Reports of Cases

OPINION OF ADVOCATE GENERAL BOBEK
delivered on 29 April 2021 [1]

Case C-852/19

Spetsializirana prokuratura
v
Ivan Gavanozov

(Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2014/41/EU – European Investigation Order – Search of residential and business premises of a person and the seizure of certain items – Hearing of the person concerned as a witness – Absence of remedies in the issuing Member State – Sincere cooperation – Mutual trust)

I. Introduction

1. Mr Ivan Gavanozov is the subject of criminal proceedings in Bulgaria for offences relating to value added tax (VAT). Those offences appear to have involved the participation of shell companies, including a company established in the Czech Republic and its representative, who is now a witness in the criminal proceedings.

2. The Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), the referring court in the main proceedings, ordered a search of the business premises of the Czech company; a search of the residence of the witness; the seizure of certain documents, if found therein; and a hearing of the witness by way of videoconference. Since this evidence needs to be obtained in the Czech Republic, the referring court considers it necessary to issue a European Investigation Order (EIO).

3. However, Bulgarian legislation does not allow for any remedies either against the national investigative measure, or against an EIO issued on its basis. Since the national legal system does not provide for any effective legal remedy to challenge the lawfulness of searches and seizures, that Member State has been found repeatedly in breach of the minimum standards under Article 13 of the European Convention on Human Rights ('ECHR') by the European Court of Human Rights ('ECtHR'). Within such a context, is the absence of *any* remedy in the *issuing* Member State compatible with Directive 2014/41/EU regarding the European Investigation Order in criminal matters [2] and with the Charter of Fundamental Rights of the European Union ('the Charter')?

[1] Original language: English.

[2] Directive of the European Parliament and of the Council of 3 April 2014 (OJ 2014 L 130, p. 1).

II. Legal framework

A. EU law

4. Recital 22 of Directive 2014/41 states that: 'Legal remedies available against an EIO should be at least equal to those available in a domestic case against the investigative measure concerned. In accordance with their national law Member States should ensure the applicability of such legal remedies, including by informing in due time any interested party about the possibilities and modalities for seeking those legal remedies. …'

5. Article 1(4) of Directive 2014/41 provides that:

'This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.'

6. Article 11 lists the grounds for non-recognition or non-execution. Its paragraph (1)(f) provides that recognition or execution of an EIO may be refused where 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

7. Article 14 of the same directive, which falls under Chapter III, 'Procedures and safeguards for the executing State', is entitled 'Legal remedies'. It is worded as follows:

'1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.

2. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.

3. Where it would not undermine the need to ensure confidentiality of an investigation under Article 19(1), the issuing authority and the executing authority shall take the appropriate measures to ensure that information is provided about the possibilities under national law for seeking the legal remedies when these become applicable and in due time to ensure that they can be exercised effectively.

4. Member States shall ensure that the time limits for seeking a legal remedy shall be the same as those that are provided for in similar domestic cases and are applied in a way that guarantees the possibility of the effective exercise of these legal remedies for the parties concerned.

5. The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO.

6. A legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.

7. The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national

procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.'

B. Bulgarian law

8. Article 6(1) of the Zakon za Evropeyskata zapoved za razsledvane (Law on the European Investigation Order, 'the ZEZR') (DV No 16 of 20. 2. 2018) lays down 'conditions for issuing a European Investigation Order':

'The competent authority in accordance with Article 5(1) shall issue a European Investigation Order following an individual assessment, on condition that:

1. A European Investigation Order is necessary and appropriate in light of the purpose of the criminal proceedings, taking account of the rights of the accused or the defendant.

2. The investigative and other procedural measures for which the European Investigation Order is issued could be carried out in a similar case under the same conditions under Bulgarian law.'

9. No provision of ZEZR provides for a possibility of challenging the issuance of an EIO.

10. Article 161(3) of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, 'the NPK') (DV No 86/05, in the version applicable at the time of the order for reference DV No 83/19) states that 'search and seizure measures in court proceedings shall be carried out on the orders of the court in which the proceedings are pending'.

11. Article 341(3) of the NPK excludes the possibility of appealing against acts other than those expressly listed. Thus, the NPK does not allow for orders for the hearing of witnesses or for a search and seizure of residential and business premises to be challenged.

12. The referring court further explains that the person concerned by the search and seizure or the hearing of the witness cannot challenge the decision because he is not party to the proceedings. It refers to Article 318(1) of the NPK according to which 'proceedings in the appellate court shall be initiated upon objection of the public prosecutor or complaint of the parties'. Article 253 of the NPK lists as parties to the proceedings: the public prosecutor, the accused party and defence counsel; the private claimant and private prosecutor; the civil claimant and the civil defendant.

III. Facts, national proceedings and the questions referred

13. Mr Gavanozov stands accused of running an organised criminal group, the purpose of which was to avoid the assessment and payment of VAT on a particularly large scale. In that context, a Czech company is alleged to have issued four false invoices that were not based on any actual deliveries.

14. In the pre-trial phase of the proceedings, no investigative measures were carried out in order to obtain evidence against the Czech company or the witness, who is the representative of that company. It was established, nonetheless, that Mr Gavanozov and the witness had communicated with each other either through an interpreter or in English because neither of them spoke the other's native language.

15. Although the witness was summoned twice, he failed to appear, claiming prior commitments. Instead, he provided a statement in Czech maintaining that, due to the language barrier, he used an interpreter in his business dealings with Mr Gavanozov. The witness did not attend the hearing that took place subsequently and failed to indicate when he would be able to attend.

16. The case file before the referring court contains an exclusive representation contract, drafted solely in Bulgarian, between Mr Gavanozov and the Czech company (represented by the witness). That contract is signed by the witness and bears the stamp of the Czech company.

