



INSIGHT

# THE REASONS BEHIND THE FAILURE OF THE EUROPEAN SUPERVISION ORDER: THE DEFEAT OF LIBERTY *VERSUS* SECURITY

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**ABSTRACT:** The European Supervision Order is an instrument of mutual recognition of judicial decisions essential to guarantee the exceptional nature of pre-trial detention. It also prevents discrimination of suspects and accused persons in criminal proceedings on grounds of nationality or residence, with regard to the possibilities of enjoying provisional release pending trial. It is, in short, an instrument that stands as a guarantee of the freedom of citizens in the European Area of Freedom, Security and Justice. However, despite its crucial role, the use of this instrument is very scarce, as its application encounters significant obstacles, including the insufficient level of trust between Member States, which appears to play a key role.

**KEYWORDS:** European Supervision Order – mutual trust – principle of mutual recognition – pre-trial detention – supervision measures – precautionary measures.

## I. OBJECTIVES OF THE EUROPEAN SUPERVISION ORDER

The European Supervision Order (hereafter ESO) addresses the issue of alternative precautionary measures to the pre-trial detention of individuals when they are prosecuted in a Member State other than the one of their residence.<sup>1</sup> Through this instrument of mutual recognition of judicial decisions, the Member State in which criminal proceedings are taking place asks the authority of the executing State, usually that of the de-

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<sup>1</sup> This instrument is regulated in the Council Framework Decision 2009/829/JHA of 23 October 2009 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 (hereafter, the ESO FD).



fendant's residence, to monitor compliance with one or more non-custodial measures, consisting of specific prohibitions or obligations, in anticipation of the trial being held.

The main objective of this instrument is to make the need to ensure the defendant's subjection to the procedure (Art. 2, para. 1, let. a), of ESO FD) compatible with the need to avoid unnecessary restrictions of his/her freedom of movement (Art. 2, para. 1, let. b), of ESO FD). Ultimately, the objective of this instrument is to ensure that precautionary measures adopted to ensure that the defendant will be available to stand trial are not disproportionate, promoting the use of measures alternative to pre-trial detention as opposed to custodial precautionary measures, which should only be used as a last resort.

In connection with the aforementioned objectives expressly envisaged by the ESO FD, the adequate use of this instrument would reinforce certain fundamental rights. Specifically, we refer to the presumption of innocence, the right to liberty (Recital 4 of ESO FD) and the right to equality before the law, avoiding discrimination based on nationality or residence (Recital 5 of ESO FD).

Fundamental rights to liberty and the presumption of innocence must be guaranteed by using pre-trial detention as a truly exceptional measure, as derived from Art. 5 and Art. 6, para. 2, of the European Convention on Human Rights and Arts 6, 47 and 48 of the Charter of Fundamental Rights of the European Union. In this sense, the abuse and misuse of pre-trial detention for non-residents, blurring the exceptional nature that must inform the use of precautionary custodial-measures, erodes the aforementioned fundamental rights. However, for this exceptionality to be achieved throughout the European area of justice, the automatic correspondence between non-residence and the assessment of the risk of flight must be rejected. The ESO could be very useful in this respect, allowing the transmission between Member States of alternative measures to provisional detention, transferring the supervision obligation to the location in which the accused resides or, in certain cases, to another Member State. This approach promotes the equal treatment of residents and non-residents when deciding on their personal situations while awaiting trial (Recital 5 of ESO FD).

In addition to the laudable purpose of ensuring the availability of the accused through the adoption of proportional and non-discriminatory precautionary measures, this instrument also aims to improve the protection of victims and the general public (Art. 2, let. c), of ESO FD). It is striking that in the preparatory work, notably in the initial FD proposal,<sup>2</sup> no reference was made to the victim, while in the final text, the protection of the victim, in addition to appearing as a further objective in Art. 2, is configured as a limit to state action. In this sense, it is stated that the regulation of the ESO "is without prejudice to the exercise of

<sup>2</sup> Communication COM(2006) 468 final of 29 August 2006 from the Commission, Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union.

the responsibilities incumbent upon Member States with regard to the protection of victims, the general public and the safeguarding of internal security" (Art. 3 of ESO FD).

However, despite the fact that the protection of victims is an objective expressly envisaged by the regulation, neither the articles of the ESO FD nor the transposition law in the case of Spain,<sup>3</sup> give a significant role to the interests of the victim. In view of the ESO FD, it is observed that victims play an absolutely secondary role in the dynamics of this instrument, as they have practically no involvement in the procedure. In fact, victims are not entitled to solicit the issuance of the instrument or to oppose its issuance or recognition, no hearing procedure is regulated and there is no duty to notify victims of decisions related to the procedure.<sup>4</sup>

<sup>3</sup> According to certain authors, on the basis that the purpose of this European instrument is also to protect victims (Art. 2, let. c), of ESO FD and Art. 109, para. 2, of the Spanish Law 23/2014, of 20 November, on Mutual Recognition of Criminal Decisions in the European Union), the lack of provision for the intervention of the victim in the procedure may and should be corrected in practical application. For example, I. PANDO ECHEVARRÍA, *Cuestiones Prácticas Relativas al Reconocimiento de Resoluciones Sobre Medidas Alternativas a la Prisión Provisional* in C. ARANGÜENA FANEGO; M. DE HOYOS SANCHO; C. RODRÍGUEZ-MEDEL NIETO (coord.) *Reconocimiento Mutuo de Resoluciones Penales en la Unión Europea: Análisis Teórico-Práctico de la Ley 23/2014, de Noviembre*, Navarra: Aranzadi, 2015, p. 260, proposes that, in case of withdrawal of the ESO, a hearing should be held, not only for the prosecutor as indicated by the law (Art. 117, para. 3, of the Law 23/2014), but also for the rest of the parties involved, including the victim if s/he acts as a private prosecutor. For its part, the Guide of the General Council of the Judiciary on the Recognition of Decisions on Alternative Measures to Pretrial Detention of 27 February 2015, drawn up by the International Relations Service of the Spanish General Council of the Judiciary, goes further and recommends that the victim, acting as a private prosecutor, can solicit the issuance of this instrument of mutual recognition, even though Law 23/2014 does not provide for it (p. 6). In the same vein, the Guide recommends that the victim, acting as a private prosecutor, must be heard before deciding on the issuance of this instrument, arguing that if the protection of victims is one of the purposes of the instrument, it seems essential to hear the victim's opinion on the matter (p. 10).

