European Supervision Order – Is it the Ballast for Law Enforcement or the Way out of the Deadlock?

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Abstract

The article analyses the conception of the European supervision order (hereinafter – the ESO) as well as some theoretical and practical problems arising in the process of implementation and effectiveness of the ESO. The authors, being guided by the currently existing legal provisions, legislative ideas and jurisprudence of the European Court of Human Rights (hereinafter - the ECHR), formulate the question whether the ESO is an operating mechanism of the international cooperation in criminal proceedings or a nice idea remaining on paper.

The attention is hereby drawn to the fact that this segment still remains at the search-discovery-search stage. The today's topical issues compel to acknowledge that in the absence of the criteria that are regulated at the level of the European Union, which must be taken into account by the issuing State when considering the person's or his/her defender's application to issue the ESO, the niche is left for Member States to misuse their right and not to issue the ESO even in the justified cases. Finally, it is hereby emphasized that the significant aspects that are related to the realization of the person's right to defence, to the appeal against the decisions, which were made by the issuing and executing States, remain not covered by Council Framework Decision 2009/829/JHA "On the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention" of the 23rd of October, 2009 (hereinafter - Framework Decision). The article calls into question whether it is appropriate to move the issue on the compensation of costs on the issuing State's shoulders.

A relatively short time has passed since the implementation of this document in the national law of Member States; therefore, the ESO topic remains relevant and new in the scientific plane; the future prospects of application of this legal mechanism are of interest. The authors are not inclined to submit final answers at this stage of the ESO existence, but they suggest some possible ways for the solution of problematic issues.

Keywords*: European supervision order, supervision measures, adaptation of supervision measures.*

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1. Introductory remarks

The Framework Decision is an "<…> instrument – on which the Council had already reached the general approach on the 27th of November, 2008 – is now adopted. It lays down the rules, according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention. Compared to the similar FD applicable to probation measures (FD 2008/947/JHA), this FD creates the regime, where the issuing authority remains to a larger extent in control of the measure. Surrender of the person concerned to the issuing State in case of breach of those measures will require the issuing of an EAW and the executing authority will be able to use all grounds for non- recognition provided for in the FD on the EAW to refuse the surrender[1]".

The prehistory of this document is explained in detail in the Explanatory Memorandum, which accompanied the original proposal for the Framework Decision of the Commission of the European Communities. The Commission noted "<...> EU citizens, who are not residents in the territory of the Member State, where they are suspected of having committed a criminal offence, are sometimes – mainly owing to the lack of community ties and the risk of flight - kept in pre-trial detention or, perhaps, subject to a long-term non- custodial supervision measure in a (for them) foreign environment. A suspect, who is a resident in the country, where he or she is suspected of having committed an offence, would often benefit in a similar situation from a less coercive supervision measure, such as reporting to the police or travel prohibition[2]". Firstly, such perverse application of the law violates the principle of equality; besides, it causes harmful consequences to a foreign citizen's social contacts in his or her legal place of residence: "Typically a foreign suspect will be in a more vulnerable position than a person, who normally is a resident in the country. Apart from being more or less cut off from contacts with his or her family and friends, there is a clear risk that a non-resident suspect in such a situation could lose his or her job as a coercive measure (e.g. travel prohibition) that the judicial authority of the trial State has imposed on the suspect would stop this person from going back to his or her country of normal residence"[3]. Secondly, "keeping persons in pre-trial detention has also an important cost implication for the public authorities involved. Moreover, the excessive or unnecessary use and length of pre-trial detention contribute to the phenomenon of prison overcrowding, which continues to blight penitentiary systems across Europe and seriously undermines improvements in conditions of detention"[4]. The European judicial supervision order, as the solution of these problems in the Union, was necessary: "The problem is that the different alternatives to pre-trial detention and other pre-trial supervision measures (e.g. reporting to the police) cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions in these matters. This means that the implementation of the right to liberty and the presumption of innocence in the European Union seen as a whole still must be considered as incomplete"[5].

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[1] European Criminal Law Academic Network. Newsletter, Issue No. 3, September – December 2009. <http://www.ja-sr.sk/files/ECLAN%20Newsletter%20-%20Issue%20No3%20(2009).pdf>.

[2] Proposal for a Council framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union COM(2006) 468 final, 29 August 2006, p. 2. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0468:FIN:EN:PDF>.

