

AG: Bulgaria Not Allowed to Issue EIOs

Thomas Wahl

News

Advocate General (AG) *Michal Bobek* recommends that the CJEU decide that Bulgarian authorities cannot issue European Investigation Orders (EIOs) unless Bulgaria introduces remedies against investigative measures.

In the case at issue (*C-852/19 – Ivan Gavanozov II*), the referring Specialised Criminal Court, Bulgaria, requests clarification on whether it can request searches and seizures and a witness hearing from Czechia on the basis of an EIO, since Bulgarian law lacks any legal remedy both against the issuance of the EIO and the lawfulness of searches and seizures. The case concerns the interpretation of Art. 14(1) of Directive 2014/41 regarding the European Investigation Order (EIO Directive), which requires “Member States to ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.” The question is how EIOs should be handled if the national law of the issuing State does not foresee any legal remedy against (coercive) investigative measures during the investigative phase.

This question had basically already been the subject of a first preliminary ruling procedure in the given criminal proceedings against *Ivan Gavanozov* who was prosecuted in Bulgaria for large-scale VAT fraud (Case C-324/17). In contrast to the AG (→ [eucrim 1/2019, 36-37](#)), the CJEU did not analyse the exact implications of Art. 14 of the EIO Directive in this case but instead confined itself to deciding on the manner in which the issuing Bulgarian authority should complete the EIO form (→ [eucrim 3/2019, 179](#)).

The AG has now concluded the following:

- In accordance with the wording, context, and overarching purpose of the EIO Directive, its Art. 14(1) is applicable to legal remedies - not only in the executing but also in the issuing Member State;
- “Equivalence” within the meaning of Art. 14(1) is logically only acceptable if the situation in the issuing State is itself compatible with the minimum standards for protection of fundamental rights, as required by the CFR and the ECHR;
- In accordance with ECtHR case law, the issuing State must at least provide for (1) the possibility to challenge the legality of the search and seizure *at some stage* in the criminal proceedings, (2) the review and its initiation being confined to the person concerned, and (3) the review covering both the lawfulness of the measure and the manner in which it was carried out;
- If this minimum level of protection cannot be ensured by national law, the issuing Member State is not allowed to issue EIOs.

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In the latter context, AG *Bobek* argues that all issued acts will, by default, be tainted because the legislation under which they were issued was itself incompatible. He refers to the ECtHR, which repeatedly found that the absence of remedies against investigative measures in Bulgaria, such as searches and seizures, is in breach of the minimum standards of Art. 13 ECHR (the right to an effective remedy). As long as the Bulgarian legislature does not remedy this situation, Bulgaria is in constant breach of fundamental rights and can therefore not take part in the mutual recognition scheme.

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