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PROCEDURAL BALANCE OR STRUCTURAL DISADVANTAGE? LEGAL REMEDIES AND DEFENCE RIGHTS IN EUROPEAN INVESTIGATION ORDER

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Abstract As cross-border crime has increased, obtaining evidence from abroad has become crucial to effective prosecution. EU cross-border cooperation for evidence gathering has evolved from mutual legal assistance to instruments such as the European Investigation Order (EIO), which combines mutual assistance and mutual recognition and has significantly accelerated procedures. However, despite its advanced and structured regulation, the position of the defence in the EIO procedures remains uncertain in some countries. Directive 2014/41/EU does not provide a sufficient legal basis for the defence to issue an EIO independently, nor does it establish an explicit right to appeal against its issuance or execution. Although fundamental rights under the EU Charter and the ECHR apply to EIO proceedings, these standards are broadly framed and allow national discretion. The CJEU has taken a step forward, notably in *Gavanozov II*, highlighting the importance of legal remedies in EIO proceedings. Nonetheless, national criminal procedures still differ in key aspects, and significant gaps remain at the EU level in ensuring effective defence rights.

Keywords
European Investigation Order, mutual recognition, adversarial proceedings, rights of defence, ECHR, effective legal remedy.

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1 Introduction

The prosecution of crimes with cross-border dimensions has long been a complex challenge.[1] To address this, the European Union introduced the European Investigation Order (EIO), a uniform instrument based on mutual assistance and mutual recognition, designed to simplify and accelerate the execution of investigative measures across borders.[2]

While the EIO represents a major achievement in enhancing the efficiency of prosecutions, it is equally important to ensure adequate protection of individual rights in criminal proceedings. Cross-border investigations require procedural guarantees for the defence, such as access to legal remedies, participation of legal counsel, and the possibility of obtaining evidence in favour of the defence. However, Directive 2014/41/EU does not explicitly regulate defence rights in EIO proceedings, leaving their protection largely to national legal systems. As a result, levels of defence protection vary significantly among Member States, particularly in jurisdictions that fail to ensure even minimum procedural safeguards.

This article examines the development of the EIO, outlines the scope of Directive 2014/41/EU, analyses defence-related provisions, and concludes with a comparative assessment of Slovenian and Italian approaches to regulating legal remedies in EIO proceedings.

2 From Mutual Assistance to the EIO

The solutions introduced by Directive 2014/41/EU are based on ideas and principles that were already applied in other contexts and other areas of law before the directive was drafted. These ideas and principles were the product of various legislators (Klip, 2016: 378). Since 1957, the Council of Europe has adopted a range of conventions to regulate cooperation in criminal matters. Among these, the 1959 European Convention on Mutual Assistance in Criminal Matters[3] is particularly significant, as it laid the foundation for international cooperation in this field. The rules and principles it established were later further developed and enhanced by the European Union through the adoption of new legal instruments. For example, on

[1] The prevalence of cross-border crime is evident in both past and recent statistics (Eurojust, 2024).

[2] See statistics on the number of warrants issued (4 262 cases involving an EIO, 3,159 EAWs issued in 2020, during the COVID-19 pandemic) and the number of other operations in the EU (Eurojust, 2020).

[3] European Convention on Mutual Assistance in Criminal Matters (Council of Europe, ETS No 30, 20 April 1959).

29 May 2000, the Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union was adopted in accordance with Article 34 of the Treaty on European Union.[4] These instruments were based exclusively on the principle of mutual assistance, which promotes model of cooperation between Member States with requests.[5] This approach has not proved sufficiently effective among EU countries, as it has largely been based on a relationship of dependency between the requesting and the requested State. In this respect, it differs significantly from the model of mutual recognition on which modern instruments of judicial cooperation are founded (Ambos, 2018: 418, 417). In addition to the limited effectiveness of such requests, other evident shortcomings include the fragmentation of rules across multiple conventions and the requirement that each convention be ratified before its provisions can take effect.[6] With the aim of remedying these shortcomings, the EU legislator began adopting framework decisions[7] on cross-border cooperation in criminal matters, several of which were later replaced by Directive 2014/41/EU. This Directive significantly reduced fragmentation by consolidating and superseding earlier instruments. Its provisions also replaced relevant rules contained in existing conventions.[8]

In accordance with Article 1 of Directive 2014/41/EU, an EIO is a judicial decision issued or validated by a judicial authority of the issuing State for the purpose of carrying out investigative measures in the executing State with a view to obtain evidence or obtain existing evidence. In practice, an EIO is a standard form contained in Annex A to Directive 2014/41/EU, available in all languages of the Member States, which is completed by one of the national judicial authorities for the purpose of obtaining evidence from another country. Another authority, such as the

[4] 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 C 197, 12.7.2000. See also Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326, 21.11.2001.

[5] For more on models of cooperation with requests see Klip, 2016: 381.

[6] For more on the problem of ratification see Klip, 2016: 375–378.

[7] In the area of evidence gathering see Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003; and Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008.

[8] Particularly the Convention on Mutual Assistance and Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000.

police, may also request an EIO, but it must always be authorised by a judicial authority.[9]

Several features of Directive 2014/41/EU contribute to speeding up procedures, in addition to the standardised form, which helps simplify and streamline the process. An EIO may be issued for all investigative measures,[10] strict procedural deadlines are set for it,[11] and in accordance with the principle of mutual recognition, Member States must recognise and execute an EIO *"without delay and without any further formalities"* (European Commission, 2021: 1*)* except in the case of explicitly listed grounds for refusal.[12]

Nevertheless, it is important to clearly define the scope of the EIO so that both judicial authorities and the defence[13] know when the EIO can be used for a particular measure or when another instrument must be used, for example, a traditional request under the Convention, or the European arrest warrant. In accordance with Article 34 of the Directive 2014/41/EU, the EIO replaces the "*relevant provisions*" of certain existing instruments. The openness of this provision allows for at least partial arbitrary interpretation and means that, during implementation, countries themselves have determined certain situations or measures to which the EIO would or would not apply.[14] Directive 2014/41/EU does in part define the scope of application of the EIO, since its provisions cover the conditions that must be met in order for the EIO to be used for a specific measure or evidence.[15] Still, confronted with certain specific cases in practice, it appears that the limits of the EIO's application are more difficult to determine and that Article 34 of the Directive does not provide sufficient guidance on its application.[16] A partial solution is provided by

[9] In Slovenia that is the public prosecutor, investigating judge or district judge. See Article 73 of the Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije (ZSKZDČEU-1), Uradni list RS, št. 48/13, 37/15, 22/18, 94/21 in 100/25 – ZS-1.

[10] The scope of application of the EIO is broader than the previous regulation. The EIO may refer to "*any investigative* measure", regardless of whether the evidence is already in the possession of the executing state or still needs to be obtained. See Eurojust, 2019: 5, 6.

[11] In urgent cases, the deadlines may be shorter, otherwise a 30-day deadline applies, and after confirmation of the EIO, a 90-day deadline for execution. At the same time, a safeguard is provided that if it is not possible to meet the deadlines, the countries have an obligation to notify. See Article 12 of Directive 2014/41/EU.

[12] For more on possible grounds for refusal, see Article 11 of Directive 2014/41/EU.

[13] For the purposes of this article, the term "defence" includes suspects, defendants, accused persons (in proceedings involving legal remedies) and their representatives.

[14] See Eurojust 2018: 4; and Eurojust, 2019: 5, where Eurojust notes the situation of EIO rejection by a country whose national legislation stipulates that the EIO does not apply in certain cases.

[15] For more information, see Articles 3, 4 and 6 of Directive 2014/41/EU and Eurojust, 2018: 5, 6.

[16] See opinion of some Member States in Eurojust, 2019: 5.

Council document 14445/11 (Council of the European Union, 2011) which lists the measures and provisions corresponding to those in the 1959 Convention on Mutual Assistance in Criminal Matters and the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.[17] Any ambiguities and gaps are filled by the guidelines and recommendations of the European Judicial Network and Eurojust.[18]

It's also important to note that the EIO does not apply to cross-border surveillance[19] or to the establishment of a joint investigation team,[20] including the gathering of evidence within that team.[21] EIO still has some geographical limitation, as it does not apply to Denmark and Ireland.[22]

Due to the specific characteristics of electronic data, particularly its dynamic nature and the fluid location of stored information across different countries, (e.g. data stored on different servers in different countries), the EU has recognised the need for special regulation of electronic evidence.[23] After several years of negotiations,[24] this type of evidence is subject to two new orders, known as the European Production Order and the European Preservation Order. The latter fall within the scope of Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on the European Production Order and the European Preservation Order for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (hereinafter: Regulation 2023/1543)[25] and the accompanying Directive (EU) 2023/1544 of the European

[17] Zakon o ratifikaciji Evropske konvencije o medsebojni pravni pomoči v kazenskih zadevah in Dodatnega protokola k Evropski konvenciji o medsebojni pravni pomoči v kazenskih zadevah (MEKPPKZ), Uradni list RS – Mednarodne pogodbe, št. 25/99, 13/01 in 12/21.

[18] For more on this see Eurojust and European Judicial Network, 2019.

[19] Cross-border surveillance is regulated by the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000.

[20] Joint investigation teams are set up in accordance with Article 13 of the 2000 Convention on Mutual Assistance in Criminal Matters and Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ L 162, 20.6.2002.

[21] See recital 8 and Article 3 of Directive 2014/41/EU. EIO procedures and joint investigation team procedures are different. It is necessary to assess on a case-by-case basis which tool is best to use, and it is also possible to combine them. For more information on this see Eurojust, 2019: 16.

[22] See recitals 44 and 45 of Directive 2014/41/EU.

[23] For more on the specifics and problems of electronic evidence, see Chikuruwo and Gamundani, 2022: 6; and Leroux, 2004: 193–220.

[24] For more on this, see Wahl, 2023.

[25] Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on the European Production Order and the European Preservation Order for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, PE/4/2023/REV/1, OJ L 191, 28.7.2023.

Parliament and of the Council of 12 July laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings (hereinafter: Directive 2023/1544).[26] Regulation 2023/1543 will apply from 18 August 2026 onwards, while Directive 2023/1544 was required to be transposed into national law by Member States by 18 February 2026. The main purpose of the new EU legislation is to establish an alternative, faster mechanism for obtaining electronic evidence, in addition to the existing tools for international cooperation. For all other measures of obtaining evidence and conducting investigative actions abroad, the EIO will continue to apply.[27]

3 Directive 2014/41/EU, ECHR Standards and Defence Rights

3.1 General Overview

Mutual assistance between judicial authorities in criminal matters is the main driver of Directive 2014/41/EU, which has thus abandoned the broader objectives of improving the protection of suspects and accused persons in cross-border criminal proceedings (Belfiore, 2015: 324; Fauchon, 2021: 43). The rules in favour of the defence in the Directive 2014/41/EU do not establish a uniform procedure or explicit additional rights of defence for all Member States.[28] The latter is reasonable, given the purpose of the directive as a tool for harmonisation and the establishment of minimum standards of protection.[29] Directive 2014/41/EU, with its loose procedural rules in favour of the defence, is in line with Article 67(1) TFEU, which, among other things, provides for respect for the different legal systems and traditions while strengthening The Area of Freedom, Security and Justice (hereinafter: AFSJ). Nevertheless, some provisions in Directive 2014/41/EU relating to the defence could be clearer and minimise gaps and differences, not only between the prosecution and the defence, but also between the defences of different

[26] Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings, PE/3/2023/REV/1, OJ L 191, 28.7.2023.

[27] For more on this see Tosza, 2020: 161–183.

[28] *Opinion of Advocate General Michal Bobek in* Case C-852/19, ECLI:EU:C:2021:346, para 45.

[29] For more on this see Kurcz, 2001: 287–307.

legal systems of the Member States.[30] This issue is particularly evident in situations where national legislation does not provide for effective legal remedies or other minimum procedural safeguards, as analysed by the CJEU in the *Gavanozov II* case.[31] All this must be taken into account when analysing the provisions of the Directive 2014/41/EU that are in one way or another helpful to the defence, in particular Article 1(3) (possibility for the defence to request an EIO), Article 1(4) (protection of fundamental rights), Article 6(1) (proportionality and necessity in issuing an EIO), Article 11(1)(f) (possibility of refusing an EIO on the basis of violations of fundamental rights) and legal remedies under Article 14 (in conjunction with Article 13, insofar as we are assessing a legal remedy that suspends the execution of an investigative measure) of Directive 2014/41/EU. These articles provide a framework for implementation, which Member States had to complete by 22 May 2017.[32] However, in exceptional circumstances, individuals may invoke individual provisions of directives directly against the state (i.e. vertical direct effect).[33] The content of such a provision of the directive must be clear, sufficiently precise and unconditional, and it may be invoked before national courts against the state if the directive has not been implemented within the prescribed period or if it has not been correctly transposed[34] into national law.[35]

3.2 The Procedural Position of the Defence under Directive 2014/41/EU

Firstly, Directive 2014/41/EU gives the defence the possibility to request the obtaining of certain evidence or the execution of an investigative measure with an EIO. Article 1(3) stipulates that, within the framework of the applicable defence rights, an EIO may be requested by the suspect or accused person or by a lawyer (defence counsel) acting on their behalf, in accordance with national criminal procedure. Although the article is intended to "level the playing field" between the

[30] To highlight differences in implementation between individual countries see European Commission, 2021. See also *Opinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346, para 91.