[3] *Supra note* 4, p. 2.

[4] *Ibid*.

[5] *Ibid*.

The Commission drew attention to one more important aspect of the ESO: "<...> the European supervision order is not only an alternative to pre-trial detention. It may also be issued in relation to an offence, for which only less severe coercive measures (e.g. travel prohibition) than pre-trial detention are allowed, i.e. where the threshold may be lower than for remand in custody"[6]. It is important that the ESO is sought for encouraging "<...> where appropriate, the application of non-custodial measures as an alternative to detention on remand"[7].

Prior to adoption of the Framework Decision, the law enforcement authorities had essentially two choices when settling the issue on supervision measures for foreign nationals: either to apply the detention on remand that is associated with imprisonment or to release a person to freedom to move under no control. Both those variants were dangerous. Imprisonment, which is directly or indirectly motivated by foreign citizenship as the main argument, creates the situation that does not meet the principle of equality, puts foreign nationals into a worse situation than they would have occurred, if they have had the citizenship of the state, in which the issue on the supervision measure is solved. Detention of a non-permanent resident can be applied even in the case, when the supervision measure would not be imposed on a constant resident in the similar circumstances. Such perverse application of the law diminishes the principle of the presumption of innocence, which is conditioned by the circumstances that the freedom of a person in criminal proceedings is understood as a rule, whereas detention - as the exception to this rule[8].

Such rules are followed also in the ECHR case-law, which has made it clear that the priority should be given to the release of a person to freedom, when considering the authorization of detention[9]. In the case of Ambruszkiewicz v. Poland the Court applied a proportionality test to detention falling under Article 5 § 1 (c) of the Convention, when considering whether the applicant's detention on remand was strictly necessary to ensure his presence at the trial and whether other, less stringent, measures could have been sufficient for that purpose. Applying the proportionality test, the Court found that the failure to consider release subject to financial security and police surveillance meant that the detention was not in accordance with Article 5 (No. 38797/03, §29-33, 4 May of the year 2006). The duty of States to consider the measures, which are alternative to detention, was construed in a number of judgments, for eg., Idalov v. Russia [GC], No. 5826/03, ECHR 2012, Bolech v. Switzerland, No. 30138/12, ECHR 2013, etc. As the ESO is also the measure, which encourages the application of supervision measures that are alternative to arrest, so the conclusion can be drawn that the States, which unreasonably do not consider the application of this measure in the case, would violate the Convention.

Moreover, such perverse application of the law deepens the problem, which is topical for whole Europe[10] - the overcrowding of imprisonment institutions. Keeping of

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[6] *Supra note* 4, p. 8.

[7] Opinion of Advocate General Campos Sánchez-Bordona delivered on 19 July 2016. JZ v Prokuratura Rejonowa Łódź – Śródmieście. Case C-294/16 PPU; View of Advocate General Jääskinen delivered on 2 May 2014. Criminal proceedings against Zoran Spasic.

[8] Gialuz M.; Spagnolo P. Reasonable length of pre-trial detention: rigid or flexible time limits? A study on Italy from a European perspective. European criminal law review. 2013. 3(2): p. 220.

[9] McKay v. the United Kingdom [GC], No. 543/03, ECtHR 3 October 2006, Estrikh v. Latvia [III], No. 73819/01, ECtHR 18 January 2007.

[10] Voyatzis, P. Alternative measures to detention in the European Court of Human Rights' case law. European criminal law review. 2014, 4(2): 169.

a foreign national imprisoned solely because he is a foreign national and has no social ties with that State, in which he does not live and even did not create such ties, does not seem to be progressive in the context of protection of human rights. On the other hand, though the free movement of persons is a value, the uncontrolled movement of the persons, who possibly have committed a criminal offence, would cause danger to the security of citizens and the society. The Framework Decision was adopted to this end; it must harmonize the right of the persons, who possibly have committed a criminal offence, to freedom with the security for the aggrieved parties and society, must encourage the application of non-custodial measures in criminal proceedings against the persons, who do not constantly reside in the Member State, where the criminal proceedings are held (Article 2(1) of the Framework Decision). Attention must be drawn to the fact that the Framework Decision also encourages using the electronic monitoring for monitoring the supervision measures (paragraph 11 of the preamble of the Framework Decision).

