

# AG: Bulgaria Must Bring its Law in Line with EIO Directive

**Thomas Wahl**

**News**

If the national legislation of an EU Member State does not provide for legal remedies, by means of which the substantive reasons for an investigative measure requested by a European Investigation Order (EIO), cannot be challenged, this Member State is not entitled to use the EIO instrument.

## Background

This far-reaching legal ramification was proposed by Advocate General Yves Bot in his opinion of 11 April 2019 in case *C-324/17 (criminal proceedings against Ivan Gavanozov)*. Note: At the time of writing, the opinion was not available in English and German.

The case marked the first occasion for the CJEU to interpret Directive 2014/41/EU regarding the European Investigation Order in criminal matters (EIO DIR). It concerns peculiarities of Bulgarian criminal procedure, and interpretation was requested as regards Art. 14 EIO DIR, which provides *inter alia*:

- Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO (Art. 14(1));
- The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State (Art. 14(2));
- “Parties concerned” shall have the possibility to effectively exercise these legal remedies (cf. Art. 14(4)).

## Facts of the Case

The request for a preliminary ruling was made by the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria) in criminal proceedings against *Ivan Dimov Gavanozov* who was being prosecuted for VAT fraud in Bulgaria. Allegedly, a company and its manager situated in the Czech Republic were involved in the fraud scheme. Hence, the Bulgarian court wished to issue an EIO requesting the Czech authorities to search residential and business premises, seize specific documents, and examine the manager as a witness. However, the Bulgarian court noted that neither the Bulgarian code of criminal procedure nor the law implementing Directive 2014/41 provide for a legal remedy against the adoption of the investigative measures of search and seizure and witness examination. Therefore, the court was also unable to fill in Section J of the EIO form, which refers to the legal remedies in the issuing State.

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## Referred Questions

As a consequence, the Specialised Criminal Court referred three questions to the CJEU:

- Is the Bulgarian legislation, which (directly and indirectly) precludes a challenge to the substantive grounds of a court decision issuing an EIO for a search of premises and the seizure of specific items and allowing examination of a witness, consistent with Art. 14 EIO DIR?
- Does Art. 14(2) EIO DIR grant, in an immediate and direct manner, to a concerned party the right to challenge a court decision issuing an EIO?
- Who is covered by the term “concerned party”?

## The Advocate General’s Answers

As regards the first question, the AG observed that, although Art. 14 EIO DIR only obliges Member States to extend existing legal remedies to the EIO context, it can be deduced from the norm that – “as a play of mirrors” – Member States are also obliged to install legal remedies which enable concerned parties to challenge the substantial grounds for issuing the EIO.

The AG even went a step further. Not only is Bulgarian legislation inconsistent with Art. 14 EIO DIR, but the Bulgarian authorities are also presently not allowed to issue EIOs, i.e., to use the EIO instrument. The AG argued that the principle of mutual trust and recognition is built on a balance between effectively cooperating in criminal matters and guaranteeing an individual’s fundamental rights. The respect of fundamental rights, however, cannot be presumed if the issuing State denies legal remedies to the persons concerned by the cooperation. Referring to case law of the ECtHR, the AG further concluded that the current Bulgarian legislation is a “flagrant denial of justice” and that deficiencies must be remedied before the EIO can be used.

As regards the second question, the AG states that Art. 14(2) EIO DIR does not grant, in a direct and immediate manner, a right to challenge an EIO in favour of the “parties concerned.” A direct effect for a legal remedy against an investigative measure cannot be created *ex nihilo*.

By answering the second question in the negative, the third question actually became obsolete. Alternatively, AG *Bot* points out that the notion “concerned parties” must be interpreted autonomously. It also covers persons who are affected by an investigative measure, but are considered a “third party” in the criminal procedure, e.g., the person who occupies the property on which the search and seizure is carried out or the person who is to be examined as a witness. The Union legislator did not exclude the protection of these persons if an EIO is applied (Art. 1(4)). In addition, the “concerned party” in Art. 14(4) EIO DIR includes the person against whom a criminal charge was brought, even though that person was not directly targeted by the measure that collected the evidence.

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