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Judicial Protection in EU Cross-Border Evidence-Gathering: the EIO as a Case Study**

Abstract

The article discusses structures of judicial scrutiny in EU cross-border investigations through the lens of the rules applicable to European Investigation Order (EIO) proceedings. These function according to an updated and, thus, more flexible approach to the principle of mutual recognition that entails a stronger accent on fundamental rights protection and on the respect of a European *ordre public*. As recent decisions of the Court of Justice have, moreover, aimed at increasing common minimum standards of judicial protection in this field and as the Court has extended the EIO system of judicial protection also to other domains of EU cross-border investigations, the EIO presents itself an ideal case study about the main components of judicial protection in EU cross-border evidence gathering.

I. Introduction

The abolition of internal borders has unified the European Union (EU) territory in terms of the free movement of persons. Nonetheless, it remains legally divided into national fragments, especially in the area of criminal law as national borders are still of great importance in law enforcement. This is evident in particular in cases that require transnational investigations.[1]

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** This contribution is part of the study conducted in the context of a research project, MEIOR (Mould EIO Review) Project, funded as EU JUST Action Grant, Project ID 101046446.

1 Valsamis Mitsilegas, *EU Criminal Law after Lisbon* (Hart Publishing 2016) 83, 125; András Csúri, 'Grenzüberschreitende Ermittlungen. Bemerkungen Zur Europäischen Ermittlungsanordnung Und Zur Europäischen Staatsanwaltschaft' in Robert Kert and Andrea Lehner (eds), *Vielfalt des Strafrechts im internationalen Kontext: Festschrift für Frank Höpfel zum 65. Geburtstag* (Neuer Wissenschaftlicher Verlag 2018) 682.

DOI: 10.5771/2193-5505-2024-2-148

The Treaty on the Functioning of the European Union (TFEU)[2] provides for both vertical, ordering and horizontal, coordinating cooperation in criminal matters.[3] The first type of cooperation is reflected in the role of EU organs and agencies such as Eurojust and the recently established European Public Prosecutor's Office (EPPO).[4] These promote and improve the coordination of investigations and prosecutions in the Member States, facilitate cooperation between the authorities of Member States or,[5] as in the case of the EPPO, may even directly prosecute certain offences[6] before the competent courts of the Member States.[7]

The horizontal model bases cooperation between judicial authorities on the principle of mutual recognition of judgments and judicial decisions.[8] This principle allows to bridge the differences between national legal systems without resorting to prior harmonisation.[9] Only to the extent necessary to facilitate mutual recognition, Art. 82 para. 2 TFEU provides for EU legislative competence to approximate national laws through directives establishing minimum rules.

On the basis of a mutual trust in the respect of human rights which is justified by the EU membership of the various States,[10] the principle of mutual recognition introduces a mechanism for (almost) automatic, rapid implementation of foreign judgments and decisions, which minimises formalities[11] and thereby makes the principle of mutual recognition the 'motor'[12] of European integration in criminal matters.[13] This

2 Consolidated Version of the Treaty on the Functioning of the European Union (2016) OJ C 202/47 (TFEU).

3 Mitsilegas, EU Criminal Law after Lisbon (n. 2) 83; Csúri (n. 2) 682.

4 Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (12 October 2017) OJ L 283/1 (EPPO Regulation); Mitsilegas, EU Criminal Law after Lisbon (n. 2) 83.

5 Note from the General Secretariat of the Council to the delegations on Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (15 July 2009) 5347/3/09 REV 3, 9.

6 See Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (5 July 2017) OJ L 198/29.

7 EPPO Regulation Art. 4.

8 TFEU Art. 82.

9 Jean Albert and Jean-Baptiste Merlin, 'Is the EU Ready for Automatic Mutual Recognition... in the Fight Against Crime?' [2015] Eucrim 60, 62; Valsamis Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (2020) 57 Common Market Law Review 45, 49.

10 Opinion 2/13 of the Court of 18 December 2014 (2014) EU:C:2014:2454, paras 191, 193.

11 Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?' (2004) 41 Common Market Law Review 5, 8–9; Mitsilegas, EU Criminal Law after Lisbon (n. 2) 126–127.

12 Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277, 1277.

13 See European Council, 'Tampere European Council 15 and 16 October 1999, Presidency Conclusions' <https://www.europarl.europa.eu/summits/tam_en.htm> accessed 11 June 2024, para. 33, where the principle of mutual recognition was defined as the 'cornerstone of judicial co-operation in both civil and criminal matters within the Union'.

is evidenced by the various EU instruments to which it applies, such as measures on arrest warrants, evidence warrants, freezing orders, or the recognition of decisions on transfer of sentenced persons.[14] These instruments also include the Directive (EU) 2014/41 on the European Investigation Order (EIO Directive) adopted in 2014,[15] which governs judicial cooperation in cross-border investigations.

Judicial cooperation in criminal matters entails far-reaching effects not only on state sovereignty but also on human rights. It enables, among others, the execution of arrest warrants pursuant to the instrument introduced by the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (FD EAW)[16] or of investigation measures, including different types of searches and seizures, through a European Investigation Order (EIO). These examples indicate how EU cooperation instruments may lead to at times severe interferences with a broad range of fundamental rights in one EU Member State that have their origin in an assessment made (mainly) in another Member State. Such assessments follow different rules from one Member State to another as Member States' procedural autonomy is likely to lead to different approaches regarding the sequence of investigation activities and judicial control. While such approaches are usually deemed to be in line with EU-wide recognised human rights minimum standards, the combination of segments from different systems might prove to be problematic.[17]

The cross-border nature of the activities in question thus raises the question about the structure(s) of judicial protection best suited to ensure that the safeguard of fundamental rights is not 'lost in translation'. To what extent is judicial scrutiny then compatible with the need for investigation and cooperation efficiency implied in the principle of mutual recognition? In principle, mutual recognition of foreign decisions does not foresee an autonomous check of the sufficient safeguard of fundamental rights by the executing authority.[18] In its Opinion 2/13, the Court of Justice of the European Union (CJEU) stressed the importance of the principle of mutual trust between the Member States for the creation and maintenance of an area without internal borders. Save in exceptional circumstances, each Member State must presume all other Member States to be complying with EU law and particularly with the fundamental rights recognised

14 See Mitsilegas, EU Criminal Law after Lisbon (n. 2) 126–127.

15 Directive (EU) 2014/41 of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (3 April 2014) OJ L130/1.

16 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (13 June 2002) OJ L 190/1 as mended by Council Framework Decision 2009/299/JHA.

17 Silvia Allegrezza and Anna Mosna, 'Cross-Border Criminal Evidence and the Future European Public Prosecutor. One Step Back on Mutual Recognition?' in Lorena Bachmaier Winter (ed), The European Public Prosecutor's Office: The Challenges Ahead (Springer 2018) 145.

18 Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (n. 10) 48.

by Union law, without checking whether in a specific case these fundamental rights have been observed.[19]

A strict approach to mutual trust instead of case-by-case verification, this was the initial idea on which the principle of mutual recognition was based, which was, however, criticised by the European Court of Human Rights (ECtHR). While reaffirming the Bosphorus presumption of equivalent protection,[20] the ECtHR expressed some reservations about an understanding of the principle of mutual trust that limits the possibility for the executing authority to verify the respect of fundamental rights in the issuing State only to exceptional cases. Compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) would require that the executing authority 'at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient'[21] – even in cases where EU law does not explicitly provide for it.[22]

The entry into force of the Lisbon Treaty and the constitutionalisation of the Charter of Fundamental Rights of the European Union (Charter) led to an increasing challenging of a cooperation model based on blind trust and strict mutual recognition also within the EU due to the discrepancy between the imposed level of mutual trust and the level of trust that would be justified in light of a case-by-case examination.[23] This is reflected both in EU legislation and case law that have gradually developed and adjusted their notion of the principles of mutual recognition and mutual trust. With them also the understanding of where to strike a balance between effective cross-border cooperation and fundamental rights protection has changed. The EIO is a prime example of this new approach to mutual recognition and is therefore the ideal object of analysis of the effectiveness of fundamental rights protection in EU cross-border evidence gathering.

This contribution takes the EIO and the form of judicial scrutiny enshrined in its framework as a starting point for a broader discussion on the main features of effective judicial protection in EU cross-border evidence gathering. To this end, it first outlines the main characteristics of the EIO and assesses its value as a cross-border cooperation tool (A). Second, the article addresses fundamental rights protection in EU cross-border evidence gathering through the lens of judicial protection afforded in the dynamic of EIO proceedings (B). In its third part, the coordinates of judicial protection,

19 Opinion 2/13 of the Court of 18 December 2014 (n. 11) paras. 191–192.

20 This doctrine goes back to the judgment Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland [2005] ECtHR App no 45036/98, CE:ECHR:2005:0630JUD004503698, para. 165 and refers to the presumption that the protection of fundamental rights within the European Union is equivalent to the Convention system.

21 Avotinš v Latvia [2016] ECtHR App no 17502/07, CE:ECHR:2016:0523JUD001750207, para. 114.

22 Giacomo Biagioni, 'Avotinš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights' (2016) 1 European Papers 579, 589–591.

23 Valsamis Mitsilegas, 'Judicial Concepts of Trust in Europe's Multi-Level Security Governance: From Melloni to Schrems via Opinion 2/13' [2015] Eucrim 90, 90.

including the concepts of judicial independence and of legal remedy, ensured in EIO proceedings, will be discussed and suggested as a baseline also for other forms of EU cross-border investigations (C).

