ARTICLES

The Interplay Between the European Investigation Order and the Principle of Mutual Recognition

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Abstract: This *Article* concerns the European Investigation Order (EIO) and its relations to the principle of mutual recognition. The principle has been the engine of judicial cooperation in criminal matters between Member States of the European Union since the adoption of the Tampere conclusions in 1999. Member States rely on the principle in creating cooperation systems, thereby facilitating interaction among their criminal justice systems. Since Member States refrain from extensive criminal law harmonisation, the principle is of utmost importance. As such, a common regulatory technique was developed through which the principle is given effect in every cooperation system created so far. Although this regulatory technique was mostly followed in the directive establishing the EIO, it also introduced several novelties in the regime, notably the option to have recourse to another investigative measure, the possibility for a greater extent of communication, and the fundamental rights-based refusal ground. This *Article* argues that these rules make the EIO directive more protective of fundamental rights and show a new trend in the cooperation systems based on the principle of mutual recognition. In addition, while reviewing the applicability of these rules in other cooperation systems, it provides a proposal on how to apply them to enhance mutual trust between Member States through legislation.

Keywords: EIO – mutual recognition – recourse to another investigative measure – enhanced communication – fundamental rights – based refusal ground.

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I. Introduction

The current system of judicial cooperation in criminal matters among the Member States of the European Union (hereinafter EU) lays on the foundation of the principle of mutual recognition as implemented into the policy of judicial cooperation in criminal matters over the last two decades.[1]

The legal literature has long criticised this system, as the implementation of the principle leaves much to be desired in terms of the protection of fundamental rights.[2] This arises from the method used to implement the principle. The cooperation systems, or mutual recognition regimes established for this purpose do not enable executing authorities to deny the request for transnational judicial cooperation even if the execution of the requested measure would pose a risk to the fundamental rights of persons subject to those measures.[3]

Despite the evident risks associated with this system, the European Court of Justice (hereinafter ECJ) gave preference to the efficiency of criminal cooperation in a number of its preliminary rulings where it dismissed the claims that the quasi-automatic process of criminal cooperation would violate fundamental rights of individuals.[4] This commitment of the ECJ eventually manifested in expressly setting out the legal principle of mutual trust in its 2/13 Opinion on the EU's accession to the European Convention on Human Rights.[5]

Later, even though the ECJ has set out the principle of mutual trust, it decided in its landmark decision in the *Aranyosi* and *Caldararu* joined cases that the principle may be challenged in exceptional circumstances. It introduced the possibility of suspending a request for transnational criminal cooperation, namely the execution of the European Arrest Warrant (hereinafter EAW) due to the risk of fundamental rights violation. This constituted a step toward a system of cooperation that is based on earned trust instead of blind trust.[6]

[1] V Mitsilegas, 'The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust' (2019) Revista Brasileira de Direito Processual Penal 566.

[2] S Alegre and M Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant' (2004) ELJ 200; L Marin, 'The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case' (2008) Maastricht Journal of European and Comparative Law 473; E Smith, 'Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security' (2013) New Journal of European Criminal Law 82; E Xanthopoulou, 'The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?' (2022) ELJ 218.

[3] V Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart 2018) 154.

[4] V Mitsilegas, 'Trust' (2020) German Law Review 69.

[5] Á Mohay, 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note' (2015) Pécs Journal of International and European Law 31.

[6] V Mitsilegas, 'Trust' cit. 70.

From that point forward, many scholars reflected on the possibility of building a system of judicial cooperation where trust is strengthened between Member States.[7] It is a generally accepted idea that trust between Member States can be increased either by legal or non-legal measures. The former includes the introduction of legal norms that enhance mutual trust between Member States and the latter includes measures that help judicial authorities get to know the judicial systems of other Member States which can cultivate a common understanding of criminal justice in Europe.[8] The aim of this *Article* is to complement the existing literature about mutual trust and its relation to the system of judicial cooperation via analysing the European Investigation Order (hereinafter EIO) – yet another mutual recognition regime that is mostly applied during the investigation phase of the criminal procedure. In addition, it will also serve as an addition to the literature about the EIO which mainly concerns the foundations of the EIO instead of going into in-depth analysis of its role and possible effects on the system of criminal cooperation of the Member States.

This *Article* analyses the EIO as it is the perfect tool for showcasing the legal changes that are necessary to strengthen trust between Member States. It is a mutual recognition regime – one that realises the free movement of judicial decisions issued in the investigation phase. As such, the EIO applies the regular toolbox for giving effect to the principle of mutual recognition. However, the EU legislator also introduced several novelties in the regime, notably the option to have recourse to another investigative measure, the possibility for a greater extent of communication, and the ground for fundamental rights-based refusal. I argue that these rules do not only deviate from the usual regulatory technique giving effect to the principle but also enhance the level of fundamental rights protection during evidentiary cooperation. In addition, they do so in a manner that institutionalises distrust – a measure that has been frequently called for by scholars.[9] As such, the main research question of this *Article* is whether these rules could be implemented in other mutual recognition regimes to strengthen the protection of fundamental rights and increase mutual trust between Member States.

To this end, this *Article* will not only analyse and prove the protective nature of the selected rules of the EIO in terms of fundamental rights, but it will also reflect on their applicability in other mutual recognition regimes. In the section II, this *Article* starts by introducing the EIO, then goes on to briefly describe the system of judicial cooperation in criminal matters based on the principle of mutual recognition while showcasing the similarities and differences in the regulatory framework of the EIO compared to the standard form of implementing the principle in other cooperation systems. In its sections III, IV and

[7] T Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) German Law Journal 339; J Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) EuConst 33; R Sicurella, 'Fostering a European criminal law culture: In trust we trust' (2018) New Journal of European Criminal Law 308.

[8] A Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021) 129.

[9] V Mitsilegas, 'Trust' cit. 70.

V, the selected rules are analysed to point out their role in the cooperation system and to shed light on the greater protection of fundamental rights in this regime. Furthermore, each section includes an analysis of the applicability of the specific rule in other tools of cooperation based on the principle of mutual recognition. Finally, in its section VI, the *Article* concludes with a proposal for the implementation of the selected rules in other mutual recognition regimes.

