

## CRIME'S VICTIM AND THE PROCEDURE OF EXECUTING THE FREEZING ORDER AND THE EUROPEAN INVESTIGATION ORDER

**Martyna Kusak**

Existing rules of obtaining evidence in criminal matters in the EU are based on two different models of cooperation. From the one side, there are instruments based on the mutual legal assistance (hereafter: MLA). On the other side, some instruments based on mutual recognition (hereafter: MR) has been adopted<sup>34</sup>, including freezing order (hereafter: FO)<sup>35</sup> and European investigation order (hereafter: EIO)<sup>36</sup>.

The 1999 Tampere Conclusions identified mutual recognition as the cornerstone of judicial cooperation in the EU<sup>37</sup>. In this context, the concept of free movement of evidence have been developed like a measure to solve the problems of criminal law enforcement across borders in an area of security, freedom and justice<sup>38</sup>. In reaction to mutual recognition in gathering of evidence, a Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility was published. The Green Paper is establishing the long-term goal of a comprehensive system for obtaining evidence in cross-border cases, as well as envisaged to replace the current legal arrangements for obtaining evidence in criminal matters with a single instrument based on the principle of mutual recognition and covering all types of evidence<sup>39</sup>.

The Framework Decision on freezing (hereafter: FFWD) was adopted on 22 July 2003 to deal with the execution of orders freezing property or evidence. The freezing order is defined as any measure taken by a competent judicial authority in the issuing state in order to prevent the destruction, transformation, moving, transfer or disposal of property which could constitute evidence<sup>40</sup>. The purpose of FO is to establish rules under which Member States shall recognize and execute in their territory freezing orders, without any further formality

---

<sup>34</sup> G. Vermeulen, W.De Bondt & Y. Van Damme, *EU cross-border gathering and use of evidence in criminal matters, Towards mutual recognition of investigative measures and free movement of evidence?*, IRCP - series, Vol.36,pp.9.

<sup>35</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003F0577>.

<sup>36</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L .2014.130.01.0001.01.ENG>

<sup>37</sup> H. G. Nilsson, *Mutual trust or mutual mistrust?* (in:) G. de Kerchove (ed.), A. Weyembergh (ed.), *La confiance mutuelle dans l'espace pénal européen/Mutual Trust in the European Criminal Area*, Bruxelles, Éditions de l'Université de Bruxelles, 2005, pp. 31.

<sup>38</sup> S. Gless, *Mutual recognition, judicial inquiries, due process and fundamental rights* (in:) J.A.E. Vervaele (ed.) *European Evidence Warrant. Transnational Judicial Inquiries in the EU*, pp. 122-123.

<sup>39</sup> Green paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility, com (2009) 624 final, [http://ec.europa.eu/justice/news/consulting\\_public/0004/national\\_parliaments/french\\_senate\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0004/national_parliaments/french_senate_en.pdf).

<sup>40</sup> A. Suominen, *The principle of mutual recognition in cooperation in criminal matters*, Bergen 2010, pp. 92-93.

being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made in domestic case<sup>41</sup>. The FO procedure covers 'evidence', what is mean objects, documents or data which could be produced as evidence in criminal proceedings (art. 2e of the FFWD). The FO became the first EU measure for asset recovery in criminal matters which require international judicial cooperation based on mutual recognition<sup>42</sup>, designed to create a system under which the EU Member States will automatically recognize freezing orders issued by each other's courts<sup>43</sup>. The main disadvantage, as well as the main failure of the FO, is the procedure of transfer of evidence, which is still held within the MLA instruments<sup>44</sup>. It is the reason for sluggishness and insufficiency of FO<sup>45</sup>.