<sup>4</sup> The ESO FD does not provide for consultation or even for the victim to be informed before a ESO is issued; it also does not require the victim to be informed of such issuance in terms of the specific measures transmitted, the executing competent authority or the consequences of any non-compliance by the defendant. Likewise, there is no provision for the victim to be informed of any adaptation of the supervision measure in case of incompatibility with the law of the executing State, and there is no provision for the victim to be consulted on any subsequent decisions regarding the renewal, review, or withdrawal of the decision on supervision measures or the modification of the measures originally recognised. In this regard, C. ARANGÜENA FANEGO, *La Protección Transnacional de la Víctima por Medio de la Orden Europea de Vigilancia en el Marco de las Medidas Cautelares no Privativas de Libertad Aplicadas entre los Estados Miembros de la Unión Europea*, in R. CABRERA MERCADO (coord.), *Análisis de medidas para mejorar la protección policial y judicial de las víctimas de la violencia de género*, Madrid: Ministerio de Sanidad, Política Social e Igualdad, 2011, p. 89, asserts that nothing in the ESO FD meets the need to communicate to the victim of the crime the supervision measures adopted or the address of the executing authority. According to the author, this omission should be integrated with the provisions of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, currently replaced by Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. Specifically, Art. 6, para. 5, of Directive 2012/29 applies, which states that "Member States shall ensure that victims are offered the op-

In any case, ensuring the due course of justice, making the defendant available to stand trial (Art. 2, let. a), of ESO FD), and protecting victims and society against the commission of new crimes (Art. 2, let. b), of ESO FD) are goals that correspond, to a large extent, to the classic dangers that precautionary measures seek to neutralise: specifically, the risk of flight and the risk of re-offending. In this context, the need to combine the effective avoidance of such risks or dangers with the principle of proportionality<sup>5</sup> and non-discrimination of foreigners or non-residents is the real justification for the existence of this instrument.

The status of foreigner or non-resident, when it is not outweighed by strong social, family, work or professional ties, is often considered as a determining factor in the risk of absconding, leading to decisions of provisional detention, when in similar circumstances a citizen resident in the same State would not be subject to such a serious measure.<sup>6</sup> In this context, risk of flight is routinely invoked disproportionately against foreign nationals and, as a result, foreign offenders are not considered for the same range of alternative sanc-

portunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures issued for their protection in case of release or escape of the offender”.

<sup>5</sup> It can be said that the dichotomy between pre-trial detention and unrestricted liberty for the non-resident suspect or accused person no longer exists. The diversity of measures available at transnational level now allows for necessary, appropriate and not disproportionate measures to be taken according to the specific circumstances of the case. As stated by T. RAFARACI. *The Application of the Principle of Mutual Recognition to Decisions on Supervision Measures as an Alternative to Provisional Detention*, in S. RUGGERI (ed.). *Liberty and Security in Europe*, Osnabruck: Universitätsverlag, 2013, p. 77, thanks to the ESO FD, the principle of proportionality of supervision measures virtuously enters the area of freedom, security and justice.

<sup>6</sup> This systemic and systematic discrimination has been denounced by many authors in Spanish literature for years. See, in this sense, C. GUERRA PÉREZ, *La decisión judicial de prisión preventiva*, Valencia: Tirant Lo Blanch, 2010, p. 156-157; M. RECIO JUÁREZ, *Nuevos Instrumentos para el Cumplimiento Transnacional de las Medidas Cautelares Alternativas a la Prisión Provisional en la Unión Europea*, in *Revista Direito e Inovação*, 2014, p. 200-204; E. GARCÍA ESPAÑA, *Extranjeros sospechosos, condenados y ex condenados: Un mosaico de exclusión*, in *Revista Electrónica de Ciencia Penal y Criminología*, 2017, p. 19; Likewise, international doctrine has highlighted the problem. See, among others, T. LJUNGQUIST, *Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures in the European Union*, in *Revue internationale de droit pénal*, 2006, p. 172-173; J.B. BANACH-GUTIERREZ, *Globalized Criminal Justice in the European Union Context. How Theory Meets Practice*, in *New Journal of European Criminal Law*, 2013, p. 165; T. RAFARACI, *The Application of the Principle of Mutual Recognition*, cit., p. 68. This systematic discrimination was also recognised in the Explanatory Memorandum of the original Framework Decision proposal (COM(2006) 468 final), stating that “EU citizens who do not reside in the territory of the Member State where they are suspected of having committed a crime are sometimes - mainly due to lack of community ties and the risk of flight - in pre-trial detention or perhaps subject to a long-term non-custodial surveillance measure in a strange environment for them. A person suspected of having committed a crime in a country in which he resides would benefit, in a similar situation, from a less coercive surveillance measure, such as the obligation to report periodically to the police or a travel ban”.

tions and measures as national offenders.<sup>7</sup> Within the EU, the competent authorities of the trial State commonly remand in pre-trial custody non-residents accused of offences in other Member States just because of the perceived greater risk of flight.<sup>8</sup>

Furthermore, along with the greater use made of imprisonment as a precautionary measure in the case of non-residents, it must also be noted that these persons suffer more when sent to prison in a State in which they have no social, family, cultural or linguistic ties, which undoubtedly has a negative effect on the uprooting and de-socialisation that imprisonment inflicts on all those who experience it. In this sense, it is widely accepted that the problems experienced by offenders in prison are generally exacerbated when they are foreigners.<sup>9</sup> Communication difficulties due to language barriers, lack of information about the legal system, alienation from the local culture and customs and the absence of contacts with relatives may have detrimental effects on foreign prisoners.<sup>10</sup> In fact, one driving idea behind the ESO is also that of “social rehabilitation”.<sup>11</sup> In this sense, this instrument is aimed at mitigating the negative effects that criminal proceedings, and specifically measures of deprivation of liberty, may have on the individuals concerned, in terms of breaking social, family, economic, professional

<sup>7</sup> P. FARALDO CABANA, *One Step Forward, Two Steps Back? Social Rehabilitation of Foreign Offenders Under Framework Decisions 2008/909/JHA and 2008/947/JHA*, in *New Journal of European Criminal Law*, 2019, p. 154.