II. New formulas in the regime of mutual recognition in the EIO

The EIO was created in 2014 by Directive 2014/41/EU.[10] It is a tool for cross-border judicial cooperation in the investigation phase, explicitly serving the transnational gathering of evidence.[11] The EIO was the first legal instrument based on the principle of mutual recognition to be created in the post-Lisbon era. Adopting the directive fitted the objective of implementing the principle of mutual recognition in the policy of judicial cooperation in criminal matters – a process that started in the early 2000s based on the Tampere conclusions of the European Council.[12]

Since the adoption of the Tampere conclusions in 1999, the Council passed various framework decisions which widened the scope of application of that principle in the process of criminal cooperation between Member States. First, it adopted the flagship instrument of the principle, the EAW, in its Framework Decision 2002/584/JHA, which was followed by the adoption of several other framework decisions that involved certain types of judicial decisions under the scope of the principle including orders freezing property or evidence.[13] The latter shows the willingness of the Council already in the 2000s to include evidentiary cooperation in the framework of mutual recognition in criminal matters. This

[10] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[11] S Allegrezza, 'Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* (Springer 2014) 52.

[12] V Mitsilegas, *EU Criminal Law* (Hart 2009) 116; with the adoption of the Lisbon Treaty, it became even clearer that criminal cooperation between the Member States is supposed to be based on the principle of mutual recognition. The Treaty sets out a legal basis in the policy of judicial cooperation specifically for enhancing the application of the principle; see art. 82 TFEU.

[13] Framework Decision 2003/577/JHA of the Council of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Framework Decision 2008/947/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Framework Decision 2008/909/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Framework Decision 2005/214/JHA of the Council of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Framework Decision 2008/978/JHA of the Council 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.

intent was reiterated multiple times by the adoption of the framework decision establishing the European Evidence Warrant, the Stockholm Programme, and the European Commission's Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. The latter documents demonstrated the political will and the necessity for creating a single regime of collecting evidence located abroad – a system that would incorporate the principle of mutual recognition.[14]

Eventually, eight Member States initiated the proposal for the directive establishing the EIO, a possibility provided by art. 76(b) TFEU.[15] The proposal aimed to create an overarching legal instrument for gathering evidence located abroad and replace multiple sources of EU law serving judicial cooperation during the investigation.[16] The main argument for a new legislative framework for the cross-border gathering of evidence was the fragmentation of the then-applicable framework of evidentiary cooperation, which was supposed to hamper the efficiency of cooperation.[17] In an attempt to overcome that fragmentation, the EIO was designed to cover any kind of investigative measure serving to gather evidence. In other words, the instrument was granted a horizontal scope.[18] In addition, the directive introduced the principle of mutual recognition to judicial decisions ordering the collection of evidence to further enhance the efficiency of criminal cooperation in the investigation phase.

As already well described by scholars, the principle of mutual recognition serves the efficiency of combatting crime in an EU area of free movement where different legal systems need to interact with each other.[19] Their interaction could be simplified by harmonising the criminal laws of Member States. However, they refrain from procedural harmonisation and only allow a smaller extent of approximation of their substantive criminal

[14] Framework Decision 2008/978/JHA cit. recitals (1)-(6); The Stockholm Programme of the European Council of 4 May 2010 on an open and secure Europe serving and protecting citizens, Green Paper of the European Commission of 11 November 2009 on obtaining evidence in criminal matters from one Member State to another and securing it admissibility.

[15] S Ruggeri, 'Introduction to the Proposal of the European Investigation Order: Due Process Concerns and Open Issues' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 5.

[16] The EIO directive replaces the Framework Decisions 2003/577/JHA of the Council of 22 July 2003 on the mutual recognition of orders freezing property or evidence and Framework Decision 2008/978/JHA cit. and the corresponding provisions of the European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959, the Convention implementing the Schengen Agreement and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol; see art. 34 of Directive 2014/41 cit.; R Belfiore, 'Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 93.

[17] Green Paper cit. points 3-4.1; Recital (5) Directive 2014/41 cit.

[18] A Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' (2014) Utrecht Law Review 120.

[19] V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individuals' (2012) Yearbook of European Law 320.

laws since they aim to retain their sovereignty in adopting criminal legislation to a great extent. As a result, emphasis was placed on creating different systems of cooperation (such as the EAW or other framework decisions) that extend national enforcement capacities in combatting (transnational) crime.[20] By implementing the principle of mutual recognition in these systems of cooperation, a process of quasi-automatic recognition and execution of judicial decisions is set up, which significantly simplifies the interaction of the different judicial systems of Member States. In that framework, certain types of judicial decisions issued in one Member State are recognised and executed in another Member State without a thorough examination of the content of that decision.[21] Thus, applying the principle removes time-consuming actions from the process of cross-border criminal cooperation. Hence, when applied to the EIO, the principle essentially makes any investigative measure executable in another Member State that facilitates the free movement of judicial decisions directed at gathering evidence.

Directive 2014/41/EU applies the usual regulatory technique for giving effect to the principle of mutual recognition as it was used in various framework decisions, including the one establishing the EAW.[22] Accordingly, the EIO is a judicial decision issued or validated by a prosecutor or a judge that shall be recognised and executed based on formal assessment. Refusal grounds are limited. A unified form is used to issue the EIO. Double criminality as a prerequisite for recognition is excluded in the case of 32 offences. The deadline for recognition and execution is set, and finally, direct communication is established between the issuing and the executing authorities.[23]

Although the EIO applies the usual formula, there are a few notable novelties in the legal framework introduced by Directive 2014/41/EU. Firstly, the directive allows the executing authority to have recourse to an investigative measure other than that which was ordered by the issuing authority in the EIO.[24] Secondly, the directive provides for direct communication between the issuing and the executing authority to a greater extent than any other mutual recognition regime.[25] Finally, the directive expressly introduces a fundamental rights-based refusal ground which has also not been applied in any previous mutual recognition regime.[26]

[20] *Ibid*. 321.

[21] V Mitsilegas, *EU Criminal Law after Lisbon* cit. 125-126.

[22] T Rafaraci, 'The European Investigation Order: Fundamental Rights at Risk?' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 45.

[23] Arts 1, 5, 7, 9, 11 and 12 of Directive 2014/41 cit.

[24] *Ibid*. art. 10.

[25] *Ibid*. arts 6(3), 9(6), 10(4), and 11(4).

[26] *Ibid*. art. 11(1)(f).

