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The Proportionality Test in Directive 2014/41/EU: Present and Future of a Fundamental Principle

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1. Introduction

Proportionality is undoubtedly one of the most important features that a European Investigation Order must have. As is well known, Article 6 of Directive 2014/41 states that an EIO can be issued only when «the issuing […] is necessary and proportionate for the purpose of the proceedings […] taking into account the rights of the suspected or accused person» (letter a, par. 1).

However, although proportionality is a cornerstone of the regulation of EIOs, it is a concept that seems difficult to define precisely; everyone could have a different idea about what is "proportionate" and the vagueness of this concept obviously risks undermining efficient cooperation, respectful of fundamental rights.

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The question is, therefore: can the principle of proportionality be a proper compass for cooperating authorities, or is this concept too ambiguous to assume such a fundamental role? To answer this question, we will firstly examine proportionality more broadly, analysing the general theory; secondly, we will investigate the case law of the European Court of Human Rights (ECtHR) and, thirdly, that of the Court of Justice (ECJ); finally, we will look into some sources of EU law. The resulting characteristics of proportionality will be used to analyse EIO Directive and, in particular, to grasp the dynamics of proportionality between the issuing and executing authorities.

2. The principle of proportionality in general theory and in ECtHR case-law

Traditionally, the concept of proportionality is used to measure the legitimacy of a public power's intrusion in the individual sphere. This means that a limitation of a fundamental right, such as liberty, property, or privacy, must be "proportionate" to the objective to be achieved and must not overstep this important mark. A "proportionality check" is often conceived as an assessment procedure, consisting of several steps[1].

The first step consists of verifying the legitimacy of the pursued aim. This test precedes any other verification and any lack of legitimacy results in the early termination of the control proceedings. At the second step, there is a necessity check: the measure adopted must be ascertained to be "necessary" for achieving the pursued aim. Finally, the third step entails ascertaining if it is worth it, i.e. whether the end justifies the means in that specific case (proportionality "*stricto sensu*").

In brief, public authorities must only carry out actions that are essential in order to achieve a legitimate aim; moreover, that aim must be worthy of being pursued in the specific situation faced by those authorities. Obviously, the final step - the cost-benefit analysis - is the most difficult to accomplish.

ECtHR case law contains many practical applications of this assessment process, with regard to criminal evidence[2].

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[1] For information on this principle and the three steps check, see, amongst others, R. ALEXY, *Constitutional Rights, Balancing, and Rationality*, in *Ratio Juris*, 2003, p. 131; M. BOROWSKI, *Absolute Rights and Proportionality*, in *GYIL*, 2013, p. 385; M. COHEN-I. PORAT, *Proportionality and the Culture of Justification*, in *AmJCompL*, 2011, p. 463; M. KLATT-M. MEISTER, *Proportionality-a benefit to human rights? Remarks on the I·CON controversy*, in *ICON*, 2012, p. 687; K. MÖLLER, *Proportionality: Challenging the Critics*, *ivi*, 2012, p. 709; S. TSAKYRAKIS, *Proportionality: An Assault on Human Rights*, *ivi*, 2009, p. 468; G. WEBBER, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, in C*anJLJurisprud*, 2010, p. 179; E. XANTHOPOULOU, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?*, London, 2020, p. 52.

[2] See, amongst others, A. ASHWORTH, *The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence*, in P. Roberts-J. Hunter (eds.), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions*, London, 2012, p. 145; A. CABIALE, *I limiti alla prova nella procedura penale europea*, Milano, 2019, p. 87; A.L-T CHOO, *The Privilege Against Self-Incrimination and Criminal Justice*, London, 2013, p. 22; D. HARRIS-M. O'BOYLE-C. WARBRICK, *Law of the European Convention on Human Rights*, 4th ed., Oxford, 2018, 417; J.D. JACKSON-J.S. SUMMERS, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions*, Cambridge, 2012, p. 151; P.F. PINAR, *The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights*, in S.C. Thaman (ed.), *Exclusionary Rules in Comparative Law*, Dordrecht-Heidelberg-New York-London, 2013, p. 371; S. QUATTROCOLO, *Artificial Intelligence, Computational Modelling*