[31] See the second decision of the court in the *Gavanozov* case of 11 November 2021. Case C-852/19*, Ivan Gavanozov*, ECLI:EU:C:2021:902.

[32] See Article 36 of Directive 2014/41/EU.

[33] For more on this, see Ferčič, Hojnik and Tratnik, 2011: 89–92.

[34] See the *Opinion of Advocate General Yves Bot* in Case C-324/17, ECLI:EU:C:2019:312, para 96.

[35] On direct effect, the CJEU ruled in Case 41-74*, Yvonne van Duyn v Home Office,* ECLI:EU:C:1974:133; For the conditions of direct effect, see Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre,* EU:C:2012:33, para 33.

defence and the prosecution,[36] it does not explicitly grant the right for the accused (or suspect at the investigation stage) or their lawyer (i.e. formal defence) to obtain evidence or carry out investigative measures in practice, using the EIO (Fauchon, 2021: 44). The defence's ability to do so is undermined by two key shortcomings.[37] Article 1(3) of Directive 2014/41/EU refers only to existing national rules of criminal procedure and does not allow for the direct issuance of an EIO by the defence. "*Within the framework of applicable defence rights in conformity with national criminal procedure*" is a clear provision indicating that it depends primarily on whether the national law of a particular country provides for the possibility for an individual to request the execution of a specific investigative measure in domestic proceedings and, if so, whether this person is also allowed to request the issuance of an EIO. Such an arrangement may lead to significant differences between the position of suspects in the different legal systems of Member States (Buric, 2016: 76–77).[38] The provision does not impose an obligation on Member States to allow the possibility of issuing an EIO at the request of the defence.[39] The latter could be remedied by the EU legislator introducing a general right enabling individuals, in EIO proceedings, to request the issue and execution of an investigative measure.[40]

Another shortcoming of the provision is that once the defence has successfully applied for the issuance of an EIO, in accordance with Directive 2014/41/EU, such a request[41] must be confirmed by the judicial authority competent to issue or authorise the EIO, e.g. a district judge, an investigating judge or a public prosecutor.[42] However, the judicial authority is not obliged to approve the request, which gives the prosecutor an advantage over the defence in the proceedings (Wijk, 2017: 95–97; Kordiš and Stajnko, 2022: 11–13). Nor does it specify whether, in the event of a refusal, the judicial authority must give reasons, or better issue a specific reasoned decision. Article 1(3) of Directive 2014/41/EU also does not address the

[36] The term "equality of arms" between the defence and the prosecution appears in connection with the right to a fair trial, see Case *Laukkanen and Manninen v. Finland,* Application no. 50230/99, ECLI:CE:ECHR:2004:0203JUD005023099.

[37] Two main shortcomings are highlighted in Fauchon, 2021: 44; Compare with *Jurka*, who highlights several shortcomings in practice (e.g. costs). Jurka, 2016: 76, 77.

[38] For more on the differences in the procedures of Member States, see Sellier and Weyemberg, 2018: 66–81.

[39] Similarly, from the perspective of equality of arms, see Wijk, 2017: 268.

[40] Compare with Wijk, who argues that this would exceed the EU's competences Wijk, 2017, 264–269.

[41] Whether this is a request or a formal application depends on national regulations.

[42] Listed examples (a district judge, an investigating judge or a public prosecutor) are the judicial authorities in Slovenian legislation that can issue or authorise the EIO; The approval of the EIO is in the hands of the first instance authorities, as highlighted by Dediu, 2018: 298, 301.

issue of legal remedies in cases where the defence has requested the issuance of an EIO, and the judicial authority has refused that request (Fauchon, 2021: 44; Wijk, 2017: 95–97).

Unlike its predecessors, Directive 2014/41/EU contains an *"innovative"*[43] provision on legal remedies, which is covered by Article 14 in conjunction with recital 22 (Fauchon, 2021: 45). Article 14 (1) of Directive 2014/41/EU obliges Member States to ensure that equivalent legal remedies to those available in similar domestic cases are available for the investigative measures provided for by the EIO. The article contains an *"equivalence clause"*[44] and stipulates that legal remedies already available in domestic proceedings are feasible with EIO. This means that these provisions should not be understood as imposing additional obligations to provide legal remedies beyond those already available for the same investigative measures and applied in a similar domestic case.[45] Similarly, this equivalence can be understood as a safeguard that states may not provide a procedure with EIO that is less favourable to the suspect or accused person.[46] As pointed out by *Scomparin* and *Peloso*, which investigative acts or measures can be challenged depends on national law, and these appeal procedures must be used (Scomparin and Peloso, 2023:166–167).[47] In the absence of appropriate legal remedies, the party or its representative could therefore invoke Article 14 of Directive 2014/41/EU before the national court, but only in relation to equivalence – where the party is not allowed to use *"legal remedies equivalent to those available in similar domestic cases*." From Article 14(1) of Directive 2014/41/EU, it can further be inferred that equivalent legal remedies may be exercised both in the issuing State and in the executing State.[48] Thus, Article 14(1) establishes a general obligation to provide equivalent remedies, while paragraph 2 limits the scope of

[43] The provision was described as a positive innovation by Fauchon, 2021: 45; Ambos, 2018: 460–461; Montero, 2017: 45–49.

[44] The term was used by Scomparin and Peloso, 2023: 166. Compare with *the* "requirement of equivalence" in *Opinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346, paras 40 and 58.

[45] See, in this regard, Case C-584/19, *Staatsanwaltschaft Wien v A. and Others,* EU:C:2020:1002, para 60; Similarly, *If the Member States do not have such legal remedies, the directive does not require them to introduce them. Opinion of Advocate General Michal Bobek in* Case C-852/19, ECLI:EU:C:2021:346, para 58.

[46] *Opinion of Advocate General Michal Bobek in* Case C-852/19, ECLI:EU:C:2021:346, para 40.

[47] This approach is understandable, given that Directive 2014/41/EU only established a general regulatory framework without distinguishing between investigative measures. For more on thsi see Lorenzetto, 2018: 157; and Scomparin and Peloso, 2023:166–167. Consequently, it was not feasible to provide for a uniform legal remedy applicable across all Member States. See assessment in Council of the European Union, 2011: 5–6.

[48] This provision refers to the issuing State and the executing State. *Opinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346, para 34; Kordiš and Stajnko, 2022: 11–13.

control regarding the substantive reasons for issuing an EIO to the issuing State.[49] The substantive grounds for issuing an EIO may, in accordance with Article 14(2) of Directive 2014/41/EU, only be challenged by an action brought in the issuing State, without prejudice to the fundamental rights of the executing State. *Montero,* explains further that any such legal remedy is possible in the issuing country, while legal remedies in the executing country are limited to the protection of fundamental rights (Montero, 2017: 45, 46). Evidently, the main purpose was to avoid interfering with the effectiveness of the requested investigative measure and to limit the involvement of the executing State in the process (Schünemann, 2014: 29).

Where national legislation provides for legal remedies, the next important provision for an effective defence is paragraph 3 of the same Article, which concerns the right to information about the availability of such remedies. Article 14(3) of Directive 2014/41/EU requires both the executing and the issuing State to take appropriate measures to ensure access to information on the availability of these remedies, within a timeframe suitable for their effective exercise under national law (Arena, 2014: 114).[50] However, this obligation is subject to the condition that it does not compromise the confidentiality of investigations, as provided for in Article 19 of the Directive 2014/41/EU. Member States must also ensure that the same time limits apply to the exercise of legal remedies as in similar domestic cases.[51] Directive 2014/41/EU further emphasises compliance with the relevant time limits for exercising legal remedies. These are the time limits set for similar domestic cases and are applied in such a way as to ensure that *"the persons concerned"*[52] can effectively

[49] *Opinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346, para 35. Similarly, *Scomparin and Peloso* state that, as regards the substantive grounds for issuing an EIO, paragraph 2 of Article 14 limits the scope by establishing a distinction between the legal remedies available for the issuance and execution of an EIO, see Scomparin and Peloso, 2023:166–167.

[50] See the provision on the general right to a fair trial in Article 6 of the ECHR in conjunction with point (a) of the third paragraph of Article 6 of the ECHR. According to the ECtHR, the notification must be given in *good time* for his defence, which in case *C. v. Italy* was four months before the trial. *Case C. v. Italy,* Application no. 10889/84, ECLI:CE:ECHR:1988:0511DEC001088984. The accused must be able to exercise his rights of defence in a practical and effective manner in good time. *Pélissier and Sassi v. France,* Application no. 25444/94, ECLI:CE:ECHR:1999:0325JUD002544494*,* para 62.

[51] See the wording of Article 14(4) of Directive 2014/41/EU.

[52] The term "person concerned" must be interpreted separately, in accordance with Directive 2014/41/EU. The term covers the accused person, even if the measure does not relate to them, because it may have an impact on them later in the proceedings (e.g. incriminating evidence). The term may also cover other persons – witnesses or third parties to whom the investigative measure relates. *Opinion of Advocate General Yves Bot* in Case C-324/17, ECLI:EU:C:2019:312, paras 58 and 64 (person concerned), and para 107 (incriminating evidence).

exercise their right to these legal remedies.[53] Member States also inform each other about any legal remedies that might have been exercised.[54]

The effect of the exercise of legal remedies on the EIO procedure is set out in Article 14(6) of Directive 2014/41/EU. As a rule, the effect of a legal remedy is not suspensive and therefore does not stay enforcement of a measure, except in two cases. The first case is covered by the aforementioned provision and refers to the possibility of suspending enforcement if this is provided for in a similar domestic case; the second case is provided for in Article 13(2) of Directive 2014/41/EU, which allows the transmission of evidence to be postponed until a decision on the legal remedy has been taken if this would cause serious and irreparable harm to the person concerned. Despite the possibility of a stay of execution under Article 13, the general provision is less favourable to the suspect, and the rights of the defence also vary in this case depending on the different national laws (Fauchon, 2021: 46).

The last paragraph of Article 14 of Directive 2014/41/EU stipulates that the issuing State shall consider a successful challenge against the recognition or execution of an EIO in accordance with its own national law. However, the paragraph in question does not specify whether this means that the State has an obligation to withhold evidence (in the case of the executing State) or to prohibit its use in court (in the case of the issuing State) (Scomparin and Peloso, 2023: 168–169). In any case, this may be one of the possible reasons for the exclusion of evidence in later stages of the proceedings, i.e. the exclusion of evidence in the issuing State. Article 14(7) further (in favour of the defence) highlights that the right to defence and the fairness of the proceedings must be respected when assessing evidence obtained through the EIO. However, this primarily concerns the fundamental rights guaranteed under the European Convention on Human Rights (hereinafter: ECHR)[55] rather than sets forward a specific protective provision (Lorenzetto, 2018: 157). Fundamental rights are not protected solely by Article 14(7); rather, Directive 2014/41/EU as a whole provides the normative framework within which these rights must be safeguarded. This framework is particularly significant when an EIO is issued in a State that does not provide a national equivalent legal remedy for EIO proceedings. In such cases,

[53] The "effective" exercise of legal remedies is linked to Article 13 of the ECHR (right to an effective remedy).

[54] See Article 14(5) of Directive 2014/41/EU; and *Opinion of Advocate General Yves Bot* in Case C-324/17, ECLI:EU:C:2019:312, para 75.

[55] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos 11, 14 and 15 and supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16) (1950) 213 UNTS 221.

States must at least act in accordance with the scope of defence-oriented provisions as determined by fundamental rights.