III. The question of defining investigative measures and having recourse to a different one

The EIO's primary aim is to enhance the ability of judicial authorities of the Member States to acquire evidence located abroad.[27] To this end, the issuing authority may order any investigative measure to be carried out in another Member State.[28] The executing authority is obliged to recognise and execute the EIO if it was issued in accordance with the procedural rules laid down in Directive 2014/41/EU.[29]

In order to realise this horizontal scope, the directive creates an open-ended definition under arts 1(1) and 3. Reflecting on the vast scope of the directive, scholars have pointed out that the directive lacks a precise definition for investigative measures. They noted that this kind of negative approach toward the scope of the EIO can potentially harm the principle of legality. Without a strict definition for investigative measures, individuals cannot be certain what measures they may be subjected to through an EIO. They have also drawn attention to the fact that such a formulation of the scope may facilitate forum shopping, whereby the issuing authority requests an investigative measure that could not be ordered under the same conditions in a similar domestic case.[30]

To counter the aforementioned harmful effects of such a broad definition, the directive introduced limits for ordering investigative measures to be carried out in another Member State. First, the principles of necessity and proportionality constrict their availability. In addition, the directive also introduces a double-equivalency clause that further restricts the availability of investigative measures in the EIO. According to this clause, the investigative measure must be available under the same conditions in a similar domestic case both in the issuing and the executing Member States.[31] Last but not least, an EIO ordering an investigative measure that does not exist under the law of the executing Member State cannot be executed.[32]

So far, these limits serve to protect individuals and mitigate harmful effects stemming from the differences in the Member States' legal systems. However, the EIO is a tool for cross-border evidentiary cooperation, which makes it essential that it does not come to an abrupt end when an investigative measure cannot be executed for the above reasons

[27] *Ibid*. Recital (7).

[28] *Ibid*. art. 6(1).

[29] *Ibid*. art. 9(1).

[30] I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' (2015) New Journal of European Criminal Law 18; A Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level' cit. 120; F Zimmermann, S Glaser and A Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: a Critical Analysis of the Initiative for a European Investigation Order' (2011) European Criminal Law 73.

[31] Arts 6(1) and 11(1)(h) of Directive 2014/41 cit.; do note that this provision was lacking in the original proposal for the directive; see I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 17.

[32] Art. 10(5) of Directive 2014/41 cit.

under the law of the executing Member State.[33] To avoid such situations, the directive created a corrective mechanism where the executing authority may have recourse to another investigative measure.[34]

This mechanism regulated under art. 10 of the directive is interesting because it enables the executing authority to apply a different investigative measure not only in cases where the requested investigative measure is unavailable under the law of the executing Member State (either because it does not exist or is only available under stricter conditions)[35] but also in an additional third case where an investigative measure is less intrusive for the concerned person than the investigative measure requested in the EIO. However, for the sake of efficiency, a different investigative measure may only be applied if it can achieve the same results.[36] While serving the efficiency of cooperation in most instances, the third case of the corrective mechanism can be seen as a *de facto* ground for refusal to protect the fundamental rights of persons subject to the investigative measure since the issuing authority cannot opt for the execution of the investigative measure originally requested in the EIO. Instead, it may supplement the EIO with a view to secure the execution of the original investigative measure or decide to withdraw it altogether.[37]

In the cooperation systems built on the principle of mutual recognition, the margin of discretion regarding the necessity and proportionality of issuing judicial decisions subject to the principle belongs solely to the issuing authority.[38] Hence authors view the third case of the corrective mechanism as a second test of proportionality.[39] Even though introducing that second test seems to go against the logic of mutual recognition regimes, it is a welcome addition.[40] It serves as a balancing act between the efficiency of criminal cooperation and the protection of fundamental rights, since the prerequisite for having recourse to another investigative measure is that the same result can be achieved through the less intrusive investigative measure. Such an option is specifically valuable for the protection of fundamental rights considering Eurojust's case law analysis which

[33] LB Winter, 'The Proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessment' in S Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* cit. 76.

[34] I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 16.

[35] Art. 10(1)(a)-(b) of Directive 2014/41 cit.

[36] *Ibid*. art. 10(3).

[37] *Ibid*. art. 10(4).

[38] F Zimmermann, S Glaser and A Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings' cit. 69; R Belfiore, 'The European Investigation Order in Criminal Matters: Developments in Evidence-gathering across the EU' (2015) European Criminal Law 317; I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 17.

[39] C Heard and D Mansell, 'The European Investigation Order: Changing the Face of Evidence-gathering in the EU' (2011) New Journal of European Criminal Law 359.

[40] Belfiore regards this rule as "a welcome consideration of the existing differences between national judicial systems", which provides more space for the protection of the individual; see R Belfiore, 'The European Investigation Order in Criminal Matters' cit. 318.

showed that the executing authorities had not invoked the fundamental rights-based refusal ground during the initial three years of practice of the EIO.[41]

III.1. The applicability of the corrective mechanism in other cooperation systems

The possibility of having recourse to another investigative measure can be effectively utilised to protect the fundamental rights of persons involved in the criminal procedure. It provides a limited margin of discretion for the executing authority to execute a different investigative measure if it finds that a less intrusive one is available to achieve the same goal. This method is particularly useful since it is the executing authority that can assess the possible harmful effects of the requested investigative measure in the context of its own criminal justice system. Hence, it is given a responsibility which it can effectively meet.

However, this corrective mechanism cannot be implemented in other tools of cooperation as the precondition of introducing such a rule is that there are at least two procedural measures that can be requested via the judicial decision that is subject to mutual recognition. This precondition is not met in any other tool of judicial cooperation such as the EAW, the mutual recognition of judgements, or the mutual recognition of freezing and confiscation orders. Since every cooperation system is established for a specific procedural aim (*i.e.* guaranteeing the presence of the suspect or accused in the criminal procedure, the execution of certain types of judgements, or asset recovery), there is currently no other tool of judicial cooperation where such a mechanism could be implemented, as the aforementioned aims can be achieved through a single procedural measure regulated in the relevant secondary sources of EU law.

As such, the corrective mechanism implemented in the EIO directive is specifically created for the process of judicial cooperation in the investigative phase where a great variety of procedural measures can be requested from the executing authority. Thus, its application in other cooperation systems is not viable due to their characteristics.

IV. An increased extent of direct communication between the issuing and executing authorities

The standard method of implementing mutual recognition in the process of criminal cooperation between Member States is characterised by measures simplifying the entire process of cooperation through unified forms used for issuing different judicial decisions subject to the principle, shortened deadlines, limited grounds for recognition, and most importantly an obligation to recognise and execute judicial decisions if they are issued in

[41] Eurojust, 'Report on Eurojust's Casework in the Field of the European Investigation Order' (November 2020) www.eurojust.europa.eu 32.

the proper form. In this toolbox, we can find a strict limitation on the extent of communication that can take place between the issuing and the executing authorities, embodied by the unified form used to issue judicial decisions, such as the EAW or the EIO.

