment of the Court (Fourth Chamber) of 2 September 2021 XK ECLI Identifier: ECLI:EU:C:2021:670

Operative part:

The request for a preliminary ruling from the Procura della Repubblica di Trento (Public Prosecutor's Office, Trento, Italy), made by decision of 15 January 2020, is inadmissible.

When the office of an Italian public prosecutor, such as the Public Prosecutor's Office, Trento, acts as an authority for the execution of an EIO within the meaning of Article 2(d) of Directive 2014/41, it does not act in proceedings which are intended to result in a judicial decision, within the meaning of the case-law of the Court referred to in paragraph 37 of the present judgment (para 43)

Reasoning:

Essentially, the Public Prosecutor's office in Trento asks whether an administrative authority, who has an investigative competence in accordance with national law, acting as an issuing authority can be exempted from the requirement to validate an EIO. The Court declined to answer this question. This decision was taken on the basis of inadmissibility, since the Public prosecutors office in Trento does not fulfil the status as "Court or Tribunal" within the meaning of Art.267 TFEU (para 43). Before coming to this conclusion, the Court considered whether the body triggering the preliminary reference procedure is s established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 51) (para 34). In this judgment, the Court considered whether the Prosecutor's office "is acting in the exercise of a judicial function for the purposes of Art. 267 TFEU" (para 36). The other criteria were left unexamined by the Court, due to insufficient information in the case file (para 35). In regards to the judicial function, the Court establishes that it is an executing authority in the sense of Art. 2(d) of the EIO is not called up on to rule a dispute and can therefore not be considered as exercising a judicial function (para 38). Additionally, on the basis of recital 34 and Art.2(c) of the EIO Directive, EIOs are provisional in nature and their sole purpose of its execution is to obtain evidence (para 41). Thus, an executing authority, within this

context, cannot be regarded as an authority entrusted to give judgment in the meaning of Art.267 TFEU, and its question is considered inadmissible (para 46).

Pending: Case C-16/22 *Staatsanwaltschaft Graz v MS*
Preliminary Reference: Case C-16/22: Request for a preliminary ruling from the Oberlandesgericht Graz (Austria) lodged on 6 January 2022 — Staatsanwaltschaft Graz v MS Question referred: Must the first sentence of Article 1(1) and Article 2(c)(i) of Directive 2014/41/EU 1 of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters be interpreted as meaning that a German tax office for criminal tax matters and tax investigation which is empowered under national rules to exercise the rights and fulfil the obligations of the public prosecutor's office in relation to certain offences is to be regarded as a 'judicial authority' and an 'issuing authority' within the meaning of those provisions of EU law?

Член 14 от Директивата за ЕЗР & Раздел Й от Приложение А

Case C-324/17 Gavanozov I
Preliminary Reference: Case C-324/17: Reference for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 31 May 2017 — Criminal proceedings against Ivan Gavanozov Questions referred: 1. Are national legislation and case-law consistent with Article 14 of Directive 2014/41/EU (1) regarding the European Investigation Order in criminal matters, in so far as they preclude a challenge, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing a European investigation order for a search on

residential and business premises and the seizure of specific items, and allowing examination of a witness? 2. Does Article 14(2) of the directive grant, in an immediate and direct manner, to a concerned party the right to challenge a court decision issuing a European investigation order, even where such a procedural step is not provided for by national law? 3. Is the person against whom a criminal charge was brought, in the light of Article 14(2) in connection with Article 6(1)(a) and Article 1(4) of the directive, a concerned party, within the meaning of Article 14(4), if the measures for collection of evidence are directed at third party? 4. Is the person who occupies the property in which the search and seizure was carried out or the person who is to be examined as a witness a concerned party within the meaning of Article 14(4) in connection with Article 14(2) of the directive?
Judgement: Case C-324/17: Judgment of the Court (First Chamber) of 24 October 2019. - Criminal proceedings against Ivan Gavanozov. ECLI identifier: ECLI:EU:C:2019:892 *Operative part:* "**Article 5(1) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, read in conjunction with Section J of the form set out in Annex A to that directive, must be interpreted as meaning that the judicial authority of a Member State does not, when issuing a European Investigation Order, have to include in that section a description of the legal remedies, if any, which are provided for in its Member State against the issuing of such an order**." *Reasoning:* The issuing of a European Investigation Order ("**EIO**") requires that the form in Annex A (the "**Form**") of Directive 2014/41/EU (1) (the "**Directive**") is completed and signed and that the content of the Form is certified as accurate and correct (para 26). According to the wording of Point 1 Section J of the Form, in particular the wording "*if so*", the Form must only include the description of legal remedies that have

already been sought against an EIO (para 28). The wording "*please provide further details*" shows that the EU legislature intended to ensure that the authority executing the EIO will be informed of any action brought against the EIO that had been forwarded to it. The wording also shows that the executing authority should not be informed more generally of the legal remedies, if any, that are provided for in the issuing Member State against the issuing of an EIO (para 29).