Indeed Article 8 of the Convention explicitly implies a balance of different rights, interests and values, which is, mostly, a proportionality test. The first paragraph states that "everyone has the right to respect for his private and family life, his home and his correspondence". The second paragraph, on the other side, allows limitations to that right and lists the conditions to be fulfilled. An "interference" with the exercise of the right concerned has to be "in accordance with the law", "necessary in a democratic society" and connected to one of the interests mentioned in par. 2: "national security", "public safety", "economic well-being of the country", "prevention of disorder or crime", "protection of health or morals", and "protection of the rights and freedoms of others". In fact, the requirements established by Article 8, par. 2 ECHR are very similar to those included in the traditional proportionality check: legitimacy of the action and of the aim pursued, as well as necessity of the interference[3].

One of the most recent judgments in this field clearly illustrates the method adopted by the ECtHR[4]. The applicant complained that the gathering of his identification data – photographs, fingerprints, palm prints and a personal description – violated his right to respect for private life. These data, gathered during an investigation which was later discontinued, were subsequently retained, due to some of the applicant's previous convictions and a prognosis of possible recidivism.

The interference in the applicant's life was deemed by the Court "in accordance with the law" and pursuing a legitimate aim, i.e. the "prevention of crime as well as the protection of the rights of others, namely by facilitating the investigation of future crimes". Then the Court "determined whether the interference in question [was] 'necessary in a democratic society', which means that it must answer a 'pressing social need' and, in particular, be proportionate to the legitimate aim pursued"[5]. Many factors were considered: "the nature and gravity of the offences in question"; the conclusion of the proceedings in which those data were gathered; the kind of materials collected, considering that "the retention of cellular samples [is] particularly intrusive compared with other measures such as the retention of fingerprints, given the wealth of genetic information contained therein"; the length of the data retention time-limit; the availability of a remedy; the presence of "safeguards against abuse (such as unauthorised access to or dissemination) of the data"[6].

No violation of the Convention was detected, from any possible standpoint: the applicant had previously been convicted many times; the police did not collect DNA samples; the

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and Criminal Proceedings. A Framework for A European Legal Discussion, Cham, 2020, p. 74; P. VIEBIG, *Illicitly Obtained Evidence at the International Criminal Court*, Berlin, 2016, p. 58.

[3] See L. BACHMAIER WINTER, *The Role of the Proportionality Principle in Cross-Border Investigations Involving Fundamental Rights*, in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina*, Heidelberg-New York-Dordrecht-Londra, 2013, p. 91; S. QUATTROCOLO, *Artificial Intelligence, Computational Modelling and Criminal Proceedings*, p. 46; P. SPAGNOLO, *I presupposti e i limiti dell'ordine di indagine europeo nella procedura passiva*, in M.R. Marchetti-E. Selvaggi, *La nuova cooperazione giudiziaria penale. Dalle modifiche al Codice di Procedura Penale all'Ordine europeo di indagine*, Milano, 2019, p. 289.

[4] ECtHR, 11 June 2020, no. 74440/17, *P.N. v. Germany*.

[5] According to the Court, «the domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored, and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored».

[6] See also ECtHR, 4 December 2008, nos. 30562/04 and 30566/04, *S. and Marper v. The United Kingdom*; ECtHR, 18 April 2013, no. 19522/09, *M.K. v. France*; ECtHR, dec., 4 June 2013, nos. 7841/08 and 57900/12, *Peruzzo and Martens v. Germany*.

retention was limited in time and German law provided for a right to review. Therefore, under those conditions "he collection and storage" ensured "a fair balance between the competing public and private interests" and constituted "a proportionate interference with the applicant's right to respect for his private life".

Beyond Article 8, the Court often applies similar tests, even though the Convention does not explicitly require a proportionality assessment. Every time the judges verify respect of fairness, they state that "what constitutes a fair trial cannot be the subject of a single unvarying rule, but must depend on the circumstances of the particular case", "having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident"[7].