A unified form not only limits the content of the judicial decision to the basic information but also restricts communication between authorities. In this framework, the executing authority may not request additional information about the underlying criminal procedure.[42] As demonstrated in various mutual recognition tools such as the EAW, the mutual recognition of financial penalties, and orders freezing and confiscating property, communication is only provided in cases when the execution of the judicial decision is at stake. According to the relevant secondary sources of EU law, when a refusal ground seems applicable, the executing authority must clarify the circumstances of the case relevant to the execution of the judicial decision to avoid its refusal.[43]

Of course, the EIO directive also applies the above rule.[44] However, the strict limitation of communication was loosened in the directive in two additional instances. According to art. 6(1)(a)-(b), the executing authority may consult the issuing authority if it has reason to believe that the EIO is not proportionate or necessary to the purpose of the proceedings or it would not be available in a similar domestic case under the law of the issuing state. In addition, art. 10(4) obliges the executing authority to inform the issuing authority if it decides to apply a different investigative measure than that which was requested in the EIO.[45]

On the one hand, art. 6(1) enabling the executing authority to make an inquiry regarding the EIO to the issuing authority seems difficult to apply since the executing authority is not in a position to properly assess the proportionality or necessity of the investigative measure ordered in the EIO. Apart from that, the executing authority may make an inquiry if it has reason to believe that the investigative measure would not be available in a similar domestic case in the issuing Member State. This also puts the executing authority in a difficult situation, since to assess such a requirement, the former would need to be an expert in the criminal justice system of the issuing Member State, which is an unrealistic expectation. Hence, it can be objectively stated that the fulfilment of neither of these requirements can be effectively scrutinised by the executing authority save in exceptional cases when the non-compliance is very tangible (for example, when a covert investigative measure is ordered in a procedure that was initiated due to a minor offence).

[42] V Mitsilegas, 'Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon' in V Mitsilegas and M Bergstromal (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016) 151; also see Eurojust, 'Report on Eurojust's Casework in the Field of the European Investigation Order' which describes the problem of excessive requests for additional information upon receiving the EIO form, which is contrary to the functioning of the current system of criminal cooperation based on the principle of mutual recognition.

[43] Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States art. 15(2); Framework Decision 2005/214/JHA cit. art. 7(3); Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders arts 8(2), 13(2), 19(2), and 22(2).

[44] Art. 11(4) of Directive 2014/41 cit.

[45] *Ibid*. arts 6(3) and 10(4).

On the other hand, the executing authority is obliged to inform the issuing authority about its decision to have recourse to another investigative measure. Upon receiving that information, the issuing authority is enabled to supplement the EIO to secure the execution of the originally requested investigative measure. In this process, supplementing the EIO can be considered a means of direct communication between the authorities. Although it resembles the communication between the executing and issuing authorities when the former decides to apply a refusal ground regulated in other tools of cooperation, it is worth analysing as a novelty, especially since it also applies to the third case of the corrective mechanism concerning less intrusive investigative measures described in the previous point of the *Article*.

First and foremost, it should be emphasised that the directive and its preparatory documents lack the reasoning for this specific rule. Thus, the nature of the supplementary information provided by the issuing authority is unclear. However, it can be deducted from the objective of the corrective mechanism, that is to avoid such situations where the EIO is rejected due to the unavailability of the requested investigative measure under the law of the executing Member State. If an efficiency-based approach is used, the issuing Member State may supplement the EIO in a way that could provide more specific information, which could prove to be enough to meet the procedural standards to execute the original investigative measure.[46]

While in the first two cases the corrective mechanism seems to solely serve efficiency, the third possibility to execute a different investigative measure concerns the protection of the individual's fundamental rights. As such, a purely efficiency-based approach cannot be applied here. Since this possibility introduces a second check for the proportionality and necessity of the investigative measure,[47] communication between the authorities should – in theory – concern these requirements and the capacity of the investigative measures in question to reach the objective of the EIO.

An interesting question regarding these rules is what their purpose is. Do they intend to enhance the rate of executed EIOs? An increased extent of direct communication is bound to hamper the execution of the EIOs. On the one hand, there are cases where the aim of direct communication is obviously to provide a possibility to the issuing Member State to secure the execution of the original investigative measure requested in the EIO. On the other hand, the second check of proportionality installed at the executing Member State inevitably draws out the process of executing the EIO if the latter Member State decides to avail itself of this possibility. Consequently, I am inclined to believe that the

[46] Such an argument is provided in Recital (10) of Directive 2014/41/EU cit. which explains the option to have recourse to another investigative measure in a situation where the procedural standard to execute an investigative measure is that the suspicion against a person reaches a certain level.

[47] S Allegrezza, 'Collecting Criminal Evidence Across the European Union' cit. 64.

greater extent of communication allowed in the directive could serve a greater purpose in the field, which is enhancing mutual trust between the Member States and authorities.

Mutual trust is the facilitator of the principle of mutual recognition in the field of judicial cooperation in criminal matters.[48] It is said to be the normative glue that enables the quasi-automatic process of cooperation based on the formal assessment of judicial decisions subject to mutual recognition.[49] It is very often relied on by the ECJ when the functioning of mutual recognition regimes comes into question.[50]

Since the principle of mutual trust is fundamental to the functioning of the current system of judicial cooperation, the EU aims to implement trust-building policies that foster mutual trust between Member States against those circumstances that may hamper mutual trust, such as frequent violations of the ECHR and the differences between the legal systems of the Member States.[51] Such trust-building policies include criminal law harmonisation, the operation of EU agencies in the field, and the joint training of law enforcement and criminal justice personnel.[52] In addition, judicial dialogue is also a crucial trust-building factor in the EU that occurs between national judicial authorities (mostly courts) and the ECJ via the preliminary ruling procedure.[53]

I argue that the directive introduced a mechanism to intensify communication between the issuing and the executing authorities as a tool for trust-building. The individual rules above seem to serve the protection of fundamental rights of persons subject to the EIO, which is essential for Member States' (mutual) trust that they respect fundamental rights when applying EU law.[54] In addition, by facilitating communication between the authorities in the process of evidentiary cooperation during the execution of an EIO, the

[48] A Willems, *The Principle of Mutual Trust in EU Criminal Law* cit. 2; V Mitsilegas, 'Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon' cit. 150.

[49] M Schwarz, 'Let's Talk about Trust, baby! Theorizing trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) ELJ 125.