Member States had to implement this Framework Decision no later than before the 1st of December, 2012. Currently, almost all States of the European Union implemented the Framework Decision, but the implementation process is still going on in Ireland and Belgium[11]. It remains to rejoice that the ESO has almost established itself in the national law of Member States. It is worth paying attention in this context to the circumstance that the transfer process was not fast in all States. Only Denmark, Finland, Latvia and Poland can be mentioned as the States, which timely implemented the Framework Decision before the 1st of December of the year 2012.

2. European supervision order and principle of recognition of the coercive measure in the Framework Decision

"Effective criminal justice is a basic prerequisite for peaceful coexistence in any society[12]". However, the effective criminal proceedings would not be possible without the "mutual recognition, whereby decisions made by the judicial authorities of one Member State are given effect by the judicial authorities of another with minimum formality and only very limited grounds for refusal[13]". The mutual recognition of procedural coercive measures is sought in the Framework Decision; this is stated in the very beginning of the document – in paragraph 2 of the preamble.

As was already mentioned, the Framework Decision together with the other relevant documents was adopted with taking into account a considerable number of citizens of the European Union, who are imprisoned in the other Member States. In a common European area of justice based on mutual trust, the European Union has taken action to ensure that non-residents subject to criminal proceedings are not treated

[11] European Judicial Network. Judicial library (Last reviewed on 6 March 2017 by EJN Secretariat). <https://www.ejn-<crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39>.

[12] European Criminal Policy Initiative. A Manifesto on European Criminal Procedure Law. This project has been funded by the European Commission's Criminal Justice 2010 Programme and the Ragnar Söderbergs Stiftelse. https://www.juridice.ro/wp-content/uploads/2013/11/manifesto.pdf

[13] The European Union Committee. The European Union's policy on criminal procedure. 30th Report of session 2010-12. https://pdfs.semanticscholar.org/230f/4d46ac4b9c7142452b5b474e1b94f89f554b.pdf, article 2.

differently from residents[14]. Thus, the goal is pursued to restrict arrest of citizens of the European Union in the country, in which they constantly reside, and to encourage the application of supervision measures in his or her natural environment in the Member State, while his or her criminal case is being examined in a foreign Member State. Such aspiration confirms the respect, which is enshrined by the European Union for human rights and freedoms. The procedural coercive measures associated with deprivation of freedom, which are applied in the absence of absolute necessity, are not only incompatible with the principle of the presumption of innocence and freedom (as a rule in criminal proceedings), but also produce a negative impact on the person's social relations, financial situation, hold back the career progress and hinder his or her family, private life.

In the Explanatory Memorandum, which accompanied the original proposal for Framework Decision 2009/829/JHA of the Commission of the European Communities, the ESO is defined as a decision issued by a judicial authority (i.e. a court, a judge, an investigating magistrate or a public prosecutor) in one Member State that must be recognised by a competent authority in another Member State[15]. According to the authors, the ESO can be defined as the enforceable decision made by the competent authority of the issuing State of the European Union in accordance with the national law in the course of criminal proceedings, according to which one or more non-custodial supervision measures, as an alternative to detention, are applied against a natural person, who does not permanently reside in the State and is suspected of having committed a criminal offence, and addressed to the executing Member State, in which that person resides. It is one of the possible definitions of the ESO, which is more detailed; however, it does not claim to be the only true and final definition of the ESO.

The executing State's obligation to accept the transfer of supervision measures and to recognize the decision made by the judicial authority of the issuing State (except for the cases, when there are the grounds for refusal, which are foreseen in Article 15 of Framework Decision and in paragraph 16 of the preamble) arise from the principle of mutual recognition.

However, the issuing State itself is not obliged to issue the ESO: "It is for the issuing authority to decide whether it wants to use it"[16]. The issuing State has the right to decide whether it will apply the European judicial supervision order in the definite criminal case. It must be also noted that a natural person's consent is necessary for the application of the European judicial supervision order (Article 9(1) of the Framework Decision). The voluntary principle is applied also in the case, when the country, in which the person permanently and lawfully resides, is not a Member State of the European Union. In such a case a person has the right to request an application on the ESO to the issuing State. The issuing State has the right to transfer the decision on the ESO to the competent authority of the non-Member State, if the latter agrees to such transmission

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[14] European Commission. Report form the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, 5 February 2014, <http://ec.europa.eu/justice/criminal/files/com_2014_57_en.pdf>, 4 p.

[15] *Supra note* 4, p. 8.