The EIO was created by a directive 2014/41/EU adopted on 3 April 2014 as a measure based on new approach and the principle of mutual recognition. The main aim of the EIO is to replace the comprehensive system for obtaining evidence in cases with a cross-border dimension. A new approach was needed because existing instruments in this area constituted a fragmentary regime. It is called for a comprehensive system to replace all the existing instruments and covering as far as possible all types of evidence and limiting as far as possible the grounds for refusal<sup>46</sup>. The EIO is to be issued for the purpose of having one or several specific investigative measure carried out in the State executing the EIO with a view of gathering evidence. The EIO covers also obtaining of evidence that is already in the possession of the executing authority<sup>47</sup>. The EIO should have a horizontal scope and therefore should apply to all investigative measures aimed at gathering evidence<sup>48</sup>. The EIO is focused on the investigative measure to be carried out<sup>49</sup>. Under the EIO procedure, the Member States would agree to carry out investigations at the request of another Member State on the basis of mutual recognition. EIO would be automatically treaded as valid and executable by the executing State, with only limited grounds for refusal or postponement of recognition or execution, to carry out such investigations<sup>50</sup>. The EIO Directive provides a specific provisions for certain investigative measures, as follows:

- a) temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure;
- b) temporary transfer to the executing State of persons held in custody for the purpose of carrying out an investigative measure;

---

<sup>41</sup> A. Suominen, *The principle of mutual recognition...*, pp. 92-93.

<sup>42</sup> D. Atkinson, *EU law in criminal practice*, Oxford 2013, pp. 60.

<sup>43</sup> J.R.Spencer, *The Problems of Trans-border Evidence and European Initiatives to Resolve Them*, (2007) no. 9, Cambridge Yearbook of European Legal Studies, pp. 469.

<sup>44</sup> A. Grzelak, T. Ostropolski, *Współpraca policyjna i sądowa w sprawach karnych*, Vol. XI, part 1, Warsaw 2009, pp. XI.1.-108.

<sup>45</sup> A. Demenko, P. Nalewajko, *Transfer dowodów między państwami Unii Europejskiej* (in:) *Unijna polityka karna*, A.J. Szwarz (ed.), Poznań 2009, pp. 97.

<sup>46</sup> Preamble of the EIO Directive (6).

<sup>47</sup> Preamble of the EIO Directive (7).

<sup>48</sup> Preamble of the EIO Directive (8).

<sup>49</sup> Preamble of the EIO Directive (9).

<sup>50</sup> D. Atkinson, *EU law in criminal practice...*, pp. 68.

- c) hearing by videoconference or other audiovisual transmission;
- d) hearing by telephone conference;
- e) information on bank and other financial accounts;
- f) information of banking and other financial operations;
- g) investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time;
- h) covert investigations;
- i) interception of telecommunication.

Above mentioned investigative measures based on the MR could successfully replaced the current environment which is indisputably over complex and cumbersome<sup>51</sup>. In the light of those close European criminal cooperation within the mutual trust and recognition in evidentiary proceedings, the following question arises - does the victim have the right to act in the procedure of executing the FO and the EIO and take legal actions directed at the protection of it is rights and interests? The main source for doubts is the victims' right to appeal against the decision to execute FO or EIO where its execution might damage ongoing criminal investigation in the executing state.

FFWD does not explicitly mention a victim in the FO procedure. However, art. 11 of the FFWD states that any interested party, including *bona fide* third parties, have legal remedies without suspensive effect against a freezing order to preserve their legitimate interests, what covers also a victim. Furthermore, the substantive reasons for issuing the freezing order can be challenged only in an action brought before a court in the issuing State. It is mean that victim, in accordance with the national law of the issuing and executing State, has a right to appeal against the freezing order, but challenging only:

- a) substantive reasons for issuing – in the issuing State;
- b) violation of executing procedure – in the executing State.

In the light of quoted articles, the procedure of executing FO does not provide a right to appeal against the authority's the decision to refuse the decision of execute the FO, when it could violated the victims' rights within proceedings ongoing in the executing State. Although art. 8.1 (a) of FFWD states that the competent judicial authority of the executing State may postpone the execution of a freezing order where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable, but still the victim does not have any legal actions to refuse the execution when it was ordered irrespective of grounds for postpone.