II. The European Investigation Order: A promising tool of judicial cooperation

The EIO is a judicial decision by which a judicial authority in the issuing State obtains evidence through investigative measures carried out in another Member State, the executing State. Such a decision may also serve to request for evidence that is already in the possession of the competent authority of the executing State.[24] The EIO Directive establishes that an EIO may be issued only by a judge, a court, an investigating judge, or a public prosecutor competent in the case concerned. Other competent authorities acting as an investigating authority in criminal proceedings can issue an EIO only if that measure is validated by one of the previously mentioned authorities.[25]
The EIO Directive reflects the claim included in the Stockholm Programme of December 2009[26] for a comprehensive and simplified system of cross-border evidence gathering. This instrument is based on the principle of mutual recognition, and it replaces all existing instruments in this area[27] and it applies as far as possible to all types of

24 Directive (EU) 2014/41 Art. 1 para. 1.
25 Ibid., Art. 2 (c).
26 Notice from the European Council: The Stockholm Programme — An open and secure Europe serving and protecting citizens 2010 (2010/C 115/01) OJ C 115/1, 1.
27 Noteworthy are in in this context, Framework Decision 2008/978/JHA on the European Evidence Warrant for obtaining objects, documents and data for use in criminal proceedings, and the Convention on mutual assistance in criminal matters between the Member States of the European Union and its Protocol. In addition, according the EIO Directive replaces the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959 (including the two Additional Protocols and the bilateral agreements concluded in accordance with Art. 26 of that Agreement), the Convention implementing the Schengen Agreement and Framework Decision 2003/577/JHA on the execution in the European Union of decisions on the freezing of property or evidence. The above-mentioned acts will maintain their effectiveness in the relations between EU Member States and third countries, see Directive (EU) 2014/41 Recital 5 and Art. 34; Silvia Allegrezza, 'Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality' in Stefano Ruggeri (ed), Transnational Evidence and Multicultural Inquiries in Europe (Springer 2014) 53; Lorena Bachmaier Winter, 'The Proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessment' in Stefano Ruggeri (ed), Transnational Evidence and Multicultural Inquiries in Europe (Springer 2014) 71, 73–74; Martin Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer Nach Neuen Regeln?' [2014] Zeitschrift für Internationale Strafrechtsdogmatik 152, 152; Michele Caianiello, 'La Nuova Direttiva UE Sull'ordine Europeo Di Indagine Penale Tra Mutuo Riconoscimento e Ammissione Reciproca Delle Prove' [2015] Processo Penale e Giustizia 1, 3; Silvia Allegrezza, Anna Mosna and Fabio Nicolicchia, 'L'acquisizione Della Prova All'estero e i Profili Transnazionali' in Giovanni Canzio, Luigi Domenico Cerqua and Luca Lupária (eds), Diritto Penale delle Società: Accertamento delle responsabilità individuali e processo alla persona giuridica (2nd edn, Cedam 2016) 185.

evidence,[28] it determines deadlines for the execution and it reduces grounds for refusal to a minimum.[29] By introducing a unified regime for cross-border investigations and evidence-gathering, the EIO Directive is the most advanced set of rules on this matter ever developed by the EU legislator.[30]

The core of the procedural simplification and acceleration consists in the application of the principle of mutual recognition to the area of cross-border investigations. Accordingly, the judicial authority of one Member State now issues an order instead of a simple request to the competent authority of the other Member State. The latter is in principle obliged to enforce such an order by recognising the foreign decision.[31] Furthermore, the issuing authority determines the kind of investigative measure to be carried out and of evidence to be gathered,[32] the date or specific deadlines for the execution of the EIO.[33] In the case of a refusal, postponement or suspension provided for by the EIO Directive or deviation from the instructions of an EIO, the executing authority must immediately inform the issuing authority to allow the latter to take further measures and to ensure a cooperation as efficient as possible.[34]

In light of the slowness and inefficiency of the pre-existing system of mutual legal assistance, this innovation was welcomed by stakeholders.[35] Nevertheless, the transposition of the liberal common market principle of mutual recognition to the field of criminal justice entails also considerable risks for the position of the suspected or accused persons.[36] In the context of the Common Market, mutual recognition ensures the free movement of goods, whose compliance with minimum health standards accepted throughout Member States is an arguably quite simple procedure.[37] While the

28 According to Directive (EU) 2014/41 Art. 3, only the setting up of joint investigation teams and the collection of evidence within such investigation teams, some specific types of telecommunications surveillance and cross-border surveillance as referred to in Art. 40 of the Convention implementing the Schengen Agreement are excluded from the scope of application of the new EU instrument; see also Recitals 8 and 9; Allegrezza (n. 28) 54.

29 See Directive (EU) 2014/41 Recital 6.

30 Allegrezza and Mosna (n. 18) 155–156.

31 Directive (EU) 2014/41 Art. 1 para. 2.

32 Ibid., Art. 5 para. 1.

33 Ibid., Art. 12 para. 2.

34 Ibid., Art. 16; Rosanna Belfiore, 'Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence' in Stefano Ruggeri (ed), Transnational Evidence and Multicultural Inquiries in Europe (Springer 2014) 97.

35 Lorena Bachmaier Winter, 'European Investigation Order for Obtaining Evidence in the Criminal Proceedings: Study for the Proposal for a European Directive' [2010] Zeitschrift für Internationale Strafrechtsdogmatik 580, 583.

36 Debbie Sayers, 'The European Investigation Order: Travelling without a "Roadmap"' [2011] Centre for European Policy Studies 3 <https://www.ceps.eu/system/files/book/2011/06/No%2042%20Sayers%20on%2 0European%20Investigation%20Order.pdf> accessed 18 April 2020.

37 See, for instance, Rewe v Bundesmonopolverwaltung für Branntwein [1979] ECJ C-120/78, EU:C:1979:42; Dassonville [1974] ECJ C-8/74, EU:C:1974:82; Kai Ambos and Peter Rackow, 'Developments and Adaptations of the Principle of Mutual Recognition — Reflections on the Origins of the European Investigation Order with a View to a Practice-Oriented

free movement of products ultimately benefits the individual by providing them with a broader spectrum of choice, applied to the area of cross-border investigation and prosecution its effects are no longer liberal but rather authoritarian as it enables the execution of the most punitive criminal law system of one Member State in all other Member States, whereby only the lowest common level of defendant's rights might be ensured.[38]

The concept of mutual recognition as included in the EIO Directive shows a reconsideration of this principle compared to its implementation in the FD EAW. The EAW is characterised by a strict application of this principle, to which it connects the almost automatic implementation of a foreign judicial decision on the basis of a generally blind trust in the observance of common minimum standards in the protection of human rights in the issuing Member State.[39] It does not provide for a proportionality test by the executing authority, as this assessment should pertain to the issuing phase,[40] nor does it mention the infringement of human rights in its extremely sparse list of grounds for refusal of enforcement.[41]

The case-law of the CJEU has evolved over time from a strict application of the principle of mutual recognition that excludes any ground for refusal that is not explicitly provided by the FD EAW[42] to a position that admits limitations of the principle in question in cases where the requested persons risks being exposed to inhumane or degrading treatment. A first opening occurred in the *Aranyosi/Căldăraru* case,[43] in which the CJEU admitted the possibility to postpone the execution of an EAW exceptionally if there is objective, reliable, specific and updated information of generalised or systematic deficiencies of the detention conditions in the issuing Member State and the

Understanding of the Mutual Recognition Principle' in Kai Ambos and others (eds), The European Investigation Order. Legal Analysis and Practical Dilemmas of International Cooperation (Duncker & Humblot 2023) 147.

38 Bernd Schünemann, 'The European Investigation Order: A Rush into the Wrong Direction' in Stefano Ruggeri (ed), Transnational Evidence and Multicultural Inquiries in Europe (Springer 2014) 31; see also Ambos and Rackow (n. 38) 147.

39 Mitsilegas, EU Criminal Law after Lisbon (n. 2) 124–126.

40 European Commission, Handbook on how to issue and execute a European arrest warrant (6 October 2017) OJ C 335/1.

41 Allegrezza (n. 28) 60.

42 In Ciprian Vasile Radu [2013] CJEU C-396/11, ECLI:EU:C:2013:39 the Court established that the FD EAW could not be interpreted as allowing the executing authority to refuse the execution of an EAW for the purpose of prosecution on the ground that the requested person was not heard by the issuing judicial authority before the EAW was issued; while in Stefano Melloni v Ministerio Fiscal [2013] CJEU C-399/11, ECLI:EU:C:2013:107 it was clarified that the execution of an EAW, through which a person convicted in absentia is requested, could not be made conditional upon the respect of a constitutional rule in force in the executing State that would require the conviction to be open to review in the issuing Member State; see also Valsamis Mitsilegas, 'Judicial Concepts of Trust in Europe's Multi-Level Security Governance: From Melloni to Schrems via Opinion 2/13' [2015] Eucrim 90, 90.