In recent years, more and more judgments relating to evidentiary complaints are based on a preset catalogue of criteria. In the well-known "Ibrahim" case, the Grand Chamber established that, "when examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account": the eventual applicant's vulnerability; "the legal framework governing the pre-trial proceedings"; "the opportunity to challenge the authenticity of the evidence"; the quality of the impugned evidence, its reliability and accuracy; the degree and the nature of the compulsion used to obtain the evidence in question; the unlawfulness of the evidence gathering and its gravity, "the use to which the evidence was put by the judge" and, finally, "the weight of the public interest in the investigation and punishment of the particular offence in issue"[8].

The Strasbourg Court compares various aspects of the concrete case: on the one hand, the seriousness of the infringement of the rights of the defence; on the other hand, the contrasting interest in preventing crimes and punishing their perpetrators. It is only when the balance tilts too far towards the latter that a violation of procedural fairness occurs.

In short, a certain degree of fairness compression is permitted; what matters is that the breach is "proportionate" to the intensity of the competing interests and does not exceed a certain threshold, beyond which it becomes intolerable[9].

3. The principle of proportionality in the EU context

The principle of proportionality is explicitly regulated in EU law[10].

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[7] ECtHR, 31 August 2021, no. 45512/11, *Galović v. Croatia*, §§ 79-80. See also ECtHR, 25 June 2020, no. 44151/12, *Tempel v. Czech Republic*, § 62; ECtHR, 23 May 2019, no. 51979/17, *Doyle v. Ireland*, § 71; ECtHR, GC, 9 November 2018, no. 71409/10, *Beuze v. Belgium*, § 121.

[8] ECtHR, GC, 13 September 2016, nos. 50541/08 and three others, *Ibrahim and Others v. the United Kingdom*, § 274. In relation to this judgment see, amongst others, M. CAIANIELLO, *You Can't Always Counterbalance What You Want*, in *EurJCrimeCrLCrJ*, 2017, p. 283; E. CELIKSOY, *Ibrahim and Others v. UK: Watering down the Salduz Principles*, in *NJEurCrimL*, 2018, p. 229; A. SOO*, Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13 September 2016)*, in *EurJCrimeCrLCrJ*, 2017, p. 327.

[9] See A. CABIALE, *I limiti alla prova,* p. 192.

[10] For a general overview of the principle of proportionality in EU law, see F. FERRARO-N. LAZZERINI, *Art. 52. Portata e interpretazione dei diritti e dei principi*, in R. Mastrioanni-O. Pollicino-S. Allegrezza-F. Pappalardo-O. Razzolini, *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2017, p. 1062; T.I. HARBO, *The Function of the Proportionality Principle in EU Law*, in *EurLJ*, 2010, p. 158; K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental Rights*, in *EurConstL*, 2012, p. 375; A. ROSANO, De Criminali Proportione*: On*

The Treaty on the European Union (TEU) mentions proportionality in Article 5, stating in paragraph 4 that, "under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". Proportionality is used here to prevent intrusions by the EU into the domestic affairs of the Member States[11]. That intrusion must be limited to what is necessary to achieve the EU aims.

Article 52, par. 1, of the Charter of Fundamental Rights (CFR) is much more detailed. According to this provision, "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms"; moreover, as confirmed by the second part of the same paragraph, "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

Therefore, while Article 5 TEU deals with relationships between the EU and the Member States, Article 52, par. 1, CFU focuses on interferences in individuals' fundamental rights. The relationship under the spotlight is that between public powers and the individual sphere.

Article 52, par. 1 CFR is partly similar to Article 8 ECHR. It requires any compression of rights and freedoms to be in accordance with the law and to pursue a legitimate aim; in addition, those limitations, even when necessary and proportionate, shall not affect the "essence" of the limited rights and freedoms.

The aforementioned requirements suggest some reflections. In EU law, necessity and proportionality *stricto sensu* are considered to be two different concepts: limitations to rights and freedoms must be both necessary and proportionate.

