# The Position of the Individual in the Process of Cross-Border Evidence Gathering in European Union Criminal Law*

## 1. Introductory remarks

Judicial assistance in criminal matters has traditionally developed as an inter-state relationship. Only sovereign states were considered subjects of it. Therefore, judicial assistance only had two dimensions, the dimension of the requesting and the dimension of the requested state. However, in the last few decades this "two-dimensional model" of judicial assistance in criminal matters has become more and more a "three-dimensional model", with the inclusion of the individual as its third subject.[1] From being a mere object of an inter-state relationship, the individual became its subject and this shift in the position of the individual can be clearly seen at the example of prerequisites for judicial assistance or its grounds for refusal: next to traditional prerequisites and grounds for refusal which have an exclusively inter-state character, new ones started to appear, which are not directed at the protection of the interests of states involved, but at the protection of the individual concerned.[2]

The purpose of this article is to analyse the extent to which this general shift in the position of the individual in cooperation proceedings can be affirmed within the framework of a specific mechanism of cooperation in criminal matters: cross-border evidence gathering. In order to undertake the analysis and to test the initially presented thesis, the provisions of legal instruments which stem from two different models of cooperation will be analysed. First, the normative framework of cross-border evidence gathering within the model of mutual legal assistance shall be the object of analysis, followed by the analysis of the normative framework of cross-border evidence gathering within the model of mutual recognition.

* This article is a product of research which has been partly funded by Croatian Science Foundation under the project 8282 *Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future*.

1 Gleß, Sabine, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung,* Nomos Verlagsgesellschaft, Baden-Baden, 2006, p. 112-113, Schomburg, Wolfgang; Lagodny, Otto; Gleß, Sabine; Hackner, Thomas, *Internationale Rechtshilfe in Strafsachen*, Verlag C. H. Beck, München, 2012, p. 2.

2 Gleß, 2006, 113.

## 2. Position of the individual under the MLA regime

First, the legal instruments in which rules on cross-border evidence gathering, pursuant to the mutual legal assistance model are found and shall be presented. These rules are found in the following legal instruments:

1. European Convention on Mutual Assistance in Criminal Matters and its Protocols,
2. Convention Implementing the Schengen Agreement,
3. Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol.

Each of these conventions was adopted within the framework of a different form of international cooperation between states and the European Convention on Mutual Assistance was adopted into the framework of the Council of Europe. A Convention Implementing the Schengen Agreement in the framework of cooperation of five European Union Member States, outside of the European Union institutional framework and Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union in the European Union framework. Despite the fact that they are adopted within a different form of international cooperation, they all form a part of the *acquis communautaire* in the area of judicial cooperation in criminal matters.[3]

Before analysing the normative framework, we need to answer why there is a need to take into account the position of the individual and what do the interests of the individual in mutual legal assistance proceedings stand for? Mutual legal assistance proceedings raise questions in relation to the position of the individual both in the requesting and in the requested State. In the requesting State, it is the position of the suspect and his defence, and in the requested State it is the position of the individual whose fundamental rights are affected by the requested assistance. In the cross-border gathering of evidence as a specific form of mutual legal assistance, the suspect and his defence have their interests and that their position in the national criminal proceedings does not change when the case involves the gathering of evidence abroad. The individual affected by the gathering of evidence in the requested State has an interest in guarantying that their fundamental rights are upheld – that their fundamental

[3] Generally on *acquis communautaire* in the area of judicial and police cooperation in criminal matters, see Ligeti, 2005, 49-51.

rights are not endangered in the execution of an evidence gathering action at the request of another State.

### 2. 1. Position of the defence

As previously stated, the defence have their interests and that its position in national criminal proceedings of the requesting State are not changed when the case involves evidence which is situated abroad. Mutual legal assistance proceedings inherently contain such a danger for the position of the defence, where the possibility for national prosecution authorities to cooperate in the gathering of evidence abroad is from the outset bigger than the possibility for the defence to do the same. National prosecution authorities are better placed to become aware of the fact that there is available evidence on the territory of another State and have greater financial and operational possibilities than the defence to gather evidence abroad. However, if prosecution and defence are to have an equal opportunity to affect the outcome of national criminal proceedings in a case which has a transnational dimension, there should be no legal difference between the prosecution and the defence in relation to the possibility of gathering evidence abroad. This means that the defence should be given the opportunity to gather evidence abroad, or at least to initiate the proceedings for the gathering of evidence abroad, and the possibility to participate in the gathering of evidence abroad. Below it will be analysed to what extent mutual legal assistance instruments take account of these considerations.

#### 2. 1. 1. Possibility for the defence to gather the evidence abroad

The defence should be given the opportunity to initiate the proceedings for the gathering of evidence abroad. Only if the defence is given this opportunity, equality of arms between the defence and the prosecution is safeguarded in cases with a transnational dimension. However, mutual legal assistance instruments do not contain provisions which would take into account this interest to the defence. The opportunity for the defence to initiate the gathering of evidence abroad is therefore left to national provisions of Contracting Parties. National provisions, be it national criminal procedure provisions or national provisions on international cooperation in criminal matters, determine the extent to which the defence has the possibility to gather the evidence abroad.