3.3 Respect for Fundamental Rights, Safeguards and Directive 2014/41/EU

3.3.1 Safeguards in the Issuance of an EIO

Point (a) of Article 6(1) prescribes "*an approach based on the least intrusive measures"*[56] by stipulating that an EIO may only be issued if it is necessary and proportionate to the proceedings, taking into account the rights of the suspect or accused person.[57] This provision represents the first safeguard in favour of the suspect or accused person, which is verified by the state itself when issuing the EIO. Assessing the necessity and proportionality of a measure is not a new concept. When it comes to the interference with the constitutional rights of individuals, certain general conditions for the admissibility of such interference must be met (Šugman Stubbs and Gorkič, 2011: 127).[58] A similar logic is also found in the Slovenian legal system, where the principle of proportionality must be taken into account in various measures, such as house searches. When assessing the so-called "*strict proportionality test"* (Šugman Stubbs and Gorkič, 2011: 127)*,* the authorities must already weigh up the *"necessity of the search"* (whether there is a less intrusive measure that could achieve the same purpose, in this case a house search) the *"appropriateness"* (the likelihood of finding evidence relevant to the proceedings or apprehending the perpetrator) and *the* "*proportionality of the interference"* (taking into account the standard of proof[59] and the goods affected) (Šugman Stubbs and Gorkič, 2011: 128).

In the *Gavanozov II* case[60], the CJEU provided an additional interpretation of Article 6 of Directive 2014/41/EU. In connection with the fundamental right to an effective remedy, the Court ruled, inter alia, that the competent authority of the

[56] *Opinion of Advocate General Michal Bobek i*n Case C-852/19, ECLI:EU:C:2021:346, para 54.

[57] In addition to necessity and proportionality, point (b) of Article 6(1) of Directive 2014/41/EU adds the condition that the investigative measure in the EIO may be ordered under the same conditions in a similar domestic case.

[58] Slovenian legislation also strongly emphasises the adversarial nature of judicial investigations, in particular the presence of the defence during investigative acts in accordance with Slovenian Criminal Procedure Act (Zakon o kazenskem postopku Article 178), more on this see Šugman Stubbs, Gorkič, and Fišer, 2020: 403–405.

[59] This is the standard of proof (the degree of probability that a person has committed a particular criminal offence) of reasonable suspicion, see VSRS, sodba I Ips 214/9, ECLI:SI:VSRS:2002:I.IPS.214.97

[60] Case C-852/19, *Ivan Gavanozov,* ECLI:EU:C:2021:902.

issuing State, when requesting the execution of investigative measures such as searches and seizures and the hearing of witnesses by videoconference through a European Investigation Order (EIO), should not issue an EIO where its national law does not provide any legal remedy against the issuance of such an order.[61] The issuing authority must also act in respect of the principle of mutual recognition, which is based on mutual trust, resulting in the presumption that all Member States operate in accordance with EU law and respect fundamental rights.[62]

Compliance with conditions set in Article 6 of Directive 2014/41/EU, is an obligation of the judicial authorities and not of the defence. However, it is equally important that the defence is aware of these conditions and understands how they apply to the individual case, so that it can identify any errors or violations in the EIO proceedings.

3.3.2 Protection of Minimum Rights and the Possibility of Refusal of an EIO by the Executing State

Point (f) of Article 11(1) additionally[63] presents the general obligation to respect fundamental rights in Directive 2014/41/EU, as the executing State may refuse to recognise and execute an EIO based on a violation of fundamental rights. Among other things, the article stipulates that the executing authority shall refuse an EIO if there are reasonable grounds to believe that the execution of the investigative measure covered by the EIO would be incompatible with the obligations of that State (the executing State) under Article 6 of the Treaty on European Union (hereinafter: TEU)[64], i.e. the obligation to respect fundamental rights under the ECHR and the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter).[65]

The grounds for refusal on the basis of a violation of fundamental rights in the EIO can be compared to the decisions of the CJEU[66] regarding the European arrest

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[61] Case C-852/19, *Ivan Gavanozov,* ECLI:EU:C:2021:902, para 62.

[62] Case C-852/19, *Ivan Gavanozov,* ECLI:EU:C:2021:902, para 54.

[63] A general provision to respect fundamental rights is set in Article 1(4) of the Directive 2014/41/EU.

[64] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

[65] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

[66] See, for example Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* ECLI:EU:C:2016:198; See also *Opinion of Advocate General E. Tanchev* in Case C-216/18 PPU ECLI:EU:C:2018:517, para 5.

warrant,[67] which provide for the suspension of surrender not only in cases of "*a real risk of inhuman or degrading treatment*",[68] but also in cases of violation of the right to a fair trial under Article 47 of the EU Charter.[69] It should be noted that the European arrest warrant results in a much more intrusive measure than the EIO, which certainly affects the assessment of the existence of a violation of fundamental rights.[70] The CJEU's decisions in the cases concerning the European arrest warrant gives us an insight into how the standard of respect for fundamental rights and the obligations of the executing state are assessed. In the joined cases *of Aranyosi* and *Căldăraru*[71], the court had already given an additional reason[72] for suspending the execution of the European arrest warrant. The CJEU ruled that the authority (in the executing country) may postpone the execution of the warrant if there is *a "real risk of inhuman or degrading treatment"*[73] and, accordingly, the CJEU presented a two-stage test to be carried out by the executing authority in order to determine whether the postponement of the warrant is possible.[74] This is primarily a two-stage assessment of the existing facts, which must be applied separately in each individual case.[75] First, it is necessary to assess the existence of a *"real risk"* of violation, but the assessment must be based only on objective, reliable and up-to-date material.[76] The second stage is the individualisation of the above-mentioned risk, where the existence of reasonable grounds for believing that the individual subject to the European arrest

[67] For more information on the European arrest warrant and surrender procedures, see Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002; and European e-justice portal on the topic.

[68] See the judgment of the Court in Joined Cases C-404/15 and C-659/15 PPU*, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* ECLI:EU:C:2016:198, para 88.

[69] See Case C-216/18 PPU*, LM,* ECLI:EU:C:2018:586.

[70] The infringement is assessed on a case-by-case basis. See, for example *Opinion of Advocate General E. Tanchev* in Case *C-216/18 PPU,* ECLI:EU:C:2018:517*,* para 8; Case C-216/18 PPU*, LM,* ECLI:EU:C:2018:586, paras 23, 24.

[71] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* ECLI:EU:C:2016:198.

[72] The executing judicial authority may otherwise refuse a European arrest warrant solely based on the specific grounds set out in Article 4 (in conjunction with Article 3) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[73] Joined Cases C-404/15 and C-659/15 PPU*, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198, para 98.

[74] *Ibid.,* para 89; Case C-216/18 PPU, *Minister for Justice and Equality v LM,* ECLI:EU:C:2018:586, para 61.

[75] See *Opinion of Advocate General E. Tanchev in* Case C-216/18 PPU, ECLI:EU:C:2018:517*,* paras 6–9.

[76] Joined Cases C-404/15 and C-659/15 PPU*, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* ECLI:EU:C:2016:198, paras 61.

warrant will be exposed to risk is assessed, taking into account the specific case[77] or situation.[78] The executing state must also obtain additional information and explanations from the issuing state in order to continue the assessment.[79] If all the conditions are met, the executing authority may "*refrain from giving effect"* to the European arrest warrant.[80]

In the subsequent case *C-216/18 PPU*[81], the Irish court referred a question to the CJEU for a preliminary ruling on whether this test of infringement of rights also applies to other cases, specifically to a Polish citizen arrested in Ireland for whom Poland had issued a European arrest warrant with the aim to carry out a surrender procedure. The detainee refused to be surrendered to Poland on the grounds that there was a risk of a violation of fundamental rights under Article 47 of the EU Charter (the right to an effective remedy and a fair trial) by the Polish authorities, as Poland had (at that time) adopted certain judicial reforms that were questionable in terms of the right to a fair trial, in particular the independence of the judiciary.[82] The CJEU's decision made it possible to apply the aforementioned test, adapted to the specific right, in this case the right to an impartial court, to the assessment of rights under Article 47 of the EU Charter.[83] Despite the promising decision of the CJEU, the Irish court did not rule in favour of suspending the surrender.[84] The Irish court sought to fulfil a very high threshold of *"flagrant disregard*" and violation of the right in a "*flagrant manner*".[85]

Attention should also be drawn to the fact that solution, whereby the state itself assesses whether the fundamental rights of the person concerned have been violated,

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[77] The assessment must be made on a case-by-case basis; the mere existence of a deficiency is not sufficient. See Joined Cases C-404/15 and C-659/15 PPU*, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* ECLI:EU:C:2016:198, para 93.

[78] *Opinion of Advocate General E. Tanchev* in Case C-216/18 PPU*,* ECLI:EU:C:2018:517, para 8.

[79] See Article 15(2) of the Council Framework Decision 2002/584/JHA; Case C-216/18 PPU*, Minister for Justice and Equality v LM,* ECLI:EU:C:2018:586, para 76.

[80] Case C-216/18 PPU, *LM,* ECLI:EU:C:2018:586, para 59.

[81] Case C-216/18 PPU, *LM,* ECLI:EU:C:2018:586.

[82] Poland has, among other things, significantly increased the role of politicians in the judicial system and introduced certain systemic changes See European Commission, 2017: 2-39; Note that, as of 2024 the European Commission closed the Arcticle 7(1) TEU procedure against Poland concluding there is no longer a clear risk of a serious breach of the rule of law. See European Commission, 2024 (press release).

[83] Differentiate the term "court" and "tribunal" as an autonomous concept of EU law in Article 47 of the EU Charter. On the concept of an impartial court, see Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg,* ECLI:EU:C:2006:587, para 52; Case C-216/18 PPU*, LM,* ECLI:EU:C:2018:586, paras 65, 67.

[84] See the decision of the Irish court in *The Minister for Justice and Equality v. Celmer no. 5, (2018) IEHC 639, The High Court, record no. 2013 295 EXT.*

[85] Compare *Ibid*., para 123 and 13.

is not ideal. In Case *C-216/18 PPU,*[86] the CJEU stated that if there is no existing Council decision on the existence of "*serious and persistent risks in the issuing Member State*" (based on the second paragraph of Article 7 TEU), the executing State must make such an assessment itself on the basis of concrete, objective material, assessing the individual nature of the risk and requesting additional information from the issuing authority.[87] We can see that if the Commission, Council of the EU or the CJEU have already made such an assessment, there is no doubt that this can be an automatic reason for not executing a European arrest warrant and surrender procedure. On the other hand, if the aforementioned institutions have not made such a decision, it is questionable whether too much responsibility is being placed on the executing country, as it must judge for itself whether the fundamental rights of another country have been violated.[88]

The CJEU has already ruled on the violation of fundamental rights in connection with the EIO and Directive 2014/41/EU in the cases *of Gavanozov I*[89] and *II*.[90] In neither case, however, did the Court examine the application of the two-stage test outlined above to situations involving a EIO. Although in *Gavanozov II* the Court was not confronted with a situation in which the executing authority had to, or would have had to, assess whether to refuse an EIO, it nevertheless highlighted the possibility of such a refusal where legal remedies are lacking in the issuing State. In connection with the violation of the fundamental right to an effective legal remedy, in accordance with Article 47 of the EU Charter, the CJEU pointed out that in the absence of any legal remedy in the issuing State against the EIO, the application of the provision in point (f) of the first paragraph of Article 11 of Directive 2014/41/EU would be "*systematic*".[91] Unlike in the joined cases of *Aranyosi* and *Căldăraru,* in the *Gavanozov II* case, the CJEU did not decide that the executing authority should weigh up the violation of the absence of a legal remedy or give an

[86] See Case C-216/18 PPU, *LM,* ECLI:EU:C:2018:586, para 72.

[87] However, it is primarily the responsibility of the issuing State to ensure that the conduct is consistent with fundamental rights when issuing the warrant. See, for example, the decision in this regard for the European arrest warrant. Case C-367/16*, Dawida Piotrowskiego,* EU:C:2018:27, para 50.

[88] *Bobek* argues that this is the responsibility of all those involved and that all responsibility cannot be transferred to the executing authority. However, if the executing authority fails to detect or even contributes to violations, it may be liable under international law. See *Opinion of Advocate General Michal* Bobek in Case C-852/19, ECLI:EU:C:2021:346, para 84 and 86, in this regard, *Bivolaru and Moldovan v. France,* Applications nos. 40324/16 and 12623/17, CE:ECHR:2021:0325JUD004032416.

[89] Case C-324/17, *Ivan Gavanozov,* ECLI:EU:C:2019:892.

[90] Case C-852/19, *Ivan Gavanozov,* ECLI:EU:C:2021:902.