Likewise, the purpose of Point 2 Section J of the Form is to ensure that the executing authority is informed of any legal remedy sought against an EIO and not to provide it with a description of the legal remedies, if any, that are available in the issuing Member State against the issuing of an EIO (para 30). Under Point 2 Section J of the Form, the authority issuing the EIO is only required to provide the name and contact details of the authority in the issuing Member State that can furnish more information about the legal remedies, legal assistance, interpretation and translation services available in the issuing Member State (para 31).

In light of these considerations, the authority issuing an EIO does not have to include a description of the legal remedies, if any, against the issuing of an EIO that are available in its Member State in Section J of the Form in Annex A of the Directive (para 33). This interpretation ensures that the objective pursued by the Directive under recitals 21 and 38 is fully attained (para 35). This interpretation is also supported by Art. 14 (5) of the Directive, which states: "The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO" (para 34).

The Form in Annex A of the Directive is intended to provide the authority executing an EIO with the minimum official information it requires to adopt the decision on the recognition or execution of that EIO and, as appropriate, to carry out the measures requested within the time limits of Art. 12 of the Directive (para 36).

Case C-852/19 Gavanozov II
Preliminary reference: **Case C-852/19: Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 21 November 2019 — Criminal proceedings against Ivan Gavanozov**

Questions referred:

'(1) Is national legislation which does not provide for any legal remedy against the issuing of [an EIO] for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive [2014/41] and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ("ECHR")]?

(2) Can [an EIO] be issued under those circumstances?'

Judgement:

Case C-852/19: Judgment of the Court (First Chamber) of 11 November 2021 - Criminal proceedings against Ivan Gavanozov ECLI identifier: ECLI:EU:C:2021:902

Operative part:

"1. **Article 14 of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, read in conjunction with Article 24(7) of that directive and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding legislation of a Member State which has issued a European investigation order that does not provide for any legal remedy against the issuing of a European investigation order, the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference.**

2. **Article 6 of Directive 2014/41, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union and Article 4(3) of the Treaty on European Union, must be interpreted as precluding the issuing, by the competent authority of a Member State, of a European investigation order, 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 a European investigation order."**

Reasoning:

This first question in essence inquires whether a Member State must preclude legislation of another Member State, which has issued an EIO and does not provide

for any legal remedy against the issuing if such an EIO with the purpose of carrying out searches and sears as well as the hearing of a witness by video conference in light of Art. 1(4) and Art. 14(1) to (4) of Directive 2014/41, read in the light of recitals 18 and 22 of that Directive, and Arts. 7 and 47 of the Charter, read in conjunction with Arts. 8 and 13 ECHR (para 24). The Court notes that Member States are required to ensure compliance with the right to an effective remedy enshrined in Art. 47(1) of the Charter *État belge (Circumstances subsequent to a transfer decision)*, C-194/19, EU:C:2021:270, paragraph 43) (para 28). Hence, since the procedure of issuing and executing an EIO is understood to be an act implementing EU law, Art. 47 of the Charter is applicable. In this regard, it must be noted that Art.47 of the Charter states that everyone whose rights and freedoms are violated, which are guaranteed by Union law, has a right to an effective remedy (para 29). Following this, the Court notes that the issuing of an EIO with the purpose of carrying out searches and seizures constitutes an interference with the rights guaranteed by Art. 7 of the Charter (para 31). Consequently, any person who wishes to rely on the protection conferred by those provisions in the context of an EIO, with the purpose of carrying such searches and seizures, must be accorded the right to an effective remedy per Art.47 of the Charter (para 32). This right means that the persons concerned by such an investigate measure must have appropriate remedies enabling them to: (1) contest the need and lawfulness of those measures and (2) to request appropriate redress, if those measures have been, or have been carried out, unlawfully (para 33). Furthermore, it is for the Member States to provide the legal remedies necessary for these purposes (ibid). This interpretation of Art.47 of the Charter is inline to that of Art.13 of the ECHR (para 34). This right for the person concerned to contest the need of those measures also means that this person must have available to him or her a legal remedy against the EIO ordering for the search and seizure to be carried out (para 35).

Art. (1) of the Directive defines the EIO as a judicial decision which has been issued or validated by a judicial authority of a Member State and Member States are meant to execute these decisions on the basis of mutual recognition in accordance with Art. 1(2) of the Directive (para 36-37). Additionally, as per Art. 9(1) the executing authority must recognise an EIO, transmitted in accordance with the procedure laid by the Directive, without further formalities, unless it wishes to make use of the grounds for non-recognition, non execution of postponement provided for in the

directive (para 38). It is also worth noting that a challenge to the substantive reasons for issuing an EIO can only be brought in the issuing state as per Art.14(2) of the Directive (para 40). For this reason, it is for the issuing Member State to ensure that the person concerned has a remedy available to them, in order for the rights guaranteed by Art. 47 of the Charter to be effectively exercised in terms of searches and seizures (para 41).