Considering the position of victim and the EIO it is worth nothing that the EIO Directive does not define the victims' position in the procedure of executing either. The conclusion is, that it can hardly be doubted that in the procedure of executing the EIO the victims' rights are guaranteed. The same problem as in FO example appears – does the victim have the right to appeal against the decision of execution of the EIO? It should be emphasized, that

---

<sup>51</sup> G. Vermeulen, W. De Bondt & Y. Van Damme, *EU cross-border gathering...*, pp. 9.

the EIO is far-reaching than FO, especially in temporary transfer of persons context. It cannot be denied, that transfer of person may cause an impossibility a conduction of criminal proceedings against the transferred person that violated the same victim.

According to the art. 14 of the EIO Directive, Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO. Such as in the FFDW regulations, the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State. It should be noted, that quoted article states, that the issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO. It is indisputable, that the fairness of the proceedings covers the protection of victims' rights. Moreover, the judicial authorities of Member States have an obligation to respect and protect the victim and to make sure that the victim is not turned into a mere object of criminal proceedings in each case<sup>52</sup>.

The lack of explicitly constituted position of victim in the procedure of the FO and the EIO does not mean, that the victim is not included and cannot act within this cases. All of the victims' rights should be considered in the light of the art. 6 of the EU Treaty of the European Union, as well as the Directive 2012/29 EU establishing minimum standards on the rights, support and protection of victims of crime which was adopted on 25 October 2012<sup>53</sup>. Moreover, both instruments states that as in other mutual recognition instruments, FO and EIO does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty<sup>54</sup>. The same conclusion was reached by the European Court of Justice in the case C-404/07, Katz v. Roland Sos: "It must therefore be concluded that the Framework Decision<sup>55</sup>, while requiring Member States, first, to ensure that victims enjoy a high level of protection and have a real and appropriate role in their criminal legal system and, second, to recognize victims' rights and legitimate interests and ensure that they can be heard and supply evidence, leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement those objectives" (par. 46). Moreover, in the Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609 the decision reads: "It is true that the national court must apply its domestic law as far as possible in the light of the wording and the purpose of the Directive (...) (par. 24). The national court must therefore ensure that that principle is observed when interpreting, in the light of the wording and the purpose of the Directive, the national

---

<sup>52</sup> I. Turudić, T. P. Borzić, I. Bujas, *The position of victim in the procedure of executing the European Arrest Warrant*, Informator of Country court Zagreb of 9. April 2014. , No 6270, pp. 2.

<sup>53</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029>.

<sup>54</sup> Preamble (18) of the EIO Directive, Preamble (6) of the FFDW.

<sup>55</sup> The Court is referring to the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

legislation adopted in order to implement it (par. 26)”. Also in the case Pupino C-150/03, the Court concludes that: “The Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected” (par. 59). In this spirit the ECTH is sentencing (see for example: Doorson v. Netherlands, No. 20524/92, 26 March 1996; T. v. Austria, No. 27783/95, 14 November 2000; Imbroscia v. Switzerland, No. 13972/88, 24 November 1993; S.N. v. Sweden, No. 34209/96, 2 July 2002; as well as the CJEU sentences: C-328/05 paragraph 59; joined cases C-46/87 and C-227/88; C-85/87 and C-94/00).

The similar issue, related to the right of victim to appeal against the court’s decision to refuse the executing of the other MR instrument European Arrest Warrant, was considered within the case carried out in the Supreme Court of the Republic of Croatia (*Kž-eun-5/14*). The final decision reads as follows: “Grammatical or literal interpretation of the quoted articles would suggest that the only parties in the EAW procedure are the wanted person, his or her attorney and the district attorney, and that they are the only parties entitled to appeal against the court’s decision. However, such a grammatical interpretation would call into question the purpose of EU legislation as expressed in the Framework Decision on the EAW, as well as the purpose of other relevant sources of EU law, i.e., directives and framework decisions governing the matter of victim and victim’s rights in criminal proceedings. Therefore, in order to achieve the objectives and principles laid down under EU law, national courts are obliged to interpret national legislation in the light of the spirit of the framework decisions and directives, thereby complying with the provision of Article 34 § 2 item b) of the Treaty on European Union (this is explicitly stated in the judgment of the European Court of Justice in case *C-105/03 P* of 16 June 2005). (...) Article 1 of the Framework Decision on the European arrest warrant and the surrender procedures between Member States defines The European arrest warrant as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The same Article states that this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 6 of the EU Treaty states that The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Human rights and freedoms, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, include, among other rights, the [right to a fair trial](#) (Article 6 of the Convention) and the right to an effective remedy (Article 13 of the Convention). Underlying rights are also protected under