43 Pál Aranyosi and Robert Căldăraru [2016] CJEU C-404/15 and C-659/15 PPU, EU:C:2016:198.

executing authority determines that there is also a real risk that the requested person will actually have to endure detention conditions that are not compatible with absolute fundamental rights. If after a reasonable time of postponement, the existence of a real risk about the minimum protection of human rights cannot be discarded, the executing authority must consider bringing the surrender procedure under the EAW to an end.[44] With its landmark decision in the *LM* case, the CJEU further acknowledged the possibility not to execute an EAW, beyond cases in which the fundamental rights at stake are absolute ones such as those protected under Art. Charter or Art. 3 ECHR, also to avert violations of the right to a fair trial.[45] It affirmed that in exceptional cases in which the executing authority assesses, pursuant to the two-step test laid out in *Aranyosi/Căldăraru*, that there are systemic and generalised deficiencies as regards the independence of the issuing Member State's judiciary *and* a concrete risk that these deficiencies would impact the requested person's right to a fair trial, if surrendered, the executing authority may refrain from executing an EAW.[46]

44 Pál Aranyosi and Robert Căldăraru [2016] CJEU C-404/15 and C-659/15 PPU, EU:C:2016:198 [104]; in ML [2018] CJEU C-220/18 PPU, ECLI:EU:C:2018:589 the Court specified that the executing authority must assess only the detention conditions in the prisons in which according to the available information that person will be detained; in Dumitru-Tudor Dorobantu [2019] CJEU C-128/18, ECLI:EU:C:2019:857 the CJEU made clear that for the purposes of verifying the real risk for a requested person to be subjected to inhuman or degrading treatment within the meaning of Art. 4 Charter, the executing authority must take account of all relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. This assessment is not limited to the review of obvious inadequacies and, with particular regard to the personal space available to each detainee, it considers the minimum requirements under Art. 3 ECHR, as interpreted by the ECtHR.

45 *LM* [2018] CJEU C-216/18 PPU, EU:C:2018:586 the background to this decision refers to judicial reforms in Poland that appear to have compromised the precondition for independence for the national judiciary and for which the Member State in question was subject to a reasoned proposal pursuant to Art. 7 para. 1 of the Treaty on European Union (TEU) for a determination by the Council that there is a clear risk of a serious breach of the values of respect for human dignity, freedom, democracy, equality, the rule of law or respect for human rights, including the rights of persons belonging to minorities, as referred to in Art. 2 TEU.

46 LM (n. 46) 59; the necessity to rely on the two-step test was confirmed in L and P [2020] CJEU C-354/20 PPU and C-412/20 PPU, EU:C:2020:925 in which the Court denied the possibility to skip the second step in cases of systemic and generalised deficiencies relating to the independence of the judiciary in the issuing Member State, stating that a concrete risk for the person in question cannot be merely presumed. Allowing for such a presumption would, indeed, lead to a de facto suspension of the implementation of the EAW mechanism in relation to a certain Member State and run counter to the objective of that very mechanism to combat the impunity of the requested person; see also Daniel Sarmiento, 'A Comment on the CJEU's Judgment in LM' (2018) 25 Maastricht Journal of European and Comparative Law 385, 386.

This case law reflects a growing awareness of the problems that an excessively strict application of the principle of mutual recognition entails.[47] In light of the accumulation of concrete incidents in which such strict interpretation of mutual recognition led to human rights violations,[48] the need to replace the blind with a scrutinisable trust became as evident as pressing.[49] It is with this in mind that the EU legislator conceived the EIO as a mutual recognition instrument that, while still based on the same principle, is provided with safety valves that allow for more scrutiny by the executing authority and, thereby, for more attention towards the protection of the defendant's fair trial rights.

This caution resonates with the sensitivity of investigations and of the evidence that emerges from it, as it forms the basis for the judgment.[50] Unlike the EAW which refers to an extradition procedure and is therefore limited in its effect to a sub-branch of the main proceedings, the EIO influences the much more complex core of criminal proceedings.[51] Its procedural rules reflect a fragile balance between the public interest (represented by the prosecution) in thorough fact-finding and efficient decision-making on the one hand, and the defendant's rights of defence on the other. How such a balance is struck often differs considerably from one national system to another.[52]

47 Sayers (n. 37) 3.

48 Symeou v Public Prosecutor's Office, Patras, Greece (2009) 1 WLR 2384 (EWHC 897): this is the case of a young British citizen who was involved in a fight with other youth while on vacation in Greece and for the surrender of whom, once he had returned to the United Kingdom, the Greek judicial authorities issued an EAW based on an accusation of manslaughter. Although the defence raised, inter alia, arguments of a concrete risk of violation of his fair trial rights under Art. 6 ECHR, the British authoriries executed the EAW. When he was finally acquitted in 2011, the defendant had spent two years in prison in Greece; John R Spencer, 'Fair Trials and the European Arrest Warrant' (2010) 69 The Cambridge Law Journal 225, 226; John R Spencer, 'Mutuo Riconoscimento, Armonizzazione e Tradizionali Modelli Intergovernativi' in Roberto E Kostoris (ed), Manuale di procedura penale europea (3rd edn, Giuffrè Editore 2017) 326.

49 Sayers (n. 37) 4–5; Lorena Bachmaier, 'Transnational Evidence: Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters' [2015] Eucrim 47, 54; Mitsilegas, EU Criminal Law after Lisbon (n. 2) 151–152; Andrea Leonhardt, Die Europäische Ermittlungsanordnung in Strafsachen: Umsetzungsanforderungen Für Den Deutschen Gesetzgeber (Springer 2017) 59; Koen Lenaerts, 'La Vie Après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 Common Market Law Review 805, 837; Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (n. 10) 49.

50 Juliette Lelieur, 'L'application de La Reconnaissance Mutuelle à l'obtention Transnationale de Preuves Pénales Dans l'Union Européenne: Une Chance Pour Un Droit Probatoire Français En Crise?' [2010] Zeitschrift für Internationale Strafrechtsdogmatik 590, 598; Giulia Fiorelli, 'Nuovi orizzonti investigativi: l'ordine europeo d'indagine penale' [2013] Diritto penale e processo 705, 708.

51 Leonhardt (n. 50) 302.

52 John R Spencer, 'The Green Paper on Obtaining Evidence from One Member State to Another and Securing Its Admissibility: The Reaction of One British Lawyer' [2010] Zeitschrift für Internationale Strafrechtsdogmatik 602, 603; Schünemann, 'The European Investigation Order: A Rush into the Wrong Direction' (n. 39) 31; Marcello Daniele, 'La Metamorfosi Del

This explains a further weakening of the mutual trust in this field and the scepticism of many Member States vis-à-vis another EU instrument restricting sovereignty.[53]

In the EIO Directive the implementation of the principle of mutual recognition is therefore balanced with various 'counterweights'. These counterweights ensure, first of all, due consideration of the differences between national criminal procedures by virtue of the principle of equivalence and proportionality that allow the executing authority to have recourse to an investigative measure other than that indicated in an EIO where the requested measure does not exist under the law of the executing State or would not be available in a similar internal case.[54] The executing authority may also carry out a different measure when such measure would achieve the same result as the one indicated in the EIO by less intrusive means.[55] Secondly, the inclusion of a national *ordre public* clause contributes to preserve the specificities of national legal systems and constitutional orders by exempting the executing authority from the obligation to comply with the formalities and procedures expressly indicated by the issuing authority if doing so would be contrary to the fundamental principles of law of the executing State.[56] Third, the EIO Directive imposes the respect of the obligations deriving from Art. 6 TEU and from the Charter: a European *ordre public* clause that ensures that the execution of an EIO is not opposed to the fundamental rights and principles of the European Union.[57]

These counterweights, which are also built into the list of grounds for refusal,[58] are flexibility elements that indicate how the EIO Directive, as a post-Lisbon instrument, implies a new understanding of mutual recognition and of mutual trust. As the foundation upon which mutual recognition is built, mutual trust in the compliance by other Member States with Union law and, in particular, with fundamental rights is no longer treated as a dogma but, rather, as a rebuttable presumption: a shift from a paradigm of 'blind trust' to one of earned trust, on the basis of a meaningful fundamental rights scrutiny.[59]

Diritto Delle Prove Nella Direttiva Sull'ordine Europeo Di Indagine Penale' [2015] Diritto penale contemporaneo 86, 87.

53 Allegrezza (n. 28) 55; Bachmaier (n. 50) 54.

54 Directive (EU) 2014/41 Art. 10 para. 1.

55 Ibid., Art. 10 para 3.

56 Ibid., Art. 9 paras. 2 and 4.

57 Ibid., Art. 1 para. 4; Bachmaier (n. 50) 54; Valsamis Mitsilegas, 'Joined Cases C-404/15 and C-659/15 PPU – Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen Resetting the Parameters of Mutual Trust: From Aranyosi to LM' in Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano (eds), The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis (Hart Publishing 2019) 423.