### 2. 1. 2. Participation in the gathering of evidence abroad

One of the fundamental rights of the defence in relation to evidence gathered by the prosecution is to have that evidence tested. When it comes to evidence gathered abroad, the possibility for the defence to test the evidence gathered by the prosecution is significantly smaller. The only way that the defence will have to test the evidence which is gathered abroad is if it were given the possibility to participate in the gathering of evidence. Mutual legal assistance instruments do not contain provisions which would guarantee the defence the right to participate in the gathering of evidence abroad. However, they do contain provisions which foresee the possibility for the defence to participate in the gathering of evidence abroad. They foresee the possibility not only for the officials, but also for other interested persons of the requesting State to be present in the execution of a request for assistance in the requested State.[4] Although these provisions do not guarantee the defence the right of participation in the gathering of evidence abroad, at least the need for such participation is recognized.

## 2. 2. Position of the individual affected

The cross-border gathering of evidence needs to be evaluated not only from the position of the defence, but also from the position of the individual affected by the evidence gathering action in the requested State. An individual situated in the requested State enjoys a spectre of fundamental right protections, with these protections having great significance in the evidence gathering process. Evidence gathering rules determine the degree to which the State is allowed to interfere into the fundamental rights of an individual for fact finding purposes. The level of protection of fundamental rights differs from State to State. However, cooperating States differ not only in relation to the degree to which they allow the interference of the State into the fundamental rights of an individual for evidence gathering purposes, they also differ with regards to which behaviour they consider to be criminal. Problems for the individual affected by the evidence gathering measure undertaken in the framework of mutual legal assistance arise when the requesting State has stricter substantive criminal law than the requested State, and when it allows the interference of the State into the fundamental rights of an individual to a higher degree than the requested State. In this situation, the fundamental rights of the individual affected by the evidence gathering action might be limited to a higher degree in the transnational context, than they would have been in a purely national context.

---

[4] Article 4 CoE-MLA-1959.

Mutual legal assistance instruments take into account this perspective, and enable the requested State to adapt the request for assistance to the demands of its legal order relating to fundamental rights protection of the individual affected by the evidence gathering action requested. Among the grounds for refusal of cooperation, there are some that take the perspective of the individual into account. In relation to the differences between substantive criminal law in the requesting and the requested State, the requested State has the possibility to refuse to undertake an intrusive evidence gathering action if the underlying offence is not an offence pursuant to the requested State's criminal law.[5] By using these grounds for refusal, the requested State protects the individual situated on its territory from the possibility of being subjected to an intervention into his fundamental rights for an act which is not recognized as a criminal offence on the territory of the requested State. In relation to the differences between procedural criminal law in the requesting and the requested State, the requesting State has the possibility to refuse to provide assistance in relation to an intrusive evidence gathering action, if that action would not be available in a similar domestic case pursuant to the law of the requested State.[6] By using these grounds for refusal, the requested State protects the individual from the possibility of being subjected to an intervention into his fundamental rights, when such an intervention would not be possible under the criminal procedural law of the requested State.

## 3. Position of the individual under the MR regime

### 3. 1. Framework Decision on the European Evidence Warrant

When mutual legal assistance instruments were analysed, the part of the analysis which was dedicated to the position of the individual in the cross-border gathering of evidence was divided into two parts: the first part, where the position of the suspect and his defence was analysed, and the second part, where the position of the individual affected by the evidence gathering measure was analysed. The same will be done here, in analyzing the position of the suspect and his defence, the position of the individual in the issuing State, and when analyzing the position of the individual affected by the evidence gathering measure along with the position of the individual in the executing State.

---

5 Article 5 (1)(a) CoE-MLA-1959.
6 Article 5 (1)(c) CoE-MLA-1959.

The interests of the suspect and his defence, on the one hand, and the interests of the individual affected by the evidence gathering measure on the other, are the same as the ones presented in the analysis of mutual legal assistance instruments. The suspect and his defence have an interest in seeing that their position in the criminal procedure of the issuing State does not change when the case involves the gathering of evidence abroad. The individual affected by the evidence gathering measure has an interest in seeing that his fundamental rights guarantees are upheld when he is the object of the evidence gathering measure ordered by the issuing State.

With the introduction of the principle of mutual recognition in the area of judicial cooperation generally, and in the area of cross-border evidence gathering specifically, the possibilities for the national law enforcement authorities of Member States to effectively prosecute crime with a transnational dimension have significantly grown. Judicial cooperation is becoming not only more important than ever before but it is also being used much more often. This also means that the suspect and his defence in the criminal proceedings of the issuing State more often than before are faced with a situation where the evidence is gathered abroad. It also means that the individual affected by the evidence gathering action in the executing State is often subjected to evidence gathering actions that were ordered abroad. All these considerations show that the position of the suspect and his defence, as well as the position of the individual affected by the evidence gathering action, should be paid more attention to in legal instruments based on the mutual recognition logic than in legal instruments based on the mutual legal assistance logic. The extent to which FD EEW takes these considerations into account shall be analysed in the following paragraphs.

### 3. 1. 1. Position of the defence

The position of the defence in the FD EEW shall be analysed through three questions: a) possibility for the defence to gather the evidence abroad, b) participation of the defence in the evidence gathering process in the executing State, and c) possibility to challenge the issuing of an EEW.