[50] As well described by Sicurella, trust is an essential part of the European integration. Mutual trust is a belief that the Member States properly apply EU law and they work to achieve the common goals of the EU. The ECJ also supplemented this concept in its 2/13 Opinion on the EU's accession to the ECHR, where it extended mutual trust to the protection of fundamental rights; see R Sicurella, 'Fostering a European Criminal Law Culture: In Trust we Trust' (2018) New Journal of European Criminal Law 309-310; Á Mohay, 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note' (2015) Pécs Journal of International and European Law 31.

[51] A Willems, *The Principle of Mutual Trust in EU Criminal Law* cit. 4; V Mitsilegas, 'Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon' cit. 150.

[52] For a detailed analysis see A Willems, *The Principle of Mutual Trust in EU Criminal Law* cit. 129-156.

[53] Arguably, Member States' trust in each other's legal system will increase if judicial authorities participating in the process of criminal cooperation are entitled to scrutinise the extent to which fundamental rights are protected in the other Member States. This phenomenon is referred to as a dialogical model of cooperation by Mitsilegas; see V Mitsilegas, 'Trust' cit. 70.

[54] E Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) CMLRev 496.

directive allows Member States to double-check the viability of the EIO in exceptional circumstances. Should the executing authority suspect that the investigative measure is not necessary or proportionate to the aim of the EIO, or a less intrusive investigative measure could achieve the same result, it can consult the issuing authority about this concern. I believe that art. 6(1) of the directive realises the goal of institutionalised distrust set by scholars in a manner that also fits the intention of the ECJ to allow the questioning of mutual trust only in exceptional cases, as the mechanism set by the directive is only applicable in obvious cases of violation of the principle of proportionality or necessity or the double equivalency clause. Ultimately, Member States can have greater trust in each other's legal systems if they can make direct inquiries to each other in such cases.

IV.1. Regulating greater communication between issuing and executing authorities as a form of institutionalised distrust

As already mentioned above, there are very limited occasions when the issuing and the executing authorities can request additional information in connection with a judicial decision subject to the principle of mutual recognition. These almost exclusively include cases when the judicial decision may be subject to refusal. In such cases, the executing authority is obliged to request clarification from the issuing authority to avoid the refusal of the execution. This serves the speedy procedure of recognising and executing judicial decisions.

The possibility for additional communication was extended in two cases in the EIO directive. As mentioned above, one possibility for further communication presents itself when the executing authority either suspects that the EIO does not meet the requirements of necessity or proportionality, or that it could not be issued in a similar domestic case in the issuing or executing Member State. The other possibility for further communication comes with the corrective mechanism. As the latter is not suitable for implementation in other tools of judicial cooperation, I will only analyse the viability of utilizing the former in other cooperation systems.

First and foremost, it should be noted that art. 6 of the EIO directive is not entirely new in terms of the standard regulatory technique for giving effect to the principle of mutual recognition. It lays down the criteria that the judicial decision needs to meet for it to be executable. These criteria are laid down in other cooperation systems as well (*i.e.*, the EAW shall be executed if it is issued following the provisions laid down in its framework decision; a decision, imposing a financial penalty shall be executed if it was transmitted following the rules laid down in the framework decision).[55] The direct consequence of these rules is that a judicial decision cannot be executed if it does not meet the requirements laid down in its secondary source of EU law. For example, the EAW is not executable if it is issued due to a criminal offence that is not punishable with a maximum amount of at least twelve months

[55] Art. 1(2) of Framework Decision 2002/584/JHA cit.; art. 6 of Framework Decision 2005/214/JHA cit.

of prison sentence, and the decision imposing a financial penalty is not executable if the unified form provided in its framework decision is not used.

However, art. 6 of the EIO directive goes further in enabling the executing authority to clarify whether the judicial decision meets those criteria for execution. Such an option for additional communication between the issuing and the executing authorities could be easily added to any other tool of judicial cooperation. One possible method for implementing this rule could be inspired by Council Framework Decision 2009/299/JHA which addressed the procedural rights of persons in connection with decisions rendered in their absence from the trial.[56] Based on this model, every mutual recognition regime could be supplemented with the possibility for executing authorities to inquire about the fulfilment of the issuing-criteria for the judicial decision that are laid down in their secondary sources of EU law.

This addition to the system of judicial cooperation based on the principle of mutual recognition could be a step from blind trust to earned trust envisioned by Valsamis Mitsilegas,[57] since judicial authorities would be able to communicate their concerns about the judicial decision at issue to their counterparts in the issuing Member State.

V. The fundamental rights-based refusal ground and the question of its applicability

According to art. 11(1)(f) of the directive, the executing Member State may refuse to execute the EIO if it would result in the violation of its obligations under art. 6 TEU and the Charter (of Fundamental Rights). Art. 6 TEU lays down the fundamental rights framework to which the EU and its Member States must adhere. The Charter defines the content of fundamental rights. Consequently, the executing authority is entitled to reject the EIO if its execution would violate fundamental rights as defined in the above sources (hence referred to as fundamental rights-based refusal ground). Its introduction is a notable deviation from the standard regulatory technique for the principle of mutual recognition in the process of criminal cooperation between Member States, as preceding its adoption, it was never directly set out in the secondary sources. Nonetheless, the protection of fundamental rights has always been part of mutual recognition regimes. Each of them sets out that its application cannot modify the obligation to respect fundamental rights and fundamental legal principles of EU law.[58] Scholars and even the European Commission perceived this as a *de*

[56] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

[57] V Mitsilegas, 'Trust' cit. 70.

[58] See, for example, the Framework Decision 2002/584/JHA cit. art. 1(3); Framework Decision 2008/909/JHA cit. art. 3(4); Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties art. 3; Framework Decision 2005/214/JHA cit. art. 3.

facto refusal ground for the protection of fundamental rights.[59] However, this assumption was not confirmed until the *Aranyosi and Caldararu* joined cases.[60] Nevertheless, the EIO directly introduced this refusal ground on the advice of the Fundamental Rights Agency of the EU – a measure that might have predicted the greater protection of fundamental rights in the framework of judicial cooperation in the EU that started to unfold in the line of cases before the ECJ beginning with the *Aranyosi and Caldararu* joined cases.[61]

Even though implementing such a measure could seem to be a significant development in judicial cooperation, the fundamental rights-based refusal ground does not seem to function at all. In its casework, published in 2020, Eurojust stated that it did not encounter any cases where this refusal ground was called up. Later even the ECJ questioned the applicability of the refusal ground in the *Gavanozov II* case for reasons elaborated below.[62] In light of these circumstances, Inés Armada's comment on the applicability of this refusal ground is worth bringing up.