58 Directive (EU) 2014/41 Art. 10 para. 1, Art. 11 para. 1 (f).

59 Ibid., Recital 19; Lenaerts (n. 50) 837, 840; Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (n. 10) 49.

III. Judicial protection under the EIO Directive

The EIO Directive stresses the need to ensure full respect of the rights as enshrined in Art. 48 Charter in its recitals[60] and in its enacting terms, where it affirms Member States' obligation to respect fundamental rights and legal principles as enshrined in Art. 6 Treaty on European Union (TEU) and allows executing authorities not to recognise or not to execute an EIO if doing so would be in contrast with such obligation.[61] From a defence rights perspective, the EIO Directive thus reaffirms the standard already established by the different Directives strengthening procedural safeguards.[62] This could be seen as a missed opportunity to strengthen the position of the accused effectively and to consolidate an important basis for judicial cooperation in the long term. The explicit extension of the right of access to a lawyer in the executing State along the lines of Art. 10 Directive 2013/48/EU,[63] that specifically provides that right in EAW proceedings, would have prevented difficulties in the effective exercise of the rights of defence that arise from a lack of an 'autochthonous' legal counsel. An amendment to Art. 7 Directive 2012/13/EU[64] would have extended the right of access to the case file also to situations of cross-border evidence-gathering through an EIO and it would have thereby allowed the suspected or incriminated person to exercise effectively this fundamental right. The EU legislator's decision not to grant the rights of the suspect and defendant in EIO proceedings the same sensitivity shown to those in EAW proceedings, risks to contribute to exacerbate the inequality of arms between prosecution and defence already inherent in criminal proceedings and thereby to jeopardise trial fairness as such.[65]

At the same time, it should also be considered that cross-border proceedings that involve an EIO are likely to differ from those that involve an EAW in that they are frequently issued and executed in a phase of criminal proceedings that is still secret. Under such circumstances, knowledge or participation by the suspect is foreseen only to a very limited extent, if at all. Defence rights issues such as access to a lawyer or access to the case file in the executing State might therefore in some cases not even arise to begin with. Rather, depending on the investigation measure included in an

60 See Recital 12 EIO Directive.

61 Art. 1 para. 4 and Art. 11 para. 1 (f) EIO Directive.

62 In this respect, already the Proposal for the EIO Directive was harshly criticised: Richard Vogler, 'The European Investigation Order: Fundamental Rights at Risk?' in Stefano Ruggeri (ed), Transnational Evidence and Multicultural Inquiries in Europe (Springer 2014) 46.

63 Directive 2013/48/EU of the European Parliament and of the Council 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 persons and with consular authorities while deprived of liberty (22 October 2013) OJ L 294/1.

64 Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings (22 May 2012) OJ L 142/1.

65 Laura Autru Ryolo, 'European Investigation Order: The Defence Rights Perspective' in Stefano Ruggeri (ed), Transnational Evidence and Multicultural Inquiries in Europe (Springer 2014) 108.

EIO, fundamental rights at stake entail, for instance, the right to private and family life covering domicile, communication and privacy, or the right to property. Moreover, the defendant has a right that investigation measures are in line with the requirements of legitimacy, necessity and proportionality and that this compliance is assessed by the competent authorities. Such an assessment is particularly important in a scenario in which the defendant is not (yet) aware of the investigation as the competent judicial authority functions as sole guardian of the correctness and fairness of the proceedings.
Against this background, the EIO Directives includes obligations for each Member State to offer legal remedies equivalent to those available in a similar domestic case (1). The importance of the availability of legal remedies has been stressed by the CJEU in its 2021 *Gavanozov II* decision[66] (2).

1. Rules on legal remedies under the EIO Directive

In addition to the protection of fundamental rights that is ensured through the obligation to follow both national and European *ordre public* in combination with an imposition to respect both the principle of proportionality and the principle of equivalence, fundamental rights protection is made actionable under Art. 14 EIO Directive that requires that Member States must make legal remedies equivalent to those applicable in a similar domestic case available regarding investigative measures indicated in the EIO. The provision further commands that, so far not in contrast with the need to ensure confidentiality of an investigation, information on the possibilities provided by national law to request a legal remedy must be conveyed in a timely manner and that deadlines must correspond to those applicable for internal cases.[67]
Given the cross-border nature of EIO proceedings, the Directive introduces a so-called 'separation model' according to which the factual grounds for the adoption of an EIO may be challenged only by an action in the issuing State, while the legal protection against their recognition and enforcement must be requested in the executing State.[68] This division follows the rationale of task and responsibility repartition in judicial cooperation proceedings aiming at the greater efficiency of such operations. From a defence perspective, however, the splitting of judicial protection may entail practical difficulties that risk to affect considerably the effective exercise of the right to a legal remedy.[69] In this context, one may think of the spatial distance to the court, a possible or even probable language barrier, the lack of familiarity with the foreign legal system and the double financial burden that could derive from the appointment of a local

66 Ivan Gavanozov II [2021] CJEU C-852/19, EU:C:2021:902.
67 Directive (EU) 2014/41 Art. 14 paras. 3 and 4.
68 Directive (EU) 2014/41 Art. 14 paras. 2 and 7; Böse (n. 28) 159.
69 Schünemann, 'The European Investigation Order: A Rush into the Wrong Direction' (n. 39) 31.

lawyer.[70] The demands for 'multinational defence teams' or a 'double defence' and an appropriate extension of legal aid so as to ensure legal advice that is always qualified and competent must be understood against this background.[71] These demands represent at the same time a criticism of the omission of a corresponding amendment of Art. 10 Directive 2013/48/EU or of an explicit reference in Directive 2016/1919/EU.[72]
Furthermore, the EIO Directive does not provide for a general prohibition of transmission in the case an appeal was lodged to the competent authority of the executing State. Through the principle of equivalence, the EIO Directive links such suspension to an equivalent rule provided under the national law of a Member State in a similar domestic case. Apart from that, the Directive merely refers to the possibility, not to an obligation, for the executing authority to suspend transmission pending the outcome of the appeal.[73] Withholding evidence is only warranted if the transfer would cause serious and irreparable harm to the persons concerned. Such a provision is, however, most likely ineffective, since serious and irreparable damage caused by the collection and transmission of evidence is difficult to substantiate in the investigative phase. Indeed, its introduction and use could still be challenged before the trial court and later the appeal court in the issuing State. Various national implementing laws seem equally to exclude a general obligation to halt the transmission of evidence until an appeal has been decided.[74]
That being said, suspension often remains a purely theoretical solution, since the investigative measures ordered through an EIO are often secret in nature. In these cases, the interested party is informed about the existence of the EIO and the evidence gathered only once the evidence has already been transmitted to the issuing authority. It is therefore only at that stage that it would even be possible to lodge an appeal. In these circumstances, the fundamental question concerns rather the value for the criminal court in the issuing State of a judicial decision from the executing State declaring the unlawfulness of the recognition or execution of the EIO in retrospect. The EIO Directive remains rather vague on this point, as it only refers to the obligation of the issuing State to *consider* a successful challenge against the recognition or execution of

70 Ibid., 33; Bernd Schünemann, 'Solution Models and Principles Governing the Transnational Evidence-Gathering in the EU' in Stefano Ruggeri (ed), Transnational Evidence and Multicultural Inquiries in Europe (Springer 2014) 164; Leonhardt (n. 50) 308–309.

71 Further solution proposals regard either the concentration of legal protection in the executing Member State or the possibility to treat the lodging of an appeal in that Member State also as a simultaneous challenge of the EIO and to forward it therefore to the competent judicial authority in the issuing Member State: Böse (n. 28) 160.

72 Directive (EU) 2016/1919 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (26 October 2016) OJ L 297/1.

73 Directive (EU) 2014/41 Art. 13 para. 2.

74 The German legislator refers similarly to the European legislator to of a mere possibility (Sec. 91i para. 2 Gesetz über die internationale Rechtshilfe in Strafsachen), while the French (Art. 694–41 Code de procédure pénale) and Italian (Art. 13 para. 4 Decreto Legislativo 21 giugno 2017, n. 108) rule out the possibility of suspensive effect in principle but provide for certain exceptions.

an EIO in accordance with its own national law. Rights of the defence and fairness of the proceedings shall be respected when assessing the evidence obtained through the EIO, however, without prejudice to national procedural rules.[75]
In other words, the competent authority in the issuing State is required to consider the declaration of unlawfulness of the EIO handed down in the executing State and to let the consequences provided for by the *lex fori* follow. However, the wording chosen by the EU legislator indicates that they did not intend to impose the automatic recognition of an order issued in the executing State to return or even destroy unlawfully gathered evidence.[76] Since the definition of exclusionary rules is not regulated on the Union level, the consequences of a *lex loci* violation for the main criminal proceeding will depend on the nationally applicable evidence law.
This way, the standard of the most favourable treatment might not always be secured,[77] and it is questionable whether rules on legal remedies included in the EIO Directive[78] ensure a satisfactory safeguard of the rights of the accused. In the absence of a harmonising provision at Union level, the protection level granted to the rights of defence and, more precisely, the right to legal remedy depends on the respective interpretation and protection level of these rights in the different Member States. This already suggests that asymmetries among national legal orders in this respect may have sensitive consequences for effective fundamental rights protection and, possibly, for the basis on which cooperation and mutual recognition among Member States is build, mutual trust.