17. The referring court decided that it was necessary to obtain new evidence on the actual relationship between Mr Gavanozov and the witness. For that reason, the referring court ordered the following investigative measures:

– a search and seizure at the business premises of the Czech company in order to establish whether the exclusive representation contract is included among the documents of the Czech company and whether documents have been issued in connection with its performance;

– a search and seizure at the witness's home in order to establish whether the witness is retaining in his home documents of relevance to the criminal activity;

– that the witness be questioned by videoconference call, as his argument that he has prior commitments is tantamount to a refusal to appear in Bulgaria for questioning.

18. Under national law, that court order is final and cannot be challenged by the parties to the proceedings or by the persons concerned, that is to say either by the Czech company or by the witness.

19. In view of the fact that the investigative measures have to be carried out by the Czech authorities, in accordance with their territorial jurisdiction, the referring court considers it necessary to issue an EIO for a search and seizure operation to be carried out at the offices of the Czech company and at the home of the witness, and also for that witness to be interviewed. However, the referring court harbours doubts about the compatibility of the national legislation with EU law since that law does not provide for any remedies against the issuance of an EIO.

20. It is in this factual and legal context that the Spetsializiran nakazatelen sad (Specialised Criminal Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'Is national legislation which does not provide for any legal remedy against the issuing of a European Investigation Order for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive [2014/41] and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 [ECHR]?

Can a European Investigation Order be issued under those circumstances?'

21. Written observations were submitted by the Czech, French, Italian and Austrian Governments, as well as by the European Commission.

IV. Assessment

22. This Opinion is structured as follows. I shall start by clarifying the scope of Article 14(1) of Directive 2014/41: is that provision indeed applicable to both the executing and the issuing Member States? (A) Next, I shall turn to the nature of the legal remedy required under that provision and Article 47 of the Charter, in view of the minimum standards set out in the ECHR and the case-law of the ECtHR (B). It is only after making those clarifications that I shall be able to turn to the key issue raised by the referring court in the present case: what consequences shall the issuing authority draw from the fact that its national law is non-compliant with the minimum standards of the ECHR, as previously established on a number of occasions by the case-law of the ECtHR (C)?

23. It might be added that Article 14 of Directive 2014/41 was already the subject of the request for a preliminary ruling made by the same referring court in *Gavanozov*.[3] However, in its answer in that case, the Court decided to focus on the manner in which the issuing authority should complete the EIO form. In contrast to the Advocate General,[4] the Court did not analyse the exact implications of Article 14 of Directive 2014/41.

A. Does Article 14(1) of Directive 2014/41 apply to the issuing State?

24. I note that Article 14(1) of Directive 2014/41 is silent as to whether the obligation contained therein is addressed to the issuing or executing State. It refers to the obligation on *Member States* to ensure that legal remedies *equivalent* to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO. Recital 22 of Directive 2014/41 relating to legal remedies is likewise worded in general terms, stating that 'legal remedies available against an EIO should be at least equal to those available in a domestic case against the investigative measure concerned. …'.

25. The first paragraph of Article 14 of Directive 2014/41 is similar to the fourth paragraph of that article, it is also addressed to 'Member States' and also lays down the obligation to provide equivalent and effective time limits applicable to legal remedies. At the same time, paragraph 6 does not refer to any specific Member State and also appears to be of general application. Those paragraphs thus differ from the other paragraphs of Article 14, namely paragraphs 2, 3, 5 and 7 which concern expressly either both the executing and issuing States (paragraphs 2, 3 and 5), or the issuing State only (paragraph 7).

26. In view of the general nature of the language of Article 14(1) of Directive 2014/41, and the use of other more precise terms therein, doubts may arise as to which State, the executing and/or issuing, that provision applies. Those doubts may also be amplified by the structure and logic of Directive 2014/41.

[3] Judgment of 24 October 2019 (C-324/17, EU:C:2019:892).

[4] Opinion of Advocate General Bot in *Gavanozov* (C-324/17, EU:C:2019:312).

27. First, Article 14 of Directive 2014/41 is placed under Chapter III, entitled 'Procedures and safeguards for the executing State'. However, the provisions of Directive 2014/41 which relate primarily to the *issuing* State are found in its Chapter II, entitled 'Procedures and safeguards for the issuing State'. What logic is there in placing obligations concerning the legal remedies for the issuing Member State into the section of the directive concerned with the executing Member State?

28. Second, it is rather difficult to see what the obligation to provide *equivalent* legal remedies would specifically entail for the *issuing* Member State. The investigative measures issued by that Member State are likely to be equivalent by default, since they are usually likely to be issued first in the form of a national legal act. Or is there an unspoken assumption that there could be Member States that would expressly derogate from their standard national system of remedies only in circumstances where they are issuing an EIO, in order effectively to discriminate against (and to lower their level of protection with regard to) investigative measures to be carried out in other Member States?

29. It is rather difficult to imagine such a scenario. Moreover, under Article 6(1)(b) of Directive 2014/41, the issuing State can issue an EIO only where 'the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case'. Those measures are therefore, in principle, already subject to a domestic system of legal remedies where such remedies exist.

30. Thus, in logical and structural terms, Article 14(1) of Directive 2014/41 would make more sense if it were applicable to the executing Member States. In the system of mutual recognition, guarantees of equivalence usually tend to be applicable to the executing Member States, rather than the issuing Member States. With regard to the latter, the requirement of equivalence appears somewhat circular.

31. However, all interested parties to the present proceedings appear impliedly to embrace the starting assumption that Article 14(1) of Directive 2014/41 is applicable to Member States acting *at both ends*: as the *executing* Member State or as the *issuing* Member State. For the reasons that follow, I can also accept that premiss as the starting point.