She points out that the wording of the refusal ground does not constrict its scope to cases when the execution of the EIO would violate fundamental rights in the executing Member State. As such, the executing authority is – in theory – entitled to refuse the execution even in cases when the violation of the fundamental rights would occur at a later stage in the criminal procedure pending in the issuing Member State. However, she did note that with such a broad scope, the executing authority is given too much discretion, which it cannot effectively use since it cannot foresee possible violations in the criminal procedure that will take place in the issuing Member State. She argues that this wide margin of discretion is too much of a burden on the executing authority since it would need to undertake a "prophetic" assessment of risks.[63]

She also brings up whether the executing authority is obliged to act *ex officio* or only on the request of the affected person and if the former applies, what circumstances may suggest to the executing authority that the refusal ground should be applied.[64] Finally, she also brings up the standard of protection that the executing authority must adhere to when assessing the EIO and its possible effects on fundamental rights. She also pointed out that the refusal ground only refers to the Charter of Fundamental Rights,

[59] V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice' cit. 326; even some Member States' legislation provided for the refusal of the EAW if it would violate the fundamental rights of the surrendered person; see A Sanger, 'Force of Circumstance: The European Arrest Warrant and Human Rights' (2010) Democracy and Security 39.

[60] Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Caldararu* ECLI:EU:C:2016:198.

[61] FRA, *Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order* fra.europa.eu, 10-11.

[62] Case C-852/19 *Gavanozov II* ECLI:EU:C:2021:902.

[63] I Armada, 'The European Investigation Order and the Lack of European Standards for Gathering Evidence' cit. 25-26.

[64] *Ibid*. 26-27.

which demonstrates the will of the EU legislator to impose EU standards over national standards (as seen in the *Melloni* case).[65]

Summing up Armada's comments, the triggering criteria for the application of the refusal ground remain unclear. The grammatical analysis of the refusal ground provides two factors, that must be assessed when considering its use. "1. Without prejudice to Article 1(4), recognition or execution of an EIO may be refused in the executing State where: (f) 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".[66]

First, it lays down the standard of proof needed to initiate the refusal ground. It is applicable when there are substantial grounds to believe that the violation of a fundamental right would occur. Secondly, it sets out the fundamental rights framework the executing authority must adhere to, namely that provided in art. 6 TEU and the Charter of Fundamental Rights.

A mere grammatical interpretation of the refusal ground could indicate a constricting approach, where it could be called up if the execution would result in the violation of fundamental rights in the executing Member State. To properly understand this statement, we must pose a question: can a Member State be responsible for the violation of fundamental rights in another state? In case of an EIO, the sole connecting factor between the executing and the issuing Member States is the execution of the requested investigative measure. The executing Member State does not influence the criminal proceedings pending in the issuing Member State in any way. In such circumstances, no connecting factor could establish the executing Member State's liability for the violation of fundamental rights in the criminal procedure in the issuing Member State.[67]

This interpretation certainly goes against that provided by Armada regarding the liability of the executing Member State. However, it would solve the problem of overburdening the executing authority with the obligation to assess possible violations of fundamental rights in a criminal procedure pending in another Member State. On the one hand, such an interpretation could provide an answer regarding the application of the refusal ground, which would be most in line with the principle of mutual recognition. In this case, the executing authority would not assess whether fundamental rights are respected in the issuing Member State. On the other hand, it would not provide efficient protection for fundamental rights as Member States execute the investigative measure requested in the EIO as any other investigative measure ordered in a domestic judicial decision. Hence, the execution of the EIO would be compatible with fundamental rights

[65] *Ibid*. 27-29.

[66] Directive 2014/41/EU cit. art. 11(1)(f).

[67] For these connecting factors, see the European Court of Human Rights, 'Guide on Article 1 of the European Convention on Human Rights' (2022) www.echr.coe.int.

in virtually any case if a Member State does not wish to expressly conclude that its procedural system violates fundamental rights in the criminal procedure.

Thus, a logical and systematic interpretation, specifically considering recital 19 of the directive,[68] would suggest that the executing authority may reject the execution of the EIO even if it would result in the violation of fundamental rights at a later stage of the criminal proceedings pending in the issuing Member State. However, when applying this approach, the question of how such a violation could be predicted remains, since the notion of substantial grounds to believe – the triggering factor for the refusal ground – is not defined in any EU source of law, be it primary or secondary.

In my opinion, one should turn to the *Aranyosi and Caldararu* joined cases when looking for the definition of the notion of substantial grounds to believe, as the joined cases and the following line of cases before the ECJ concerned the refusal to recognise and execute the EAW, another judicial tool based on the principle of mutual recognition, in case its execution would violate fundamental rights of persons subject to the order. This makes the *Aranyosi and Caldararu* joined cases sufficiently closely related to the fundamental rights-based refusal ground regulated in the EIO directive. The *Aranyosi and Caldararu* joined cases confirmed that the execution of the EAW may be suspended if it would amount to the violation of art. 4 of the Charter, that is, the surrendered person's right not to be subjected to torture and inhuman or degrading treatment or punishment. In later cases, such as *LM* and *Dorobantu*, the ECJ confirmed that the execution of the EAW may be suspended in cases when other fundamental rights are compromised.[69]

The *Aranyosi and Caldararu* joined cases concerned two EAWs issued by Hungary and Romania. The *Hanseatisches Oberlandesgericht in Bremen* (Higher Regional Court of Bremen) decided to refer the cases before the ECJ for a preliminary ruling procedure since the persons sought by the issuing authorities challenged the EAWs on the basis that their execution would violate their right not to be submitted to inhuman or degrading treatment due to prison conditions in Hungary and Romania.[70] Even though the EAW Framework Decision does not have a refusal ground for cases of fundamental rights violations, the ECJ ruled that whenever there seems to be a real risk of inhuman or degrading treat-

[68] Directive 2014/41/EU cit. recital (19): "The creation of an area of freedom, security, and justice within the Union is based on mutual confidence and a presumption of compliance by the other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused".

[69] P Bárd and W Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister of Justice and Equality v. LM' (2018) New Journal of European Criminal Law 360.