However, these two requirements are not enough: the essential core of the infringed value must remain intact. This does not mean that a complete deprivation of the right/freedom at stake is always forbidden. For example, nobody would assume that the deprivation of liberty, by enforcing a final conviction, is not possible. However, sometimes the standards set by the ECtHR refer to the 'quality' rather than the 'intensity' of the limitation to a fundamental right. So, liberty can be deprived due to the enforcement of a sentence but, in order not to affect the essence of the right to liberty, such compression must take place only after a fairly given judgment and in a manner respectful of the sense of humanity[12]. This particular condition curbs the effects of a rigid application of the proportionality check: even if public interest appears to be very strong in the concrete case, a specific threshold cannot be overridden[13].

Proportionality Standing between National Criminal Laws and the EU Fundamental Freedoms, in *University of Bologna Law Review*, 2017, p. 51; W. SAUTER, *Proportionality in EU Law: A Balancing Act*, in *CYELS*, 2012, p. 439 ; E. XANTHOPOULOU, *Fundamental Rights and Mutual Trust*, p. 58.

[11] See D. HELENIUS, *Mutual Recognition in Criminal Matters and the Principle of Proportionality. Effective Proportionality or Proportionate effectiveness?*, in *NJEurCrimL*, 2014, p. 350.

[12] See, among the others, ECtHR, 17 July 2014, Nos. 32541/08 and 43441/08, *Svinarenko and Slyadnev v. Russia*, § 116. It can also noted the provisions of Art. 5 ECHR, according to which «no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law».

[13] See T. TRIDIMAS-G. GENTILE, *The Essence of Rights: An Unreliable Boundary*, in *GermanLJ*, 2019, p. 804: «the trouble is that the core element of the right is difficult to determine. It could be defined subjectively-from the point of view of the right holder - or objectively - from the point of view of the function of rights within the constitutional polity. The problem with a subjective definition is that it leads to an excessively broad understanding of essence: Imprisonment by definition defeats the right to liberty just as deportation defeats the EU right to free movement […]. To determine the core of the right, we need to look at its objectives, its positioning in the constitutional hierarchy, the objectives of the limitations imposed on it, and the circumstances of a specific restriction»; K.

No other indication stems from Article 52 CFR: in particular, it explains nothing about the elements to be considered in the proportionality check and the best way to conduct it. What can be balanced? In what way should we balance the various interests and values involved? The Charter does not explain these aspects.

The proportionality test has also been used in some famous judgments by the ECJ. In the case of "WebMind Licensed Kft.", the Court was asked if, "in the interests of the proper observance of the obligation of the Member States of the European Union to collect the total amount of VAT effectively […] the tax authority of the Member State, at the evidence-gathering stage of the administrative tax procedure and in order to clarify the facts, is entitled to admit data, information and evidence, and, therefore, records of intercepted communication, obtained without the knowledge of the taxable person by the investigating body of the tax authority in the context of a criminal procedure and to use them as a basis for its assessment of the tax implications"[14].

In their answer, the EU judges confirmed that "the measures which the Member States may adopt must not go further than is necessary to attain the objectives of ensuring the correct levying and collection of VAT and the prevention of tax evasion". They verified, in particular, whether the information in question "could not have been obtained by means of investigation that interfere less with the right guaranteed by Article 7 of the Charter than interception of telecommunications and seizure of emails, such as a simple inspection at WML's premises and a request for information or for an administrative enquiry sent to the Portuguese authorities". The proportionality check was therefore focused on the necessity requirement.

More complex reasoning underpins the solution in the case of "Digital Rights Ireland Ltd" [15], regarding data retention for the purpose of the investigation, detection and prosecution of serious crime, as regulated, at the time, in Directive 2006/24/EC[16]. After having stated that the Directive pursued a legitimate aim, the Court verified the compliance with proportionality considering many factors, "including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference". It was established that, "by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter".

While the aim was legitimate and the data retention itself "appropriate for attaining the objective pursued", the Directive failed the scrutiny of strict necessity. Indeed, such regulation covered, "in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception"; in addition, there were no limits to "persons authorised to access" and the retention period was the same for all data.