### 3. 1. 1. 1. The possibility for the defence to gather the evidence abroad

If the defence and the prosecution are to have equal possibilities to affect the outcome of a criminal case with a transnational dimension, they both have to be given the possibility to initiate the proceedings for the gathering of evidence abroad. Provisions of the FD EEW recognize the public prosecutor as an issuing authority – a judicial authority of the issuing State which is competent to issue an EIO. This does not mean that the public prosecutor shall act as the issuing authority in each case. Member States decide which authorities, among the authorities offered by the FD EEW – a judge, a court, an investigating magistrate, a public prosecutor - shall be the authority competent to issue an EEW when that State is acting as the issuing State.[7]

It is clear that the suspect or his defence lawyer cannot act as issuing authorities, because they are not State bodies with the competence to order the gathering of evidence in a national or transnational context. However, they should be given the possibility to initiate the proceedings for the gathering of evidence abroad, when they have the knowledge that evidence helpful to the defence is located on the territory of another Member State. FD EEW does not take these considerations into account and does not recognize the right of the defence to request that evidence located abroad be gathered.

### 3. 1. 1. 2. Participation of the defence in the evidence gathering process in the executing State

Equally important as the possibility for the defence to request the gathering of evidence abroad is the possibility to participate in the evidence gathering process in the executing State. By participating in the execution of an EEW the defence exercises its participatory rights in relation to the gathering of evidence, but also acquires information which can be useful in the evaluation of the admissibility of the gathered evidence in the criminal procedure of the issuing State.

FD EEW does not take these considerations into account either, and does not guarantee a right or a possibility for the defence to participate in the gathering of evidence abroad.

---

[7] Article 2 (c)(i) FD EEW.

### 3. 1. 1. 3. Possibility to challenge the issuing of the EEW

The defence also needs to have the possibility to challenge the issuing of an EEW. This is especially important in light of the fact that the FD EEW prescribes conditions for issuing the warrant. Pursuant to the FD EEW, in order for the warrant to be issued, the issuing authority needs to be satisfied that evidence sought is necessary and proportionate for the purpose of the proceedings in relation to which a warrant is issued and that it would be available under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.[8]

The provision of the FD EEW which regulates the question of legal remedies prescribes that the substantive reasons for issuing the EEW, including whether the conditions for its issuing have been met, may only be challenged in an action brought before a court in the issuing State. However, the availability of legal remedies is not guaranteed by the FD itself, but depends on the national criminal law of Member States. The FD EEW obliges the issuing State to ensure the applicability of legal remedies which are available in a similar domestic case.[9]

### 3. 1. 2. Position of the individual affected by the EEW

In the mutual recognition regime of cross-border evidence gathering, an evidence gathering action is ordered pursuant to the law of the issuing State, but it is executed in the territory and pursuant to the law of the executing State. When intrusive evidence gathering actions are undertaken in the territory of the executing State pursuant to an EEW, an individual affected by these actions is subjected to foreign substantive and procedural criminal laws, which have different fundamental rights guarantees that the criminal laws of the State he is situated in. Such a situation is not problematic when the fundamental rights guarantees of the issuing State are higher than those of the executing State. Quite a different situation appears when the fundamental rights guarantees of the issuing State are lower than those of the executing State. In the latter case, an individual situated in the territory of the executing State is subjected to fundamental rights limitations to a degree higher than the one which is allowed pursuant to the law of the executing State.

---

8 Article 7 FD EEW,
9 Article 18 (2) FD EEW.

The FD EEW takes these considerations into account in a number of its provisions which may be seen as a fundamental rights guarantee. These provisions can be divided into three groups: i) choice of the evidence gathering action as a fundamental rights guarantee, ii) fundamental rights oriented grounds for refusal, and iii) legal remedies.

### 3. 1. 2. 1. Choice of the evidence gathering action as a fundamental rights guarantee

In the regime created by the FD EEW, the issuing State does not make a decision about the evidence gathering action that is going to be undertaken on the territory of the executing State. The issuing State only decides, orders, that a certain type of evidence which comes within the scope of the FD EEW, objects, documents or data, is gathered on the territory of the executing State. The executing State is obliged to fulfil the order issued by the issuing State, but is free to decide about the manner in which it is going to do so. The executing State decides about the evidence gathering action that is going to be undertaken on its territory in execution of an EEW. This enables the executing State to adapt the EEW to the demands arising out of its legal order. When making such a decision the executing State is obliged to consider fundamental rights implications of the evidence gathering action. The text of the FD EEW obliges the executing State to use the least intrusive means available to obtain the objects, documents and data sought.[10]

### 3. 1. 2. 2. Fundamental rights oriented grounds for refusal

Among the grounds for refusal of cooperation, there are some which undoubtedly have fundamental rights considerations. Fundamental rights oriented grounds for refusal include the application of the *ne bis in idem* principle, double criminality requirement, immunity or privilege under the law of the executing State, and a refusal to execute an EEW which has not been validated by a judicial authority *stricto sensu*.