[16] Libor Klimek „Mutual Recognition of Judicial Decisions in European Criminal Law“ 403 p., Springer, 2016.

(Article 9(2) of the Framework Decision). Article 9(3) of Framework Decision gives the discretion to Member States, i.e. in which cases they would transfer the decision on the ESO to the non-Member State.

The European judicial supervision order is applied under Article 8(1) of the Framework Decision to the following foreseen six supervision measures: 1) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; 2) an obligation not to enter certain localities, places or defined areas in the issuing or executing State; 3) an obligation to remain at a specified place, where applicable during specified times; 4) an obligation containing limitations on leaving the territory of the executing State; 5) an obligation to report at specified times to a specific authority; 6) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed. Member States may impose more supervision measures than it is foreseen in the mentioned provision. For this reason, it is very important that the national law of all Member States would adequately regulate the ESO issues. Otherwise, nationals of the State, which does not follow this obligation, who are detained in the other Member State, would not be able to use this legal mechanism.

The issuing Member State retains its competence for monitoring the supervision measures, if the executing Member State does not recognize the decision on the ESO and does not inform the issuing State about its decision not to recognize it. Under Article 11(2) of the Framework Decision, if the competence for monitoring the supervision measures has been transferred to the competent authority of the executing State, such competence shall revert back to the competent authority of the issuing State: (a) where the person concerned has established his/her lawful and ordinary residence in a State other than the executing State; (b) as soon as the competent authority in the issuing State has notified withdrawal of the certificate referred to in Article 10(1), pursuant to Article 13(3), to the competent authority of the executing State; (c) where the competent authority in the issuing State has modified the supervision measures and the competent authority in the executing State, in application of Article 18(4)(b), has refused to monitor the modified supervision measures because they do not fall within the types of supervision measures referred to in Article 8(1) and/or within those notified by the executing State concerned in accordance with Article 8(2); (d) when the period of time referred to in Article 20(2)(b) has elapsed; (e) where the competent authority in the executing State has decided to stop monitoring the supervision measures and has informed the competent authority in the issuing State thereof, in application of Article 23.

The absence of the relevant supervision measure in the national law of the executing Member State does not serve as the grounds for refusing to recognize the decision on the ESO. In such a case the executing Member State may adapt it in line with the types of supervision measures, which apply, under the law of the executing State, to equivalent offences. The adapted supervision measure shall correspond as far as possible to that imposed in the issuing State (Article 13(1) of the Framework Decision). Attention must be drawn to the fact that under part 2 of this Article the adapted supervision measure shall not be more severe than the supervision measure, which was originally imposed. As the process of adaptation is not regulated in detail in the document itself, so the issue to decide, which supervision measure could be equated to the other supervision measure, is left to the discretion of the executing State. On the

other hand, after having received the information about adaptation of the supervision measure, the issuing State, which does not recognize the adapted application of coercive measures to the specific criminal case, under Article 13(3) of the Framework Decision has the right to decide to withdraw the certificate as long as monitoring in the executing State has not yet begun.

Under Article 19(3) of the Framework Decision the executing State is obliged to inform the issuing State about of any breach of the supervision measure, and any other finding, which could result in taking any subsequent decision referred to in Article 18(1). Accordingly, afterwards the issuing State takes further decisions on the application of the supervision measure.

For illustration purposes the example of the Republic of Lithuania can be briefly mentioned. Special Law No XII-1322 of the 13th of November of the year 2014 on the mutual recognition and enforcement of judgments in criminal matters by Member States of the European Union (Law No XII-1322) based on the Framework Decision was implemented in Lithuania. When the Republic of Lithuania is the executing State, the entities competent for the recognition of the decision on the supervision measure under Article 6 of the Framework Decision are a prosecutor of the Vilnius Regional Prosecutor's Office according to the place of residence of the person, in respect of whom this decision is made (Article 40(1) of Law No XII-1322), and where appropriate - a prosecutor of the Prosecutor General's Office of Lithuania or a pre-trial investigation judge (Articles 40(2) and 40(3) of Law No XII-1322). A decision on a supervision measure imposed in respect of a person not ordinarily resident in the Republic of Lithuania, may also be recognised and executed in the Republic of Lithuania at the request of that person and if the prosecutor agrees to take over the execution of the decision on the supervision measure. In this case, the decision to recognise the supervision measure is issued by a prosecutor of the Prosecutor General's Office of the Republic of Lithuania. In accordance with Article 8(2) of the Framework Decision, as well as the supervision measures set out in Article 8(1) of the Framework Decision, the Republic of Lithuania also recognises and executes decisions on supervision measures issued in criminal proceedings in other Member States of the European Union, imposing, as an alternative to the detention of the suspect, defendant or sentenced person, one or more of the following obligations and prohibitions: a) a prohibition from engaging in certain activities related to the alleged offence; b) a driving ban; c) an obligation to deposit a certain sum of money or to give another type of guarantee, which may either be provided through a specified number of instalments or entirely at once.