LENAERTS, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, *ivi*, p. 792, according to which «the essence of a fundamental right is not compromised where the measure in question limits the exercise of certain aspects of such a right, leaving others untouched, or applies in a specific set of circumstances with regard to the individual conduct of the person concerned»; E. XANTHOPOULOU, *Fundamental Rights and Mutual Trust*, p. 89.

[14] ECJ, 17 December 2015, Case C-419/14, ECLI:EU:C:2015:832.

[15] ECJ, GC, 8 April 2014, Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[16] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

The principle of proportionality also applies to the issuance of a European Arrest Warrant (EAW)[17]; even though Framework Decision 2002/584/JHA does not expressly provide for a proportionality requirement, the ECJ recently confirmed that "the second level of protection of the rights of the person concerned requires that the issuing judicial authority review observance of the conditions to be met when issuing a European arrest warrant and examine objectively — taking into account all incriminatory and exculpatory evidence, without being exposed to the risk of being subject to external instructions, in particular from the executive — whether it is proportionate to issue that warrant"[18].

Again, with regard to the EAW, the contents of the *Handbook on how to issue and execute a European Arrest Warrant* are even more important: according to the Handbook, "issuing judicial authorities are advised to consider whether in the particular case issuing an EAW would be proportionate"[19]. In order to conduct this control, the following factors should be taken into account: "the seriousness of the offence"; "the likely penalty imposed if the person is found guilty of the alleged offence"; "the likelihood of detention of the person in the issuing Member State after surrender"; "the interests of the victims of the offence"; the existence of "other judicial cooperation measures" equally "effective but less coercive"[20].

4. Necessity and proportionality in Directive 2014/41/EU

Thus far, the impression given is that, in general, the "proportionality check" abstractly is quite a clear concept: any intrusion into the individual's sphere, affecting fundamental rights and freedoms, is subject to verification, including an assessment of inevitability (necessity) and worthiness (proportionality *stricto sensu*). However, the parameters of this control and the process for carrying it out are less clear. The ECtHR and the ECJ have attempted to lay down some instructions but the choice of criteria, the weight given to them and the balancing in itself may be influenced by personal understanding and beliefs.

In the light of these findings, we will now analyse proportionality, as regulated in Directive 2014/41/EU. In the original draft, no proportionality check was mentioned[21]; it has been said that the absence of such a mention was not a real problem, given that the proportionality principle is implied in the EU system of law[22]. Nevertheless, during the initial negotiations, "some Member States raised concerns about the fact that the issuing or execution of an EIO could not be proportionate. Based on current experience of the application of the European Arrest Warrant, these Member States underlined the importance to ensure proportionality check of any EIO"[23]. Shortly after, the Presidency of the Council – convinced about the opportunity of applying "a certain threshold of seriousness of the offence to be

[17] See, amongst others, E. XANTHOPOULOU, *The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment*, in *NJEurCrimL*, 2015, p. 32.
[18] CJE, 12 December 2019, Cases C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077, § 61. See also CJE, 10 March 2021, C-648/20 PPU, ECLI:EU:C:2021:187, § 51.
[19] Commission Notice, *Handbook on how to issue and execute a European arrest warrant*, 2017/C 335/01, p. 15
[20] Commission Notice, *Handbook*, p. 19
[21] See A. MANGIARACINA, *A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Orde*r, in *UtrechtLR*, 2014, p. 125.
[22] L. BACHMAIER WINTER, *The Role of the Proportionality Principle in Cross-Border Investigations*, p. 99.
[23] Doc.15531/10, 29 October 2010, Brussels, p. 6.

investigated via the EIO"[24] – suggested adding a new provision in this regard, which was later supported by all delegations.

The final version of Article 6, "conditions for issuing and transmitting an EIO", states that "the issuing authority may only issue an EIO", where two important requirements, among others, "have been met": "the issuing of the EIO is necessary and proportionate for the purpose of the proceedings […] taking into account the rights of the suspected or accused person".