### 3. 1. 2. 3. Legal remedies

The individual affected by the evidence gathering action undertaken in the execution of an EIO must have the possibility to challenge it, especially when the evidence gathering action undertaken is an intrusive one. Provisions of the FD EEW guarantee the right to a legal remedy against the decision and execution of an EEW to any interested party. Such a legal

[10] Recital 12 FD EEW.

remedy must be provided for in the legal orders of Member States, but Member States are free to limit the use of legal remedies to situations where the EEW is executed using a coercive measure.[11]

The individual affected by the evidence gathering action undertaken in the execution of an EEW can challenge not only recognition and execution of an EEW, but also its issuing, by challenging the existence of conditions for issuing an EEW. However, such an action can be brought only before a court in the issuing State.[12] Since the individual affected by the evidence gathering action is situated in the territory of the executing State, this significantly limits his right to an effective legal remedy against the decision to issue an EEW.

### 3. 2. Directive regarding the European Investigation Order

When the position of an individual in the framework of EIO proceedings is analysed, two situations have to be differentiated: a) the position of the suspect and his defence in the proceedings in the issuing State in relation to which an EIO has been issued, and b) the position of an individual who is affected by the investigative measure indicated in an EIO, which is undertaken in the territory of the executing State.

#### 3. 2. 1. Position of the suspect and his defence

Whenever a crime includes a transnational dimension, the position of the suspect is more demanding that in a purely national case.[13] The suspect needs to organize his defence in two or more different states, and in at least one of them, he/she is faced with a language and a legal system he/she is not familiar with.

With the introduction of the principle of mutual recognition, which has significantly increased the prosecutorial powers in transnational proceedings,[14] the need for measures which will enable equal possibilities for the defence became more acute than ever before.

---

11 Article 11 (1) FD EEW.
12 Article 18 (2) FD EEW.
13 Gleβ, Sabine, *Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approches to a General Principle*, Utrecht Law Review, 4/2013, p. 90-91.
14 Schünemann, 2014, p. 30.

The principle of mutual recognition has often been criticised for benefiting only the position of the prosecution. It has been stated that the introduction of the mutual recognition paradigm in the area of judicial cooperation in criminal matters in the EU did not bring any benefits to the position of the defence and that there is no real balancing between the interests of the prosecution and the defence.[15]

In the following paragraphs, the position of the defence within the framework of EIO proceedings shall be analysed. First, some i) general remarks regarding the position of the defence shall be given. Special attention shall be devoted to specific provisions which regulate the position of the defence in relation to an EIO, by analysing the following three issues: ii) possibility for the defence to gather evidence abroad, iii) participation of the defence in the execution of an EIO, and iv) legal remedies.

### 3. 2. 1. 1. General remarks regarding the position of the defence

In relation to fundamental rights in general, the Directive takes the position characteristic for mutual recognition instruments: the Directive shall not have the effect of modifying the respect for fundamental rights.[16] The same also applies in relation to the rights of the defence in criminal proceedings: the Directive shall not have the effect of modifying the rights of defence of persons subject to criminal proceedings.[17] However, these provisions are pure declarations of respect for fundamental rights and the rights of the defence.

In relation to fundamental rights and rights of the defence, the Directive gives the issuing and executing authorities some obligations and possibilities. When issuing an EIO, the issuing authority needs to assess whether the issuing of an EIO is necessary and proportionate for the purpose of proceedings in relation to which an EIO is issued, taking into account the rights of the suspected or accused person.[18] The executing authority may refuse recognition and execution of an EIO if its recognition and execution would be incompatible with the executing State's obligation to respect fundamental rights.[19]

---

15 Vernimmen-Van Tiggelen, Gisèle; Surano, Laura, *Analysis of the future of mutual recognition in criminal matters in the European Union, Final Report*, Institute for European Studies, Université Libre de Bruxelles, 2008, p. 15.
16 Recital 18 and 39 of the Preamble of the Directive.
17 Article 1 (4) of the Directive.
18 Article 6 (1)(a) of the Directive.
19 Article 11 (1)(f) of the Directive.

However, the real question is which rights the defence has in relation to an EIO. In order to answer this question, the position of the defence in relation to the issuing, execution and challenging of an EIO shall be analysed.

### 3. 2. 1. 2. Possibility for the defence to gather evidence abroad

When it comes to criminal evidence, the prosecution and defence should be given equal opportunity to adduce evidence.[20] The same should apply to evidence which is located on the territory of another State. The defence should be given an opportunity to initiate the procedure for the gathering of evidence abroad. If this opportunity is reserved only for the prosecution, the balance between the parties in criminal procedure is disturbed, and the equality of arms is lost.[21]

The Proposal for a Directive was silent with regards to the possibility for the defence to request the issuing of an EIO. However, a provision which enables the defence to request the issuing of an EIO was inserted into the Proposal during the negotiating process[22] and adopted in its final text. Pursuant to Article 1 (3) Directive EIO the issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure.

This provision does not provide for a binding European rule which would enable the defence to have the right to gather the evidence abroad, which would be welcome. Instead, the provision only refers to the national law of the Member States by providing that the opportunity for the defence to gather the evidence abroad is only granted in the framework of applicable defence rights in conformity with national criminal procedure. This means that the defence will be given the opportunity to gather the evidence abroad only to the extent to which they are allowed to initiate the gathering of evidence in purely domestic criminal procedure.