When the Republic of Lithuania is the issuing State under Article 6 of the Framework Decision, the decision to transmit a supervision measure to another EU Member State at the pre-trial stage is taken by a prosecutor, while at the trial stage, such decision is taken by the trial court (Article 44(1) of Law No XII-1322). The following procedural coercive measures, which were imposed in the course of criminal proceedings ongoing in the Republic of Lithuania, can be transmitted to the other State of the European Union for execution: 1) the supervision measures – intensive supervision, house arrest, bail, seizure of documents, obligation to report regularly to the police institution and written undertaking not to leave the place; 2) the procedural coercive measure – temporary removal from the held duties or temporary deprivation of the right to be engaged in certain activities (Article 43(1) of Law No XII-1322).

The ESO legal regulation allows drawing the conclusion about the importance of the principles of cooperation between the countries, the presumption of innocence,

recognition of the procedural coercion and voluntariness. The purposes of criminal proceedings can remain unachieved, if the States do not sufficiently cooperate with each other; therefore, it is very important that the executing State would properly supervise the compliance with the supervision measure and as soon as possible would inform about the violations. The non-recognition of the measures of procedural coercion by the issuing State in the case of adaptation can lead to difficulties in application of the ESO.

3. Some theoretical and practical problems with the regulation of the European judicial supervision

It would be difficult to deny that a suspect's legal position during the investigation, the trial, or after the trial may vary significantly, depending on whether he is prosecuted in one Member State or the other[17]. Nevertheless, the issuing State makes the decision on the application or non-application of the ESO in the particular case. It is supposed that the issuing State's unlimited discretion to refuse applying the ESO is one of the most problematic aspects, which can lead to the non-application of the Framework Decision or to its unreasonably unequal, discriminatory application, for eg., against the persons, whose social status is perfect and they have the possibility to make use of the services rendered by lawyers of the highest professional level.

As is rightly noted by some authors, namely "<...> the harmonized level of procedural safeguards becomes an essential aspect of criminal procedure, in all legal systems of the Member States[18]". Thus, the ESO regulation must be such, so as to provide at least the minimum criteria to be taken into account by the national competent authorities, when solving the applications on issuance of the ESO. This is necessary, so that the competent authorities of the issuing State would not have the unlimited discretion, which can turn into the misuse, not to apply the ESO through various reasons, for eg. through the lack of competence or inflexible attitude towards novelties, avoidance to pile on oneself additional work and so on or the discriminatory application of these measures, oriented, for eg., towards the social status, sexual orientation, etc. The Framework Decision does not foresee the cases, when a Member State is obliged to issue the ESO. It is left to the discretion of Member States. Finally, the national case-law on this issue will form in the long run and namely the courts, prosecutors or other competent authorities will finally decide on the ESO in each case whether it is worth to transfer the particular person to the other state with the aim to impose or not to impose the supervision measure on him or her. On the one hand, clearly unregulated issues always cause problems and create preconditions for the application of a different case-law. On the other hand, to oblige the relevant state to transmit the execution of supervision measures that are applied against a citizen, who does not constantly reside therein, also would be a difficultly doable task due to the state's sovereignty and the state's right arising from the territorial principle of the

[17] Michiel Luchtman. Choice of forum in an area of freedom, security and justice. Utrecht Law Review. Volume 7, Issue 1 (January) 2011, p. 75.

[18] Joanna Beata Banach-Gutierrez. Protection of Fundamental Rights in the 'Globalised' Criminal Justice and its Impact on the National Human Rights Policies in Europe. <http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2010biec/Protection_of_Fundamental_Rights_in_the_Globalised_Criminal_Justice_and_its_Impact_on_the.pdf>.

international criminal law to maintain the jurisdiction over the criminal offences committed in its territory, even in relation to foreign nationals[19].