32. First and perhaps most straightforward, there is the matter of the language and syntax: on the face of it, 'Member States', without any further qualification, is most naturally to be interpreted as including both the executing and issuing Member States.

33. Moreover, as set out above in point 25 of this Opinion, Article 14 of Directive 2014/41 refers specifically to the *executing* or *issuing* Member State or *executing* and *issuing* authorities in its various paragraphs. Similarly, by way of systemic analogy, the Freezing Order Framework Decision [5] and the European Evidence Warrant Framework Decision [6] referred, in their respective provisions concerning legal remedies, to *Member States* before specifying expressly the aspects of legal remedies that were to be made available in the issuing or executing State respectively. A similar pattern has been embraced by Regulation (EU) 2018/1805 on the mutual recognition of

[5] Article 11, entitled 'Legal remedies', of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ 2003 L 196, p. 45).

[6] Article 18, entitled 'Legal remedies', of Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJ 2008 L 350, p. 72).

freezing orders and confiscation orders.[7] Its Article 33 is entitled 'Legal remedies in the *executing State* against the recognition and execution of a freezing order or confiscation order'.[8] That same approach was taken by the legal predecessor of that regulation.[9]

34. It would thus appear that when the EU legislature wished to be clear and indeed to distinguish specifically between the issuing and the executing Member States, it was very much able to do so. The fact that in Article 14(1) of Directive 2014/41 (and also in Article 14(4)), the EU legislature chose to use the more general term of 'Member States' seems to indicate the intention to include both the issuing *and* executing States, the title of Chapter III notwithstanding.[10] Moreover, if that chapter is able to contain provisions expressly relating to the *issuing* State, despite the fact that its heading refers solely to the *executing* State, then the same chapter is surely able to also contain provisions that are relevant for *both* the issuing and executing States, designated as a whole by the term '*Member States*'.

35. Second, the fact that Article 14(1) of Directive 2014/41 may also apply to the issuing Member State can equally be inferred from Article 14(2) of that directive. Those two paragraphs bring about a 'jurisdictional split'. While Article 14(1) sets out a general obligation of equivalence in legal remedies, Article 14(2) reserves the review of the *substantive* grounds for the issuing of an EIO to the *issuing* State.

36. The fact that the review of substantive grounds is limited only to the issuing Member State is entirely logical. However, if Article 14(2) of Directive 2014/41 were to be read as a jurisdiction *exclusion* clause (removing the judicial review of substantive grounds from the executing Member State), would that not also imply an initial assumption that there is some sort of review possibility in the issuing Member State? Otherwise, Article 14(2) of that directive would not mean that 'only the issuing Member State can provide for review of substantive grounds of an EIO', but rather in practice that 'no one can provide for such a review' if, in the issuing State, no such review exists. In a case such as that at hand, Article 14(2) would amount to a *renvoi* into the void. The risk that such a reading exposes may thus lead to the suggestion that the (narrower) scope and focus of Article 14(2) may indeed imply that Article 14(1) must be broader and applicable to both the executing and issuing Member States.

37. Third, the same conclusion is also confirmed by the overarching purpose of Directive 2014/41. As the Court noted, this directive seeks, through a simplified and more effective system based on the EIO as a single instrument, 'to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union to become an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States'.[11] The latter is based 'on the rebuttable presumption that other Member States comply with EU law and, in particular, fundamental rights'.[12] The simultaneous attention paid by Directive 2014/41 to the efficiency of the judicial cooperation and respect of fundamental rights is expressed in Article 1(2) and (4). While Article 1(2) imposes the obligation to execute an EIO, paragraph 4 of that article recalls the need to respect the fundamental rights.

7 Regulation of the European Parliament and of the Council of 14 November 2018 (OJ 2018 L 303, p. 1).

8 My emphasis.

9 Article 9 of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ 2006 L 328, p. 59).

10 It might be added that it in fact reads 'Procedures and Safeguards *for* the Executing State', and not 'Procedures and Safeguards *in* the Executing Member State'. It is certainly true that a base line of legal protection *in* the issuing Member State is a form of guarantee *for* the executing Member State. My emphasis.

11 Judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 39).

12 Ibid., paragraph 40.

38. Article 14 of Directive 2014/41 also contributes to this balance by relying on the solutions that already exist in the respective Member States in terms of legal remedies. To construe this obligation of equivalence as applying to both the executing and issuing States thus maintains, in respect of both States, the abovementioned balance between the efficiency and the protection of fundamental rights. The contrary solution that consists in applying Article 14(1) to the executing State only would allow, at least implicitly, the Member States the possibility to make the legal protection against an EIO weaker compared to a similar domestic situation.

39. It is true that, as already suggested above in points 28 and 29, it is not immediately obvious how and why an issuing Member State would deliberately discriminate between purely national investigative measures and the same measures if issued as an EIO.

40. However, any such discrimination need not necessarily be the result of a *deliberate* differentiation on the part of the Member State. It could simply be brought about as a result of different procedural rules in national law, particularly if there is no need for there to first be a corresponding national procedural legal act in order for an EIO to be issued. In this way, the requirement of equivalence could indeed be seen as preventing that State from subjecting EIOs incidentally to a less favourable system of legal remedies compared to the same investigative measures when executed domestically, simply for having made these subject to different procedural rules. In such manner, the obligation of equivalence is intended to prevent the Member States from weakening the legal protection of persons concerned by investigative measures in an EIO compared to those concerned by purely domestic investigative measures. [13]

41. In view of the foregoing, I consider that Article 14(1) of Directive 2014/41 requires that the legal remedies in both the issuing and executing Member States respect the obligation of equivalence where such legal remedies exist.