---

20 Heard, Catherine; Mansell, Daniel, *Fair Trials International's Response to a European Member States' Legislative Initiative for a Directive on a European Investigation Order*, p. 3.

21 Mangiaracina, Annalisa, *A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order*, Utrecht Law Review, 1/2014, p. 123. See also Currie, Robert J., *Human rights and international mutual legal assistance: Resolving the tension*, p. 16, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114339 (12 August 2014).

22 Mangiaracina, 2014, p. 124.

### 3. 2. 1. 3. Participation of the defence in the execution of an EIO

The second issue through which the position of the defence in transnational criminal investigations in the EU shall be analysed is the possibility for the defence to participate in the execution of an EIO. The participation of the defence in the execution of an EIO enables the defence to monitor the way in which the investigative measure indicated in an EIO is undertaken. Only when the defence has the possibility to participate in the execution of an EIO, can it successfully challenge the investigative measure and its results with the use of legal remedies. Therefore, participation of the defence is necessary to enable the defence to use its legal challenge against the investigative measure indicated in an EIO effectively.[23] However, the participation of the defence in the execution of an EIO is important not only for the aforementioned reason, but at least with some investigative measures, the defence needs to be given an opportunity to participate in the execution of an EIO in order to be able to exercise its defence rights during the execution of an investigative measure in for example, the interrogation of a person. Namely, if the evidence so gathered is to be admissible in the criminal procedure of the issuing State, the defence needs to be given the opportunity to actively participate in the execution of the investigative measure in the executing State.[24] For example, if a witness is interrogated in the execution of an EIO, the statement so obtained will be admissible in the criminal procedure of the issuing State only if the defence had the opportunity to cross-examine the witness.

The Directive EIO does not seem to take account of any of these issues. In Article 9 (4) the Directive EIO provides only the possibility for the authorities of the issuing State to assist in the execution of an EIO in the executing State. However, the possibility for the defence to take part in the execution of an EIO may be included in the provision on compliance by the executing authority with the formalities and procedures indicated by the issuing authority. The issuing authority may request the presence of the defence in the execution of an EIO as a formality or a procedure under the law of the issuing State. However, in the latter case, the presence of the defence in the execution of an EIO is not a right guaranteed at the EU level, but a possibility which is left to the discretion of the issuing authority and dependent on the agreement of the executing authority.[25]

---

[23] Belfiore, 2014, p. 102.
[24] Belfiore, 2014, p. 102.
[25] Belfiore, 2014, p. 102.

### 3. 2. 1. 4. Legal remedies

The provision on legal remedies is provided in Article 14 of the Directive EIO. This provision regulates the following matters: a) decisions that can be challenged by a legal remedy, b) information about the possibilities for seeking a legal remedy, and c) consequences of a legal remedy.

#### 3. 2. 1. 4. 1. Decisions that can be challenged by a legal remedy

In relation to the decisions that can be challenged by a legal remedy, a couple of questions arise: Can the issuing of an EIO be challenged by a legal remedy? Can the decision of the executing State to recognize and execute an EIO also be challenged? What are the possibilities to challenge the decision on the investigative measure indicated in an EIO, and the investigative measure to be executed in the executing State?

The Directive provides for the possibility to challenge the issuing, the recognition, and the execution of an EIO.[26] In relation to the issuing of an EIO, the Directive determines that the substantive reasons for issuing an EIO may be challenged only in an action brought in the issuing State. This provision is a characteristic feature of all mutual recognition instruments,[27] representing its procedural core.[28] In the EIO framework, the issuing authority is the only one who assesses the necessity and proportionality of an EIO and having this in mind, this limitation seems logical. However, it does significantly weaken the position of an individual situated in the executing State who is an object of an investigative measure indicated in an EIO. Since the substantive reasons for issuing an EIO cannot be challenged in the executing State, he/she is forced to take action before the courts of a remote country, thereby encountering a number of practical (language, costs) and legal (foreign legal order) disadvantages.[29] The recognition and execution of an EIO can also be challenged by a legal remedy. Since the recognition and execution of an EIO is taking place in the executing State, it is to be expected that the legal challenges are going to take place there, although the Directive does not contain any rules on this matter. A legal challenge against the recognition

[26] Article 14 (5) of the Directive.
[27] See Article 18 (2) FD EEW, Article 11 (2) FD FO.
[28] Schünemann, 2014, p. 33.
[29] Schünemann, 2014, p. 33.

and execution of an EIO can, for example, indicate the fact that the recognition and execution of an EIO should (have) be(en) refused.