<sup>8</sup> T. RAFARACI, *The Application of the Principle of Mutual Recognition*, cit., p. 68; Contrary to this common judicial practice, Recommendation CM/Rec (2012)12 of the Committee of Ministers to Member States Concerning Foreign Prisoners adopted on 10 October 2012, states that in order to ensure that remand in custody is used for foreign suspects, as for other suspects, only when strictly necessary and as a last resort, alternatives to remand in custody shall always be considered for a foreign suspect; and the fact that such a suspect is neither a national nor a resident of the State or has no other links with that State shall not, in itself, be sufficient to conclude that there is a risk of flight.

<sup>9</sup> See A. TARZI, J. HEDGES, *A Prison Within a Prison*, London: Inner London Probation Service, 1990; E. GIMÉNEZ-SALINAS, *Extranjeros en Prisión, in Cuaderno del Instituto Vasco de Criminología. Eguszkilore*, No. Extra 7, December 1994, p. 135-137; T. UGELVIK, *The Incarceration of Foreigners in European Prisons*, in S. PICKERING, J. HAM (eds.) *The Routledge Handbook on Crime and International Migration*, London and New York: Routledge, 2014, p. 107.

<sup>10</sup> P. FARALDO CABANA, *One Step Forward*, cit., p. 152.

<sup>11</sup> It should be recognised that it is controversial to discuss proper social rehabilitation at this stage of the proceedings and that this concept is not explicitly envisaged by the ESO FD. In fact, the suspect or accused, who has not yet been tried, must be considered innocent for all purposes, and should therefore not be rehabilitated or re-socialised, but, rather, should be prevented from being de-socialised. In any case, in the awareness that social rehabilitation is not the pivotal objective of the ESO FD, by preventing unnecessary pre-trial detention, a reduction in the likelihood of receiving a custodial sentence after complying successfully with pre-trial supervision may be expected (I. DURNESCU, *Framework Decisions 2008/947 and 2009/829: State of Play and Challenges, ERA Forum*, 2017, p. 357). In any case, avoiding imprisonment in a foreign state, either as pre-trial detention or as a penalty, seems to assist the individual in preserving family, linguistic, cultural and professional ties. On this issue, T. RAFARACI, *The Application of the Principle of Mutual Recognition*, cit., p. 68-69, argues that together with the purpose of promoting the principle of *favor libertatis*, the ESO FD fulfils a humanitarian objective, as executing a measure in the Member State where the person concerned is resident allows family and social ties to be preserved.

or cultural ties. This breakdown, and the subsequent process of “de-socialisation”, is normally aggravated when the defendant or convict must remain in a territory other than that of his/her usual residence while awaiting trial.

## II. THE FAILURE IN APPLICATION OF THE EUROPEAN SUPERVISION ORDER IN THE FACE OF THE SUCCESS OF THE EUROPEAN ARREST WARRANT

The many and varied instruments of mutual recognition of judicial decisions that exist today allow virtually any decision taken within criminal proceedings in a given Member State to be enforced almost automatically in another Member State with relative ease, through fairly swift procedures. There is no doubt that the proper functioning of these instruments brings us closer to the ideal of the EU as a single area of freedom, security and justice, the creation of which was established as an objective of the EU in the 1997 Treaty of Amsterdam. However, within the range of mutual recognition instruments available, some are used much more than others. In this sense, the ESO has been systematically ignored and underused by the competent authorities of the Member States.

For instance, the data concerning Spain is certainly revealing. The statistics present a bleak picture in terms of the use of an instrument that is so important for safeguarding the right to liberty of suspects and accused persons within the EU.

| Year | Received | Issued |
|------|----------|--------|
| 2015 | 0        | 2      |
| 2016 | 0        | 3      |
| 2017 | 3        | 2      |
| 2018 | 0        | 1      |
| 2019 | 2        | 7      |

TABLE 1. Source: Judicial Statistics of the Spanish General Council of the Judicial Power.

As the table shows, in 2015, Spain issued 2 ESOs and did not receive any. In 2016, 3 were issued and, again, none were received from other Member States. In 2017, 2 were issued and 3 were received. In 2018, only 1 ESO was issued. In 2019, the year in which this instrument was used the most to date, Spain received 2 ESOs and 7 were issued.<sup>12</sup>

At European level, the situation does not seem to be any better. This is firstly due to the difficulty in obtaining complete and reliable data<sup>13</sup> and secondly, because the scarce

<sup>12</sup> These data can be found in the different annual reports, prepared by the Spanish General Council of the Judiciary available at [www.poderjudicial.es](http://www.poderjudicial.es), last access: 22 September 2020.