42. Although none of the interested parties raised this particular issue, I still find this preliminary conclusion rather significant. It is only if Article 14(1) of Directive 2014/41 is applicable also to the issuing Member State that that specific issue of legal remedies in that State comes within the scope of EU law for the purposes of Article 51(1) of the Charter, thereby triggering all Charter-based guarantees, including Article 47 thereof. If that were not the case, then it may be considered that Directive 2014/41 does not regulate legal remedies in the issuing Member State at all, and hence the Charter would also not be applicable to this specific issue.

43. However, the conclusion that Article 14(1) of Directive 2014/41 is applicable to the legal remedies in the issuing Member State says rather little about the exact nature of the legal remedies required. Thus, the issue then revolves around the exact remedy required of the issuing Member States by virtue of Article 14(1) of Directive 2014/41, in conjunction with the provisions of the Charter.

[13] Similar to the Framework Decision on the European evidence warrant which expressly imposed the obligation of equivalence on the *issuing* State in its Article 18(2) concerning legal remedies. See footnote 6 above.

B. What is a legal remedy under Article 14(1) of Directive 2014/41?

44. As regards the obligation imposed in the matter of legal remedies upon the Member States, the language of Article 14(1) of Directive 2014/41 is quite clear. It limits that obligation to the requirement of *equivalence*, as pointed out by the Czech, French and Austrian Governments, as well as by the Commission. [14]

1. The origin of the standard: The diversity and the nature of investigative measures

45. The equivalence requirement appears to be a consequence of the difficulty, acknowledged in the *travaux préparatoires*, in laying down a more detailed solution which would respect the variety of systems of legal remedies existing at national level for the different investigative measures that the new directive was to cover. The explanatory memorandum to that directive pointed out that the evidence-gathering sector presents important differences between national systems and stressed the need to improve cooperation in this area, without affecting any fundamental aspects or differences between national systems. For that reason, it was 'not appropriate to provide … a single regime for legal remedies. …' [15]

46. Indeed, contrary to its legal predecessors, which were narrower in scope, [16] Directive 2014/41 applies, in principle, to any investigative measure. [17] Some of those measures may be coercive, some may not. Some may be conducted openly, whereas others may be covert by definition. Directive 2014/41 itself illustrates this point through the list of several investigative measures whose regimes it regulates in more detail. [18]

47. The *variety* of investigative measures and of national systems of remedies explain why the legislative body chose to limit the obligation in Article 14(1) of Directive 2014/41 to the requirement of equivalence and also to depart in that respect from the generally worded obligation to provide legal remedies adopted by the predecessors of Directive 2014/41 whose scope was narrower. [19] I agree in this respect with the Czech Government.

48. However, the variety of investigative measures covered by Directive 2014/41 is not the only factor that should determine the nature of the obligation imposed by Directive 2014/41 as regards legal remedies. Another relevant element is *the very nature* of the investigative measures within the criminal proceedings considered as a whole.

14 See also judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 60).

15 Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters – Explanatory Memorandum (OJ 2010 C 165, p. 22) (Council Document 9288/10 ADD 1 of 3 June 2010).

16 See Article 34 of Directive 2014/41, which states that Directive 2014/41 replaces: the corresponding provisions of the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols, and the bilateral agreements concluded pursuant to Article 26 thereof; the Convention implementing the Schengen Agreement; the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol; Framework Decision 2003/577 and Framework Decision 2008/978s. See footnotes 5 and 6 above.

17 With the exception of joint investigation teams that continue to be regulated by Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (OJ 2002 L 162, p. 1).

18 See Chapter IV of Directive 2014/41 on 'Specific provisions for certain investigative measures', concerning, for example, the temporary transfer of persons held in custody, hearing by videoconference or telephone conference, obtaining information on bank and other financial accounts or on banking and other financial operation, or covert investigation. Chapter V deals with interception of telecommunications.

19 See above, footnotes 5 and 6.

49. In that respect, the situation of a person subject to an investigative measure is quite different to that of the addressee of a final judicial decision. While in the latter context, the full guarantees of procedural rights must apply and be respected throughout the entire proceedings, applying the same procedural standard to investigative measures considered in isolation would likely hamper the practical value of those measures or, in any case, many of them. Indeed, requiring search and seizures or continuous monitoring of bank (or other) operations to be properly notified first to the persons concerned, while giving those persons an opportunity to challenge them in court, would in fact undermine any practical purpose of such an investigative measure.

2. The minimum standards in Directive 2014/41

50. The foregoing does not, however, mean that the issuance and the execution of an EIO are not subject to any standards. The Court already noted, in *Staatsanwaltschaft Wien*, the existence, in Directive 2014/41, of a 'normative framework comprising a set of safeguards both at the stage of issuing or validation and of the execution of the [EIO], whose aim is to ensure protection of the fundamental rights of the person concerned'. [20]

51. Indeed, as all interested parties having submitted observations in the present proceedings rightly point out, the system set up by Directive 2014/41 cannot work to the detriment of the protection of fundamental rights flowing from the Charter and, by virtue of Article 52(3) thereof, from the minimum standards enshrined in the ECHR and expressed by the ECtHR.

52. The strict adherence to those safeguards is perhaps all the more important for a third party in national criminal proceedings. It serves to be mindful that in contrast to the person accused or being prosecuted, such third parties are unlikely ever to have any procedural rights at the later stage or to be able to challenge the lawfulness of the investigative measures, at least indirectly, by, for example, requesting that the evidence obtained be excluded, or by challenging the final decision.

53. Thus, standards with which the issuance of an EIO must comply (and the safeguards that are contained therein) are twofold: first, those provided by Directive 2014/41 itself and, second, the overarching respect for the fundamental rights to which the provisions of that directive refer without setting them out in any detail itself.