Besides an EIO, the investigative measure indicated in an EIO can be subjected to a legal challenge. The differentiation between a legal challenge against an EIO and against an investigative measure indicated in an EIO is not an artificial one. The Directive differentiates between the necessity and proportionality of an EIO and between availability, necessity and proportionality of an investigative measure indicated in an EIO. In challenging the investigative measure indicated in an EIO, it might be claimed that the indicated investigative measure is not available under the law of the issuing or the executing State, or that its use is not proportionate under the circumstances of the case. In relation to legal remedies against the investigative measure indicated in an EIO, the Directive EIO obliges Member States to ensure applicability of legal remedies equivalent to those available in a similar domestic case.[30]

### 3. 2. 1. 4. 2. Information about the possibilities for seeking a legal remedy

In order to use a legal remedy, the suspect or his defence lawyer need to be informed about the possibility to seek a legal remedy. In relation to the investigative measures which are indicated in an EIO and the possibility to inform the suspect and his defence lawyer about the opportunity to use a legal remedy, the following three situations need to be differentiated: information prior to the execution of the investigative measure with the possibility to challenge the decision before the measure is executed, only information during or after the measure is executed and the possibility to challenge the measure only thereafter, and information about the investigative measure only at a later stage, after the investigation has already been completed.[31] From the standpoint of the defence, the first option is the best one, the possibility to challenge the investigative measure before it is executed diminishes the possibility of a fundamental rights violation. However, a prior challenge is not always possible and in certain situations it is excluded because of the very nature of the investigative measure (covert measures). While in certain situations providing information about the ongoing investigation would endanger the success of investigation (confidentiality of the investigation).

---

[30] Article 14 (1) of the Directive.

[31] Arena, Alessandro, *The Rules on Legal Remedies: Legal Lacunas and Risks for Individual Rights*, in Ruggeri, Stefano (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer, 2014, p. 115-116.

In relation to this question, the Directive EIO contains the following rule: the issuing and the investigating authority are obliged to take appropriate measures to ensure that information is provided about the possibilities under national law to seek a legal remedy. This, already vaguely defined obligation is further limited with two preconditions. Such an obligation is triggered only where it would not undermine the need to ensure the confidentiality of an investigation, and only after legal remedies become applicable under national law and in due time to ensure that they can be exercised effectively.[32]

### 3. 2. 1. 4. 3. Consequences of a legal remedy

In relation to the consequences of a legal remedy, three situations can be differentiated: the effect of the legal remedy on the execution of the investigative measure indicated in an EIO, the effect of the legal remedy on the transfer of evidence obtained in the execution of an EIO, and the effect of the legal remedy on the criminal procedure that is taking place in the issuing State and in relation to which an EIO has been issued.

In relation to the effects of the legal remedy on the execution of the investigative measure indicated in an EIO, the question that has to be answered is: does the legal remedy suspend the execution of the investigative measure or does it not affect it? The Directive EIO does not contain a mandatory rule on the issue, but rather refers to the national law of the Member States by stating that a legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.[33]

A legal remedy may have the effect of suspending the transfer of evidence, unless sufficient reasons are indicated in an EIO that an immediate transfer is essential for the proper conduct of the investigation or for the preservation of individual rights. However, when the transfer of evidence may cause serious and irreversible damage to the person concerned, it can be suspended pending a decision regarding a legal remedy.[34]

Special problems with the effects of a legal remedy arise in a situation where the successful outcome of a legal challenge against the recognition and execution of an EIO has become known only after the evidence obtained in the execution of an EIO has already been

[32] Article 14 (3) Directive.
[33] Article 14 (6) Directive.
[34] Article 13 (2) Directive EIO.

transferred to the issuing State. In this situation, the evidence transferred is used in the criminal procedure of the issuing State. Does a successful legal challenge against the recognition and execution of an EIO effect the admissibility of transferred evidence in the criminal procedure of the issuing State, and if it does, in what way? Successful legal challenges against recognition and execution of an EIO may mean that an EIO should not have been recognized or executed, because, for example, the grounds for refusal of recognition and execution existed. The Directive EIO does not directly prescribe the effects of a successful legal challenge against the recognition and execution of an EIO in the criminal procedure of the issuing State, but rather refers to the national law of the issuing State, by stating that the issuing State shall take into account a successful challenge against the recognition and execution of an EIO in accordance with its national law. However, the Directive does oblige the issuing State to ensure that the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through an EIO.[35]

#### 3. 2. 1. 5. Preliminary conclusion

Analysis undertaken on the position of the defence in the framework of EIO proceedings has shown that the Directive does not directly guarantee the defence any specific rights in relation to the transnational proceedings. All the rights that the defence has in relation to an EIO are dependent on the scope of rights that are grated to the defence in the framework of national criminal proceedings. If a balanced system of transnational investigations is to be built, a greater possibility for the prosecution to enforce national criminal laws transnationally, which was brought about with the principle of mutual recognition, needs to be counterbalanced by the specific rights of the defence in transnational criminal proceedings. Thus, specific rights for the defence need to be woven into the fabric of the Directive EIO.

### 3. 2. 2. Position of an individual affected by the investigative measure

Rules on the gathering of evidence represent a balanced answer of the legal order of every State to the question posed by the tension between two colliding tendencies: on the one hand, there is a tendency to effectively prosecute crime, and, on the other, there is a tendency to safeguard the rights and freedoms of an individual. Rules on the gathering of evidence are very different from State to State and they reflect the peculiarities of historical and cultural

[35] Article 14 (7) Directive EIO.

surroundings in the framework of which national criminal procedural rules were developed. Evidence gathering actions often require the interference of the State into the rights and freedoms of an individual, while criminal procedural law of the State determines the degree to which this is allowed.