<sup>13</sup> According to FRA's findings, in relation to the Framework Decision on the ESO, the amount of information collected by Member States' competent authorities is much less than the information collected on other mutual recognition instruments: 19 Member States do not require the compilation of transfer-related

data available confirm the very limited use of this instrument.<sup>14</sup> For instance, Romania issued 2 ESOs and received another 2 in 2017. In 2018, it issued 1 and received only 1 ESO. Before 2017, 8 ESOs were received and there was no issuance by Romania.<sup>15</sup> In Italy, the available data are even less helpful, as they do not distinguish between instruments issued and received, only revealing the opening of 2 procedures in 2016, 4 in 2017 and 3 in 2019. In the Netherlands, since the instrument was implemented in November 2013 until 2017, 16 ESOs were received and a total of 18 were issued.<sup>16</sup>

In contrast to the scarce use of the ESO, the predominant instrument is undoubtedly the European Arrest Warrant (hereafter EAW). For instance, in 2019, the last year for which we have data, Spain issued 452 EAWs and received 1,176, compared to the issuance of seven ESOs issued and only two received in the same period. In Italy, in 2018 alone, 1,362 EAWs were issued and 728 were executed, while in Romania, in the same year, 1,067 EAWs were issued and 722 were executed.<sup>17</sup>

At European level, contrary to what happens with the ESOs, a large amount of information is available on the implementation of the EAW.<sup>18</sup> Indeed, quantitative information regarding the number of EAWs issued and executed is available for the 2005-2018 period, initially collected by the Council and more recently based on Commission

information (European Union Agency for Fundamental Rights, *Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers*, 2016, p. 32, available at [fra.europa.eu](http://fra.europa.eu)).

<sup>14</sup> The same FRA report for 2016, already mentioned, indicates that the use of this instrument has been relatively limited (p. 33). On the other hand, according to the European Judicial Network Secretariat, Report on activities and management 2017-2018, p. 16, available at [www.ejn-crimjust.europa.eu](http://www.ejn-crimjust.europa.eu), this instrument is not commonly used by practitioners in Member States due to a lack of awareness and experience of them, but also because of the burdensome administrative procedures that must be followed. In addition, the main conclusions and observations on the application of mutual recognition instruments of the European Judicial Network, published as Council Doc. 14754/18, Conclusions from the 51st EJM Plenary meeting (Vienna, November 2018) on the application of Mutual Recognition Instruments, p. 2, available at [db.eurocrim.org](http://db.eurocrim.org), indicate that less than 1/5 of the EJM Contact Points have dealt with the FD 2009/829/JHA Supervision Order, which reflects the rare use of this instrument. According to this document, there may be other reasons why the Contact Points are rarely or not at all involved with regard to one or more of the instruments. For instance, the instruments may work smoothly, not entailing any problems that would require the involvement of an EJM Contact Point. However, this latter hypothesis does not seem the most likely, in view of the figures available for the countries for which data exists.

<sup>15</sup> Unfortunately, this data is not public, but was provided by the national authorities involved in response to a specific request in this regard. Data collection has been conducted in the framework of the European Project "Trust and Action".

<sup>16</sup> M. BEUN, *Conference Presentation During CEP Expert Meeting*, Brussels, 26 September 2017 referred to in I. DURNESCU, *Framework Decision 2008/947*, cit., p. 362

<sup>17</sup> European Commission Staff Working Document SWD(2020) 127 final of 2 July 2020, *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2018*, p. 10 and 14, available at: [ec.europa.eu](http://ec.europa.eu).

<sup>18</sup> W. VAN BALLEGOIJ, *European Arrest Warrant. European Implementation Assessment*, European Parliamentary Research Service, p. 4-5, available at: [www.europarl.europa.eu](http://www.europarl.europa.eu).

questionnaires.<sup>19</sup> The most recent quantitative data relating to the practical operation of the FD EAW is from 2018, in which 17,471 EAWs were issued and 7,527 executed. As can be seen from the figures, the number of EAWs issued and executed is experiencing an upward trend.

The first question to be asked is whether the comparison between the use of these instruments makes sense, considering their different scope and purposes. In my opinion, the comparison is helpful precisely in view of those differences between the two instruments, as they may constitute an explanatory factor for their unequal degree of use.

It should be considered that the ultimate aim of the EAW is to ensure that Member States are able to exercise their own jurisdiction when prosecuting and punishing criminal behaviour, despite the fact that the offender is located in the territory of another State; national borders must therefore not be an obstacle to their sovereign power. However, through the ESO, the control over the person subject to the pending procedure is temporarily ceded to another State. It could be said, therefore, that the EAW allows the State to retain its power, while the ESO entails a temporary cession of sovereign power.

The EAW is, in short, an instrument that serves the purposes of security, prevention and repression, which have ultimately guided the EU's initiatives in the field of judicial, criminal and police cooperation.<sup>20</sup> In contrast to this, although featuring in the State's repressive apparatus, the ESO is aimed at guaranteeing the defendant's right of liberty at the cost of assuming a greater risk in ensuring his/her subjection to the procedure by the issuing State.

Indeed, the lack of use of the ESO is concerning from the point of view of individuals' rights since the possibility for non-resident suspects or accused people to be released on bail or to be placed on probation awaiting trial rather than being subjected to pre-trial detention depends largely on the effective use of such instrument. Indeed, the implementation of this instrument should have led to a reduction in the frequency and unjustified use of EAWs, particularly for less serious crimes.<sup>21</sup> However, the aforementioned growing trend in the use of EAWs, compared to the insignificant use of ESOs, demonstrates that this has not been the case.<sup>22</sup>

<sup>19</sup> Replies to questionnaires on quantitative information on the practical operation of the EAW are available at: [ec.europa.eu](http://ec.europa.eu).

<sup>20</sup> J. F. ETXEBERRIA GURIDI, *Medidas de Vigilancia Alternativas a la Prisión Provisional en el Espacio Judicial Europeo*, in J. L. GÓMEZ COLOMER; S. BARONA VILAR; M. PÍA CALDERÓN CUADRADO (coords.), *El Derecho Procesal Penal Español del Siglo XX a Golpe de Tango. Juan Montero Aroca. Liber Amicorum, en Homenaje y para Celebrar su LXX Cumpleaños*, Valencia: Tirant Lo Blanch, 2012, p. 1225-1226.

<sup>21</sup> T. RAFARACI, *The Application of the Principle of Mutual Recognition*, cit., p. 77; In this regard, I agree with A. RYAN's analysis in this special focus, the potential of the ESO is currently untapped and it has the ability to make the EAW procedure function more efficient.

<sup>22</sup> As has been observed by A. RYAN, in her contribution to this special focus, national authorities very often prefer to resort to the EAW, but then release the person concerned on bail a few days after surrender. These are all cases in which the use of the ESO could have been useful.