54. Under the first category, Article 6(1) of Directive 2014/41 states that an EIO can be issued only where it is necessary and proportionate for the purpose of the proceedings and where the investigative measures indicated in it could have been ordered under the same conditions in a similar domestic case. This approach of minimum necessary intrusion is also reflected in other provisions of the directive, the common denominator of which is the minimising or blocking altogether of the intrusion to which a specific investigative measure may give rise. [21]

55. With regard to the second category, EIOs are linked to respect for fundamental rights at both ends: in the issuing and executing Member States. Article 1(4) of Directive 2014/41 first recalls a general obligation on Member States to respect the fundamental rights and legal principles

[20] Judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 69).

[21] For example, under Article 10(3) of Directive 2014/41, 'the executing authority may also have recourse to an investigative measure other than that indicated in the EIO where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO'. Furthermore, respective provisions of Chapter IV detailing several types of investigative measures lay down specific grounds of non-recognition and non-execution, in addition to the general list provided in Article 11 of Directive 2014/41.

enshrined in Article 6 TEU. That general statement is made more specific in Article 11(1)(f) which introduces *a general and express* ground for refusing recognition and execution of an EIO when 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

56. However, when it comes to legal remedies that allow for an EIO to be challenged as such, it is fair to admit that the nature of the investigative measure will often not be compatible with a possibility of challenging that measure separately and *ex ante*, with the effect of that challenge being the possibility of postponing or ruling out the execution of the measure altogether.

57. In other words, claiming that an *ex ante* legal remedy, in the form of a judicial remedy before a court or tribunal contesting the lawfulness of that measure, must always exist would hardly strike the appropriate balance between the protection of fundamental rights of the persons concerned by the investigation and the requisite effectiveness of the investigative measures.

58. The variety of measures mentioned above and their general nature thus explain, in my view, why the EU legislature limited the obligation in Article 14(1) of Directive 2014/41 to the requirement of equivalence. This means that where no legal remedies exist, Article 14(1) of that directive does not require the Member State to introduce any. As the Czech and French Governments point out, that position seems to have already been expressed by the Court in *Gavanozov*, given the repeated use of the term 'if any' when referring to the availability of legal remedies in the issuing State. [22]

59. That statement is nonetheless subject to a rather important caveat: the equivalence is logically only acceptable if the situation in the issuing State, to which the requirement of equivalence refers, is itself compatible with the minimum standards for protection of fundamental rights, as required by the Charter and the ECHR. Indeed, in this regard, I agree with the French and Austrian Governments, as well as with the Commission, who point out that Directive 2014/41 relies on the presumption that the Member States respect fundamental rights. Put simply, equivalence is acceptable only *as long as* it is not relied upon to validate an 'equivalent infringement' of the minimum ECHR standards.

3. The minimum standards of fundamental rights under the ECHR

60. In this context, it is necessary to set out briefly the minimum requirements laid down by the ECtHR. Indeed, the referring court, as well as a number of the interested parties, point to a line of case-law of the ECtHR in which Bulgaria has repeatedly been held liable for breaching Article 13 ECHR due to the lack of legal remedies against search and seizure orders. [23]

[22] Judgment of 24 October 2019, *Gavanozov* (C-324/17, EU:C:2019:892, paragraphs 25, 29, 30, 32, 33, 37, 38 and the operative part of the judgment).

[23] ECtHR, judgment of 19 January 2017, *Posevini v. Bulgaria*, CE:ECHR:2017:0119JUD006363814, §§ 83 to 87. See also ECtHR, judgments of 26 July 2007, *Peev v. Bulgaria*, CE:ECHR:2007:0726JUD006420901, § 70; of 22 May 2008, *Ilya Stefanov v. Bulgaria*, CE:ECHR:2008:0522JUD006575501, § 59; of 15 October 2013, *Gutsanovi v. Bulgaria*, CE:ECHR:2013:1015JUD003452910, §§ 234 and 235; of 30 September 2014, *Prezhdarovi v. Bulgaria*, CE:ECHR:2014:0930JUD000842905, §§ 26 to 28, 30 and 31 and 49 to 52; of 16 February 2016, *Govedarski v. Bulgaria*, CE:ECHR:2016:0216JUD003495712, §§ 38 to 40, and 72 to 75; of 31 March 2016, *Stoyanov and Others v. Bulgaria*, CE:ECHR:2016:0331JUD005538810, § 152; and of 9 June 2016, *Popovi v. Bulgaria*, CE:ECHR:2016:0609JUD003965111, § 122.

61. With regard to the interpretation of the corresponding provisions of the Charter, Article 52(3) of the Charter establishes that the ECHR is the threshold below which the protection provided for by the Charter cannot fall. Article 13 ECHR corresponds, at least in part, to the first paragraph of Article 47 of the Charter. However, Article 47 requires a legal remedy before a court which is not necessarily the case with Article 13 ECHR. [24]

62. In order to assuage doubts as to what exactly Article 47 of the Charter requires in terms of remedy before a court or tribunal with regard to investigative measures, it is important to point out precisely the minimum requirements laid down in the case-law of the ECtHR.

63. The ECtHR has steadily clarified that the concept of 'effective remedy' under Article 13 ECHR requires that it be possible to contest both *the lawfulness* of the search and seizure orders, as well as the way in which they are *executed*.

64. The ECtHR held that the concept of 'effective remedy' under Article 13 ECHR does not presuppose the possibility of challenging the issuing of the warrant prior to the search. [25] However, in *Posevini*, the ECtHR added that a disciplinary action against the police for the execution of a search and seizure cannot be considered to be a remedy within the meaning of Article 13 ECHR. What is relevant in the context of the assessment of Article 13 ECHR is whether the person concerned by a search and seizure had access to a procedure enabling them to contest the lawfulness of that measure and to obtain appropriate redress if it was unlawfully ordered or executed. [26] The ECtHR has stressed that the possibility 'to challenge a search as such, or the way in which it has been ordered or authorised' must be available. [27]

65. In other words, on the one hand, a motion for triggering disciplinary proceedings against the police for 'heavy-handed' methods of execution is not enough to satisfy the requirement of legal remedy under Article 13 ECHR. On the other hand, that provision does not go as far as to require an appeal against the judicial decision ordering a search and seizure which would have to be available before the search and seizure is carried out. The ECtHR does not require that the legal remedy must allow the person concerned to prevent the search and seizure from happening or that that remedy must be available at any specific moment within the procedure related to the search and seizure. Nor is it required that the respective remedy be available within the criminal proceedings to which the search and seizure order relates.