[70] H Sorensen, 'Mutual Trust – Blind Trust or General Trust with Exceptions? The CJEU Hears Key Cases on the European Arrest Warrant' (2016) Pécs Journal of International and European Law 56.

ment, the executing authority must make a further assessment of whether there are substantial grounds to believe that the concerned individual will be exposed to that risk.[71] Academics described this process as the *Aranyosi test*, the purpose of which is to determine whether the surrender would result in the violation of the surrendered person's right not to be submitted to inhuman or degrading treatment.[72]

It consists of two phases: the first is concluding that there is a real risk of violating the fundamental right in question,[73] which is called an *in abstracto* threat. If an *in abstracto* threat can be identified, the executing authority – in the second phase of the *Aranyosi test* – is called to determine whether that risk can manifest in the individual case under its specific circumstances. Academics call that an *in concreto* threat, and the ECJ refers to it as "substantial grounds to believe".[74]

Consequently, if we derive the meaning of substantial grounds in the EIO directive from the EJC's ruling in the *Aranyosi and Caldararu* joined cases, it means that the execution of the EIO exposes the concerned person to the evident possibility that their fundamental rights will be violated. However, this answer in and of itself is not enough to map out the applicability of the refusal ground in the EIO directive since the method of scrutiny is equally important.

The question of how to identify that the person concerned by the EIO would be exposed to fundamental rights violations brings up the problem referred to by Armada, namely that the executing authority would need to undertake a prophetic assessment of the facts of the case to identify this probability. To mitigate this problem, once again, we can turn to the ECJ's ruling in the *Aranyosi and Caldararu* joined cases since it sets the method of scrutiny. The ECJ established that the executing authority may only rely on objective, reliable, specific, and properly updated information to determine whether there is a real risk of inhuman or degrading treatment. Sources of such information may be judgements of international or national courts and decisions, reports, and other documents produced by bodies of the Council of Europe or under the aegis of the UN.[75]

[71] *Aranyosi and Caldararu* cit. paras 91-92.

[72] A Martufi and D Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority: The Practice of the Court of Amsterdam in EAW Proceedings' (2020) New Journal of European Criminal Law 286; P Bárd and W Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust?' cit. 361.

[73] *Aranyosi and Caldararu* cit. para. 88; there is an abstract threat of a fundamental right being infringed if it has not yet occurred but is likely to occur. In its assessment, the executing authority may only use objective, reliable sources that are genuinely relevant and up-to-date in the given situation; see A Martufi and D Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority' cit. 290.

[74] *Aranyosi and Caldararu* cit. para. 92; A Martufi and D Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority' cit. 284.

[75] *Aranyosi and Caldararu* cit. para. 89; thus, the role of monitoring NGOs becomes more important; see E Aizpurua and M Rogan, 'Understanding New Actors in European Arrest Warrant Cases concerning Detention Conditions: The Role, Powers and Functions of Prison Inspection and Monitoring Bodies' (2020) New Journal of European Criminal Law 205.

Consequently, two crucial questions in connection with the application of the fundamental rights-based refusal ground can be answered based on the judgement of the ECJ in the *Aranyosi and Caldararu* joined cases: the triggering factor for the refusal ground and the source of information which the application of the refusal ground can be based on. However, one question remains: is the executing authority obliged to scrutinise the protection of fundamental rights *ex officio*, or only on the request of the concerned person? The ECJ never mentioned the former, *ex officio* obligation in the *Aranyosi and Caldararu* joined cases or others that continued this line of cases. Thus, I am inclined to believe that the executing authority is not obliged to practice such control over the protection of fundamental rights in connection with the execution of the EIO. Instead, this scrutiny should take place only at the request of the concerned person and only when the argument is well-founded. This could unify the case law regarding the refusal ground in every Member State thus preventing an unbalanced status of the concerned person in different Member States.

This interpretation elaborated above is in line with the judgement of the ECJ delivered in the *Gavanozov II* case, where the lack of available legal remedies against certain investigative measures was brought into question.[76] In that case, the referring Bulgarian judge asked the ECJ whether legislation that does not allow for challenging an EIO requesting the search of residential and business premises, the seizure of certain items, and the hearing of a witness is compatible with arts 47 and 7 of the Charter read in conjunction with arts 13 and 8 of the ECHR.[77] The ECJ found that such legislation is indeed in violation of the right to an effective legal remedy. Hence it violates the Charter and the ECHR.[78] However, it remained a question how to remedy this situation. Both AG Bobek, in his advisory opinion, and the ECJ argued that in such cases, the fundamental rights-based refusal ground could not be applied since that would place too much burden on the executing authority.[79] In addition, the Court noted that when the EIO is *a fortiori* in violation of fundamental rights, the refusal ground cannot be applied since its application would become automatic in such cases. That would not be compatible with the principles of mutual trust and sincere cooperation, not to mention that the refusal ground is devised to be applied on a case-by-case and exceptional basis which could not be guaranteed.[80]

Consequently, it is safe to assume that the executing authority should only examine the protection of fundamental rights in the case of an EIO if the concerned person requests it, and that request is based on precise, up to date and reliable information proving that there is a real risk of the violation of the concerned person's fundamental rights if the EIO is executed. In such cases, the executing authority should consult with the issuing authority

[76] *Gavanozov II* cit.
[77] *Ibid*. para. 23(1).
[78] *Ibid*. para. 34.
[79] Case C-852/19 *Gavanozov II* ECLI:EU:C:2021:346, opinion of AG Bobek, paras 89-91.
[80] *Gavanozov II* cit. paras 59-60.

to exclude the possibility of fundamental rights violations. If that cannot be guaranteed, then the execution of the EIO should be rejected or postponed at the very least.

V.1. Making the fundamental rights-based refusal ground the norm instead of it being the exception

With the introduction of the fundamental rights-based refusal ground, the intention of the EU legislature certainly was to better protect the fundamental rights of persons concerned by the EIO, however, its efficiency can be questioned due to the highly uncertain terms of its application. Even though there seems to be a working mechanism that can be analogous to the application of the refusal ground, one problem remains specifically in connection with the EIO. Investigative measures are usually executed without the prior knowledge of the concerned person. Thus, there is no intermediary stage where the person could object to the execution of the EIO, unlike the EAW where the person sought is interviewed by the court before the execution of the warrant.

Since the objective of the EU legislature was to strengthen the status of the individual in the criminal procedure, the introduction of such an intermediary procedural stage should be considered where possible. Accordingly, the executing authorities should provide the possibility for the concerned persons to object to the transfer of evidence gathered through the EIO to the issuing Member State. This method would maintain the original exceptional characteristics of the refusal ground. However, it must be noted that this intermediary stage for challenging the transfer of evidence cannot take place before the execution of the investigative measure as it would jeopardise the aims of the investigation if the concerned persons were notified in advance of the investigative acts.