### III. THE REASONS FOR THE FAILURE IN APPLICATION OF THE ESO

Despite the aforementioned essential purposes pursued by the ESO, as well as its safeguarding function in relation to certain fundamental rights of the suspect or accused person, this instrument has been systematically underused, leading to questions about the reasons for its poor application.

The factors that could influence this situation are very varied and not easy to determine. Among them, the insufficient mutual trust between Member States appears to be an essential factor.

In the freedom-security dialectic, the ESO signifies more freedom and less security, despite the fact that the protection of victims and the general public is established among its generic objectives.<sup>23</sup> At least, this is certainly the case when compared to the EAW. In this sense, it must be borne in mind that the ESO ultimately involves a transfer of the power to supervise the person under investigation from the issuing State to the executing State. Therefore, the former assumes the risk that its prosecution will be frustrated if the latter is not sufficiently diligent in fulfilling its duty of supervision. That is why the level of trust required in order to implement and issue a ESO seems higher than that required to implement a EAW and to request the arrest and surrender of an individual.

The initial lack of commitment on the part of the Member States in the transposition phase<sup>24</sup> seems to have been transferred, alarmingly, to the action of the judiciary or, in general, to the action of the competent issuing authorities of the Member States, which enjoy discretionary power when it comes to deciding whether or not to issue a ESO.<sup>25</sup>

The discretionary nature prevailing over the decision to issue this instrument implies that - unlike the position of the executing State, which carries out a regulated activity and is obliged to recognise and execute non-national supervision measures, unless the conditions for recognition are not met or one of the grounds for refusal applies - it is merely a possibility for the issuing State to make use of this instrument. In addition to

<sup>23</sup> In this sense, the ESO allows the monitoring of the movements of the accused, with the ultimate aim of protecting the general public from the risk posed by the system in which there are only two alternatives: provisional imprisonment or unsupervised release (Recital 3 Council Framework Decision 2009/829). However, as the title of the instrument itself indicates, these supervision measures are considered to be alternatives to provisional detention, which means that for a given level of risk, in the absence of this instrument, the most likely alternative would be custody on remand, which is obviously a more restrictive and burdensome measure for the rights of the accused.

<sup>24</sup> Despite the fact that the implementation date expired in December 2012, at that time, the States that had implemented this instrument could literally be counted on the fingers of one hand - Poland, Latvia, Finland and Denmark - according to data available at [www.ejn-crimjust.europa.eu](http://www.ejn-crimjust.europa.eu) - while, at the beginning of 2014, fewer than half of the States had fulfilled the transposition obligation. The last Member State to transpose this regulation was Belgium, which did so in 2017 through a law of 23 March, while the transposition process in Ireland is still unfinished.

<sup>25</sup> B. MIN, *The European Supervision Order for Transfer of Defendants: Why Hasn't it Worked?*, in *Penal Reform International*, 25 September 2015, [www.penalreform.org](http://www.penalreform.org)

this, there are no institutions or organisations that aim to encourage the use of the ESO FD at national level. In this regard, it appears that, while probation services around Europe are involved in promoting Framework Decision 2008/947, there are no equivalent organisations to enhance the use of the ESO FD at pre-trial stage.<sup>26</sup>

It is therefore for the issuing judicial authorities to decide, based on the circumstances of the case, whether it is appropriate and desirable to make use of the ESO. It is true that the suspect may ask for it to be issued, but, strictly speaking, s/he does not have the right to benefit from the alternative measures to pre-trial detention in the State of his/her residence (Art. 2, para. 2, of ESO FD).<sup>27</sup>

In the described context - that is, the issuance of the instrument being a discretionary decision - its actual use will depend, to a large extent, on the incentives of the authority to resort to such a transnational procedure. In this sense, the incentives to issue a EAW and a ESO are quite different. In the case of a EAW, its issuance is imposed *de facto* on the authority that wishes to fulfil its jurisdictional function, namely judging and enforcing its judgment. On the contrary, in the case of a ESO, the issuing authority, by resorting to this instrument, grants control to a foreign authority, such that the effective exercise of *ius puniendi* is subject, from that moment on, to the effective fulfilment by the executing authority of its duty of supervision.

So, the next question to be answered is: What are the incentives for resorting to the ESO? Basically, these consist of respect for the fundamental right to liberty and the presumption of innocence of the person under investigation, which, although being

<sup>26</sup> In this sense, according to I. DURNESCU, *Framework Decision 2008/947*, cit., p. 362, the ESO FD suffers from "a lack of parenthood".

<sup>27</sup> At this point, it is important to highlight that discretion does not mean arbitrariness. Therefore, if a request is made by the defendant, the issuing authority should assess the case in view of the rights to liberty, the presumption of innocence and the principle of proportionality. In this regard, the following judgments of the European Court of Human Rights condemning Austria are interesting: judgment of 27 June 1968, no. 1936/63, *Neumeister v. Austria*; judgment of 11 October 1969, no. 1602/62, *Stögmüller v. Austria*, and judgment of 16 July 1971, no. 2614/65, *Ringelsen v. Austria*. In all these cases, the Court rules that the rejections of provisional release did not contain sufficient grounds, leading to the conclusion that the requirement of the reasonable period of provisional detention envisaged by Art. 5, para. 3 of the European Convention on Human Rights has been violated. Thus, for example, in *Neumeister v. Austria*, cit., para. 4, the Court states that Art. 5, para. 3, of the European Convention on Human Rights "cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release even subject to guarantees. The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable". Likewise, in *Stögmüller v. Austria*, cit., para. 4, the Court states that in order to examine whether Art. 5, para. 3 of the European Convention on Human Rights has been observed, it is necessary "to consider and assess the reasonableness of the grounds which persuaded the judicial authorities to decide [...] on this serious departure from the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction".

grounds of undoubted merit, may conflict with the duty of the national judge to enforce criminal law. In this context, if the competent issuing authority considers that the ESO will jeopardise the conduct of the criminal investigation or the availability of the defendant for trial, it will avoid using this instrument. Therefore, if the trust is not sufficiently robust, national authorities will be reluctant to relinquish control over the person under investigation, pending trial.