[91] Case C-852/19, *Ivan Gavanozov,* ECLI:EU:C:2021:902, para 59; See also the "*automatic*" or "*systematic"* application of this provision in Weyembergh, 2022.

assessment in this regard (Szijártó, 2022: 50), but clearly decided that if the issuing country's legislation does not provide for legal remedies against the EIO, it must not be issued and must also be rejected.[92] The extent to which, and the circumstances in which the executing authority must verify the existence of an effective legal remedy and the consequences of failing to refuse such an EIO remain open questions for future cases, since the CJEU has not yet addressed them in the necessary detail (Weyembergh, 2020). The CJEU's decisions on the European arrest warrant, such as the joined cases of *Aranyosi and Căldăraru*, remain important, as they examine in detail the possibilities for rejecting warrants in connection with violations of fundamental rights and can thus serve as a guide for future assessments of violations of fundamental rights, including in proceedings under the EIO (Weiss, 2022: 186).

3.3.3 The Provision on Respect for Fundamental Rights in Directive 2014/41/EU and the Existence of an Effective Legal Remedy under the ECHR

The general obligation to respect fundamental rights is laid down in Article 1(4) of Directive 2014/41/EU.[93] As highlighted above, Article 14 of Directive 2014/41/EU does not impose an obligation on Member States to establish a specific legal remedy for EIO proceedings, unless this is provided for in similar national cases. The question is whether, in countries where no legal remedy is available under its national criminal legislation, that right is granted by the ECHR or, in this context, by the EU Charter. As Advocate General *Bobek* points out,[94] Article 14 of Directive 2014/41/EU and its equivalent clause is only permissible in the issuing country, which has a system in place that at least respects the minimum standards of protection of rights in accordance with the EU Charter and the ECHR.

The right to an effective remedy and a fair trial is enshrined in Article 47 of the EU Charter. Deriving from the explanations to the EU Charter,[95] Article 47 is based on Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the ECHR. Even though, the content and scope of the articles in the EU Charter and the ECHR

[92] The execution of such an EIO would also not be in line with the principle of mutual trust. Case C-852/19, *Ivan Gavanozov*, ECLI:EU:C:2021:902, para 60.

[93] *Opinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346, para 55.

[94] *Opinion of Advocate General Michal Bobek in* Case C-852/19, ECLI:EU:C:2021:346, para 59; Case C-852/19, *Specialised Prosecutor's Office v Ivan Gavanozov,* ECLI:EU:C:2021:902, para 60.

[95] Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 14.12.2007.

are not entirely identical, [96] it is necessary, in accordance with Article 52(3) of the EU Charter, to analyse the meaning and scope of the articles in the ECHR, in this case Article 13 of the ECHR (right to an effective remedy), in order to assess whether the absence of a legal remedy in a particular country constitutes a violation of the aforementioned rights.[97]

The assessment of Article 13 of the ECHR must be made from the viewpoint of Article 6 of the ECHR.[98] The entire proceedings must be taken into consideration.[99] The requirements of Article 6 (right to a fair trial) of the ECHR are relevant for assessing the effectiveness of the remedy under Article 13 of the ECHR. The criterion of fairness (or fairness of proceedings) is an integral part of an effective legal remedy, since the latter cannot be considered "effective" in the first place if certain minimum standards are not guaranteed to enable the complainant to challenge a decision that allegedly violates his rights under the ECHR.[100] With the help of the ECtHR's interpretation, Article 13 of the ECHR tells us what remedies must actually be available to individuals in the sphere of a "fair trial" in order for the legislation of a Member State to comply with minimum standards. Firstly, Article 13 of the ECHR sets out the framework within which an effective remedy must be placed. This is a domestic legal remedy before a *"competent"* national authority, whereby the said authority allows for the examination of the substance of a well-founded or "*arguable"* complaint.[101] The term "*arguable*" must be assessed in light of the particularity of the individual claim, which can be argued or defended.[102] The

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[96] For example, compare the concept of "tribunal*"* in Article 47 of the EU Charter and the concept of a court ("national authority") in Article 6 of the ECHR. For more on this, see Centre for Judicial Cooperation and European University Institute, 2019: 7–11.

[97] Article 52 of the EU Charter stipulates that the meaning and scope of the rights laid down in the ECHR and included in the Charter shall be determined by reference to the ECHR. Paragraph 3 of Article 52 of the EU Charter contains *a "threshold below which the protection afforded by the Charter may not fall*". See *Opinion of Advocate General Michal Bobek in* Case C-852/19, ECLI:EU:C:2021:346, para 61.

[98] It should be noted that, when determining violations, Article 13 of the ECHR supplements other provisions in terms of content and is applied in combination with other rights (in this case Article 6 of the ECHR). Case of *Zavoloka v. Latvia,* Application no. 58447/00, ECLI:CE:ECHR:2009:0707JUD005844700 , para 35.

[99] *Association Innocence en Danger and Association Enfance et Partage v. France,* Application no. 15343/15, 16806/15, ECLI:CE:ECHR:2020:0604JUD001534315, paras 188–196.

[100] Deriving from the case *Csüllög v. Hungary,* Application no. 30042/08, ECLI:CE:ECHR:2011:0607JUD003004208, para 46.

[101] Case *Boyle and Rice v. The United Kingdom,* Applications nos. 9659/82, 9658/82, ECLI:CE:ECHR:1988:0427JUD000965982 , para 52.

[102] In this sense, see more about the requirement that a complaint be sufficiently persuasive corelating to the basis of a case (i.e., the existence of a dispute), meaning that facts indicating a possible violation of a right can be presented before a court or competent body. In this regard, see the statement "*in respect of grievances which can be regarded as arguable*" in *Powell and Rayner v. the United Kingdom,* Application no. 9310/81,

ECtHR does not provide an abstract definition for the mentioned terms, as it is necessary to assess them, within the framework of the facts, taking into account the nature[103] of the allegation of a violation or a particular claim, and whether this can form the basis for an appeal in each individual case.[104]

Countries have sufficient leeway[105] to determine how they will fulfil their obligations under this provision.[106] When evaluating a legal remedy within this framework, its "effectiveness" is first assessed by looking at the nature of the procedure, the authority's powers, and the safeguards in place. Effectiveness is assessed on a case-by-case basis and depends on the individual case.[107] Effectiveness is achieved if the legal remedy is accessible, sufficient and meets the minimum conditions of speed (promptness).[108] In terms of sufficiency, it is taken into account that the legal remedy available must provide "*adequate redress"*. Speed is considered in the sense that the legal remedy must contain minimum guarantees of speed,[109] since a legal remedy that will not "*bear fruit*" in a timely manner,[110] cannot be effective given the nature and

ECLI:CE:ECHR:1990:0221JUD000931081, para 31. See also further explanations of the notion of an arguable claim in *M.S.S. v. Belgium and Greece,* Application no. 30696/09, ECLI:CE:ECHR:2011:0121JUD003069609, para 288; *De Souza Ribeiro v. France,* Application no. 22689/07, ECLI:CE:ECHR:2012:1213JUD002268907, para 78; and *Boyle and Rice v. the United Kingdom,* Applications nos. 9659/82, 9658/82, ECLI:CE:ECHR:1988:0427JUD000965982, para 52.

[103] Since the nature of the right in question does indeed influence the type of remedy that the State should provide under Article 13 of the ECHR. *Budayeva and others v. Russia,* Applications nos. 15339/02, 11673/02, 15343/02, 20058/02, 21166/02, ECLI:CE:ECHR:2008:0320JUD001533*902,* para 191.

[104] Summarised from *Boyle and Rice v. The United Kingdom,* Applications nos. 9659/82, 9658/82, ECLI:CE:ECHR:1988:0427JUD000965982, para 55.

[105] Similarly*, Silver and others v. The United Kingdom,* Applications nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, ECLI:CE:ECHR:1983:0325JUD000594772, para 113.

[106] This means, in particular, that States are entirely free to determine the relevant procedures. Neither Article 13 nor any other provision of the ECHR imposes on States any particular method of ensuring the effective exercise of the rights set out in the provisions. *Council of Civil Service Unions v. The United Kingdom,* Application no. 11603/85, ECLI:CE:ECHR:1987:0120DEC001160385, see decision under point 2, para 3.

[107] The national authority deciding the case must assess the effectiveness on a case-by-case basis. See *Peck v. The United Kingdom,* Application no. 44647/98, ECLI:CE:ECHR:2003:0128JUD004464798, para 106; case *Smith and Grady v. The United Kingdom,* Applications nos. 33985/96, 33986/96, ECLI:CE:ECHR:1999:0101JUD003398698, para 106; *Smith and Grady v. The United Kingdom,* Applications nos. 33985/96, 33986/96, ECLI:CE:ECHR:1999:0927JUD003398596 , para 138.

[108] Regarding accessibility and adequacy, see the court's decision in *Paulino Tomas v. Portugal,* Application no. 58698/00 ECLI:CE:ECHR:2003:0327DEC005869800. Regarding the promptness of legal remedies, see the case of *Çelik and İmret v. Turkey,* Application no. *44093/98, ECLI:CE:ECHR:2004:1026JUD004409398,* para 59.

[109] *Kadikis v. Lettonie (n° 2),* Application no 62393/00, ECLI:CE:ECHR:2006:0504JUD006239300, para 62, second subparagraph.

[110] *Pine Valley Developments Ltd and others v. Ireland,* Application no 12742/87, ECLI:CE:ECHR:1991:1129JUD001274287, point 47 in para 3.

specifics of the case.[111] However, this does not exclude the possibility that the remedy may be available at a later date.[112]

If we apply this to the investigative measures provided for by the EIO in Directive 2014/41/EU, the conclusion is that there must be a legal remedy in at least some form, but its scope or reach is quite broad. The provisions of the ECHR do not provide for the prior prevention of investigative measures, such as house searches, nor do they stipulate the existence of a legal remedy prior to their implementation.[113] It is sufficient that the person has the opportunity at some stage of the proceedings to challenge such a measure and to claim compensation in the event of unlawfulness.[114] However, national law must provide for at least some kind of procedure by which a person can challenge the legality of a search or seizure and obtain compensation if the measures were unlawfully ordered or carried out. Otherwise, this would constitute a violation of Article 13 of the ECHR.[115] Advocate General *Bobek*[116] points out a further shortcoming, namely that such a legal remedy is not necessarily available in criminal proceedings, although the advantage is certainly that the legal remedy must allow a review of the "*lawfulness of the ordering"* of a certain measure as well as the "*manner in which the measure was carried out"*.[117] Despite the vague obligations, fundamental rights establish a minimum premise below which protection in Member States must not fall.

3.3.4 The Existence of Legal Remedies in EIO Proceedings: The Gavanozov II Case

In the *Gavanozov II* case[118] the CJEU assessed the correlation between the implementation of Directive 2014/41/EU and the consequences of the absence of

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[111] Taking into account also "the *damage that could have been caused*". See, in this sense, *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey (n° 1*), Applications nos. 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, ECLI:CE:ECHR:2006:0330JUD006417800, para 94.

[112] See case *M.S. v Sweden,* Application no 20837/92, ECLI:CE:ECHR:1997:0827JUD002083792, para 55.

[113] The concept of an effective remedy (considering the assessment in each individual case) does not presuppose the possibility of challenging the issuance of a warrant prior to the investigation. Summarised from case *Iliya Stefanov v. Bulgaria,* Application no. 65755/01, ECLI:CE:ECHR:2008:0522JUD006575501, para 59.

[114] *Opinion of Advocate General Michal Bobek i*n Case C-852/19, ECLI:EU:C:2021:346, para 66.

[115] *Iliya Stefanov v. Bulgaria,* Application no. 65755/01, ECLI:CE:ECHR:2008:0522JUD006575501, paras 59, 60.

[116] *Opinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346, para 66.

[117] Regarding challenging a search in criminal proceedings, see *Posevini v. Bulgaria,* Application no. 63638/14, ECLI:CE:ECHR:2017:0119JUD006363814 , para 85.