Once again "necessity" and "proportionality" appear to be different notions. An EIO can be necessary but not proportionate and vice versa. "Necessity" can be seen as the obligation to apply a certain measure or, if negative, the impossibility of obtaining a piece evidence without a certain measure. Proportionality is something different: even when the chosen measure is the only one appropriate to gather a specific piece of evidence, it is nevertheless essential to assess the importance of such a piece of evidence in the specific case and the overall advantages and disadvantages resulting from its gathering[25].

By way of example, the Italian investigation authorities are seeking some documents that could be crucial evidence in ascertaining a fraud. These documents are probably stored at the domicile of the accused, in France, where s/he conducts most of his business. The accused has always refused to collaborate with the investigators and no copies of these documents are available; therefore, a search order seems necessary. However, this does not mean that, although necessary, the measure is also proportionate: the inviolability of home is a fundamental right, protected by the law in Italy, as much as in France. In addition, the EIO is a complex mechanism that involves authorities of different Member States and requires costs and coordinated activities.

If the fraud in question has caused a small amount of damage, consisting of a few hundred Euros, and it was an isolated offence not part of a wider criminal plan, the EIO may not be proportionate. Considering the individual rights at stake and the complexity of the mechanism to be triggered, the costs of the document-gathering process may appear to be much higher than the benefits deriving from the prosecution of that crime.

While the concept of "necessity" is sharp enough, proportionality (*stricto sensu*) is less objective. The only way to rationalise this assessment is to establish precisely the values and interests to be balanced. In fact, the Directive does not provide many indications in this respect[26]. Recital 11 states that an EIO "should be chosen where the execution of an investigative measure

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[24] In particular, according to the Presidency, «it appears as self-evident that a realistic approach towards a rational use of available resources for investigations demands that a certain threshold of seriousness of the offence to be investigated via the EIO be respected by the issuing authorities. In this respect, an assessment of proportionality at some stage of the procedure is an issue which certainly merits further consideration» (Doc. 12201/10, 20 July 2010, Brussels, p. 11).

[25] See L. BACHMAIER WINTER, *The Role of the Proportionality Principle in Cross-Border Investigations*, p. 90; M. DANIELE, *I chiaroscuri dell'OEI e la bussola della proporzionalità*, in M. Daniele- R.E. Kostoris (eds.), *L'ordine europeo di indagine penale. Il nuovo volto della raccolta transnazionale delle prove nel d.lgs. n. 108 del 2017*, Torino, 2018, pp. 59-60; D. HELENIUS, *Mutual Recognition in Criminal Matters and the Principle of Proportionality*, pp. 353-354, according to which «the positive value of the administration of criminal justice must be weighed against the negative aspects of procedural measures»; P. SPAGNOLO, *I presupposti e i limiti dell'ordine di indagine europeo*, p. 290.

[26] See L. BACHMAIER WINTER, *Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters*, in *Eucrim*, 2017, p. 51, according to which the Directive «does not set any guidelines on how to assess» the proportionality principle and «does not establish a threshold under which the EIO could be considered unproportional».

seems proportionate, adequate and applicable to the case in hand"; the issuing authority must check "whether the evidence sought is necessary and proportionate for the purpose of the proceedings, whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence concerned, and whether, by means of issuing the EIO, another Member State should be involved in the gathering of that evidence". Recital 23 adds that it should be considered "whether an EIO would be an effective and proportionate means of pursuing criminal proceedings" and Article 6, par. 1 requires consideration of "the rights of the suspected or accused person".

In light of these few indications and the findings of the previous paragraphs, we can list some factors that the issuing authority must consider: the gravity of the investigated crime (level of punishment laid down by law, concrete seriousness and dangerousness of the offence, extent of criminal intention), the damages caused by the crime, the number and conditions (social, economic and health) of the victims, the kind of evidence to be collected, the evidence gathering measures to be carried out (coercive or not)[27], the importance of the evidence at issue in the fact-finding activity, the rights and freedoms to be compressed, the procedural rights of the accused to be sacrificed, the number of persons involved and the intensity of the intrusion into their rights and freedoms, the complexity (time and human resources) of the activities to be carried out by the executing authority, and the total costs of executing the EIO[28].