Political barriers also cannot be rejected. The probability that the states, the mutual relations of which are tense, will not be inclined to apply the ESO, remains. As a result, citizens of the relevant state will suffer the most, i.e. the imprisonment together with all the ensuing consequences will threaten them more than it will threaten residents: the dying out family ties, stopped career progress, decreasing income, etc. Thus, the question, in which cases and how often Member States will use the ESO as well as the national courts and the criminal prosecuting authorities will apply the ESO, remains open as well as the question, how to deal with this potential problem, does.

According to the authors, persons in all Member States of the European Union must have the guarantees compatible with each other, including the unanimous criteria adopted at the European Union level, which must be taken into account by the issuing State when deciding on the issue of the ESO. These criteria could resemble the ones, when the issue on extradition detention is solved and the person's social relations are assessed at the national level. The issuing State could also assess social relations of that person in the executing State according to the objective data submitted by the person, his or her personality and criminal experience. The person's marital status, constant place of residence, labour relations, health condition, previous convictions, possessed assets and the other circumstances could be taken into account in the executing State. The absence of similar criteria can lead to the circumstance that the ESO in some Member States can remain as a nice idea on paper.

It is foreseen in paragraph 15 of the preamble of the Framework Decision that since the objective of this Framework Decision, namely the mutual recognition of decisions on supervision measures in the course of criminal proceedings, cannot be sufficiently achieved by Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 2 of the Treaty on the European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in that Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

It is worth remembering that under Article 70 of the Treaty on the Functioning of the European Union, without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Thus, we see that in the case, when Member States do not sufficiently cooperate with each other, the European Union reserved the right to take the appropriate measures to regulate the problematic issues in more detail. Having identified that the ESO in Member States is applied in violation of the European Union policy, the national parliaments could adopt additional measures in their national law, so that the proper

[19] Peter Malanczuk. Akehurst‘s modern introduction to international law. Seventh revised edition. Routledge: London and New York, 1987, p. 110.

operation of the ESO would be ensured and so that this advanced idea on transmission of the execution of supervision measures in the context of human rights would not remain only on paper.

It is also important that the issue of defence remains non-discussed in the Framework Decision, though there are many places in the Framework Decision, where the issue of defence is relevant and causes unclearness.

The first situation is related to the issue on the extension of supervision measures, which is being solved in the executing State. Attention must to drawn in this context to the fact that such legal regulation is rather inconsistent, as the issuing State has jurisdiction to take all subsequent decisions relating to a decision on supervision measures. Such subsequent decisions include notably: 1) renewal, review and withdrawal of the decision on supervision measures; 2) modification of supervision measures; 3) issuing an arrest warrant or any other enforceable judicial decision having the same effect (Article 18(1) of the Framework Decision). It remains unclear until the end what makes the issue on the extension of supervision measures be particular, so that namely this issue is transferred not to the competence of the issuing State, but to the competence of the executing State. Where the time period referred to in Article 20(2)(b) is due to expire and the supervision measures are still needed, the competent authority in the issuing State may request the competent authority in the executing State to extend the monitoring of the supervision measures, in view of the circumstances of the case at hand and the foreseeable consequences for the person if Article 11(2)(d) would apply. The competent authority in the issuing State shall indicate the period of time for which such an extension is likely to be needed (Article 17(1) of the Framework Decision). If the issuing State can impose the supervision measure and transmit it for execution to the executing State, and if the issuing State can review, annul, change and so on the supervision measure, it remains unclear why it cannot extend it, whereas the latter is transferred to the competence of the executing State.

The conclusion is to be drawn that the person, who wishes to have a defence lawyer, may need even two defence lawyers: the actions on imposing, renewal, revision, change and so on of the supervision measure, which are provided in Article 18(1) of the Framework Decision, are attributed to the competence of the issuing State and the law of the issuing State is applied to them (Article 18(2) of the Framework Decision). Whereas the issue on the extension of the supervision measure is within the limits of the competence of the executing State and the law of the executing State is applied to this issue (Article 17 of the Framework Decision). If a person wishes to have a defence lawyer, he or she needs either one defence lawyer, who knows the national law of the executing State and the national law of the issuing State or he or she needs two separate defence lawyers both in the process of issue of the ESO and when disputing the necessity to extend the supervision measure. It is supposed that, if the issue on the extension of the supervision measure is attributed to the competence of the issuing State, there would be no problem in this place, whereas the problem exists under the current legal regulation. It remains unclear whether the executing State would provide the person with the state advocate, because it is not clear whether Member States have regulated this issue in their national law, for eg. by foreseeing the necessity of participation of an advocate when solving the issue on enforcement of the ESO. The same can be said about the process of issuing the ESO – it is unclear whether Member States have foreseen the mandatory participation of the defender in such proceedings, which misses even clear criteria for the court to be guided by. The prosecutor or the