To overcome these obstacles, the only effective formula seems to be a greater amount of trust, which, in the current Club of 27 countries, is no longer as strong and robust as it was in the late 1990s when the EU consisted of just 15 Member States. The issuing State will not use this instrument if it does not trust the diligence of the executing State to supervise the measures effectively and to guarantee that, when the time comes for the trial, the defendant will be handed over, even against his/her will. As stated in the Green Paper on the application of EU criminal justice legislation in the area of detention: "Mutual trust is central to the ESO's successful operation. However, there is a risk that the instrument will not be used uniformly across all Member States, but only between those countries where mutual trust exists".<sup>28</sup> The problem lies in the fact that the high level of trust required for courts to entrust the supervision of a suspect and, therefore, the possibility of bringing him/her to trial and enforcing any conviction against him/her in another Member State does not seem to exist in practice.<sup>29</sup>

This inadequate level of trust is not helped by the fact that most States<sup>30</sup> have made use of the possibility envisaged by Art. 21, para. 3, of ESO FD to notify the General Secretariat of the Council of the EU that, also in the context of this procedure, the EAW may be refused on the grounds set out in Art. 2, para. 1, of the EAW FD, i.e. that the accused faces a custodial sentence of less than 12 months.<sup>31</sup> This situation is especially worri-

<sup>28</sup> Communication COM(2011) 327 final of 14 June 2011 from the Commission, *Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, p. 7.

<sup>29</sup> Indeed, as stated in Council Doc. 14754/18, Conclusions from the 51st EJP Plenary meeting (Vienna, November 2018) on the application of Mutual Recognition Instruments, already cited, p. 7, "especially in serious crime cases, certain reluctance appears in the Member States to release the person due to lack of confidence that the person finally appears in the court".

<sup>30</sup> For instance, on 19 March 2015, Spain notified its will to the General Secretariat of the Council of the EU stating that "By virtue of Art. 21, para. 3 of Framework Decision 829, Spain hereby gives notification that Art. 2, para. 1 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States will apply" (Council Document 8138/15 of 23 April 2015 (COPEN 93 / EUROJUST 76/EJN 33), p. 5-6, available at [www.ejn-crimjust.europa.eu](http://www.ejn-crimjust.europa.eu)).

<sup>31</sup> At this point, it is important to note that Art. 15, para. 1, let. h), of ESO FD states that the competent authority in the executing State may refuse to recognise the decision on supervision measures if, in the event of breach of the supervision measures, it would be obliged to refuse to surrender the person concerned in accordance with the regulation on the EAW. However, in the same situation, the executing State may nevertheless recognise and monitor the supervision measures, after informing the competent

some considering that the ESO is mostly likely to cover cases of less serious offences, where supervision measures should generally be applied.<sup>32</sup>

Indeed, the situations in which the ESO may be particularly useful would be those of less serious offences, with pre-trial detention being disproportionate, along with the obligation to remain in the territory of the prosecuting State awaiting trial.<sup>33</sup> This would explain the lack of a minimum penalty threshold for the application of the ESO, which appears reasonable, as it would be unfair and discriminatory to grant the benefits stemming from the execution of a non-custodial measure in the Member State of residence only when the offence in question is serious.<sup>34</sup>

The EAW is the coercive mechanism that ultimately ensures that the defendant is subjected to the proceedings pending in the issuing State, also within the ESO procedure. So, the possibility of refusing a EAW due to low sentence limits may be a crucial reason for discouraging the use of the ESO, by opting for the deprivation of liberty of the individual in the trial State.<sup>35</sup> Hence, some authors argue that it would be preferable to introduce a surrender procedure not linked to the EAW process, thereby alleviating concerns regarding any refusal of surrender in the event of the breach of the supervision measures.<sup>36</sup>

Another major obstacle to the application of the ESO appears to relate to a lack of awareness and understanding of how the instrument works,<sup>37</sup> exacerbated by insuffi-

authority in the issuing State of the reasons for the possible future refusal of surrender, in which case the issuing State may decide to withdraw the certificate.

<sup>32</sup> Recital no. 13 of ESO FD.

<sup>33</sup> As noted by T. LJUNQUIST. *Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures*, cit., p. 173, apart from being more or less cut off from contacts with family and friends, there is a clear risk that a non-resident suspect who is prevented from returning to his/her country of residence, for example, due to a travel prohibition, will lose his/her job. That same idea is supported by M. RECIO JUÁREZ, *Nuevos Instrumentos para el Cumplimiento*, cit. p. 198-199, who points out that the precautionary measures alternative to provisional detention, such as periodic appearance before the judicial authority or prohibition on leaving the national territory, are inappropriate to the non-resident status of the suspect, being excessively burdensome in his/her personal situation.

<sup>34</sup> T. RAFARACI. *The Application of the Principle of Mutual Recognition*, cit., p. 70.

<sup>35</sup> C. ARANGÜENA FANEGO, *Reconocimiento Mutuo de Resoluciones sobre Medidas Alternativas a la Prisión Provisional: Análisis Normativo*, in C. ARANGÜENA FANEGO; M. DE HOYOS SANCHO; C. RODRÍGUEZ MEDEL (coords.), *Reconocimiento Mutuo de Resoluciones Penales*, cit., p. 235.

<sup>36</sup> T. RAFARACI. *The Application of the Principle of Mutual Recognition*, cit., p. 76.

<sup>37</sup> In fact, according to I. DURNESECU, *Framework Decision 2008/947*, cit., p. 362, based on the discussions in different expert groups organised by the Confederation of European Probation, it seems that the main reason for the underuse of this instrument is insufficient awareness. The author asserts that this tool is still new in the penal field and therefore not yet in mainstream practice. In the same vein, European Judicial Network Secretariat, *Report on activities and management 2017-2018*, p. 16, already cited, highlights the lack of awareness and experience of national practitioners as being one of the main obstacles to the implementation of this instrument. Interviews with practitioners conducted in the framework of the European Project Trust & Action also support this conclusion.

cient training of the competent authorities, both in terms of the dynamics of the procedure and of its potential.

