

# Scope of judicial review in the executing Member State in EIO proceedings

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# EIO System

Issuing State



Executing State

Split of Judicial Control

**“If” question:**

should there be a Judicial Control in the executing State?

art. 2 *d* EIO directive:  
execution “may require a **court authorisation** in the **executing State** where provided by its **national law**”

art. 14 § 1 EIO directive:  
“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”

**“Scope” question:**

How far should judicial control go in the executing State?

Judicial control in the executing state should be limited only to **formal aspects** and to the **modes of execution** of the EIO?

(f.e. presence of a lawyer at the moment of a search?)

or

Judicial control should also be extended to **substantive reasons for issuing** the EIO  
(f.e. presence of suspicion of criminal offence;  
strict necessity and proportionality of the  
measure)

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In favour of judicial control in the executing State limited to formal aspects and modes of execution



**literal argument**

art. 14 § 2 EIO directive:

“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”

## In favour of judicial control in the executing State limited to formal aspects and modes of execution



### literal argument

Court of Justice, 11 november 2021, Gavanozov II, § 48:

“The **courts of the executing Member State** will **not have jurisdiction**, in accordance with Article 14(2) of Directive 2014/41, to examine the **substantive reasons** for an EIO ordering the hearing of a witness by videoconference”

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In favour of judicial control in the executing State limited to formal aspects and modes of execution

**lack of knowledge argument**

f.e. conclusions of General Advocate, Gavanozov II, § 85:

**The executing authorities “may realise” the incompatibility of an EIO with the respect of fundamental rights, “in some cases, while being blissfully unaware in others”**

## In favour of judicial control in the executing State limited to formal aspects and modes of execution

### efficiency argument

- Problem of the availability of the file of the case for the judicial authority in the executing State
- Problem of the peculiarities of lex loci in relation to substantive reasons for issuing the measure



## Ambiguity of 14 EIO directive

art. 14 § 2 EIO directive:

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**”

## Meaning of “prejudice” to fundamental rights in the executing State?

Court of Justice, 5 April 2016, Aranyosi and Căldăraru (EAW):

**The judicial authority of the executing State must assess the presence of “objective, reliable, specific and properly updated evidence” that demonstrates that in the issuing state there are “deficiencies, which may be systemic or generalised”, which risk to create a serious violation of a fundamental right**

## Meaning of “systemic deficiencies” which risk to create a serious violation of a fundamental right?

Court of Justice, 11 november 2021, Gavanozov II, § 59:

“In the **absence of any legal remedy in the issuing State**”, the refusal to execute an EIO for the reason of incompatibility with fundamental rights “would become automatic. Such a consequence would be contrary both to the general scheme of Directive 2014/41 and to the principle of mutual trust”.

Issuing State



Executing State

**Asymmetric Split of Judicial Control**

## EIO Execution Italian System



**Recognition and Execution by Public Prosecutor**  
(f.e. search and seizures)

**For some coercitive measures: ex ante authorization by “Preliminary Investigation Judge”**  
(f.e. interceptions)

**In any case: the recognition decision is subject to an ex post “Opposition” in front of the Preliminary Investigation Judge**

## Italian Case-Law: presumption of respect for fundamental rights in the issuing State

Italian Court of Cassation, 25 October 2022:

**“the European investigation order must have as its object evidence that can be acquired in the issuing State and must be carried out in accordance with what is provided in the State of execution for the performance of a similar act”, “since it can be presumed that such discipline and fundamental rights are respected, unless concrete verification to the contrary is required”**