2. Judicial protection in EIO proceedings according to the CJEU

It is thus not surprising that in one of its early decisions in matters of EIO, the CJEU was confronted with the issue of judicial protection in cross-border investigations and with the question on whether there is an EU-wide minimum standard of protection to be granted by Member States for them to be deemed to protect fundamental rights in a way that allows them to take part in a cooperation system based on mutual recognition. In the (first) *Gavanozov* case, that was decided in 2019, the Court was requested to assess whether Art. 14 EIO Directive, while not imposing any harmonisation with regard to the level of protection of the right to legal remedy, implied at least the requirement that some sort of legal remedy be available with respect to the EIO.[79] More specifically, the Bulgarian Specialised Criminal Court inquired whether a national law that does not provide for any possibility to challenge the substantive grounds for issuing an EIO is in contrast with the Directive and whether its Art. 14 para. 2 grants to a

75 Directive (EU) 2014/41 Art. 14 para. 7; Anna Mosna, 'Europäische Ermittlungsanordnung Und Europäische Staatsanwaltschaft: Die Regelung Grenzüberschreitender Ermittlungen in Der EU' (2019) 131 Zeitschrift für die gesamte Strafrechtswissenschaft 808, 829.
76 Böse (n. 28) 160–161.
77 Ibid., 161.
78 Directive (EU) 2014/41 Art. 14.
79 Ivan Gavanozov [2019] CJEU C-324/17, EU:C:2019:892.

concerned party a direct and immediate right to legal remedy, even when not foreseen under national law.[80]

While excluding that Art. 14 para. 2 EIO Directive can be relied upon to create a right by direct effect,[81] Advocate General Bot argued that the provision on legal remedies in the Directive itself shows that the EU legislator clearly assumed that legal remedies were available in domestic cases and considered it necessary for the Member States to introduce such measures also for an EIO mechanism.[82] The opinion of the Advocate General identifies an obligation for EU Member States 'at the very least and through a "mirror effect", to introduce remedies against the investigative measures indicated in an EIO which are equivalent to those available in a similar domestic case'.[83] Thus, when safeguards such as the legal remedies against the substantive reasons for investigative measures included in an EIO are not provided for in a national legal order, the judicial authorities of that Member State should not be allowed to trigger the EIO mechanism.[84]

In his opinion, Advocate General Bot made it clear that it would not suffice to leave the solution of a structural problem such as the one stemming from the absence of legal remedies within a specific legal order to the executing authority who could decide to invoke a ground for non-recognition or non-execution under Art. 11 EIO Directive. Not only must these grounds be construed narrowly as an exception to the general obligation to execute an EIO. With specific regard to the ground under Art. 11 para. 1 (f) EIO Directive that allows not to recognise or execute an EIO whenever there are substantial grounds to believe the execution of an investigative measure would be incompatible with the executing State's obligation pursuant to Art. 6 TEU and the Charter, the Directive requires a case-by-case assessment of whether the presumption of respect for fundamental rights should be rebutted. This would imply considerable responsibility on executing authorities, which would be at risk to breach themselves fair trial rights as established under the ECHR and the Charter, and lead either to a varying application of Art. 11 para. 1 (f) or to a blanket use of this provision that would jeopardise the practical relevance of the EIO altogether.[85]

The first *Gavanozov* judgment did however not confirm this reasoning.[86] Rather than addressing the issues highlighted in the Advocate General's opinion, the CJEU argued that since the doubts that led to the request for preliminary ruling arose

80 Case C-324/17 Ivan Gavanozov, EU:C:2019:892, para. 16.
81 Case C-324/17 Ivan Gavanozov, Opinion of Advocate General Bot, EU:C:2019:312, paras 98, 100.
82 Ibid., para. 54.
83 Ibid., para. 55.
84 Ibid., para. 70.
85 Ibid., para. 84–87.
86 Michele Simonato, 'Mutual Recognition in Criminal Matters and Legal Remedies: The First CJEU Judgment on the European Investigation Order' (European Law Blog: News and comments on EU law, 1 April 2020) <https://europeanlawblog.eu/2020/04/01/mutual-recognition-in-criminal-matters-and-legal-remedies-the-first-cjeu-judgment-on-the-european-investigation-order/> accessed 11 June 2024.

because of difficulties in the completion of the section on legal remedies in the form set out in Annex A of the Directive, an answer to the question formulated by the Bulgarian Specialised Criminal Court was not required. Instead, the CJEU stated that the form required the issuing authority to indicate if a legal remedy has been sought in the issuing State and to provide further details only in the event such remedy has been sought. There is, hence, no obligation for the issuing judicial authority to include in the form a description of the legal remedies, which are provided for in its Member State against the issuing of the EIO.[87] The chosen approach arguably prioritises the effectiveness of the EIO Directive by facilitating its functioning on the basis of mutual recognition, arguably missing an opportunity to affirm a minimum level of procedural safeguards. Protection in cross-border proceedings of fundamental rights, in general, and of defence rights, in particular, may still vary sensitively depending on the Member States involved. In the wake of the first *Gavanozov* judgment, this seemed to imply not only that the lower level but even that no level of protection may apply.

In *Gavanozov II*[88] the Court's approach changed. The Bulgarian Specialised Criminal Court presented the same question – without any reference to difficulties on how to complete the form set out in Annex A of the Directive – to the CJEU again soon after the above-mentioned judgment had been handed down. In his opinion, Advocate General Bobek clearly states that authorities of Member States that do not provide for any opportunity to challenge the substantive reasons for issuing an EIO should be precluded from participating in the system established by Directive 2014/41/EU on the grounds that their national legal order is not in line with minimum standards required under the ECHR and the Charter.[89] Following this advice, the CJEU establishes that Art. 14 EIO Directive read in conjunction with Art. 47 Charter must be interpreted as precluding national legislation that does not provide for the possibility to challenge the issuing of an EIO requiring searches and seizures or aiming at obtaining the hearing of a witness by videoconference.[90] In addition, in the absence of legal remedies against the issuing of such an EIO within the legal order of a Member State, competent authorities of that Member State may not trigger the EIO mechanism, on the basis of a combined reading of Art. 6 EIO Directive, Art. 47 Charter and Art. 4 para. 3 TEU establishing the principle of sincere cooperation.[91]

With this judgment the CJEU moves from an approach that prioritises the effectiveness of the EIO Directive to one that is more conscious of the importance of securing the very basis on which this measure operates. This decision is the first of its kind in that the Court suspends the use of a mutual recognition instrument in criminal law for

87 Ivan Gavanozov (n. 80) paras 37–38.
88 Case-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902.
89 Case-852/19 *Ivan Gavanozov II*, Opinion of Advocate General Bobek, EU:C:2021:346, paras 73–74.
90 *Ivan Gavanozov II* (n. 88) para. 50.
91 *Ibid*., para. 62.

noncompliance with fundamental rights.[92] In line with the position of both Advocate General Bot and Advocate General Bobek, in *Gavanozov II* the Court embraced a broader vision of effectiveness that refers to judicial cooperation based on mutual trust earned by effective protection of fundamental rights. The CJEU clearly affirms that only in presence of an adequate level of protection of fundamental rights, even if in form of reliance on a ground for refusal that results in hindering cooperation, mutual recognition, which is to be seen as a privilege that cannot be accorded for free, is justified.[93]

The decision in question has sparked considerable attention among stakeholders as the CJEU extends the requirement of judicial protection also to investigative measures and evidence gathering activities that are traditionally non-coercive, such as the hearing of a witness by videoconference. Thus, the *Gavanozov II* decision could potentially be applicable to all investigative activities geared towards acquiring evidence.[94] This reflection broadens the spectrum of the impact of the judgment in question and entails the possibility that also other Member States may fall short of the *Gavanozov II* rule, thereby feeding into concerns for the proper functioning of the main EU cooperation system coined to investigate and to gather evidence abroad.

In early 2022, the General Secretariat of the Council released a Note on the impact of the judgment of the CJEU in the *Gavanozov II* case including a questionnaire and compilation of replies by Eurojust and the European Judicial Network (EJN) on the matter.[95] The objective was to clarify to what extent legal remedies against the issuing of EIOs for the search, seizure and the hearing of a witness via videoconference are available in the Member States to assess the potential impact of the *Gavanozov II* judgment on the practice of EIO proceedings. The questionnaire brought to light that various legal systems across the EU do not foresee legal remedies for every investigative measure, especially when such measure is not categorised as coercive.[96]

92 Alba Hernandez Weiss, 'Effective Protection of Rights as a Precondition to Mutual Recognition: Some Thoughts on the CJEU's Gavanozov II Decision' (2022) 13 New Journal of European Criminal Law 180, 181.

93 Ivan Gavanozov (n. 80) para. 83: 'If it cannot be presumed that a Member State respects fundamental rights, mutual trust cannot be required from other Member States, with the result that mutual recognition cannot be implemented or taken advantage of by that Member State'; Lorenzo Salazar, 'Twenty Years since Tampere: The Development of Mutual Recognition in Criminal Matters' [2019] Eucrim 255, 260; Simonato (n. 86).

94 Michele Panzavolta, 'Judicial Cooperation and the Right to an Effective Remedy' in Michiel Luchtman (ed), Of swords and shields: due process and crime control in times of globalization. Liber amicorum prof. dr. J.A.E. Vervaele (Eleven 2023) 362.

95 Council of the European Union, 'The impact of the judgment of the CJEU in Case C-852/19 (Gavanozov II) — Questionnaire and compilation of replies by Eurojust and the European Judicial Network (EJN)', 14 February 2022, 6052/22.

96 Council of the European Union, 'The impact of the judgment of the CJEU in Case C-852/19 (Gavanozov II) — Questionnaire and compilation of replies by Eurojust and the European Judicial Network (EJN)', 14 February 2022, 6052/22, 11.

Moreover, no uniform approach to the concept of 'legal remedy', within the meaning of the EIO Directive and Art. 47 Charter, nor to its scope could be identified.[97] Given the silence of the EU law maker and of the CJEU on the matter, one must appreciate the *Gavanozov II* judgment for upholding an EU-wide minimum standard of judicial protection. Likewise, one must consider it as the mere starting point of a discussion on what 'legal remedy' means and entails and on what it signifies in terms of minimum standards of judicial protection as, in the aftermath of *Gavanozov II*, such minimum standards are necessary to allow national competent authorities to engage in judicial cooperation in criminal matters.[98]

IV. Coordinates of judicial protection in cross-border investigations

The principle of effective judicial protection, as reaffirmed in Art. 47 Charter, is an essential requirement for ensuring fundamental rights. At the same time, it is vital also for the proper functioning of the rule of law, as suggested by Art. 19 para. 1 TEU.[99] An analytic approach to the principle at issue arguably requires dismantling it into two main components. These present themselves as answers to the two following questions: *who* is dispensing it?; and through *what* instrument is it afforded? It is argued here that an evaluation of what constitutes effective judicial protection derives from the features and from the quality of the so-called 'who-element' (1) and of the so-called 'what-element' (2).