66. I draw the following points from the ECtHR's case-law. First, it must be possible to challenge the legality of the search and seizure *at some stage*, but not necessarily (rather logically) before that measure has been executed. Second, that review and its initiation must clearly pertain to *the person* concerned. It cannot be dependent on the initiative or discretion of a third party, such as an internal review within the police force. Third, both aspects of a search and seizure must be open to review: not only concerning potential excesses in the manner in which the measure was carried out, but also the lawfulness of the actual ordering of that measure in the first place.

[24] Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

[25] ECtHR, judgment of 22 May 2008, *Ilya Stefanov v. Bulgaria*, CE:ECHR:2008:0522JUD006575501, § 59.

[26] See, ECtHR, judgment of 19 January 2017, *Posevini v. Bulgaria*, CE:ECHR:2017:0119JUD006363814, § 84. See also ECtHR judgment of 16 February 2016, *Govedarski v. Bulgaria*, CE:ECHR:2016:0216JUD003495712, § 94 in which the ECtHR noted that 'aucune disposition du droit interne ne permettait [aux demandeurs] de contester la régularité et la nécessité d'une perquisition du domicile …'. In its judgment of 30 September 2014, *Prezhdarovi v. Bulgaria*, CE:ECHR:2014:0930JUD000842905, § 50, the ECtHR noted that the lack of clear rules regarding the scope of judicial review is a problem, as well as the lack of any meaningful review of the lawfulness of and justification for the search and seizure.

[27] See, ECtHR, judgment of 19 January 2017, *Posevini v. Bulgaria*, CE:ECHR:2017:0119JUD006363814, § 85.

67. To provide a simple example: a person whose doors were kicked in one morning by the police must have the opportunity to initiate, before a body of the Member State, a subsequent review that would not be limited only to ascertaining whether it was indeed necessary to kick in the front door or break the hand of the person allegedly resisting the search in the process (*the manner of execution* of the measure), but would also determine whether that search was, in fact, lawfully ordered (*the lawfulness* of the measure per se).

68. This is the nature of the right as guaranteed by the ECHR. It is in the potential safeguarding *of that right* that Article 47 of the Charter guarantees the possibility of, in due course, the action being brought before a tribunal.

69. However, the fact that it must be possible to contest the findings before an independent tribunal under the first paragraph of Article 47 of the Charter does not change the nature of the underlying right, nor does it prevent the possible prior insertion of an administrative remedy or the obligation first to lodge an administrative complaint before bringing the matter before a national court. [28]

4. Interim summary and the real issue

70. Viewed and understood in this context, there is nothing in the case-law of the ECtHR capable of frustrating the execution of the investigative measures under Directive 2014/41. Similarly, there is no issue with Article 47 of the Charter being potentially applicable, if appropriate, both to the manner in which an investigative measure was carried out in the executing Member State by the authorities of the executing Member State, as well as to the lawfulness of the order on the basis of which an EIO is issued by the authorities of the issuing Member State. Indeed, the jurisdictional split brought about in Article 14(1) and (2) of Directive 2014/41 seems to reflect precisely that approach.

71. All these clarifications concerning the proper scope of Directive 2014/41, as well as the case-law of the ECtHR and the minimum standards required, were necessary in order to be able to frame and eventually contend with the genuine problem of the present case. The issue is not necessarily the compatibility of the national legislation with any specific provision of Directive 2014/41. The real issue is one step ahead, metaphorically placed at the gates of the entire system: is a Member State able to issue EIOs even though it is aware that those acts breach the minimum standards of the ECHR and, therefore, the minimum level of protection required under EU law?

C. A Member State in breach of the minimum standards of the ECHR cannot issue EIOs that are bound to suffer from the same type of infringement

72. By the second question raised in the present proceedings, the referring court asks whether it can issue an EIO for searches and seizures, both at the premises of a company and that of a private dwelling, as well as whether it can hear a witness in a situation in which there is no remedy available to the persons concerned by those measures under national law.

[28] See my Opinion in *El Hassani* (C-403/16, EU:C:2017:659, points 116 and 117 and the case-law cited). By implication, see also judgments of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960, paragraphs 39 to 41), and of 10 March 2021, *Konsul Rzeczypospolitej Polskiej w N.* (C-949/19, EU:C:2021:186, paragraphs 45 and 46).

73. In my view, the answer is 'no, it cannot'. *As long as* the issuing Member State has not ensured compliance with the minimum standards required by the ECHR and set out in the previous section of this Opinion, the authorities of that State are precluded from participating in the system established by Directive 2014/41.

74. As was rightly pointed out, in particular by the French and Austrian Governments, as well as the Commission, participation in the system of judicial assistance, and the mutual recognition established by Directive 2014/41, presupposes that all participants meet the minimum requirements of the protection of fundamental rights.

75. Admittedly, the peculiarity of the present case lies in the fact that the questions have been referred by a court in the issuing Member State while the procedure is still in a 'pre-recognition' phase. The referring court envisages the issuing of an EIO, but no act has yet crossed the borders.