[118] The Court ruled on this issue in two cases, *Gavanozov I* and *Gavanozov II,* but in Case C-324/17, *Ivan Gavanozov,* ECLI:EU:C:2019:892 (*Gavanozov I*), the CJEU only defined the technical and formal requirements for completing

a legal remedy in proceedings concerning EIO in Bulgaria. In light of the fundamental rights under Article 13 of the ECHR and Article 47 of the EU Charter, the CJEU, among other things, provided an interpretation of Article 6, point (f) of Article 11(1) and Article 14 of Directive 2014/41/EU. The most important aspect of the aforementioned court decision is the interpretation of Article 14 of Directive 2014/41/EU and the possible obligation to introduce a legal remedy against the EIO, which the CJEU indirectly established in the *Gavanozov II*. The case addressed the issuance of an EIO by Bulgaria for investigative measures involving the examination of witnesses and searches and seizures in the Czech Republic, where the EIO was to be executed. However, prior to the issue, Bulgaria referred a question for a preliminary ruling, *inter alia*, on the appropriateness of such an issue in accordance with Article 14 of Directive 2014/41/EU.[119]

In accordance with the Advocate General's opinion,[120] the CJEU ruled that Article 14 of Directive 2014/41/EU, in conjunction with Article 47 of the EU Charter, "*must be interpreted as precluding legislation of a Member State which has issued an EIO that does not provide for any legal remedy against the issuing of an EIO*".[121] It can be seen that, despite the vague "equivalent" obligation to provide legal remedies under Article 14 of Directive 2014/41/EU and the vague criteria for an effective legal remedy under Article 47 of the EU Charter and the corresponding Article 13 of the ECHR, the Court did not leave it entirely to the discretion of the Member States whether to offer suspects or accused persons a legal remedy against the EIO at the investigation stage (Wahl, 2021: 228–229; Weyembergh, 2022). After examining the judgment of the Court in *Gavanozov II,* a step forward can be seen in the protection of the right to an effective legal remedy in EIO proceedings.

Similar to the standard of protection under Article 13 of the ECHR, the CJEU emphasised that a person subject to an investigative measure must have access to legal remedies that allow them to challenge the legality and necessity of the measure and, in the event of the illegality of the measure, to request appropriate redress for the violations.[122] The CJEU has expressly clarified that the right of the person

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the form in Annex A, Section J of the EIO (description of legal remedies). A more specific assessment of the significance of Article 14 of Directive 2014/41/EU was provided in Case C-852/19, *Specialised Prosecutor's Office v Ivan Gavanozov,* ECLI:EU:C:2021:902 *(Gavanozov II*).

[119] For more on this, see the Request for a preliminary ruling submitted by the *Spetsializiran kazatelen sad* (Bulgaria) on 31 May 2017 in criminal proceedings against *Ivan Gavanozov*, Case C-324/17, OJ C 256, 7.8.2017.

[120] *Opinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346.

[121] See the Court's decision in Case C-852/19*, Specialised Prosecutor's Office v Ivan Gavanozov,* ECLI:EU:C:2021:902.

[122] Case C-852/19, *Specialised Prosecutor's Office v Ivan Gavanozov,* ECLI:EU:C:2021:902, para 33.

concerned to challenge the legality and necessity of the measures includes the obligation to provide a legal remedy against the issue of an EIO ordered for the execution of those measures. In its decision, the CJEU did not impose an explicit obligation on Bulgaria to establish a legal remedy. It based its decision*, inter alia*, on the interpretation that an EIO is a judicial decision which, on the basis of mutual recognition, is recognised by the competent authorities without further formalities.[123] A country, in this case Bulgaria, which does not have legal remedies against the issuance of an EIO, is not acting in accordance with EU law and is not respecting fundamental rights and, as a result, cannot participate in the EIO system.[124] Advocate General *Bot,*[125] pointed out in his opinion that this is a case of incorrect implementation and that countries that do not comply with at least minimum standards pose a risk to mutual trust between countries, which is essential for mutual recognition. In such a case, the EIO should not have been issued at all, and the executing country should not have confirmed or executed it.[126]

The *Gavanozov II* case has also indirectly highlighted the differences in judicial protection that still exist between Member States at the investigation stage (Weyembergh, 2022). The CJEU's decision in *Gavanozov II* has far-reaching consequences (Szijártó, 2022: 45). As *Weiss* pointed out, the CJEU's decision may represent a kind of *"de facto harmonisation"* of Member States' procedures (Weiss, 2022: 192). Other Member States that do not have appropriate legal remedies against the issuance of an EIO will also have to review their legislation and amend it accordingly if necessary (Weyembergh, 2022). In doing so, care must be taken to ensure that the effect of the CJEU's decisions does not only affect EIO proceedings, but also domestic proceedings. The introduction of legal remedies against the issuance of an EIO must not create disproportionate differences between the protection of suspects or accused persons in the acquisition of evidence from abroad and the acquisition of evidence within the country's borders (Szijártó, 2022: 50). In the *Gavanozov II* case, the CJEU did not specify what characteristics the legal remedy against an EIO should have. This leaves several questions open, including whether this legal remedy can be available before or after the measure has been carried out

[123] *Ibid.,* paras 35, 38.

[124] See *Ibid.,* paras 54, 57; Similar interpretation also by Wahl, 2021: 228–229; and Weyembergh, 2022.

[125] *Opinion of Advocate General Yves Bot in* Case C-324/17, ECLI:EU:C:2019:312, paras 79, 98 and 99; Similarly*, Opinion of Advocate General Michal Bobek in Case C-852/19*, ECLI:EU:C:2021:346*,* paras 79 and 81.

[126] Cases in which the issuer itself ensures the appropriateness of the issue are rare. See O*pinion of Advocate General Michal Bobek* in Case C-852/19, ECLI:EU:C:2021:346, para 76. In such a case, the executing authority may refuse the EIO in accordance with point (f) of Article 11 of Directive 2014/41/EU.

and whether its effect is suspensive or not. The position taken is that a legal challenge to an EIO does not suspend the execution of the investigative measure, i.e. the legal remedy is generally not suspensive. Unless such a suspensive effect of the legal remedy is provided for in similar domestic cases in accordance with Article 14(6) of Directive 2014/41/EU (EIPA, 2025). At the same time, it is most reasonable that the legal remedy may be available *ex post*, i.e. in the sense of ensuring subsequent adversarial proceedings, as *Weyembergh* pointed out, so as not to hinder the effectiveness of prosecution, which is also the primary purpose of the EIO (to speed up and simplify proceedings) (Weyembergh, 2025).

However, it appears that much more could be achieved in this area, and several questions remain unanswered. Among them is the clarification of which complaints may be brought in the issuing State and which in the executing State. If certain challenges are not available, does this mean that national legislation is not in compliance with Article 47 of the EU Charter? It should be recalled that substantive ground for issuing an EIO may be challenged only in proceedings brought in the issuing State, without prejudice to guarantees of fundamental rights in the executing State, in accordance with Article 14(2) of Directive 2014/41/EU. On the other hand, the recognition and execution of an EIO must be challenged in the executing State, taking into account Articles 9 and 11 of Directive 2014/41/EU.[127]

Recently, France raised a question from a similar perspective. A request for a preliminary ruling was lodged by the *Cour de cassation* on 23 September 2025 in Case C-625/25*, Prudniez*.[128] Similarly to the question previously referred by Bulgaria, France seeks clarification as to whether Article 14(1) Directive 2014/41/EU read in conjunction with Article 47 EU Charter can be interpreted as precluding legislation of an executing Member State which does not provide that a person against whom evidence obtained by means of the European Investigation Order is relied on in the issuing State has a legal remedy in the executing State enabling them to challenge the lawfulness and necessity of that evidence. The question therefore focuses on the availability of legal remedies in the executing State, rather than the issuing State. If or when the CJEU provides an answer, it will constitute a further step in understanding the scope and application of Article 14 in the Directive 2014/41/EU from the perspective of the defence.

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[127] See explanation above and EIPA, 2025.

[128] Case C-625/25, *Prudniez*: Request for a preliminary ruling from the Cour de cassation (France) lodged on 23 September 2025 – NV v *Ministère public*, OJ C, C/2025/6126, 8.12.2025.

4 The EIO in the Broader Legislative Context: Effective Legal Remedies under Regulation 2023/1543 and Overview of Defence Safeguards in Directive 2012/13/EU and Directive 2013/48/EU

The regulation of legal remedies in EIO proceedings is best examined within the broader EU legislative framework. In this respect, Regulation (EU) 2023/1543, alongside Directive 2012/13/EU and Directive 2013/48/EU, offers a relevant normative point of reference.[129]

As explained above, the EIO has not proven to be an effective enough tool for obtaining evidence in electronic form, in 2023 the EU adopted specific rules contained in Regulation 2023/1543, which regulates procedures involving European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings.[130] Taking into account the possibility of direct application of the provisions of EU regulations,[131] Article 18 of Regulation 2023/1543 stipulates, *inter alia*, that any person whose data has been requested by a European Production Order has the right to an effective legal remedy against that order.[132] In addition, the provision specifically allows suspects and accused persons to have such a remedy available during the criminal proceedings in which the data was used.[133] The provision also does not affect any other additional remedies available under national law.[134] This represents a significant advance over Directive 2014/41/EU, which contains no explicit provision on legal remedies and refers only loosely to equivalent remedies available in domestic proceedings. Furthermore, also unlike the provisions of Directive 2014/41/EU, Article 18(2) of Regulation 2023/1543 clearly stipulates that the legal remedy must cover the legality of the measure, including its necessity and proportionality. Similar to EIO proceedings under Directive 2014/41/EU, Article 18(3) of Regulation 2023/1543 stipulates that information on the possibilities

[129] The following section provides only a concise overview of these instruments, limited to elements necessary for comparative purposes rather than a comprehensive analysis.

[130] For more on this, see Tosza, 2020: 161–183.

[131] Regulations are directly applicable in Member States, in accordance with Article 288 TFEU.

[132] Note that Article 18 of Regulation 2023/1543 in the European order for the preservation of electronic evidence in criminal proceedings does not apply.

[133] Compare with the effective remedy under the ECHR. *Bobek,* specifically points out that it is not necessary for a remedy under the ECHR to be available specifically in criminal proceedings in order to satisfy the criterion of effectiveness. *Opinion of Advocate General Michal Bobek in Case C-852/19, ECLI:EU:C:2021:346,* para 66.

[134] See Article 18(1) of Regulation 2023/1543. For further interpretation of the article, see also Juszczak and Sason, 2023: 182–200; and Topalnakos, 2023: 200–203.

for legal remedies under national law must be provided in a timely manner, with the addition that effective enforcement of legal remedies must also be ensured.[135] Considering that Directive 2014/41/EU and Regulation 2023/1543 deal with very similar areas, i.e. obtaining evidence from abroad, it would make sense to add such a provision in a future amendment to the regulation of EIO procedures. However, certain shortcomings remain. The right to an effective remedy can only be exercised before a court in the issuing country, in accordance with its national law. The executing country is only required to respect fundamental rights guarantees in that country, rather than providing independent review of the order (Juszczak and Sason, 2023: 182–200; Topalnakos, 2023: 200-203). Stemming from this, it is evident that some progress has been made in enhancing the procedural safeguards of the defence, at least with regard to procedures for obtaining electronic evidence. Nevertheless, certain discrepancies persist, particularly, as noted above, the practical difficulties individuals face in cases involving cross-border elements.

From a broader perspective, it is also important to note the existence of numerous other legal instruments which, in one way or another, regulate or influence the rights of the accused. One example of such instruments is the package of six directives that the EU has adopted, aimed at balancing the need to expedite investigations with the protection of the rights of suspects and accused persons in criminal proceedings.[136] Specifically, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (hereinafter: Directive 2012/13/EU)[137] and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third parties and consular authorities while deprived of liberty (hereinafter: Directive 2013/48/EU),[138] indirectly interfere with the area of investigative measures. As provided in Article 9(2) of Directive 2014/41/EU, the executing State shall carry

[135] An exception to the notification requirement under Regulation 2023/1543 is the possible confidentiality of the investigation. Compare Article 14(3) of Directive 2024/41/EU and Article 18(3) in conjunction with Article 13 of Regulation 2023/1543.

[136] The directives were adopted as part of the programme, see European Commission, 2016.

[137] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

[138] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third parties and consular authorities while deprived of liberty, OJ L 294, 6.11.2013.

out the investigative measure in accordance with all the formalities and procedures specified in the EIO by the issuing authority (provided that fundamental rights are respected). Only in exceptional cases may the executing State carry out a different type of investigative measure.[139] The rights and guarantees of suspects and accused persons (regulated with different legal instruments including the aforementioned directives) in the proceedings of the issuing State will thus also be reflected in the execution of the investigative measure by the executing State.[140] At the outset, it is necessary to reiterate that directives do not interfere with the procedural autonomy of the Member States. [141] As to the use of its provisions, the CJEU has already addressed this issue and in the Case C-209/22, specifically ruled that the content of the second paragraph of Article 8 (legal remedies) of Directive 2012/13/EU and the first paragraph of Article 12 (right of appeal) of Directive 2013/48/EU is sufficiently clear and precise for the provisions to have direct effect.[142]

The scope of Directive 2012/13/EU and Directive 2013/48/EU is similar, and Article 2 of both Directives sets out the same characteristics.[143] The Directives apply from the moment the competent authority of a Member State informs a person by official notification or otherwise that they are suspected or accused (regardless of whether the person is deprived of liberty) until the conclusion of the proceedings.[144] Two conditions therefore apply to both directives: the person must be "*de facto suspected or accused"*, and the competent authorities have *"made them aware*" of this. The first condition is met when there is no doubt about the existence of suspicions concerning the person concerned.*[145]* However, the person may be provided with all the necessary information at any time during the proceedings, within a period

[139] See Article 10 of Directive 2014/41/EU.