1. Judicial independence as qualifying feature of the 'who-element'

The first element to be considered refers to the core features of the entity that is entrusted with the responsibility of ensuring judicial protection. Hence, the notion of effective judicial protection must be read considering the concept of judicial authority.[100] As EU primary law does not define 'judicial authority', the EU concept of 'court or tribunal' as enshrined in Art. 267 TFEU has traditionally been relied upon. Over the years, the CJEU has laid out the characteristics that an authority must have to qualify as a 'court or tribunal' under EU law. According to settled case law, it must be established by law, it must be permanent and have compulsory jurisdiction, it must decide in *inter partes* procedures and apply rules of law, and it ought to be independent.[101]

97 Council of the European Union, 'The impact of the judgment of the CJEU in Case C-852/19 (Gavanozov II) — Questionnaire and compilation of replies by Eurojust and the European Judicial Network (EJN)', 14 February 2022, 6052/22, 8–11

98 See, on this point, Hernandez Weiss (n. 92) 189.

99 Rosneft [2017] CJEU C-71/15, EU:C:2017:236 [73].

100 See, among others, Adriano Martufi, 'Effective Judicial Protection and the European Arrest Warrant: Navigating between Procedural Autonomy and Mutual Trust' (2022) 59 Common market law review 1371, 1373.

101 Margarit Panicello [2017] CJEU C-503/15, EU:C:2017:126 [27]; Associação Sindical dos Juízes Portugueses [2018] CJEU C-64/16, EU:C:2018:117 [38].

With regard to this latter requirement, the case law of the Court distinguishes between two dimensions, one considering external aspects and one considering internal aspects, as part of judicial independence. The first aspect presumes that a court or tribunal exercises its functions autonomously, free from any hierarchical constraint or subordination to any other body, without taking orders and instructions from other sources, and being protected from external interventions or pressure that would interfere with their judgment.[102] The second aspect requires that the court or tribunal does not have any interest in the outcome of the proceedings (apart from the strict application of the rule of law) to ensure a level playing field for the parties and that it is, therefore, impartial.[103]

Judicial independence has a structural function to ensure fundamental rights protection as confirmed by the phrasing of the provision enshrined in Art. 47 Charter. It is also a reflection of the principle of the separation of powers. Judicial independence thus plays a pivotal role with respect to the sphere of fundamental rights protection and that of the rule of law principle, both values enshrined in Art. 2 TEU.[104] As the assumption that all EU Member share the values set forth in Art. 2 TEU justifies the existence of mutual trust,[105] which is the precondition for mutual recognition[106] and, thus, for the functioning of judicial cooperation in criminal matters, judicial independence must be regarded as an indispensable principle to allow for such cooperation.[107]

A look at the instruments of judicial cooperation will confirm how, while the concept of judicial authority relevant in this field differs from the above notion of 'court and tribunal', the principle of independence plays the same crucial role. Regarding the EAW system, the CJEU, indeed, adapts the concept of judicial authority by including not only courts and tribunals of EU Member States as identified by the criteria set out in its previous case law. In *Poltorak* and in *Kovalkovas*, adopting a more comprehensive approach, the CJEU affirms that the term 'judicial authority' referred to in Art. 6 para. 1 FD EAW is an autonomous concept of EU law[108] and that it includes also other authorities participating in the administration of justice.[109] The Court limits this extension by explicitly excluding police services and administrative authorities from the

102 Wilson [2006] CJEU C-506/04, EU:C:2006:587 [51]; Margarit Panicello (n. 101) para. 37.
103 Wilson (n. 102) para. 52; Margarit Panicello (n. 101) para. 38.
104 Koen Lenaerts, 'The Two Dimensions of Judicial Independence in the EU Legal Order' in Robert Spano and others (eds), Fair Trial: Regional and International Perspectives/Procès equitable: perspectives régionales et internationales. Liber Amicorum Linos Alexandre Sicilianos (Anthemis 2020) 334.
105 LM (n. 46) para. 35; Achmea [2018] CJEU C-284/16, EU:C:2018:158 [34].
106 Tupikas [2017] CJEU C-270/17 PPU, EU:C:2017:628 [49]; LM (n. 46) para. 35.
107 Bob-Dogi [2016] CJEU C.241/15, EU:C:2016:385 [64].
108 Poltorak [2016] CJEU C-452/16 PPU, EU:C:2016:858 [52]; Kovalkovas [2016] CJEU C-477/16 PPU, EU:C:2016:861 [48].
109 Poltorak (n. 108) para. 33.

scope of this definition in accordance with the separation of powers that mandates that the judiciary be distinguished from the executive.[110]

Following this reasoning, the Court excluded that an organ of the executive, such as the Ministry of Justice of the Republic of Lithuania, could be considered as a judicial authority competent to issue EAWs. Decisions of such an authority may therefore not be considered judicial decisions.[111] Conversely, as confirmed in *Özçelik*, the Court explicitly includes public prosecutors that are responsible for the administration of justice among judicial authorities[112] for the purposes of the FD EAW affirming that the decision of such prosecutors must be regarded as a judicial decision on which an EAW may be based.[113]

These judgements emphasise judicial independence as the core feature determining whether a national authority may be considered a judicial authority pursuant to the FD EAW: while prosecutors may not fit all criteria that Luxembourg case law has developed to identify courts and tribunals, they must be independent from the executive power. Indeed, in *OG and PI*, the Court excludes from the scope of judicial authorities under the FD EAW prosecutors that, even on a purely theoretical level, may receive general instructions from the executive.[114] The Court found that prosecutors, such as those of Schleswig Holstein and Saxony, which belong to a hierarchical structure subject to the Minister for Justice of the *Land* in question and may thus be exposed to the 'external' power of the Ministry for Justice to give instructions, do not meet the requirement of independence. This requirement, which must be guaranteed by statutory rules and the institutional framework in which judicial authorities are embedded, ensures that they are able to exercise their responsibilities objectively, evaluating both incriminatory and exculpatory evidence without being exposed to the risk of having of external directions and instructions interfering with this decision-making power.[115]

This case law suggests that the Court's notion of independence in the context of judicial cooperation differs from the one developed considering courts and tribunals in that it includes the external aspect of that principle but does not cover the internal aspect as a necessary element. That being said, the CJEU upholds a strict approach to the necessary standard of (external) independence, as shown in *OG and PI*. This must

110 Ibid., 34–35.
111 Kovalkovas (n. 108) paras 39, 45.
112 As already implied in Kossowski [2016] CJEU C-486/14, EU:C:2016:483 [39].
113 Özçelik [2016] CJEU C-453/16 PPU, EU:C:2016:860 [34].
114 OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau) [2019] CJEU C-508/18 and C-82/19 PPU, EU:C:2019:456 [88].
115 Ibid., 73–74; applying the same criterion to the position of the Prosecutor General of Lithuania, the Court concluded that given the benefit of independence anchored in the Constitution of the Republic of Lithuania and in the Law on the Public Prosecutor's Office of the Republic of Lithuania, the Prosecutor General may be regarded as 'issuing judicial authority' under the FD EAW: PF (Prosecutor General of Lithuania) [2019] CJEU C-509/18, EU:C:2019:457 [55–56].

be understood considering the fundamental rights at stake in extradition and surrender proceedings that include the right to liberty and security.

Turning towards the independence threshold required for judicial authorities in EIO proceedings, the reasoning changes. Presented again with a question referring to the possibility of considering a German public prosecutor's office—this time from Hamburg—as judicial authority, the Court distinguishes the notion of judicial authority applicable in this context from the one adopted as autonomous concept for EAW proceedings. In *Staatsanwaltschaft Wien*, the CJEU relies upon textual, contextual and teleological differences between the two legal instruments in question to reach a more nuanced conclusion.[116]

First, the CJEU considers that the EIO Directive mentions public prosecutors explicitly among the 'issuing authorities' in Art. 2 (c) EIO Directive. Second, the procedures and guarantees under the EIO Directive—including those relating to the respect for fundamental rights of the person concerned—are distinguished from those governing the issuing of an EAW. Third, the difference in the objective is appreciated by observing that the EIO aims to have one or several investigative measures carried out to obtain evidence and that it does therefore not interfere with the right to liberty of the person concerned. Against this background, the Court delivers an interpretation of 'judicial authority' for the purposes of the EIO Directive that includes the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor and the executive and regardless of the exposure of that public prosecutor to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting an EIO.[117]

The fact that the CJEU accepts also authorities that are not equipped with 'full' independence for EIO proceedings suggests that the Court envisages judicial independence as a matter of degrees that can be adjusted according to the sensitivity of the fundamental rights at stake. The Court acknowledges limitations to such correlation, first, in *Spetsializirana Prokuratura*.[118] Relying on the principle of equivalence, the CJEU excludes that a prosecutor may issue autonomously an EIO for an investigative measure —in this case it concerned the collection of traffic and location data associated with telecommunications—for which in a similar domestic case the authorisation of a judge, i.e. an authority that meets the criteria to be considered a court or tribunal in the sense of Art. 267 TFEU, would be required.[119]

116 Staatsanwaltschaft Wien [2020] CJEU C-584/19, EU:C:2020:1002 [74].

117 Ibid., 75.

118 *Spetsializirana prokuratura* [2021] CJEU C-724/19, EU:C:2021:1020; see also Anna Mosna, 'Spetsializirana Prokuratura: Principle of Equivalence and Allocation of Competence to Issue a European Investigation Order' (*EU Law Live*, 12 January 2022) <https://eulawlive.com/analysis-spetsializirana-prokuratura-principle-of-equivalence-and-allocation-of-competence-to-issue-a-european-investigation-order-by-anna-mosna/> accessed 23 March 2024.