Since every cooperation system building on the principle of mutual recognition is defined by the same set of rules, the implementation of the refusal ground should not pose any real problems. The implementation could be achieved in the very same manner as the implementation of rules regarding the greater extent of communication between the competent authorities.

However, it is important to better circumscribe the criteria for the application of the refusal ground as currently practitioners may only rely on the case law of the ECJ. It would be beneficial to clarify the application criteria for two reasons. Firstly, it would create a framework that is universally applied throughout the EU. Secondly, the universally applicable framework would eliminate the differences between the case law which could vary in each Member State. Such a reformulation of the application criteria of the refusal ground would increase legal certainty throughout the EU. In doing so, I propose to stick to the interpretation provided above.

To summarise, the refusal ground should be applicable in cases when the violation of fundamental rights of a person subject to a judicial decision based on the principle of mutual recognition is a real possibility due to the circumstances of the individual case pending in the issuing Member State. In such cases, the execution of the respective tool

of mutual recognition should be postponed until the issuing Member State provides sufficient guarantees that the fundamental rights of the concerned person are protected. This method would provide sufficient discretion for the judicial authorities taking part in the process of criminal cooperation without resulting in different case laws directed at the application of the refusal ground. Apart from that, the institutionalised *Aranyosi test* should be applicable based on the concerned person's well-founded initiative to avoid the refusal ground being shifted from an exceptional measure to a general practice.

VI. Conclusion

Although the EIO shows great similarities to other tools of judicial cooperation in criminal matters based on the principle of mutual recognition, the aforesaid showed that the directive introduced a framework for evidentiary cooperation which deviates from the standard regulatory technique for giving effect to the principle of mutual recognition in the policy of judicial cooperation in criminal matters on several points. Most of the newly introduced rules discussed above serve to strengthen the status of the individual in the Area of Freedom, Security, and Justice, where the enforcement capacities of the Member States are extended beyond national borders.

Even though having recourse to a different investigative measure serves the efficiency of cooperation in two instances, it aims to protect the fundamental rights of the person concerned by the EIO in its third case. As already mentioned, that can be perceived as a *de facto* refusal ground for the protection of fundamental rights as the issuing Member State does not have the power to uphold the original investigative measure if the executing Member State decides to avail itself of the possibility to have recourse to another investigative measure. The great advantage of the corrective mechanism is that it enables the executing authority to provide greater protection for the concerned person in the procedure while retaining the efficiency of cooperation. To apply this part of the corrective mechanism, the executing authority would have to consider both the intrusiveness of the investigative measure originally ordered in the EIO and the capability of the alternative investigative measure to reach the underlying objective in the criminal procedure which made it necessary to issue an EIO in the first place.

In addition, the EIO Directive provides a greater extent of communication, which can be seen as a crucial trust-building factor between the Member States. An interpretation focused on the efficiency of the legal tool is excluded here since the permission to engage in further communication between the authorities could very well postpone the execution of the EIO.

The fundamental rights-based refusal ground was one of a kind at the time of the directive's adoption. At that time, the ECJ still maintained a strict efficiency-based approach toward criminal cooperation between Member States. Notably, we had to wait two more years after the adoption of the EIO directive for the ECJ to confirm that the execution of a legal tool based on the principle of mutual recognition in the policy of judicial cooperation

in criminal matters – namely the EAW – can indeed be postponed if fundamental rights would be compromised upon its execution. Hence, in a way, the EIO directive foretold the future of judicial cooperation in criminal matters by expressly setting out a refusal ground for the protection of fundamental rights. Paradoxically, this refusal ground has never been applied in case of an EIO. However, arguably, it could be applied under a process similar to that outlined in the *Aranyosi* and *Caldararu* joined cases.

In conclusion, the adoption of the EIO directive had a predominantly positive impact on the status of the individual in the EU area of free movement, which is only slightly shadowed by well-founded critiques directed at the current framework, such as the insufficient representation of defence rights and the deficient regime of legal remedies.[81] This inspired me to review the possibility of implementing the above regulations in other cooperation systems as well – an idea that was brought up before this *Article*, because the fundamental rights-based refusal ground has already been integrated into Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders.[82]

However, the EU legislator should not stop at that point. It could be possible to implement and further enhance the applicability of the analysed rules in other mutual recognition regimes as well, especially those which institutionalise distrust. Enabling the executing authorities to double-check the criteria for issuing the judicial decision in the form of an inquiry could be implemented in any mutual recognition regime as they are based on the same logic. Every judicial decision that is subject to mutual recognition may be recognised and executed in case it is issued in line with the rules laid down in its mutual recognition regime. The inquiry could be provided for cases when the executing authority suspects that the criteria for issuing the judicial decision are not met. For example, this possibility could be included in the EAW framework decision for cases when the executing authority doubts that the underlying offense is punishable by a custodial sentence for a maximum period of at least twelve months in the issuing Member State.[83]

In addition, the introduction of the fundamental rights-based refusal ground could clarify the currently undefined practice of suspending the process of criminal cooperation when it directly amounts to the violation of the fundamental rights of the concerned persons.[84] Not only would this strengthen the status of the individual in the Area of Freedom,

[81] J Blackstock, 'The European Investigation Order' (2010) New Journal of European Criminal Law; R Garcimartín Montenero, 'The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations' (2017) eucrim eucrim.eu 48; R Belfiore, 'The European Investigation Order in Criminal Matters' cit. 320-321; F Zimmermann, S Glaser and A Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: A Critical Analysis of the Initiative for a European Investigation Order' (2011) EuCLR.

[82] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders arts 8(1)(f), 19(1)(h).

[83] Framework Decision 2002/584/JHA cit. art. 2(1).

[84] Literature shows that Member States sometimes implement optional refusal grounds as mandatory, and the judgements of the ECJ show that occasionally Member States create refusal grounds that are

Security and Justice and mitigate the harmful effects stemming from the differences between the criminal justice systems of the Member States, but it would also increase mutual trust as it would provide a form of scrutiny that may be applied only in exceptional cases where there is a well-founded risk of the violation of fundamental rights. This would decrease the responsibility of the executing authorities while enhance the remedial rights of the persons subject to the mutual recognition regimes, hence developing defence rights as well.

not based on the Framework Decision; see V Glerum and H Kijlstra, 'EAW: Next Steps, Will Pandora's Box Be Opened?' (2023) Review of European and Comparative Law 127; case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57 paras 68-74.