[140] If this does not happen, the issuer risks that the evidence will not be admissible in further stages of the proceedings and the defendant may request the exclusion of evidence. See the conditions for exclusion in Slovenian proceeding: USRS odločba Up-899/16, Up-900/16, Up-901/16, ECLI:SI:USRS:2022:Up.899.16, para 13; See the explanation of the admissibility of evidence from abroad (Serbia and Uruguay) in VSRS sodba I Ips 44415/2010, ECLI:SI:VSRS:2021:I.IPS.44415.2010.1.

[141] *Opinion of Advocate General Priit Pikamäe in* Case C-209/22, ECLI:EU:C:2023:249*,* para 65.

[142] Case C-209/22, *AB, with the participation of Rayonna prokuratura Lovech,* ECLI:EU:C:2023:634, para 60.

[143] The scope of application of both directives "*coincides*". Case C-209/22*, AB, with the participation of Rayonna prokuratura Lovech,* ECLI:EU:C:2023:634, para 38.

[144] Compare Article 2 of Directive 2013/48/EU and Directive 2012/13/EU, where the latter adds the phrase "*or by other means*" in relation to notification. Despite this normative difference, according to the CJEU and the Advocate General, the scope of application of both directives remains the same. See Case C-209/22*, AB, with the participation of Rayonna prokuratura Lovech,* ECLI:EU:C:2023:634, para 38. *Opinion of Advocate General Priit Pikamäe in* Case C-209/22*,* ECLI:EU:C:2023:249, paragraph 38.

[145] With similar words, *Pikamäe* emphasises in *Opinion of Advocate General Priit Pikamäe in Case C-209/22,* ECLI:EU:C:2023:249, para 39 and 40.

defined by the standard of "timelines", but limited by the first formal hearing.[146] If the notification comes after the first official hearing (at the police station or before the competent authority), such notification would be untimely. However, this does not necessarily cover all investigative actions, as possible preliminary hearings are permitted, for example, traffic checks, random police checks, etc.[147] Advocate General *Pikamäe*[148] stated that this information must not be provided too late, so as not to restrict the right of defence, which means that such notification must be made at an initial stage of the proceedings in order to be effective.[149]

Directive 2013/48/EU allows for the presence of a lawyer during investigative acts, insofar as this is provided for in the national legislation of the Member State,[150] but otherwise specifies only three cases where the presence of a lawyer is mandatory, i.e. during identifications, confrontations and reconstructions of the offence.[151] According to Article 3(1) of Directive 2013/48/EU, suspects and accused persons shall be provided with a lawyer "*in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively".*[152] The presence of a lawyer and the standard of protection are thus assessed in the context of the general fundamental right of defence. The latter was also assessed by the CJEU in Case *C-209/22*,[153] which concerned a conduct of a personal search and the related seizure of prohibited substances. In the mentioned case the CJEU did not find that such a measure would significantly restrict the freedom of action of the person being searched, thus it was not necessary for the measure to be carried out in the presence of a lawyer. CJEU took the view that the presence of a lawyer during a personal search and seizure was not objectively necessary to ensure the effective exercise of that person's right of defence. Similarly, prior notification (i.e. prior adversarial proceedings) was not necessary for this investigative measure.[154] The adversarial principle will be therefore fulfilled in the later stages of the proceedings by respecting

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[146] See the explanation in *Ibid.,* para 41 with recitals 19 and 28 of Directive 2012/13/EU.

[147] See recital 20 of Directive 2013/48/EU and the explanation in Case C-209/22*, AB, with the participation of Rayonna prokuratura Lovech*, ECLI:EU:C:2023:634, para 72.

[148] *Opinion of Advocate General Priit Pikamäe* in Case C-209/22, ECLI:EU:C:2023:*249*, para 41.

[149] See, in this regard, the explanation provided by the CJEU in Case C-209/22*, AB, with the participation of Rayonna prokuratura Lovech*, ECLI:EU:C:2023:634, para 41.

[150] Insofar as these acts are provided for in national law and the suspect or accused person is required or may be required to attend under national law, see Article 3 of Directive 2013/48/EU.

[151] See point (c) of Article 3(3) of Directive 2013/48/EU.

[152] Case C-209/22*, AB, with the participation of Rayonna prokuratura Lovech,* ECLI:EU:C:2023:634, para 68.

[153] *Ibid.*

[154] See Case C-209/22, *AB, with the participation of Rayonna prokuratura Lovech,* ECLI:EU:C:2023:634, paragraphs 74-78 and paragraphs 40-43 (even *implicit* notification is sufficient).

the right to be informed of the charges and rights (Articles 6 and 3 of Directive 2012/13/EU) and the right of access to the case file[155] (Article 7 of Directive 2012/13/EU). In addition, the CJEU ruled that a subsequent approval of an investigative measure is possible if the irregularities are remedied at a later stage of the proceedings.[156] However, it emphasised recital 50 of Directive 2013/48/EU, which stipulates that acting in accordance with the right of defence and the fairness of the proceedings does not preclude a situation where national law allows all evidence to be submitted to the judge *"without a separate or prior assessment of its admissibility".*[157]

Directive 2012/13/EU and Directive 2013/48/EU provide for legal remedies in cases of infringement of the rights set out in their provisions.[158] Legal remedies for breaches of the rights under the directives on notification and access to a lawyer are determined on the basis of the principle of equivalence,[159] similar to Directive 2014/41/EU. In this regard, the CJEU has specifically pointed out that this does not imply an obligation to introduce a separate appeal procedure. Some protection may be available, and only *"indirect protection"* is possible*,* in accordance with Article 13 of the ECHR and Article 47 of the Charter EU, i.e. that it is an "*effective legal remedy*".[160] The analysis gives clarity that the two directives fall short of significantly broadening the original concept of the "effective legal remedy." Although there is room for improvement, it is to be welcomed that they include such provisions at all. To reiterate, as highlighted by *Jurka*, these directives do not affect the functioning of the EIO itself, as they offer protection in national proceedings against suspects, which take place in the country issuing the EIO. As a concrete example, he cites the questionable nature of the protection provided by the executing state to a temporarily transferred detainee for the purpose of carrying out an investigative measure in accordance with Article 22 of Directive 2014/41/EU (Jurka, 2016: 79).

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[155] Compare the right of access to materials under Article 7 of Directive 2012/13/EU with the fundamental right to a fair trial under Article 6 of the ECHR, where the right of access to relevant files is covered by Article 6(3)(b) of the ECHR. For more on this, see *Beraru v. Romania,* Application no. 40107/04, ECLI:CE:ECHR:2014:0318JUD004010704, para 70.

[156] The CJEU refers in particular to the subsequent assessment of inadmissibility or probative value in national proceedings. Case C-209/22*, AB, with the participation of Rayonna prokuratura Lovech,* ECLI:EU:C:2023:634, para 61.

[157] *Ibid.,* para 53.

[158] See Article 8 of Directive 2012/13/EU and Article 12 of Directive 2013/48/EU.

[159] For more on the principle of equivalence, see *Opinion of Advocate General Priit Pikamäe i*n Case C-209/22, ECLI:EU:C:2023:249, para 64. And compare with above given analysis of Article 14 of Directive 2024/41/EU.

[160] Case C-209/22, *AB, with the participation of Rayonna prokuratura Lovech,* ECLI:EU:C:2023:634*,* paras 53 - 54 and 58.

Member States must therefore fill any gaps through implementation and, ideally, provide additional protection in their national procedures.[161]

5 EIO Proceedings in Slovenia from the Defence Perspective

5.1 General Overview of Slovenian Legislation in EIO Proceedings

When assessing the EIO from the perspective of the defence in Slovenia, three key sets of questions arise. First, the extent to which the defence is informed and involved in EIO proceedings must be examined, particularly in light of the adversarial principle, the equality of arms, and the right to confrontation under Slovenian criminal law. Second, it is necessary to consider whether the defence may itself request the issuance of an EIO, as an expression of the adversarial principle and the right to propose investigative measures. Third, attention must be given to the availability of legal remedies, including whether the defence may challenge the issuance or confirmation of an EIO, as well as the legality of the procedure through which evidence is obtained pursuant to an EIO. Cooperation in Criminal Matters with the Member States of the European Union Act (hereinafter: ZSKZDČEU-1),[162] into which the Directive 2014/41/EU was transposed,[163] does not contain any detailed provisions on adversarial proceedings or legal remedies directly related to the EIO. Article 2(3) of ZSKZDČEU-1 provides for the application of other laws matters not regulated by it, in this case the Criminal Procedure Act (hereinafter: ZKP).[164] ZKP does not contain any specific provisions relating to EIO. There are general rules under the ZKP that also apply to EIO proceedings (in particular, as already mentioned, the adversarial principle and the right to legal remedies).

5.2 The adversarial principle

[161] For more on the issue in the executing state and ideas for defence (establishment of a single body in the EU for the benefit of defence), see Mangiaracina, 2014: 113–133.

[162] Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije (ZSKZDČEU-1), Uradni list RS, št. 48/13, 37/15, 22/18 in 94/21.

[163] The chapters 8 and 9 and adding of chapter 9a were amended by the ZSKZDČEU-1B. Zakon o spremembah in dopolnitvah Zakona o sodelovanju v kazenskih zadevah z državami članicami Evropske unije – ZSKZDČEU-1B, Uradni list RS, št. 22/18 z dne 4. 4. 2018.

[164] Zakon o kazenskem postopku (ZKP), Uradni list RS, št. 176/21 – uradno prečiščeno besedilo, 96/22 – odl. US, 2/23 – odl. US, 89/23 – odl. US, 53/24, 93/25 – ZNUZJV in 10/26 – ZKOM.

The adversarial principle gives the parties the opportunity to actively participate in the proceedings by submitting statements, proposals and opinions (Šugman Stubbs, Gorkič and Fišer, 2020: 124). In the Slovenian legal system, the adversarial principle is most pronounced at the main hearing, but it is also encountered at various stages of criminal proceedings, including the investigation stage and when exercising legal remedies (Dežman and Erbežnik, 2003: 246). In the investigation phase, the adversarial principle is primarily reflected in the right of the accused (alongside the injured party and the suspect) to be present at procedural acts pursuant to Article 178 of the Slovenian Criminal Procedure Act (ZKP). Nevertheless, regarding the obligation to notify the defence of investigative measures carried out by the police, where the investigation has already focused on a specific individual, the adversarial principle is not absolute. In particular, under Article 164 ZKP, when an urgent investigative measure is undertaken, only the public prosecutor is notified.[165] With respect to other investigative acts, Article 183 ZKP provides for the possibility of subsequently notifying a party who was not present, enabling that party to acquaint themselves with the evidence within a specified period. In this manner, the legislation seeks to reconcile the effectiveness of the investigation with the requirements of adversarial proceedings.

If the provisions governing the presence of defence counsel at the main hearing are violated, such violation constitutes a breach of criminal procedure that the appellant is entitled to invoke pursuant to Article 371(1)(3) ZKP. Such appeal may result in the annulment of the judgment. On the other hand, violations of other provisions concerning the presence of defence counsel during procedural act, provided that the defence was entitled to attend, constitutes a breach of procedure under Article 371(2) ZKP. [166] These safeguards are closely linked to both the right to formal defence (i.e. defence through counsel) and the right to material defence. Moreover, in individual cases, a judgment cannot be based on evidence obtained in a manner that fails to respect the legally established rights of the defence.[167]

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[165] Article 22 of the Constitution of Republic of Slovenia (Ustava Republike Slovenije, Uradni list RS, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a, 92/21 – UZ62a in 98/25 – UZ74a, hereinafter: URS) sets forward the right of the accused to be present during investigative proceedings. Conducting a necessary investigative procedure of inspection without the presence of the accused infringes upon this right. The interference is permissible if it is necessary, appropriate and proportionate, and must be carried out without delay in order to secure evidence. See decision of the Constitutional Court of Republic of Slovenia: USRS odločba Up-3367/07, ECLI:SI:USRS:2009:Up.3367.07.

[166] For more on this see Dežman and Erbežnik, 2003: 366.