119 Spetsializirana prokuratura (n. 118) paras 35, 39, 44–45.

This resonates also with a previous judgment of the CJEU in the *Prokuratuur* case that was recently confirmed in *La Quadrature du Net and Others*[120] and in *Procura della Repubblica presso il Tribunale di Bolzano*.[121] Reading Art. 15 para. 1 of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)[122] in light of Arts. 7, 8, 11 and 52 para. 1 Charter, the Court established that prosecutors that conduct the investigations with a view to bringing public prosecution do not have the power to authorise access to traffic and location data for the purposes of a criminal investigation.[123] Such authorisation must be granted either by a court or tribunal or by an independent administrative body having a status enabling it to act objectively and impartially and being free from any external influence.[124] Thus, the Court adds the requirement of impartiality back in as an additional layer of protection given the sensitivity of the interference enabled by investigation measures aiming at collecting traffic and location data and allowing to draw precise conclusions about a person's private and family life.[125]

The rationale behind the decision in *Prokuratuur* and the more recent case law cited above hints to possible problematic issues that the (lower) independence standard set in *Staatsanwaltschaft Wien* raises, and that are not necessarily neutralised by the principle of equivalence, pursuant the decision in *Spetsializirana Prokuratura*. While many investigative measures will interfere with fundamental rights that do not reach the sensitivity of the right to liberty, the latter is not the only fundamental right whose effective judicial protection may require a higher level of independence. This is especially true when considering the invasiveness of investigation measures procuring access to digital data and the delicacy of the interference with right to privacy and protection of personal data that such measures entail.

The second limitation to the above-mentioned correlation between fundamental rights at stake and required degree of independence is established in *Staatsanwaltschaft Graz*. In this judgment the Court makes clear that even though the German tax office for criminal tax matters and tax investigations may have the power at a national level to take on the role and function of prosecutors for certain offences, they do not have the power to autonomously issue EIOs. Rather than allowing an isolated reading of the principle of equivalence favouring the circulation of the lowest standard of protection, the Court established that following the principle of the separation of powers, which

120 La Quadrature du Net and Others [2024] CJEU C-470/21, EU:C:2024:370.
121 Procura della Repubblica presso il Tribunale di Bolzano [2024] CJEU C-178/22, EU:C:2024:371.
122 Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (12 July 2002) OJ L201/37 as amended by Directive 2006/24/EC and by Directive 2009/136/EC.
123 Prokuratuur [2021] CJEU C-746/18, EU:C:2021:152 [57, 59].
124 Ibid., 53.
125 See, in this sense, La Quadrature du Net and Others (n. 120) para. 125; Procura della Repubblica presso il Tribunale di Bolzano (n. 121) para. 61.

characterizes the operation of the rule of law, the judiciary and the executive power must be distinguished.[126] As tax authorities are in the province of the executive, they do not qualify as judicial authorities under the EIO Directive, which is confirmed by the fact that they are not mentioned in Art. 2 (c) (i) EIO Directive. Tax authorities may issue EIOs, but they may do so pursuant Art. 2 (c) (ii) EIO Directive. Therefore, they need validation from a judge, a court, an investigating judge, or a prosecutor.[127]

Despite these limitations, prosecutors are entrusted with more power and responsibilities in EU cross-border evidence gathering than in EAW procedures. In cases where no judicial control by an authority matching the criteria developed by CJEU case law to identify courts and tribunals under Art. 267 TFEU is foreseen, they are the ultimate guardian of fundamental rights protection and of the coherent and correct application of EU law. While both fundamental rights protection and uniform application of EU law are crucial to ensure effective judicial protection, prosecutors are arguably kept in a sub-optimal position to do so.

The CJEU decision in *XK* confirms that prosecutors—in the specific case it was an Italian public prosecutor—while being considered independent enough to take an autonomous decision as executing authority, are considered not meeting the requirement of having to decide in *inter partes* procedures.[128] As they cannot be regarded as exercising a judicial function, they do not qualify as an authority considered under Art. 267 TFEU. As such, they cannot access the preliminary ruling mechanism through which they could seek the CJEU's guidance in their endeavour to award effective judicial protection.

The reasoning that investigative measures may be deemed merely provisional in nature as the final decision on the evidence gathered and transferred is to be taken by the competent judicial authorities in the issuing Member State certainly applies to many instances of cross-border evidence gathering, especially noncoercive ones.[129] However, considering the sensitivity of the fundamental rights at stake, the scrutiny in the issuing Member State, once evidence is transmitted, may be able to avoid violations of the right to a fair trial of the suspect or accused person, but not always would it be able to remedy (adequately) the prejudice to other fundamental rights including the right to private and family life and to the protection of personal data which could have, instead, been prevented by a decision of the executing authority.

The acceptance of a lower independence standard has led to the recognition of public prosecutors as judicial authorities in EU judicial cooperation proceedings. The range of responsibilities that comes with it and that is increased by the transnational nature of such proceedings seems, however, to be accompanied by an asymmetry between the powers attributed to them and the instruments offered to them to ensure consistently effective judicial protection in the exercise of their function.

126 Staatsanwaltschaft Graz [2023] CJEU C-16/22, EU:C:2023:148 [35, 46].
127 Ibid., 37, 46.
128 XK [2021] CJEU C-66/20, EU:C:2021:670 [38].
129 Ibid., 41–42.

2. Models of judicial control in the EIO system and beyond

The second element to be considered is the instrument through which judicial protection is ensured. Article 14 EIO Directive refers to 'legal remedies' without, however, defining the concept more closely. Nor has CJEU case law acknowledged the existence of an autonomous concept of legal remedy for the purposes of EU law. It does therefore appear legitimate to read it as an overarching notion covering different forms of judicial scrutiny.

A flexible concept allows national procedural autonomy to shape structures of judicial control according to the dynamics and requirements of their procedural systems. Accordingly, Member States may provide for specific and immediate remedies against single measures, such as oppositions or *interim* appeals, or defer the control to a later stage, such as the evaluation on evidence admissibility or even the appeal of the judgment of first instance. Similarly, national systems may require prior review or a subsequent remedy. The option between the two forms of scrutiny is likely to depend on the type of investigation measure, the fundamental rights with which such measure interferes and the degree of interference—with severe interferences with fundamental rights usually warranting an *ex ante* review of the measure. Moreover, this determination may vary depending on the authority that conducts the investigations: police services, public prosecutors or investigating judges. Likewise, requirements of confidentiality of the investigations and of the specific investigative measure will have an impact on the nature of the protection tool. Whether judicial control occurs *ex officio* or because an opposition or an appeal is filed by the person concerned will also depend on the secrecy of the investigations at a given stage and, thus, on the awareness of the proceedings by the person concerned.

Cross-border investigations which, by definition, combine segments of different national legal frameworks add another layer of complexity as activities are spread over different systems, with different rules and protection structures becoming applicable. At the latest since the decision in *Gavanozov II* it is clear that stark asymmetries between national control systems may not only be prejudicial to the protection of the fundamental rights of the individuals—suspects, accused persons or third persons—involved but also to the functioning of EU judicial cooperation. Thus, what kind of control ensures the necessary degree of judicial protection?

When it comes to cross-border evidence-gathering, three main moments of control can be identified. These include the judicial decision on the issuing of an EIO, the judicial decision on the recognition and execution of that EIO and the decision on the legitimacy and admissibility of the results of the investigative activities carried out in the executing state once they are transferred back to the issuing state. These need to be individually assessed.

Judicial control in the issuing phase includes an assessment of the legality, necessity and proportionality of the investigative measure in question. Proportionality is a key principle enshrined in the EIO Directive. Yet a clear definition of what it entails is missing, as a study conducted by a consortium of universities in the context of

the MEIOR Project has stressed.[130] While competent authorities in different Member States perceive a difference between so-called internal proportionality regarding the evaluation upon which the adoption of measures is based and a cross-border proportionality that refers to the assessment made for the purposes of issuing an EIO, i.e. 'sending that measure abroad', guidance is needed regarding which additional factors, e.g. costs or time intensity, would have to be considered.[131]

While there is no guidance (yet) from the CJEU on this exact point, in its decision in *Procura della Repubblica presso il Tribunale di Bolzano* the Court highlights the importance of a prior proportionality check *in concreto* by a judicial authority or an independent administrative authority—in this case, a judge responsible for preliminary investigations—of the seriousness of the offence under investigation to ensure that the proportionality requirement of measures such as the collection of all data with tracking and localisation methods of incoming and outgoing telephone conversation, communications and connections made in an investigation for aggravated theft of telephones is met.[132] Although the case underlying this judgment does not refer to a cross-border investigation, the position taken by the Court indicates its awareness and sensitivity towards the role of a thorough proportionality check for ensuring effective judicial protection in criminal investigations.[133]

Judicial control in the executing country follows the separation model established by Art. 14 EIO Directive according to which substantive reasons (such as fulfilment of the proportionality requirement) for issuing an EIO may be scrutinised only in the issuing state, while judicial control in the executing state extends only to aspects related to the recognition and execution of the EIO. A first reading of the EIO Directive would, however, suggest that the control of the executing authority may reach further. Art. 6 para. 3 EIO Directive allows the executing authority to consult the issuing authority if it harbours doubts about the existence of the conditions (that include the proportionality of the measure) for issuing an EIO. Article 10 para. 3 EIO Directive confers the executing authority the power to have recourse to a different investigative measure, among others, if the alternative measure would achieve the same result by less intrusive means. Both provisions confer the executing authority the competence to exercise a proportionality assessment on their own.