Article 47 of the Charter of Fundamental Rights of the European Union, as well as under Articles 8 and 10 of the United Nations Declaration of Human Rights”.<sup>56</sup>

Following the judges I. Turudić, T. P. Borzić, I. Bujas and their interpretation of above case: “In conclusion (...) an obligation to respect the basic human rights and basic legal principles contained in Article 6 of the Treaty on European Union, also creates an obligation to respect and protect the rights of victims. The fact that the Framework Decision does not expressly mention the victim does not mean that the victim is not included. On the contrary, Article 1 of the Framework Decision, which prescribes an obligation to protect human rights pursuant to Article 6 of the Treaty on European Union, includes victims’ rights. This is in keeping with the Framework Decision on the victim, which vests the victim with rights before, during and after the criminal process that is defined by national legislation, and in all other processes in the wider sense of the word, in connection with the victim case (art.1.(c),(d) of the FD). These processes definitely include the surrender procedure (...). Furthermore, Directive 2012/12/EU gives the victim the right to have the decision by which the offender is released reviewed (right to appeal, of which the victim must be warned), as well the decision by which actions in a criminal matter are interrupted before the formal beginning of criminal proceedings. Denial of surrender in the procedure of execution of the European arrest warrant evidently represents “release of the offender” in the procedure, which should be interpreted in the wider sense of the word, that is in connection with the victim case, and which under the Directive gives the victim the right to have the decision reviewed on appeal”<sup>57</sup>.

The above quoted and very well - aimed argumentation proves that only the fact of excluding victim in the FFWD and EIO Directive does not mean that the victim is not included in those proceedings. This conclusion should be considered by the Member States within implementation of the EIO Directive. As said, EIO could provoke and exacerbate feeling of imbalance on victims’ rights, mainly because of lack of possibility to appeal against the decision of execute the EIO. That is mean, that the victim cannot refuse of transfer of evidence which is or could be used within the ongoing proceedings, when the competent authority decides to execute the EIO. It is worth nothing that the proposal of the EIO was widely criticized for affecting safeguards for victim: “An EIO may affect a wide range of persons. In order to uphold the right to fair trial, it is necessary to provide effective access to courts for all these persons. The adoption and execution of an EIO requires specific safeguards in order to ensure that the rights of victims and also those of witnesses are effectively protected. According to the CJEU, the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted so as to ensure respect for fundamental rights, particularly the right to fair trial as guaranteed by Article 6 ECHR and as interpreted by the ECtHR.<sup>29</sup> In its case law, the CJEU emphasises that Article 6 ECHR requires the right of the accused to fair trial to be balanced with the rights of

---

<sup>56</sup> I. Turudić, T. P. Borzić, I. Bujas, *The position of victim...*, pp. 2-4.

<sup>57</sup> The decision of the Supreme Court of Croatia, case *Kž-eun-5/14*: " For these reasons, the victim correctly points out that the first instance Court has violated his/her right to seek a legal remedy in the proceeding that is not a criminal proceeding, but rather a court proceeding *sui generis* in which other remedies are not available, and the aim of that procedure is to facilitate the conduct of the criminal prosecution in another EU Member State".

vulnerable victims. Accordingly, states are under an obligation to organize their criminal proceedings in such a way that the interests of victims and witnesses are not unjustifiably endangered”<sup>58</sup>. Above quoted scepticism well reflects the neglected position of the victim in the MR evidence instruments.

In evidence gathering cooperation contexts, the study on position of victim shows, that the procedure of executing the FO and EIO can deprived the victims’ rights who cannot take legal actions directed at the protection of all its rights and interests. The way in which the EIO implementation should be widely consider, is to give the victim right to appeal against the decision of the EIO execution, which should be available in each Member States’ domestic procedure.

---

<sup>58</sup> Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, [http://fra.europa.eu/fraWebsite/research/opinions/op-eio\\_en.htm](http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm)