In regards to the hearing of a witness by videoconference, as per Art. 24(7), it must be noted that each Member State is to ensure that where a person is being heard in its territory and refuses to testify, its national law will apply in the same way as if a hearing took place in a national procedure (para 43). It follows from this that a person who refuses to testify is likely to face significant consequences on the basis of the rules laid down for that purpose in the national law of the executing Member States (para 44). Some of these would require the person to appear at the hearing and be obliged to answer, and failing to do so could lead to penalties being imposed on the witness (ibid). It is also settled case-law that protection against arbitrary or disproportionate intervention by public authorities constitutes a general principle of EU law (judgment of 16 May 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, paragraph 51) (para 45). This protection may be relied on by any person as a right guaranteed by Union law in order to challenge an act adversely affecting the person such as an order to provide information or a penalty imposed on grounds of non-compliance, for the purposes of Art.47(1) of the Charter (para 46). The execution of an EIO with the purpose of hearing a witness by videoconference is likely going to adversely affect that person, and must therefore have a legal remedy available to him or her against such a decision, in line with Art.47 of the Charter. It must be noted that the executing Member State does not have jurisdiction to examine the substantive reasons for missing such an investigative measure as per Art.14(2) (para 48). Based on all these considerations, it is for the issuing state to ensure that a person who is subject to an obligation to be heard as a witness in the context of the execution of an EIO, has a remedy available to the, in the issuing Member State (para 49). This remedy must enable the person to challenge at least the substantive reasons for issuing such an EIO (ibid).

The second question inquires whether the issuing of an EIO with the purpose of carrying out searches and seizures, as well as the hearing of witnesses, must be precluded where the legislation of that issuing state does not provide a remedy for

the issuing of an EIO (para 51). Art. 6(2) of the Directive states that the issuing of an EIO is subject to two conditions: (1) that it must be proportionate and necessary for the purpose of the procedures referred to in Art. 4, taking into account the rights of the suspect or accused person; (2) that the investigative measure must be capable of being ordered under the same conditions in a similar domestic case (para 52). This provision does not mention the rights of persons other than those accused when issuing an investigative measure (para 53). Nonetheless, it follows from recitals 2, 6 and 9 that the EIO is based on the principle of mutual recognition and that is a cornerstone of judicial cooperation. Moreover, the principle of mutual trust is based on the rebuttable presumption of compliance by other Member states with Union law and fundamental rights (judgment of 8 December 2020, Staatsanwaltschaft Wien (Falsified transfer orders), C-584/19, EU:C:2020:1002, paragraph 40) (para 54). Thus, the observance of those rights falls primarily within the responsibility of the issuing state, in the context of EIOs (see, by analogy, judgment of 23 January 2018, Piotrowski, C-367/16, EU:C:2018:27, paragraph 50) (para 55). However, the fact that it is impossible to context the need for and lawfulness of these investigative measures, at least in light of the substantive reasons for issuing an EIO, constitutes an infringement of the right to an effective remedy such as to rule out the possibility of mutual recognition being implemented and benefiting that Member State (para 56). It should also be born in mind that it is for Member States to ensure in their territories the application and perfect for EU law, as well as it it for them to take any appropriate measures to ensure the fulfilment of the obligations arising from Union law (judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, paragraph 34 and the case-law cited) (para 57). Hence, due to the essential role of mutual recognition for the system established by the EIO directive it is for the issuing Member State to create the conditions under which an executing state may grant its assistance in accordance with EU law (para 58).

While the Directive is based on the principle that EIOs are to be executed, Art. 11(1)(f) allows executing authorities to exceptionally derogate from this principle following an assessment on a case-by-case basis (para 59). Still, in the absence of a legal redy in the issuing state, the application of the provision would become automatic and this would be contrary to the general scheme of the Directive and of the principle of mutual trust (ibid). As a result, the issuing of an EIO of which there are substantial grounds to believe that its execution would lead to an

infringement of Art.47 of the Charter is not compatible with the principles of mutual trust and sincere cooperation (para 60). Thus, 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 Art. 47 of the Charter (para 60). Hence, the answer to the second question is that Art. 6 of Directive 2014/41, read in conjunction with Art. 47 of the Charter and Art. 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 (para 62)

Ne bis in idem

Case C-505/19 WS v Bundesrepublik Deutschland

Judgement:

Case C-505/19: Judgment of the Court (Grand Chamber) of 12 May 2021 - WS v Bundesrepublik Deutschland. ECLI identifier: ECLI:EU:C:2021:376

Paragraph 105

"Second, while, according to Article 11(1)(d) of Directive 2014/41, the execution of a European Investigation Order issued by a Member State may be refused in the executing Member State where such execution would be contrary to the ne bis in idem principle, it is apparent from recital 17 of that directive that, given the preliminary nature of the procedures underlying the European Investigation Order, its execution should not be subject to refusal where it is aimed at establishing whether a possible conflict with the ne bis in idem principle exists."

Този проект е финансиран от програма „Правосъдие" на Европейския съюз (2014-2020 г.) по договор за безвъзмездна финансова помощ № 882068.

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2. Directive (EU) 2022/228 of the European Parliament and of the Council of 16 February 2022 amending Directive 2014/41/EU, as regards its alignment with Union rules on the protection of personal data OJ L39, 21.2.2022, p. 1–3
3. Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union OJ C197, 12.7.2000, p3-23
4. 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 L303, 28.11.2018, p. 1–38
5. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ L119, 4.5.2016, p. 1–88
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