

CJEU: Bulgaria (Currently) Precluded from Issuing EIOs Due to Lack of Legal Remedies

News

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On 11 November 2021, the [CJEU ruled](#) on the consequences of the peculiar Bulgarian legislation which has not provided for a legal remedy against (coercive) investigative measures and the issuance of a European Investigation Order (EIO) during the first stages of criminal proceedings. According to the judges in Luxembourg, the current situation infringes the fundamental rights of the Charter and means that Bulgaria cannot issue EIOs as long as this situation is not remedied.

Background of the case

The case at issue ([C-852/19, *Ivan Gavanozov II*](#)) is a follow-up of a first ruling by the CJEU which answered the question how the Bulgarian authorities should fill in the EIO form if legal remedies are not foreseen in the Bulgarian legal order (→ [eucrim 1/2019, 36-37](#)). The referring court, the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria), was not satisfied with this answer and submitted a new reference for preliminary ruling asking for the substantial consequences of the current legal situation in Bulgaria.

The case in the main proceedings concerns criminal investigations against *Ivan Gavanozov* for large-scale VAT fraud. The Bulgarian authorities wished to request searches and seizures and a witness hearing from Czechia on the basis of an EIO, although Bulgarian law lacks any legal remedy both against the issuance of the EIO and the lawfulness of searches and seizures/witness hearings. The referring court opposed to this idea and asked the CJEU:

- Whether Union law precludes legislation of a Member State which has issued an EIO that does not provide for any legal remedy against the issuing of an EIO the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference;
- Whether Union law precludes the issuing, by the competent authority of a Member State, of an EIO, the purpose of which is the carrying out of searches and seizures as well as the hearing of a witness by videoconference, where the legislation of that Member State does not provide any legal remedy against the issuing of such an EIO.

Ruling of the CJEU

The judges in Luxembourg followed the Opinion of Advocate General *Bobek* in this case (→ [eucrim 2/2021, 104-105](#)). They shared his opinion that Art. 14(1) and Art. 1(4) of Directive 2014/41 regarding the EIO read in light with Art. 47 of the Charter does not leave discretion to an EU Member State whether it provides for legal

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remedies against the issuance of an EIO and investigative measures during the investigative phase. They justified this conclusion by the concept of mutual recognition and mutual trust: since, as a rule, the executing authority is required to recognise an EIO transmitted in accordance with Directive 2014/41, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing Member State, that authority must be sure that the issuing State complies with the EU's fundamental rights. This includes the persons' right to contest the need and/or lawfulness of an EIO and to obtain appropriate redress if an investigative measure has been unlawfully ordered or carried out.

Since the lack of legal remedies against the investigative measures in question and the issuance of an EIO in the current Bulgarian legislation infringes Art. 47(1) of the Charter and also rebuts the presumption of mutual trust, Bulgaria is not able to issue EIOs anymore.

Put in focus

The CJEU's judgment strengthens the position of the individuals' fundamental rights in the EU scheme of mutual legal assistance. It can also implicitly inferred that the executing authorities are obliged to refuse the execution of EIOs if fundamental rights are not upheld in the issuing EU Member State in accordance with Art. 11(1)(f) of the EIO Directive. Nonetheless, the judgment concerns the specific Bulgarian situation where no legal remedies are foreseen in the investigative phase and it relates only to measures that encroach into fundamental rights. The latter, however, should be the case for most EIO requests. As the CJEU clarified, an infringement into the EU's fundamental rights also occurs if videoconferences are sought with witnesses. Not entirely solved is the question what persons who are affected by an EIO can do if there is no court in the issuing State, which examines the issuance of an EIO and takes an opposing position (to the law enforcement authorities), or if the issuing authorities ignore any justified objections against fundamental rights infringements in their country.

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