court may not issue the ESO without giving detailed reasons, since the Framework Decision does not provide any criteria that should be taken into account when solving this issue. It is very complicated for the person to defend himself or herself in such proceedings. The more so, the professional defence would be necessary in such circumstances, seeking for withstanding the possible appeal of the public prosecution against such judicial decision.

The defensive position can be very important in the executing State when solving the issue on the adaptation of supervision measures (Article 13 of the Framework Decision). The adapted supervision measure cannot be more severe than the supervision measure, which was originally imposed. However, it is difficult to assert with certainty that the executing State will never violate this imperative and will properly adapt the measure. It must be noted in this context that the Framework Decision does not provide the decision on the mechanism of appeal against the adaptation of the supervision measure, i.e. to be more precise – generally nothing is mentioned in the document about the procedures of appeal against the decisions made by the competent authorities of the issuing State and of the executing State and about the impact of the appeal against the decision on execution of the adaptation, etc.

In this context paragraph 17 of the preamble of the Framework Decision provides a certain answer to problematic issues, which foresees that this Framework Decision does not prevent any Member State from applying its constitutional rules relating to entitlement to due process, freedom of association, freedom of the press, freedom of expression in other media and freedom of religion. One could think that the Framework Decision did not specially discuss the issue of defence, but the general principles of law, the law of national states as well as the International and European Union legislation are applied to the issues of defence. Certainly, it is a certain answer to the questions, but, as was already mentioned, the national law does not regulate certain issues, which are related to defence.

So, it is supposed that the person's position must be ensured and secured even more when staying in a foreign country and solving the issue on issuance of the ESO. It is supposed that it would be most appropriate to regulate this issue at the European Union level, because this would ensure the uniformity of application of the law. On the other hand, having not regulated this issue in the Framework Decision, Member States could foresee the mandatory participation of the defender when solving the issue on issuance of the ESO in their national criminal procedural laws or special laws. Accordingly, the issue of defence must be also discussed in the legal acts when solving the issue on extension of the supervision measure, as this issue is solved according to the law of the other state. The attorney, who had been defending the person in the issuing State, can have no knowledge about the legal base of the executing State. The executing State's defence position is important also when solving the issue on adaptation of supervision measures. In general, it must be said that, when solving the issues of the European supervision order and its transmission for execution, it would be appropriate to foresee the procedures of appeal against the decisions of the issuing State and the executing State in order to ensure the imperatives of legal clarity and legal certainty arising from the rule of law.

The issue of the costs, which are incurred, remains topical. Under Article 25 of the Framework Decision, the costs resulting from the application of this Framework Decision should be borne by the executing State, except for costs arising exclusively within the territory of the issuing State. Also paragraph 14 of the preamble of the

Framework Decision must be systemically construed together with this provision, i.e. that the "costs relating to the travel of the person concerned between the executing and issuing States in connection with the monitoring of supervision measures or for the purpose of attending any hearing are not regulated by this Framework Decision. The possibility, in particular for the issuing State, to bear all or part of such costs is a matter governed by national law". It must be assumed that, when transporting a person from the issuing State to the executing State, the costs are incurred by the issuing State; thus, the issuing State must cover these costs. In cases, when a person is transported from the executing State to the issuing State and back due to the pre-trial investigation actions of the issuing State or court sittings, it must be assumed that the costs have also formed in the issuing State, which made the decisions, as a result of which that person must be transported.