Some of those elements encompass the interest in the investigation and punishment of the offence (gravity, harm caused and victim's condition), which, as observed above[29], is often considered by the ECtHR and is mentioned in the *Handbook* on the EAW. The other factors, in some way competing with the former, concern, on the one hand, the protection of the individual sphere from unreasonable breaches and, on the other hand, the guarantee of loyal and efficient cooperation between Member States.

The competition between the main objective of any judicial system (to ascertain guilt) and the respect of individual rights is a classic theme of criminal procedural law. In the context of supranational cooperation, another interest is searching for space: a mechanism like the EIO, based on mutual trust, is characterised by a fragile compromise. EU Members agree to cooperate and trust other Members, but the interests of the cooperation cannot override a certain threshold, beyond which it becomes too demanding, risking the breakdown of such a fragile system.

5. The duties of the issuing and executing authority

[27] For Recital 16, «non-coercive measures could be, for example, such measures that do not infringe the right to privacy or the right to property, depending on national law».

[28] For similar catalogues, see S. ALLEGREZZA, *Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality*, in S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, Cham-Heidelberg-New York-Dordrecht-Londra, 2014, pp. 61-62; L. BACHMAIER WINTER, *Towards the Transposition of Directive 2014/41*, p. 52.

[29] See §§ 2-3.

The "proportionality check", as Article 6, par. 2, states, is firstly a duty of the issuing authority[30] , which is surely the one that best knows and understands the features of the concrete case[31].

With regard to the executing authority, the lack of necessity/proportionality *stricto sensu* does not directly constitute a ground for non-recognition or non-execution[32]. In fact, despite the pressures of some Members States[33], "a wide majority of delegations [were] of the opinion that a ground for refusal based on proportionality would undermine the EU cooperation based on mutual recognition and mutual trust. They also argued that it is the issuing authority which is the best placed to make that proportionality assessment. Conferring such control to the executing authority would require it to make a substantial analysis of the case, with the additional risk of requiring extensive information from the issuing authority and delaying cooperation"[34].

Nevertheless, the executing authority has an important role[35]. According to Article 6, par. 3, "where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO"; "after that consultation the issuing authority may decide to withdraw the EIO". Thus, before the execution, the entity that receives the EIO has the opportunity to highlight that, in its opinion, the "necessity" or "proportionality" is not met. At this preliminary stage, the latter authority has no other particular power: the issuing authority may modify or withdraw the EIO, but may also reiterate its own request[36]. This privilege is a fundamental application of the principles of mutual trust and mutual recognition: the authority issuing the EIO is in the best position to assess the conditions of issuance and the executing authority should ultimately trust it[37].

The most significant power of the executing authority is illustrated in Article 10, par. 3. It may "have recourse to an investigative measure other than that indicated in the EIO where

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[30] See S. ALLEGREZZA, *Collecting Criminal Evidence Across the European Union*, 62.

[31] Moreover, it was generally agreed that «proportionality should be checked by the issuing authority as it is the best placed to assess the necessity and proportionality of the issuing of an EIO» (Doc. 15531/10, 29 October 2010, Brussels, p. 6).

[32] See D. HELENIUS, *Mutual Recognition in Criminal Matters and the Principle of Proportionality*, p. 358; F. ZIMMERMAN-S. GLASER-A. MOTZ, *Mutual Recognition and Its Implications for the Gathering of Evidence in Criminal Proceedings: A Critical Analysis of the Initiative for a European Investigation Order*, in *EurCrimLR*, 2011, p. 79.

[33] Doc. 12862/10, 30 August 2010, Brussels, p. 7: «two delegations (DE, UK) reiterated that a possibility for the executing authorities to reject the EIO for lack of proportionality should be included in the text. However, a large majority of delegations (CZ, ES, FR, IT, LT, LU, LV, PL, SK) opposed this view, maintaining that no such ground for refusal should be introduced and that, at most, a check by the issuing authorities could suffice».