76. The case-law of the Court dealing with the matter of mutual recognition in criminal matters has typically encountered questions from *executing* authorities concerning doubts as to whether EU law allows them to follow up on requests made by authorities of a different Member State. Indeed, the instruments that rely on mutual recognition have customarily placed the mechanisms which prevent a defective act from producing the desired legal effects on the side of the executing States. The present case is a rare example of an exercise in self-restraint by the issuing authority due to doubts as to whether it is even able to trigger a specific instrument of mutual recognition

77. However, it certainly cannot be inferred from the above that EU law is blind to the situation in the issuing Member State.

78. At the practical level, Directive 2014/41 regulates a number of issues and lays down a number of requirements on the issuing Member State. These requirements are further underlined by the general obligation on all relevant judicial authorities, set out in Article 1(4) of that directive, to respect fundamental rights.

79. It is, however, when viewed at the level of the principle that the issue becomes crystal clear. I fail to see how there could be any 'mutual trust' in a system where the issuing Member States are able to issue acts that, by default and as already previously established, are in breach of the minimum standards to which the entire system subscribes, and yet such acts are, irrespective of that fact, allowed knowingly to enter the system.

80. Indeed, I do not think that it is necessary to repeat the abundant case-law on the matter, stressing the importance of mutual trust for the mutual recognition and functioning of numerous mechanisms of judicial cooperation in criminal matters within the European Union. [29] Specifically, the requirement of mutual trust, or rather, realistically, the prohibition of distrust, means that the authorities of the executing Member State are *to presume* that the rules and fundamental rights in the issuing Member State have been observed, and are thus *not to check*, save in exceptional cases, the compliance of the act adopted in the issuing Member State with fundamental rights. [30]

[29] See, for example and recently, judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 40), or of 10 March 2021, *PI* (C-648/20 PPU, EU:C:2021:187, paragraph 35 and the case-law cited).

[30] See, for example, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraph 192). See also judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 34 and the case-law cited).

81. The Court also stressed that 'the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the [Union] ...'. [31]

82. Against this backdrop, a Member State availing itself of the system and aware that the acts it issues are in fact already incompatible with the requisite minimum guarantees in relation to fundamental rights is, in my view, not acting in the spirit of sincere cooperation. Such acts cannot generate any mutual trust. They are in fact the antithesis thereof, forcing any other actor, and in particular the executing Member State, to embrace *mutual distrust* as their default position. How could any mutual trust be generated in a system where some of its actors are knowingly allowed to disregard the rules?

83. Admittedly, Directive 2014/41 contains several safeguards ensuring the respect of fundamental rights with regard to recognition and execution of the given investigative measure in the executing Member State. [32] That list indeed includes the ground for refusal under Article 11(1)(f) of Directive 2014/41, possibly leading to a refusal on the basis of non-compliance with fundamental rights.

84. However, that certainly does not mean that all responsibility can be shifted towards the executing Member State. Again, sincere cooperation (and the mutual trust) are inter-relational. They include, by definition, all parties to the transaction. The Court has emphasised this idea by stating that compliance with fundamental rights is a *shared obligation*, falling on both the issuing and the executing Member States. The initial obligation to ensure compliance with fundamental rights is placed squarely on the shoulders of the issuing Member State. [33] Allowing the, at the outset, incompatible EIOs to enter the system would shift the entire responsibility for the protection of fundamental rights solely onto the executing authorities, [34] who may realise this in some cases, while being blissfully unaware in others.

85. In my view, playing such a game of 'Russian roulette' with individual rights would conceptually be wholly incompatible with the approach taken by the system of mutual recognition. The issuing authority would be aware of the fact that the issued EIO breaches fundamental rights, but would simply leave it to the vigilance of the executing authority to see whether the latter will realise, the consequence being a rather selective regard for the fundamental rights of the individuals involved in the process. [35]

[31] Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 34 and the case-law cited).

[32] Outlined above in points 53 and 54 of this Opinion.

[33] See, for example, judgment of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraph 50 and the case-law cited) confirming in the context of the European arrest warrant the *primary responsibility of the issuing* Member State to ensure compliance with fundamental rights.

[34] I agree in this respect with the Opinion of Advocate General Bot in *Gavanozov* that such a solution defies not only the general design of Directive 2014/41, but also the concept of mutual trust (C-324/17, EU:C:2019:312, points 84 to 87).

[35] All this makes one think of a hypothetical motor vehicles manufacturer that releases vehicles into circulation although aware of the fact that all of them have a technical fault, but nevertheless relies on the belief that police checks are not that frequent and, fingers crossed, that hopefully there will not be that many traffic accidents resulting in injury or harm to passengers or members of the public due to that technical fault.

86. Moreover, such Russian roulette not only passes the responsibility for detecting the breach onto the executing Member State, but it also makes the executing Member State potentially complicit in those infringements should it fail to detect and prevent them. In that way, the Member States involved would run the risk of failing to uphold the requirements laid down by the ECtHR in *Avotiņš*[36] and thus trigger their responsibility under international law.[37]

87. Indeed, *Avotiņš*, as well as the case-law of this Court relating to the potential non-recognition or non-execution of an act of an issuing Member State in the executing Member State,[38] are concerned with systemic failures or systemic deficiencies in the issuing Member State that may have certain consequences in the executing Member State.

88. However, or rather a fortiori, I fail to see why, if those consequences are foreseen for macro (systemic) failures, namely when the entire system becomes dysfunctional,[39] as well as for what one may label as sectoral failures,[40] the same should not be the case for what could be termed as mere micro failures, that is to say deficiencies identified solely with regard to specific procedural elements.

89. Moreover, if the approach is that, from a certain point onwards, the executing Member State is no longer obliged to recognise or to enforce acts coming from certain issuing Member States,[41] is it not also inherent in that statement that the issuing Member State, when it knows that it is in non-compliance, ought to be prevented from having recourse to a system of judicial cooperation, the entry requirements for which it no longer meets?