The depth of such control is however unclear. A thorough check would require the executing authority to have access to the complete case file to make an informed decision. This is, however, not an option since it would annihilate the aim of the EIO

130 The consortium included KU Leuven (PI Prof. Michele Panzavolta) as coordinator and University of Padua, Gdansk University, Complutense University of Madrid and Uppsala University as project partners, see https://www.meior.org/ accessed 3 June 2024.

131 Michele Panzavolta, 'Mould EIO Review—MEIOR' (MEIOR Conference—Judicial scrutiny in EIO proceedings, KU Leuven, 25 March 2024) <https://www.meior.org/_files/ugd/24818c_6fc1986cf4c24bb5aa7d68e76222a158.pdf> accessed 3 June 2024.

132 Procura della Repubblica presso il Tribunale di Bolzano (n. 121) paras 17, 43, 51, 61, 63.

133 See, in this regard, ibid., 42, 60.

Directive to provide a means to efficient cooperation.[134] With the limited information at their disposal, executing authorities are likely to be able to except only manifest violations of the principle of proportionality and, in general, to exercise a rather 'light' control that verifies that the national and the European *ordre public* are not infringed, that no ground for refusal applies and that, pursuant to the *Gavanozov II* rule, legal remedies are available in the issuing Member State.[135]

In its first judgment relating to the EPPO and more specifically to the allocation of judicial control in cross-border investigations under Art. 31 EPPO Regulation the Court establishes that for EPPO proceedings to be, at least, as efficient as investigations through EIO cross-border cooperation, the same separation model set forth in Art. 14 EIO Directive must be adopted. In its decision *GK and others* the CJEU provides that the review conducted in the Member State of the assisting European Delegated Prosecutor (EDP) may relate only to the matters concerning the enforcement of the measure, while matters concerning the justification and adoption of an investigative measure pertain, so far provided under national law, to the competence of the judicial authority in the Member State of the handling EDP.[136] Also in this case, however, the CJEU relies on a form of *de facto* harmonisation aiming at securing a minimum standard of judicial protection at least in those cases in which fundamental rights might be interfered with in a serious way. It does so by requiring that investigative measures be subject to prior judicial review in the Member State of the handling EDP in the event of serious interference with the rights of the person concerned as guaranteed by the Charter.[137]

In both cases the Court intervenes to add, or shape, layers of protection in the issuing Member State and in the Member State of the handling EDP, respectively. It thereby does not deny that judicial control is crucial in all involved Member States as there are, at times different, fundamental rights at stake both in the country from which the order or assignment (when speaking of cross-border investigations of the EPPO) originates and in the jurisdiction in which it is to be executed. However, the Court acknowledges the limited oversight that judicial authorities in the latter country have and that it is for the judicial authority in the originating country to take on the main responsibility of judicial protection and to conduct both a specific assessment at the moment of the issuing and an overall assessment once the results are sent over. It is

134 Empirical studies conducted in the course of the MEIOR project do equally not refer in any way to file transmissions (and translations), see also https://www.meior.org/ accessed 3 June 2024.

135 Panzavolta (n. 131); Bachmaier (n. 50) 55; Frank Zimmermann, 'Die Europäische Ermittlungsanordnung: Schreckgespenst Oder Zukunftsmodell Für Grenzüberschreitende Strafverfahren?' (2015) 127 Zeitschrift für die gesamte Strafrechtswissenschaft 143, 169.

136 GK and others [2023] CJEU (Opinion of Advocate General Ćapeta) C-281/22, EU:C:2023:510 [71–72]; see, on this point, Hans-Holger Herrnfeld, 'Efficiency Contra Legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others (Parquet Européen)' [2023] Eucrim 229.

137 GK and others [2023] CJEU C-281/22, EU:C:2023:1018 [78].

against this backdrop that the third phase of control reveals itself as a decisive moment to ensure effective judicial protection.

In this context the core precondition for an effective assessment, for instance by the trial judge in the issuing Member State, may be captured with the concept of transparency. To assess the legitimacy and admissibility of evidence gathered abroad, bearing in mind that the judge of one Member State is not in the best position to evaluate activities carried out in another Member State by the authorities of that country and according (mainly) to the *lex loci*. The findings of the MEIOR Project, as first formulated by *Michele Panzavolta*, propose that this assessment be made in view not of national but of European standards on the basis of information included in a dedicated response form that is to completed by the executing authority and transferred together with the results of the investigation. The MEIOR Project therefore proposes the introduction of a new 'Annex E' to EIO Directive in which the executing authority is required to indicate, with translation, the applicable legal basis for the investigative measure in question, to briefly outline the steps and activities undertaken and to mention specifically the applicable procedural safeguards and the way they were granted.[138]

This is an arguably workable solution to equip the competent judicial authorities confronted with evidence gathered abroad with an effective tool to identify evidence gathered in violation of the European *ordre public* and thus in violation of fundamental rights—as the last bastion of judicial protection on this matter. Such control is even more important as there is no EU harmonisation in matters of evidence admissibility or, at least, exclusionary rules. That being said, some indication to this end comes from the CJEU. In its recent *M.N. (EncroChat)* case, it affirms that Art. 14 para. 7 EIO Directive requiring Member States to ensure that rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO must be interpreted as implying an obligation to exclude evidence from criminal proceedings on which a party is not in a position to comment effectively.[139] The Court does, however, not clarify the criteria (and rationale behind them) to reach such a conclusion also in other scenarios.[140]

Overall, this case law shows how the Court is increasingly concerned with establishing, despite the general principle of procedural autonomy in this field, a common standard through actions of *de facto* harmonisation. While this must be appreciated as the indication of standards tends to establish more legal certainty, the question arises as

138 Panzavolta (n. 131).

139 MN (EncroChat) [2024] CJEU C-670/22, EU:C:2024:372 [130–131]; see also Prokuratuur (n. 123) para. 44.

140 For a discussion of rationales for excluding illegally obtained evidence in criminal cases, see Michele Panzavolta and Elise Maes, 'Exclusion of Evidence in Times of Mass Surveillance. In Search of a Principled Approach to Exclusion of Illegally Obtained Evidence in Criminal Cases in the European Union' (2022) 26 The International Journal of Evidence & Proof 199.

to whether the time has come for the EU legislator to intervene and provide minimum harmonisation in this field.

V. Conclusion

The interpretation of the concept of mutual recognition included in the EIO Directive is the result of the experience with other EU instruments, first and foremost the EAW, that are based on this principle and on the consideration of the key function of evidence acquisition in criminal proceedings. The EIO Directive establishes a moderate form of mutual recognition, which signals the overcoming of the previously accepted, almost dogmatic understanding of mutual trust. The adoption of a concept of mutual trust as rebuttable presumption accompanied by a statement of principle on the need to adequately protect fundamental rights represents an important step forward compared to the rationale guiding the understanding of mutual trust and mutual recognition in relation to the application of an EAW.[141]

The EIO Directive reflects a more realistic and therefore more mature interpretation of the principle of mutual recognition. This is a promising compromise between efficiency for uncomplicated cross-border collection of evidence and enough flexibility to ensure the protection of defence rights for such evidence to be ultimately usable. It thereby entails a desirable signal effect for future instruments of mutual recognition.[142]

The above-mentioned flexibility also characterises the framework of judicial protection enacted by the EIO Directive and the case law of the CJEU. The separation model responds to efficiency as well as to feasibility needs, while concentrating the bulk of the protection responsibility in the competence of the judicial authorities in the issuing country. The fact that this model has been espoused by the Court also regarding EPPO cross-border investigations establishes the EIO system as an interesting case study to pinpoint the main characteristics and the most crucial issues linked to effective judicial protection in cross-border evidence gathering.

These can be summarised as follows. First, judicial independence: the more sensitive the fundamental right at stake and the more serious the intervention, the higher degree of independence that a competent judicial authority needs to reach. It is crucial that the responsibilities match the available tools to ensure protection. Second, thorough proportionality checks when deciding on the issuing of an investigative measure: streamlining and clarifying the criteria to consider are vital to consolidate this aspect of judicial protection. Third, transparency: information about legal and factual elements concerning the activities carried out in the executing Member State allows the competent judicial authority in the issuing Member State to make an informed assessment and, thus, to provide more comprehensive judicial protection.

Observing the increasing integration of EU judicial systems through the lens of cross-border evidence gathering, it becomes apparent that more clarity and consensus on

141 Allegrezza, Mosna and Nicolicchia (n. 28) 187–188.
142 Leonhardt (n. 50) 59.d

these matters will ensure more vigorous judicial protection and facilitate even more cross-border cooperation while upholding the values on which the area of freedom, security and justice is built.