In the area of judicial cooperation in criminal matters which is based on the principle of mutual recognition the issuing State decides on the investigative measure pursuant to its own rules which strike the balance between efficiency of prosecution and fundamental rights protection. However, a decision which has been made by the authority of the issuing State is transnationally enforceable,[36] because in principle it must be enforced on the territory of the executing State. As a consequence, in the area of fundamental rights, this means that the executing State will be obliged to interfere with the fundamental rights of individuals situated on its territory, although its own law would not allow for such interference. This situation is problematic not only from the point of view of an individual who is affected by the investigative measure undertaken on the territory of the executing State, but also from the point of view of the executing State. Namely, it creates a situation whereby different fundamental rights standards apply for investigative measures undertaken in a national framework, on the one hand, and for those undertaken in a transnational framework, on the other. This affects the unity and coherence of the legal order of the executing State.

The following paragraphs will analyse the degrees to which the provisions of the Directive take into account the position of an individual who is affected by the investigative measure indicated in an EIO. It will also analyse the degrees to which a person's fundamental rights are guaranteed under the legal order of the executing State and are safeguarded in the process of recognition and execution of an EIO.

### 3. 2. 2. 1. Recourse to a different type of investigative measure as a fundamental rights guarantee

Pursuant to the Directive EIO, the issuing authority decides about the investigative measure that is to be undertaken on the territory of the executing State in the execution of an EIO. The issuing authority bases this decision on the criteria prescribed in its own law. Although the executing authority may not allow for the same investigative measure to be undertaken at all,

---

36 Ruggeri, Stefano, *Beweisrechtshilfe und Grundrechtseingriffe am Beispiel des Richtliniensvorschlag einer europäischen Ermittlungsanordnung,* ZStW, 2/2013, p. 410.

or it may not allow for the same investigative measure to be undertaken under the same factual circumstances, the executing authority is obliged to execute the investigative measure indicated in an EIO. This is a typical feature of mutual recognition instruments, where, in the collision between the laws of the issuing and the executing State, the law of the issuing State prevails.

As previously explained, this may cause problems in the sphere of fundamental rights protection. If fundamental rights protection standards in the area of evidence gathering in the issuing State are lower than the standards of the executing State, the executing State will have to interfere into the rights and freedoms of an individual in a way which is contrary to the fundamental rights guarantees of its legal order.

However, the Directive EIO offers some solutions in order to avoid this. The first possibility which the issuing State has at its disposal is to have recourse to a different type of investigative measure. The executing authority may substitute the investigative measure indicated in an EIO by an investigative measure which is in existence, available and proportionate under its law.[37] Such a solution, welcomed from the position of fundamental rights protection and the safeguarding of coherence of the legal order of the executing State, represents a negation of mutual recognition logic.[38] By using this mechanism the executing authority may adapt the investigative measure indicated in an EIO and ordered pursuant to the law of the issuing State, to its own fundamental rights standards. If such an adaptation is not possible, the investigative measure indicated in an EIO will not be executed.

From a fundamental rights point of view, recourse to a different kind of investigative measure, in order to be recognized as an effective guarantee, should be mandatory for the executing authority whenever there is a fundamental rights issue. However, the Directive EIO did not go so far but had recourse to a different kind of investigative measure, which is mandatory for the executing State only when the measure indicated in an EIO is not in existence under the law of the executing State or would not be available in a similar domestic case. In the case of non-proportionality, when the executing authority may opt for a less intrusive measure than the one indicated in an EIO – which seems to be most important from the point of view of fundamental rights – there is no such obligation for the executing

[37] See Article 10 of the Directive.

[38] Ruggeri refers to it as a deviation (*Abweichung*) from the classical model of mutual recognition, Ruggeri, Stefano, *Beweisrechtshilfe und Grundrechtseingriffe am Beispiel des Richtliniensvorschlag einer europäischen Ermittlungsanordnung,* ZStW, 2/2013, p. 412.

authority. In the latter case, recourse to a different kind of investigative measure is only optional.

#### 3. 2. 2. 2. Fundamental rights oriented grounds for refusal

Besides the possibility to have recourse to a different kind of investigative measure, the executing authority has another possibility to safeguard the executing State's fundamental rights and considerations. To this end, the executing authority may use one of the fundamental rights oriented grounds for refusal, recognition or execution of an EIO. The Directive EIO contains a number of grounds for refusal that can be used in order to achieve that goal. Besides explicit refusals on the grounds of interference of fundamental rights, fundamental rights considerations can also trigger the application of other grounds for refusal, for example, immunity or privilege under the law of the executing State or the double criminality requirement.

#### 3. 2. 2. 3. Legal remedies

In the two previously analysed mechanisms, the safeguarding of the rights of an individual affected by an investigative measure indicated in an EIO is left in the hands of the executing authority. However, the individual concerned also has the possibility to safeguard his rights in the EIO scheme, by using legal remedies against an EIO or against an investigative measure indicated in an EIO. In relation to the individual concerned and his possibilities to use legal remedies, the same limitations which have been previously explained in relation to the position of the defence apply. [see *supra* C. IV. 3. 5. 4. a) iv)].