[167] USRS odločba Up-143/97, ECLI:SI:USRS:1997:Up.143.97, para 8.

The defence may also obtain access to evidence gathered through an EIO after the investigation has been completed, based on the right of the accused or his representative to inspect the file[168] under Article 73 of the ZKP. In addition to other expressions of adversarial principle in the proceedings cited by *Dežman*, from Article 170, 205 and 169 ZKP, the above-mentioned situations provide a good insight into the obligation to inform the defendant of various facts and obtained evidence, which may also encompass investigative measures and evidence obtained through an EIO (Dežman and Erbežnik, 2003: 248, 249).

5.3 The principle of adversarial proceedings and equality of arms

In addition to being informed of the evidence after it has been obtained, the defence may also encounter the EIO earlier. Article 5(2) of the ZKP, allows the accused, in accordance with the principle of adversarial proceedings, to make a statement on all facts and evidence incriminating him and to present facts and evidence in his favour (Dežman and Erbežnik, 2003: 359). In accordance with Article 177 of the ZKP, adversarial proceedings are ensured with respect to principle of equality of arms in such a way that the accused is allowed to propose to the investigating judge that specific investigative actions be carried out. In this case, the defence will request the investigating judge (and, in exceptional cases, the prosecutor) to issue an EIO for the purpose of carrying out a specific measure (Šepec, Erbežnik, Stajnko and Dugar, 2020: 23). Later, during the main hearing, in accordance with Article 329(4) of the ZKP, the parties may propose that new facts and evidence be investigated (Dežman and Erbežnik, 2003: 248). In the above cases, the defendant's proposal for evidence is assessed by the court in accordance with the principle of free assessment of evidence (also free evaluation of evidence). The court is not obliged to examine every piece of evidence proposed by the defence.[169] The right to examine evidence is therefore not absolute.[170] The court will only follow the defence's proposal if certain conditions are met and the proposal for evidence passes the assessment according to the criteria established by case law.[171] At the same time, in doubt, the accepted

[168] Compare with the right of access to documents under Article 7 of Directive 2012/13/EU and the fundamental right to a fair trial under Article 6 of the ECHR, where point (b) of the third paragraph of Article 6 of the ECHR covers the right of access to relevant files.

[169] USRS odločba Up-11/00, ECLI:SI:USRS:2002:Up.11.00, para 6.

[170] USRS odločba U-I-27/95, ECLI:SI:USRS:1996:U.I.27.95, para 17.

[171] See, for example VSRS, sodba I Ips 291/2007, ECLI:SI:VSRS:2007:I.IPS.291.2007, para 13 ; USRS, odločba Up-11/00, ECLI:SI:USRS:2002:Up.11.00, para 6; VSRS, sodba I Ips 320/2007, ECLI:SI:VSRS:2008:I.IPS.320.2007;

decision regarding proposal for evidence should be in favour of the defendant, but not in cases where the presentation of such evidence would clearly be unsuccessful.[172]

Even though Slovenian law allows the defence to request an EIO based on the above-mentioned general provisions of the ZKP, considering all the criteria, it is not certain that the judicial authority will approve the issuance of an EIO. Even in the case of approval, there is an additional problem of the characteristics of the evidence obtained (the gathered evidence through an EIO can benefit the defence or it can be quite disadvantageous to the strategy that the defence is building). Lawyers cannot fully guarantee that all evidence obtained with EIO will be in favour of their client. The evidence is first forwarded to the national authorities, who will inform the lawyer of its content. It is therefore doubtful whether the request for an EIO is fully compliant with the Code of Professional Conduct for Lawyers,[173] because if there is any doubt that the evidence obtained will not be in the client's favour, the defence's request for an EIO is controversial, as the lawyer could harm his client (Šepec, Dugar, Erbežnik and Stajnko 2023: 120).[174] It is worth emphasizing also an additional problem regarding costs of lawyers for investigations abroad, as the defence still has to face other practical problems.[175]

5.4 Legal remedies in connection with the EIO

The right to legal remedies (ordinary, such as appeals, and extraordinary, i.e. legal remedies after a court decision has become final) is enshrined in Article 25 of the Constitution of Republic of Slovenija (hereinafter: URS)[176] and allows the accused to review the decisions of lower courts (Dežman and Erbežnik, 2003: 357-358). If

For what the defence must substantiate in its evidentiary proposal, see USRS odločba Up-34/93, ECLI:SI:USRS:1995:Up.34.93, para 13 .

[172] VSRS sodba I Ips 291/2007, ECLI:SI:VSRS:2007:I.IPS.291.2007, point 13, and the explanation in Dežman and Erbežnik, 2003: 846. See also the rejection of the defence's motion to hear a witness in VSRS sodba I Ips 320/2007, ECLI:SI:VSRS:2008:I.IPS.320.2007.

[173] See Slovenian Bar Association, Code of Professional Ethics for Lawyers (slov. *Odvetniška zbornica Slovenije, Kodeks odvetniške poklicne etike).*

[174] In this regard, see the importance of the investigation by the defence, where evidence would be gathered only in favour of the accused. Scomparin and Peloso, 2023: 173.

[175] The reality in practice is quite different, also from the point of view of the high costs of lawyers for investigations abroad, this aspect is pointed out also by. Zimmermann, 2015: 4; and Winter, 2010: 580–589.

[176] Ustava Republike Slovenije (URS), Uradni list RS, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a, 92/21 – UZ62a in 98/25 – UZ74a.

we look at the right in the broader context of the ECHR, whose minimum rights are also protected by Directive 2014/41/EU, Article 13 of the ECHR provides for the right to an effective remedy, which is directly linked to Article 6 of the ECHR on the right to a fair trial.[177] Article 25 of the URS does not include the words effective remedy in the provision itself, however, Constitutional court of Republic of Slovenia (hereinafter: USRS) has explained that the meaning of this provision is not only to lodge a legal remedy, but also that this legal remedy can be used to defend oneself effectively.[178] USRS has repeatedly confirmed the position that the right to a legal remedy does not guarantee anything other than the right to a multi-stage trial (appeal against a decision of the court of first instance).[179]

Neither ZSKZDČEU-1 nor ZKP provides for specific legal remedies to challenge an EIO. A legal remedy available in the context of procedural challenges to an EIO is, *inter alia*, set out in Article 399(1) ZKP, which provides that the parties and persons whose rights have been violated may lodge an appeal against decisions (slov. *sklep*)[180] of the investigating judge and against other first-instance court decisions. Pursuant to Article 77b ZSKZDČEU-1, in EIO proceedings, the temporary transfer of detained persons for the purpose of carrying out an investigative measure under Article 22 of Directive 2014/41/EU is confirmed by way of a decision (slov. *sklep*). However, investigative measures themselves are formally carried out only based on a judicial order (slov. *odredba*), and in certain cases also based on consent or, exceptionally, statutory authorization (Šugman Stubbs and Gorkič, 2011: 126). Where an EIO is recognised, the competent authority proceeds in accordance with Article 66 ZSKZDČEU-1 and orders (slov. *odredi*) the execution of the investigative measure. Evidently, it does not issue a decision, for which a legal remedy is available (against a decision of the investigating judge, see Article 399 ZKP). On the other hand, pursuant to Article 65(3) ZSKZDČEU-1, the competent authority issues a decision (slov. *sklep*) where it refuses recognition of the EIO. ZSKZDČEU-1 expressly provides for the possibility of an appeal against a decision (slov. *sklep*) on the seizure of objects under Article 203. A similar explicit provision could arguably

[177] For more on the right to an effective remedy, see Chapter: *The provision on respect for fundamental rights in Directive 2014/41/EU and the existence of an effective remedy under the ECHR.*

[178] USRS odločba U I 98/91, ECLI:SI:USRS:1992:U.I.98.91, para 5; for more on this see Jerovšek, 2002; Dežman and Erbežnik, 2003: 358.

[179] USRS odločba Up-369/01, ECLI:SI:USRS:2001:Up.369.01, para 4.

[180] In official English translations of Slovenian legislation, the term *sklep* is consistently rendered as "decision" (and, in certain contexts, also as "order"); however, in the structure of Slovenian procedural law, it denotes a formal court ruling distinct from a judgment (*sodba*) or a judicial order (*odredba*).

be envisaged for other investigative measures and for the gathering of evidence in EIO proceedings. The general rules under the ZKP also do not provide for cases of appeal against an EIO when it has been issued, executed or recognised by the public prosecutor. The rectification of any errors and violations of procedural rights will therefore have to take place later, after the evidence has been obtained from abroad (Kordiš and Stajnko, 2022:11–13). As regards the options available to the defence after evidence has been obtained from abroad by the authorities using an EIO, the general rule under the ZKP applies *i.e.* the exclusion of inadmissible evidence in accordance with the second paragraph of Article 18 of the ZKP.[181] The accused thus has the opportunity to have violations in the investigation remedied later in the proceedings by excluding evidence.[182] Conversely, this does not apply to other persons to whom the EIO might potentially relate, as they are not afforded any comparable form of legal protection in EIO proceedings (Šepec, Erbežnik, Stajnko and Dugar, 2020: 23).

From the above, we can derive a general rule that there is no specific legal remedy under the ZKP against an order for a measure such as a house search (which also applies to the ordering of a measure under the EIO). Although a specific appeal against orders is not expressly excluded in the ZKP, this is evident from an assessment of the ZKP as a whole. In accordance with the first paragraph of Article 112 of the ZKP, decisions in criminal proceedings are therefore issued in the form of judgments, decisions and orders. In accordance with Article 366 of the ZKP, a legal remedy*, i.e.* an appeal, is expressly provided for judgments (slov. *sodba*). A special appeal is also provided for against decisions (slov. *sklep*) that may be adopted by other bodies and not only by the court. A special appeal against decisions is only permitted in the cases referred to in the first paragraph of Article 399 of the ZKP or when specifically provided in individual provisions. No special appeal is provided for other decisions, such as orders (slov. *odredbe*).[183]

The Constitutional Court has already examined the compatibility of the current provisions of the ZKP with fundamental rights, in particular Article 25 of the URS, and found no inconsistencies. The existing legislation satisfies the requirements of

[181] The Constitutional Court of Slovenia (USRS) has also incorporated this principle into the right to remedy for human rights violations under Article 15(4) URS. The exclusion of evidence is also one of the options that ensures equality of arms between the parties in criminal proceedings. USRS odločba Up-899/16, Up-900/16, Up-901/16, ECLI:SI:USRS:2022:Up.899.16, para 13. See the explanation of the admissibility of evidence from abroad (Serbia and Uruguay) in VSRS sodba I Ips 44415/2010, ECLI:SI:VSRS:2021:I.IPS.44415.2010.1.

[182] For more on the exclusion of evidence and evidence obtained from abroad, see Šepec and Fišer, 2023: 191–215.

[183] USRS odločba U-I-190/00, ECLI:SI:USRS:2003:U.I.190.00, para 4 and 5.

fundamental rights by providing individuals with legal safeguards and remedies under the ZKP other than the right to appeal against an order (slov. *odredba*).[184] However, when assessing the Slovenian system, it is nevertheless questionable whether the absence of a legal remedy when ordering investigation and interrogation measures, particularly in EIO proceedings, complies with the standard of protection set by the CJEU in the *Gavanozov II* case.[185] Consideration should therefore be given weather Slovenian legislation needs to be amended, to provide, in addition to the subsequent possibility of excluding unlawfully obtained evidence, a specific right to appeal against the issuance and recognition of an EIO, like the approach adopted by Italy regarding confirmation of an EIO. Under the current system of legal remedies provided by the ZKP, it is questionable whether Slovenia can issue EIOs in compliance with Article 6 of Directive 2014/41/EU. The decision of the CJEU on the interpretation of Article 6 of Directive 2014/41/EU in the light of Article 47 of the EU Charter opposes the issuance of an EIO for the purpose of conducting investigations and seizures and conducting witness hearings via videoconference by the competent authority of a Member State if the law of that country does not provide for any legal remedy against the issue of such an EIO.[186] It would therefore be reasonable to consider the possibility of issuing an EIO, especially for investigation measures and interrogations via videoconference, by means of a decision (slov. *sklep*) not just an order (slov. *odredba*), as is already the case under Article 77.b (transfer of detained persons for interrogation) and Article 25 of ZSKZDČEU-1 (seizure). In accordance with the general rule under Article 399(1) of the ZKP, an appeal would be provided for against such decisions (appeal against a decision, slov. *pritožba zoper sklep*), but it would be necessary to specify whether such a legal remedy would have suspensive effect or not. According to Article 401 of the ZKP, an appeal against a decision has suspensive effect, unless otherwise specified in individual cases. The suspensive effect of an appeal against an investigative measure would be contrary to the purpose of such an (effective) measure. If the EIO were to be adopted by decision, the legislator would have to specifically stipulate that such an appeal is not suspensive. This is also a permissible restriction of the right to an effective legal remedy.[187] Moreover, it is important to

[184] *Ibid.*, para 6.