This situation, which could easily be improved through training actions aimed at certain legal players, is aggravated by the lack of sufficient knowledge of the systems of non-custodial precautionary measures existing in other Member States. In this regard, different legal cultures and an insufficient level of knowledge about other national systems, along with a complete absence of harmonisation at European level, could be behind the under-utilisation of this instrument.

At this point the absence of harmonisation on pre-trial detention must be emphasised.<sup>38</sup> As a result, when applying the ESO FD, different rules on pre-trial detention across the EU require adaptation processes in the executing state. In this context, doubts arise due to the lack of knowledge of the supervisory measures involved in the national regulation of other Member States.<sup>39</sup>

Other issues relating to the specific dynamics of the instrument should also be taken into consideration, as they might hinder or discourage its use. Thus, consideration must be given to the fact that the obligation arising in the executing State constitutes an obligation of successive nature, i.e. it is not an obligation that can be fulfilled in a single act, as in the case of the surrender of a detainee or the transfer of a prisoner from one prison to another. The ESO requires constant coordination between the competent authorities of the Member States involved in order to avoid any interruption in supervision of the person who has been charged or is under investigation. This is clearly reflected in the different forms of consultation and communication envisaged by the ESO FD between the authorities involved,<sup>40</sup> which reveals the considerable workload that the proper functioning of this instrument could entail.<sup>41</sup>

<sup>38</sup> There are no initiatives in this regard, despite the fact that the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/ C 295/01) includes this matter as measure F) stating that “The time that a person can spend in detention before being tried in court [...] varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands”. Therefore, “appropriate measures in this context should be examined in a Green Paper”. As stated in *EU Law Analysis*: A. MARTUFI; C. PERISTERIDOU, *Pilate washing his hands. The CJEU on pre-trial detention*, in *EU Law Analysis*, 5 December 2019, eulawanalysis.blogspot.com: “neither the CJEU nor the EU legislator are eager to provide common standards on pre-trial detention, even if the lack of these standards is partly to blame for problems of mutual trust between judicial authorities in the Member States”.

<sup>39</sup> According to the European Judicial Network, “[d]ifferences between the legal systems and the national legislation are an additional obstacle” to the implementation of this instrument. Concerns emerge on several issues, such as applying a more severe supervision measure than foreseen by the issuing Member State; adapting/leaving out measures (without consultation) as well as confusion about the types of measures as listed in Art 8, para.1, of the ESO FD (Council Doc. 14754/18, cit., p. 4 and 7).

<sup>40</sup> In this sense, Art. 11, para. 3, of ESO FD is relevant. According to this provision, once the competence for monitoring the supervision measures has been transferred to the competent au-

In short, the way in which this instrument is conceived results in an almost permanent need for communication between the issuing and executing authorities. This is firstly due to the provisional nature and variability of the measures, which are in keeping with their precautionary nature and, secondly, because the executing State does not, in principle, have jurisdiction to act in certain circumstances (e.g. change of address, failure to comply with obligations, need to modify supervisory measures, etc.), but must merely communicate such aspects to the issuing State, which ultimately retains the power to make subsequent decisions on the measures in question.<sup>42</sup>

The functional distribution of power between the issuing and executing States was harshly criticised<sup>43</sup> by advocates of the rival system, Eurobail,<sup>43</sup> who highlighted the exist-

thority of the executing State, when that competence reverts back to the competent authority of the issuing State, the authorities of both States must consult in order to avoid, as far as possible, any discontinuance in the monitoring of the supervision measures. Likewise, the possibility of consultations is envisaged in cases where there are certain reasons for non-recognition, before making the decision to deny or recognise the order (Art. 15, para. 3, of ESO FD). In addition, Art. 22 of ESO FD includes the possibility of consultations between States involved: *a*) during the preparation, or, at least, before forwarding a supervision order; *b*) whenever it would be convenient to facilitate the smooth and efficient monitoring of the supervision measures; *c*) and also in cases of non-compliance, where the person has committed a serious breach of the supervision measures imposed.

<sup>41</sup> The European Judicial Network Secretariat, in its Report on activities and management 2017-2018, p. 16, already cited, states that this instrument is not commonly used by practitioners in Member States due to a lack of awareness and experience of them, but also because of the burdensome administrative procedures that must be followed.

<sup>42</sup> Although the competent authority to supervise the measures is that of the executing State, which will monitor the measures in accordance with its national law (Art. 16 of ESO FD), the issuing State retains the competence to adopt all subsequent decisions related to the supervision measures, such as: renewal, revision or withdrawal; modification; issue an arrest warrant or any other executive judicial decision that has the same effect (Art. 18, para. 1, of ESO FD). The law of the issuing State shall apply to this decision (Art. 18, para. 2, of ESO FD). In the event that the supervision measures are modified, the executing State may recognise these new measures and adapt them if their nature is not compatible with its legislation; or refuse to control them, if these new measures are not included in the types of supervision measures referred to in Art. 8, para. 1 (Art. 18, paras 3 and 4, of ESO FD).