#### 3. 2. 2. 4. Preliminary conclusion

With regards to the position of the individual affected by the investigative measure indicated in the EIO, the Directive contains three mechanisms which enable the adaptation of the investigative measure ordered pursuant to the law of the issuing State to the fundamental rights standards which arise out of the legal order of the executing State. Two of the mechanisms are of an indirect nature, because they put the protection of the fundamental rights of the individual in the hands of the executing authority, and one of them is direct in nature which enables the individual who is the object of the investigative measure to become directly involved in EIO proceedings. The first mechanism is recourse to a different kind of

investigative measure. This enables the executing authority to successfully adapt the investigation order to its fundamental rights standards, without activating the need to make use of one of the grounds for refusal of cooperation. Although welcomed from the standpoint of fundamental rights, by way of representing a deviation from the mutual recognition principle, it produces negative effects on the effectiveness of the transnational enforcement of EU criminal law. The second mechanism is fundamental rights oriented grounds for refusal for cooperation. In a case where the EIO cannot be adapted to the fundamental rights demands of the legal order of the executing State, the executing State has the possibility, as a last resort, to make use of one of the grounds for refusal of cooperation. The EIO is innovative in that it represents the first mutual recognition instrument which introduced a specific fundamental rights oriented grounds for refusal of cooperation. The third mechanism is the possibility for the individual affected to get directly involved in the EIO proceedings by making use of legal remedies. The individual has the possibility to use a legal remedy which is subjected to the same limitations which apply in the case of the accused and their defence in the criminal procedure of the issuing State.

## 4. Conclusion

The analysis of the position of the individual in the cross-border evidence gathering procedure was divided into two parts. Namely, cross-border evidence gathering affects the position of the individuals from both sides of the border, it affects the individual who is facing a criminal charge in the requesting/issuing State, as well as the individual who is the object of the evidence-gathering measure in the requested/executing State. Both of these individuals have their specific interests in the process of cross-border evidence gathering. The individual who is facing a criminal charge in the issuing State has a vested interest in seeing that *his position is not affected when the case involves evidence which is situated abroad*. In other words, the accused and his defence in the criminal procedure of the issuing State have an interest in seeing that their position, defence rights and their possibilities to affect the outcome of the case are not reduced when the case involves a transnational dimension. However, specific interests in the process of cross-border evidence gathering are also attached to the individual who is the object of the evidence gathering action in the requested/executing State. Since substantive and procedural criminal laws of cooperating States are different, this individual has an interest in seeing that, in a situation when they are subjected to an evidence gathering action requested/ordered by another State, his/her fundamental rights are not restricted to an

extent higher than the one applicable in a case which only has a national dimension. In other words, they have an interest in seeing that *their fundamental rights guarantees are upheld*.

In relation to the position of the accused and his/her defence in the criminal procedure of the requesting/issuing State, the following questions were the object of normative analysis: do they have the possibility to initiate the gathering of the evidence abroad, and do they have the possibility to participate in the evidence gathering process which is taking place in another Member State? The analysis showed the following results:

- the *mutual legal assistance model* does not guarantee any specific rights for the defence in the process of cross-border evidence gathering as the possibility for the defence to initiate the gathering of evidence abroad is not mentioned at all. Mutual legal assistance instruments do not contain provisions which would guarantee the defence the right to participate in the gathering of evidence abroad. However, they do contain provisions which foresee the possibility for the defence to participate in the gathering of evidence abroad;

- the development of the *mutual recognition model* brought increased attention for the interests of the defence in the framework of judicial cooperation in criminal matters. This is a natural consequence of the fact that the mutual recognition model brings better perspectives for the transnational enforcement of national criminal laws, which needs to be counter-balanced by the improved position of the defence in the framework of judicial cooperation proceedings. Clear and predictable rules, instead of broad, flexible and unpredictable rules, which are characteristic for the mutual recognition model, also offer a better perspective for the protection of the interests of the defence in transnational criminal proceedings. The development of these rules in the direction of the recognition of specific rights of the defence in the cross-border evidence gathering procedure is advancing slowly, but an improvement in relation to the mutual legal assistance regime is visible. Observance of the rights of the defence in the framework of cross-border evidence gathering in the mutual recognition model is visible not only through the explicit obligation of the cooperation States to take the interests of the defence into account, but also through the recognition of specific rights

for the defence, the right to initiate the proceedings for cross-border evidence gathering and the right to make use of legal remedies in the process.

With regards to the position of the individual who is the object of the evidence gathering measure in the requested/executing State, the extent to which respective judicial cooperation instruments take into account the interests of the individual affected was analysed. The normative analysis showed the following findings:

- *mutual legal assistance* instruments contain no provisions which would enable direct protection of the individual affected by the evidence-gathering action undertaken in the requested State. Protection of rights of the individual affected is left to cooperating States, in this case the requested State, by giving it the possibility to make use of one of fundamental rights oriented grounds for refusal of cooperation;

- *mutual recognition instruments* provide for mechanisms which enable both, indirect and direct protection of the individual affected by the evidence gathering measure which is undertaken in the executing State. Indirect protection is guaranteed through the observance of the interests of the individual affected in the decision making process of the competent judicial authorities of the issuing and the executing State, and direct protection is guaranteed through the prescription of a right to make use of legal remedies.