On the one hand, we seek for reduction of the level of deprivation of freedom, which is still considerable, by measures that are not associated with deprivation of freedom. On the other hand, we seek for saving the state budget funds, which would be allocated for persons in custody. However, the transportation of suspects and accused persons, including the costs, which accrue to their safekeeping, would also affect the state budget, if such phenomenon is frequent. Seeking for solving this issue of costs, which accrue to the state budgets, it is provided in paragraph 10 of the preamble of the Framework Decision that in order to avoid unnecessary costs and difficulties in relation to the transfer of a person subject to criminal proceedings for the purposes of a hearing or a trial, Member States should be allowed to use telephone and videoconferences. The authors think that, seeking for solving this problem, Member States can also attribute such costs to the costs of proceedings in the national legal acts and recover them from a person, who caused them. However, this issue is sensitive, as it would be complicated or even impossible for certain indigent citizens to make use of the ESO mechanism, whereas such situation is incompatible with the principle of equality, the rule of law aspiration; thus, as regards this issue, it would be progressive to foresee the financial relief or compensation mechanisms for indigent persons.

Final remarks

1. The ESO was adopted as a legal instrument intended for solving the issue on keeping foreigners under detention and the tendencies prevailing in the national courts when solving the issue of supervision measures, for creating the unequal conditions for foreigners, if compared with residents of that state. The EU citizens, who are not residents in the territory of the Member State, where they are suspected of having committed a criminal offence, are sometimes – mainly owing to the lack of community ties and the risk of flight - kept in pre-trial detention or perhaps subject to a long-term non-custodial supervision measure in a (for them) foreign environment, whereas a suspect, who is a resident in the country, where he or she is suspected of having committed an offence, would in a similar situation often benefit from a less coercive supervision measure.

2. ESO solved the problem that the different alternatives to pre-trial detention and other pre-trial supervision measures cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions in these matters.

3. The ESO could be defined as the European Union enforceable decision made by the competent authority of the issuing State under the national law during criminal

proceedings, according to which one or several supervision measures not associated with deprivation of freedom, as an alternative of detention, are imposed on a natural person, i.e. a non-permanent resident, who is suspected of having committed the criminal offence, which is addressed to the executing Member State, in which that person resides.

4. The ESO is an innovative and advanced measure, which, when applied, allows reducing the level of keeping in custody, ensures better the principle of the presumption of innocence, the right to liberty, helps the persons, who are suspected of having committed criminal offences, and the accused persons to preserve their family ties, workplace and income. However, non-legal reasons related to a large workload of the law enforcement institutions, lack of the initiative for novelties, political mutual disagreements can lead to the sluggish application of the European judicial supervision order. States' discretion in the application of the European judicial supervision order would be hardly restricted due to States' sovereignty and the territorial principle of the international criminal law.

5. The procedural guarantees to be harmonized between Member States at the European Union level must be secured for persons, also including the unanimous criteria, which must be taken into account by the competent authorities of the issuing State when solving the issue on issuance of the ESO. These criteria could be similar to the ones, when the issue of extradition detention is being solved at the national level and a person's social relations are being assessed. The absence of similar criteria may lead to the circumstance that the ESO in certain Member States may remain only as a nice idea on paper.

6. The ESO legal regulation raises the importance of cooperation between states, of the principles of the presumption of innocence, recognition of the measures of procedural coercion and volunteering. Insufficient cooperation between States can become an obstacle to achieving the objectives of criminal proceedings.

7. Member States, without any reason not considering the application of the ESO in the criminal case, would violate the Convention, as the ESO is a measure, which encourages the application of supervision measures that are alternative to detention, whereas the responsible consideration of the measures of procedural coercive in each case serving as an alternative to detention is the duty of States, which is clarified in the ECHR jurisprudence.

8. The issues of defence, which also are not regulated by certain Member States in their national law, remain not covered by the Framework Decision. It is to be considered whether the state attorney must be guaranteed for persons in the ESO sanctioning process. In the absence of any minimal criteria, which must be taken into account by courts when solving the issue of the ESO, it is difficult for a person to defend his or her rights. The issue, whether a person, due to different national legal bases, must hire two advocates in the course of adaptation and extension of the supervision measure under the ESO, which is transmitted to the competence of the executing State, unlike all the other actions on sanctioning the supervision measure, as well as how the organizational issues must be settled, is not solved. Also the issues of appeal, on the consequences of appeal for execution of the decision, on adaptation of the supervision measure, etc. remain not discussed in the Framework Decision.

9. The Framework Decision does not completely regulate the issue on compensation of the costs; thus, this issue is left to be decided by Member States. It is supposed that the issue on transportation of suspects and accused persons as well as of

the costs, related to it, must not be a mere issue of the issuing State's budget; the costs must be recovered from the transported suspects and accused persons; the financial relief or compensation mechanisms must be foreseen for indigent persons.

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