<sup>43</sup> Compared to the system of the ESO, the Eurobail model works as follows: while a non-resident is awaiting trial, s/he is sent to his/her country of residence, which is competent to decide on pre-trial detention or provisional release and, if the latter is chosen, on the supervision measures to be applied. The issuing State would simply perform a preliminary assessment of whether bail would be feasible in the specific case, but it would then be up to the executing State to decide on the specific measures to be applied. This would avoid the duality of the ESO in the distribution of powers between the States concerned, consequently being much clearer, with the executing State as responsible for supervision but also for taking the specific precautionary measures required on the basis of the risk assessment, as well as for taking action in the event of non-compliance. This model, alternative to the ESO, was one the five policy options identified by the Commission services and assessed by an external contractor in line with the Communication COM(2006) 468 final of 29 August 2006 from the Commission, *Commission's guidelines and the handbook on impact assessment according to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union*.

ence of a sort of artificial separation between the attribution of competence to the executing State in supervising the measures, and the decision-making power, assigned to the issuing State, regarding the appropriateness of the individual being held on remand or released on bail based on the assessment of risks involved in the case, as well as regarding the adoption of subsequent decisions in cases of non-compliance or changes in circumstances.<sup>44</sup>

Thus, for example, a German man, resident in Germany, accused of a crime of sexual assault in France, might be released on bail by the French authorities and be subject to certain supervision measures that should be monitored by the German authorities. In such a situation, what could the German authorities do if they have grounds to believe that there is a high risk of re-offending and that the person under investigation should be held in custody? Indeed, they could not take any autonomous decisions on the adequate supervision measures over the person under investigation, as their capacity to act is limited to notifying the French authorities to reconsider their decision to release the accused on bail.<sup>45</sup>

Finally, the provisional, variable and temporary nature of the precautionary measures also works against their transnational implementation. Since these measures must be adapted to changes in the circumstances that justified their adoption, the authorities concerned must maintain permanent communication in order to ensure that the measures in force at all times are effective and proportionate and also to avoid any interruption in monitoring.

On the other hand, with regard to the issue of time limits, it should be noted that supervision measures are provisional in nature and therefore not likely to become final, sometimes even being of short duration. In this context, the issuing authority may conclude that it is not worthwhile launching the procedure for the suspect to enjoy provisional liberty for such a short period of time. Moreover, due to the urgency inherent in precautionary protection, the time limits under the ESO FD are much shorter than in other instruments: twenty working days to make the decision whether or not to recognise the decision on the supervisory measures.

In addition, according to the provisions of the ESO FD, the issuing authority must specify in the certificate itself the time limit applicable to the supervision ruling, where

<sup>44</sup> House of Lords, European Union Committee, *European Supervision Order: Report with Evidence, 31st Report of Session 2006-07*, in *House of Lords Papers*, 2007, p. 26-30.

<sup>45</sup> In this sense, Art. 22, para. 2, of ESO FD states that "The competent authority in the issuing State shall take due account of any indications communicated by the competent authority of the executing State on the risk that the person concerned might pose to victims and to the general public", while Art. 22, para. 3, of ESO FD provides that "the competent authorities of the issuing State and of the executing State shall exchange all useful information, including: a) information allowing verification of the identity and place of residence of the person concerned; b) relevant information extracted from criminal records in accordance with applicable legislative instruments".

appropriate (Art. 10, para. 5, let. a), of ESO FD), while the executing State must report without delay on the maximum period during which the measures may be monitored in accordance with its own law (Art. 20, para. 2, let. b), of ESO FD). Upon receipt of this information, the issuing authority may decide to withdraw the certificate (Art. 13, para. 3, of ESO FD). However, if it does not do so, it must remain attentive to the passage of time as well as to any communication from the executing authority, given that after the expiry of the maximum period set by the executing State, supervision will revert back to the competent authority of the issuing State. Similarly, when the executing State informs the issuing State of any breach of the supervision measure or when it requests regular confirmation of the need to extend the measure for a longer period, in the absence of a reply from the issuing authority, the competent authority of the executing State has the right to cease monitoring the measures (Art. 23 of ESO FD), with the subsequent risk of frustrating the pending criminal proceedings.

Another relevant issue that could hinder the application of the ESO concerns the risks to the ongoing investigation. Thus, if a criminal investigation is in progress, it is quite possible that the issuing State will have to carry out procedures, such as identity parades, confrontations or crime scene reconstructions, which usually require the presence of the person under investigation. This clearly works against the issuance of this instrument which, in short, would allow the suspect or accused person to remain far away from the place of trial, where the investigation is taking place. In this regard, in order to avoid unnecessary costs and difficulties in relation to transferring the person subject to criminal proceedings, temporary transfers must be strictly limited to those investigative procedures which necessarily require the physical presence of the suspect in accordance with the legislation of the issuing State. For all other procedures, such as questioning of the suspect or hearings necessary to modify the supervision measures, telephone or video conferences should preferably be used (Recital 10 of ESO FD).<sup>46</sup> However, once again, the success of the ongoing investigation and the pending judicial procedure would depend on effective and agile cooperation between the competent authorities of the Member States involved, as well as on the availability of technical means for a hearing held by video conference with sufficient quality.

In short, there are many reasons that could have led to the poor implementation of this instrument. In fact, the situation is most probably explained by a set of factors which, to a greater or lesser extent, have thus far determined the failure of this poten-

<sup>46</sup> To this end, the issuing authority may issue a European Investigation Order for the purpose of hearing a suspected or accused person by video conference or other audiovisual transmission (Art. 24, para. 1, of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters). This is another example of the interdependence that exists between the various mutual recognition instruments.



tially very valuable instrument.<sup>47</sup> What seems clear, however, is that mutual trust is a *conditio sine qua non* for the principle of mutual recognition to become a reality, particularly in relation to precautionary measures aimed at ensuring the effectiveness of national criminal prosecutions.

The goals of guaranteeing the availability of the person under investigation to stand trial before the competent authority of the issuing State and promoting, at the same time, the use of non-custodial measures alternative to provisional detention conflict, creating tension between security and liberty and, ultimately, between the effectiveness of the criminal prosecution and the freedom of the accused. This tension can only be relieved by a higher level of trust between the Member States involved which would allow the accused to be given more freedom without compromising the effectiveness of the criminal prosecution.

In short, for as long as mutual trust is not sufficiently robust, mutual recognition will not work in practice as it ought to theoretically, being a mere programmatic principle and not a practical reality capable of improving people's lives.

<sup>47</sup> See D. SAYERS, *The EU's Common Rules on Detention: How Serious Are Member States about Protecting Fundamental Rights?*, in *EU Law Analysis*, 17 February 2014, [eulawanalysis.blogspot.com](http://eulawanalysis.blogspot.com).