90. In a way, such a conclusion is not only inherent in the approach taken by the system, but also much more *proportionate*. Instead of burdening the entire system of judicial cooperation (and all the individual actors in the Member State) with the task of examining, in each individual case, again and again, whether or not grounds for refusal to recognise and execute an EIO have been given, is it not more reasonable temporarily to suspend the recognised and acknowledged problematic source so that it may first secure compliance with the minimum standards before being re-admitted? Such a solution appears all the more warranted as, in contrast to a situation where the potential systemic failure must be shown to result in a threat to the individual situation of the person concerned,[42] in the case of deficient sectoral regulation relating to one

36 ECtHR, judgment of 23 May 2016, *Avotiņš v. Latvia*, CE:ECHR:2016:0523JUD001750207, § 116.

37 See recently, ECtHR, judgment of 25 March 2021, *Bivolaru and Moldovan v. France*, CE:ECHR:2021:0325JUD004032416.

38 Judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865); of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198); and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

39 Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraphs 58 to 62).

40 Within which what is stated is a failure in relation to certain areas at issue, such as conditions for the seekers of international protection – judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 89 and 90, 94, 106), or prison conditions – judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 89 to 94), without in either scenario suggesting that the entire judicial system of given Member State would have been affected by those shortcomings.

41 Most recently restated by the Court in the judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), and subsequently applied by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) in the judgment of 10 February 2021, Case No RK 20/771 13/751021-20, NL:RBAMS:2021:420.

42 Necessary in the 'two-step test' which requires both structural (systemic and generalised) as well as individual consideration relating to the individual case – judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraphs 61 and 68) as confirmed in the judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraphs 54 and 55).

issue alone, it is clear that the issuing of any act that would be compliant is not possible. All of the acts issued will, by default, be tainted because the legislation under which they are issued was itself incompatible.

91. In short, whoever wishes to use the system of judicial assistance and mutual recognition under Directive 2014/41, or under any other instrument of judicial cooperation and mutual recognition for that matter, must come, metaphorically speaking, with clean hands, or rather, cannot come with hands that are knowingly dirty. The failure to observe that rule of basic hygiene, which has been repeatedly recognised and systematically emphasised, may indeed lead to that person being asked to leave the room and to come back only after having found some soap and carried out the necessary procedures.

92. In the specific context of the present case, as described above, in *Posevini*[43] and in previous judgments, the ECtHR has found Bulgaria to be in breach of the obligation to provide an effective remedy within the meaning of Article 13 ECHR due to the absence of any procedure allowing for the lawfulness of a search and seizure order to be challenged or for appropriate redress to be obtained.[44] As stated in those decisions, the Bulgarian Government in fact acknowledged that failure and has made its commitments to the Committee of Ministers to remedy the situation,[45] but so far to no avail, as also pointed out in the order for reference in the present case.

93. In summary, as long as that national legislative failure is not remedied, the authorities of the given Member State are indeed precluded from issuing an EIO that automatically and unavoidably brings about the same breach of fundamental rights as (the one) already observed by the ECtHR.

94. I note that no similar issue has been identified as regards a decision ordering a hearing of a witness. In this respect, I agree with the French and Austrian Governments that, in essence, a hearing of a witness is unlikely per se to result in as serious an intrusion on an individual's fundamental freedoms as that of a search and seizure order.

95. Moreover, Article 24 of Directive 2014/41 contains a rather detailed arrangement for the hearing of a witness by videoconference or other audiovisual transmission. Alternatively, Article 25 thereof concerns the hearing of a witness by telephone conference. Those provisions contain specific guarantees, including a ground for non-recognition or non-execution under Article 24(2) of that directive, the requirement for the executing authority to apply the 'fundamental principles of the law of the executing State' under Article 24(5)(a) of that directive and the obligation to provide information about procedural rights that include the right not to testify, as laid down in Article 24(5)(e) thereof.

96. That being said, I do not consider that limiting the solution in the present case to the search and seizure orders is likely to bring about a systemic solution to a potentially open list of possible infringements of fundamental rights. Different investigative measures may present, as has already been noted, different degrees and intensities of intrusions. From this perspective, it appears difficult to draw a line in the abstract in order to claim that a given investigative measure can *never* be problematic.

43 ECtHR, judgments of 19 January 2017, *Posevini v. Bulgaria*, CE:ECHR:2017:0119JUD006363814.

44 See above, footnote 23.

45 See, ECtHR, judgment of 19 January 2017, *Posevini v. Bulgaria*, CE:ECHR:2017:0119JUD006363814, § 47.

97. As regards the specific hearing of a witness, although it may be characterised as a rather 'mild' intrusion into one's personal sphere, it cannot be excluded that a hearing of a specific witness in a specific situation may nonetheless lead to a breach of protected individual rights, such as the rights of vulnerable persons whose specific situation would not have been duly taken into account during the adoption of an EIO ordering such a hearing. Should such a situation occur, the person affected must also have access to remedies that would make it possible to review the lawfulness of such a measure and obtain the appropriate redress.

98. In summary, it is the duty of the issuing authorities to make sure that their own acts are not tainted by unlawfulness due to non-compliance with the minimum standards laid down in the ECHR when these acts enter the system of Directive 2014/41.

V. Conclusion

99. I propose that the Court answer the questions referred for a preliminary ruling by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) as follows:

Article 14(1) and Article 1(4) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, and Article 4(3) TEU, preclude the situation in which national legislation does not provide for any legal remedy against the issuing of a European Investigation Order, if the issuance of such an order will automatically and unavoidably bring about the same breach of the minimum standards guaranteed by the European Convention on Human Rights as the one already observed by the European Court of Human Rights. Those provisions also oppose the issuance of a European Investigation Order in such circumstances.