[185] See the analysis in above chapter about *Gavanozov II* case.

[186] The decision in Case C-852/19*, Ivan Gavanozov,* ECLI:EU:C:2021:902. Each Member State will have to assess whether its legislation is now in line with the CJEU decision. Weyembergh, 2022.

[187] For more on this, see USRS odločba U-I-190/00, ECLI:SI:USRS:2003:U.I.190.00, para 8.

note that in the event of a possible change in the legislation governing EIO proceedings, care must also be taken to ensure that the change does not create excessive differences between obtaining evidence from abroad and domestic proceedings.[188]

5.5 Comparative Perspective: EIO Proceedings in Italy from the Defence Perspective

Directive 2014/41/EU was implemented into Italian law by *Decreto Legislativo n° 108* of 21 June 2017 (hereinafter: Legislative Decree 108/2017).[189] In addition to the *Codice di procedura penale*[190] (hereinafter: CPP), which contains general rules in the field of criminal procedure, Legislative Decree 108/2017 specifically regulates the rights of individuals in EIO proceedings.

Similar to ZSKZDČEU-1, there is no possibility for the defence to issue an EIO directly, and it will still be up to the judge or prosecutor to decide whether to approve the EIO. Italian provisions on EIO also do not provide for any legal remedy if the defence's request for the issuance of an EIO is not approved (Scomparin and Peloso, 2023: 172). *Scomparin* et al. (Scomparin, Ferraris, Cabiale, Peloso and Calavita, 2023: 83), highlight two further key shortcomings. First, Legislative Decree 108/2017 does not provide rules ensuring the effective participation of defence counsel in EIO proceedings conducted abroad. Second, it fails to regulate the possibility of using the EIO exclusively for defence investigations, that is, enabling counsel to obtain evidence solely in favour of the accused.[191] This issue is particularly relevant in light of the aforementioned concern that, where the defence is not permitted to gather evidence independently or to initiate investigative measures, there remains a risk that evidence obtained through an EIO may ultimately prove detrimental to the client (Šepec, Dugar, Erbežnik, and Stajnko, 2023: 135). The practical feasibility of such a defence-oriented use of the EIO also appears limited. In practice, obtaining evidence from abroad through an EIO entails considerable costs, including procedural

[188] This is also pointed out by Szijártó, 2022: 50.

[189] *Decreto Legislativo* 21 June 2017, n. 108 *Norme di attuazione della direttiva* 2014/41/UE *del Parlamento europeo e del Consiglio, del 3 aprile 2014, relativa all'ordine europeo di indagine penale*, 17G00120, GU n.162 del 13-7-2017.

[190] *Codice di procedura penale, Testo del D.P.R. 22 settembre 1988, n. 447 aggiornato, da ultimo, al D.Lgs. 7 dicembre 2023, n. 203.*

[191] "Defensive investigation" refers to all investigative activities carried out by a lawyer to find evidence in favour of their client in the forms and for the purposes specified by the Italian Code of Criminal Procedure (in particular Articles 222 and 391 of the CCP). See for example: Buisman, and Hooper, 2017: 519–558.

expenses and the need for accurate translations into the required languages, among other logistical burdens (Scomparin, Ferraris, Cabiale, Peloso and Calavita, 2023: 83). When comparing the adversarial nature of proceedings with the EIO, Legislative Decree 108/2017 offers a specific provision under Article 4(4) which requires prosecutors to notify the opposing party of the confirmed EIO. When defence counsel for the person under investigation has not been informed of the order recognising the EIO, *Scomparin* et al., propose a "*configuration of general nullity in an interim regime*" (Scomparin, Ferraris, Cabiale, Peloso and Calavita, 2023: 83). Point c of the first paragraph of Article 178 of the CPP provides for the possibility of invoking nullity if the requirement of defence participation in criminal proceedings has not been respected; this includes, *inter alia*, the assistance, support, and representation of the accused. In accordance with this provision, the issue of untimely notification of the suspect by the prosecution was also addressed by the Italian court in its judgment of 7 February 2019.[192] In this judgment, the court examined whether the suspect had been properly informed of the search and seizure. Germany had issued an EIO, which was recognised by Italy as the executing State. The search and seizure of IT devices were carried out on 24 May, while the suspect was informed only later, on 5 June, when the examination of the seized material was to take place.[193] The court found a violation of Article 4(4) of Legislative Decree No. 108/2017, resulting in procedural nullity. This decision indirectly underscores the importance of the recognition order and the related duty of notification. It may also have significant implications at a later stage of the proceedings, particularly regarding the admissibility of the evidence. It would therefore be appropriate to establish mechanisms ensuring that the issuing State is promptly informed of a declaration of nullity, especially where evidence may already have been transmitted (Scomparin, Ferraris, Cabiale, Peloso and Calavita, 2023: 84).[194]

Contrary to Slovenian legislation, the legal remedies, more specifically the appeal, available in EIO proceedings is regulated in Article 13 of Legislative Decree 108/2017. This allows the defence in Italy as the executing country, to challenge the

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[192] The judgment is highlighted by Scomparin, Ferraris, Cabiale, Peloso and Calavita, 2023: 83. See the decision of the Italian court, points 2.1. and 2.2. and the explanation under point 2.2. *Corte di cassazione Sezione VI penale Sentenza, dated 7 February 2019*, *No. 14413*.

[193] *Ibid.*, paras 1 and 2 of the factual situation, it. *ritenuto in fatto.*

[194] In connection with the explanation of the Italian court decision under point 2.2. *The judge shall decide whether to grant the objection to the recognition order (it. confronti del decreto di riconoscimento) after consulting (including hearing) the prosecutor; if the objection is accepted, the EIO shall not be executed, and the issuing authority shall be notified thereof without delay [my translation]. Corte di cassazione Sezione VI penale Sentenza, dated 7 February 2019, No. 14413.*

EIO already during the recognition and execution proceedings.[195] Article 13 of Legislative Decree 108/2017 stipulates, among other things, that the person under investigation and their lawyer may lodge an objection with the preliminary investigation judge (investigating judge) against the recognition order (including the one issued by the public prosecutor's office in accordance with paragraph 5 of Article 13) within five days of the notification referred to in Article 4(4). The judge, after consulting the public prosecutor, shall issue a decision (it. *ordinanza*)[196] on this.[197] The decision shall be communicated to the public prosecutor and brought to the attention of the interested party, and the recognition order shall be revoked. However, pursuant to Article 13(4) of Legislative Decree 108/2017, the objection shall not have suspensive effect on the execution of the investigative measure provided for by the EIO or on the transmission of the results of the activities carried out. The public prosecutor may not communicate the results of the investigative actions carried out if this could cause serious and irreparable damage to the person under investigation, the accused or any person affected by the act in any way.[198] Legal remedies may only be used to challenge the decision (decree) confirming the EIO; specific challenges to the content of the EIO are not covered. This limitation, however, does not diminish the importance of the EIO's content. The recognition decree is linked to the substance of the EIO, since only a comprehensive assessment that takes fundamental rights into account enables the executing State, and, in the context of an appeal, the defence, to determine its lawfulness and appropriateness (Scomparin, Ferraris, Cabiale, Peloso and Calavita, 2023: 84). Similar provisions allowing for the possibility of appeal in EIO recognition proceedings could be introduced into Slovenian legislation, specifically in the ZSKZDČEU-1, thereby contributing to strengthened procedural safeguards for the defence.

6 Conclusion

[195] Similarly, Scomparin, Ferraris, Cabiale, Peloso and Calavita, 2023: 83; Kordiš and Stajnko, 2022: 11–13.

[196] It. *an ordinanza* in criminal proceedings is a decision by a judge intended to resolve ancillary procedural issues in individual proceedings and, as a rule, does not contain substantive decisions on the case. See the explanation in the legal dictionary Brocardi.it, 2023.

[197] See Article 4 in conjunction with Article 13 of Legislative Decree 108/2017. On consultation with the prosecutor, see also *Corte di cassazione Sezione VI penale Sentenza, dated 7 February 2019, No. 14413.*

[198] Legislative Decree 108/2017 follows Article 13(2) of Directive 2014/41/EU, which also provides for a suspensive effect in cases of serious irreparable damage.

Although Directive 2014/41/EU contains several promising safeguards, it does not establish an explicit right to a legal remedy for the defence in EIO proceedings. Directive 2014/41/EU refers to the possibility for the defence to request the issuance of an EIO in accordance with Article 1(3) and that Member States ensure access to legal remedies equivalent to those in similar national cases as provided by Article 14. While these provisions reflect the principle of equality of arms, in practice the defence remains dependent on judicial confirmation, and there are no uniform remedies if a request is rejected or EIO is issued. By contrast, Regulation 2023/1543 on electronic evidence explicitly guarantees an effective legal remedy against a European Production Order. Despite the fact that other EU directives, such as those on access to a lawyer (Directive 2013/48/EU) and the right to information (Directive 2012/13/EU), further strengthen procedural safeguards, contributing to harmonisation and minimum standards across Member States, like Directive 2014/41/EU, they do not provide the explicit right to a legal remedy against investigative measures. Because Member States are not required to introduce specific remedies for EIO proceedings by directives, protection varies across legal systems, potentially weakening the effectiveness of the defence, also considering many other practical and financial obstacles that defence must face in cross-border evidence gathering. Directive 2014/41/EU nonetheless provides that the level of rights protection in EIO proceedings may not fall below the standards guaranteed by the EU Charter and the ECHR. However, Member States retain wide discretion in how these standards are implemented. As a result, even where the minimum threshold is formally respected, the defence does not necessarily enjoy a substantially stronger procedural position. The notion of an "effective" remedy under the ECHR does not require prior judicial review; rather, it is assessed on a case-by-case basis and may encompass a broad range of remedies available at different stages of the proceedings. Additional problems arise where Member States offer no legal remedies and fail to ensure minimum fundamental rights standards under the EU Charter and the ECHR, as highlighted by the CJEU in *Gavanozov II* case. In such circumstances, issuing an EIO is highly questionable. In *Gavanozov II*, the CJEU raised the protection standard by requiring Member States to provide a legal remedy against the issuance of an EIO, though it did not specify its form or timing. A comparison of national laws shows differences in implementation. Slovenia does not provide a specific legal remedy against the issuance or confirmation of an EIO, whereas Italy does. Following *Gavanozov II*, Member States lacking such remedies may risk breaching fundamental rights and may need legislative reform to continue issuing

EIOs. Examining national approaches, such as Italy's, highlights good practices and underscores the need for clearer regulation. Strengthening legal remedies in EIO proceedings is essential not only for protecting defence rights but also for ensuring the admissibility of evidence and legal certainty in criminal proceedings.

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Povzetek članka v slovenskem jeziku (abstract in Slovene language)

Z naraščanjem čezmejnega kriminala je pridobivanje dokazov iz tujine postalo eden ključnih vidikov učinkovitega kazenskega pregona. Sodelovanje med državami članicami Evropske unije se je postopoma razvijalo od sistema medsebojne pravne pomoči do uvedbe evropskega preiskovalnega naloga (EPN), ki združuje elemente medsebojne pomoči in načela vzajemnega priznavanja ter je bistveno pospešil in poenostavil pridobivanje dokazov v čezmejnih primerih. Navkljub novi ureditvi pa položaj obrambe v okviru EPN ostaja nejasen in mestoma negotov. Direktiva 2014/41/EU namreč ne zagotavlja zadostne pravne podlage, da bi obramba lahko samostojno izdala EPN, prav tako pa ne določa izrecne pravice do pritožbe zoper njegovo izdajo ali izvršitev. Čeprav se temeljne pravice iz Listine EU in EKČP uporabljajo tudi v postopkih z EPN, so ti standardi oblikovani široko in dopuščajo nacionalno diskrecijo. Sodišče Evropske unije je naredilo korak naprej, zlasti v zadevi *Gavanozov II*, in poudarilo pomen pravnih sredstev tudi v postopkih z EPN. Kljub temu se nacionalni kazenski postopki še vedno razlikujejo v ključnih vidikih, pomembne vsebinske vrzeli pa pri zagotavljanju učinkovitega varstva pravic obrambe na ravni EU še vedno ostajajo v postopkih z EPN.