[34] Doc. 15531/10, 29 October 2010, Brussels, p. 6. See also Doc. 12201/10, 20 July 2010, Brussels, p. 11: «in the view of the Presidency, it should be left to the responsibility of the issuing authority to apply that test: in this respect, the formulation of a specific ground for refusal would place the option in the hands of the executing authorities, which are perhaps not the best placed to assess all the conditions of a specific case».

[35] See M. DANIELE, *Evidence Gathering in the Realm of the European Investigation Order*, in *NJEurCrimL*, 2015, p. 190.

[36] For L. BACHMAIER WINTER, *Towards the Transposition of Directive 2014/41*, p. 53, «this provision may function as a "warning" to the issuing authority».

[37] See L. BACHMAIER WINTER, *European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European Directive*, in *ZIS*, 2010, p. 581: «the system of mutual recognition thus is based on mutual trust. In essence it means that the state of execution can renounce to exert control upon the grounds that motivate the request for evidence of the issuing state, because the execution state can trust that the requesting authorities have already checked the legality, necessity and proportionality of the measure requested».

the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO"[38].

"Less intrusive" means that the alternative measure is characterised by a lesser impact on individual rights and freedoms or appears to be less demanding in terms of complexity of execution[39]. The executing authority is therefore entitled to consider the requested measure "unnecessary", as another measure allows the same evidence to be obtained with less sacrifice[40]. This evaluation of "necessity" is clearly not impartial; thus, it is unlikely that, at this stage, the degree of compression of the accused person's procedural rights will be properly taken into account. These issues would certainly be better addressed by the judge in charge of ruling upon the admissibility of the evidence gathered.

The decision of the executing authority is indisputable: there is only a duty to inform the issuing authority, which – in a manner similar to that prescribed in Article 6, par. 3 – "may decide to withdraw or supplement the EIO" (Article 10, par. 4)[41].

The situation is very different when the executing authority estimates that the requested measure does not meet the condition of necessity, but another, less intrusive measure is not envisaged by its domestic law. In such a case, the required measure must be executed without the opportunity to refuse. In fact, the opposite alternative of notifying "the issuing authority that it has not been possible to provide the assistance" is subject to two precise conditions: the measure requested "does not exist under the law of the executing State", or "would not be available in a similar domestic case", and, in the meantime, "there is no other investigative measure which would have the same result" (Article 10, par. 4). In other words, if the requested measure is applicable and the executing authority wishes to replace it, but its domestic law does not envisage a suitable measure, assistance must be granted. Of course, the possibility of invoking a ground for non-recognition or non-execution remains[42].

Another consideration is crucial. While "necessity" is questionable by the executing authority, the previous assessment of "proportionality" *stricto sensu* cannot be reversed. Article

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[38] See I. ARMADA, *The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a fundamental Rights-Based Refusal the Solution?* in *NJEurCrimL*, 2015, p. 19, which remarks that the «recourse to a different measure is […] merely optional when the alternative method leads to the same result by less intrusive means».

[39] See S. ALLEGREZZA, *Collecting Criminal Evidence Across the European Union*, p. 64, according to which this provision «is a satisfactory compromise, even in the light of fundamental rights of the individuals»; according to D. HELENIUS, *Mutual Recognition in Criminal Matters and the Principle of Proportionality*, p. 358, «the need for effectiveness has to be balanced against the need for proportionality».

[40] The executing State does, however, have a duty of information similar to the consultation phase envisaged by Article 6, par. 3: «when the executing authority decides to avail itself of the possibility referred to in paragraphs 1 and 3, it shall first inform the issuing authority, which may decide to withdraw or supplement the EIO». See L. BACHMAIER WINTER, *Towards the Transposition of Directive 2014/41*, p. 54, according to which «this mechanism is welcome insofar as it does not affect the efficiency of the cooperation, while it provides ad additional safeguards for the fundamental rights».

[41] A. MANGIARACINA, *A New and Controversial Scenario in the Gathering of Evidence at the European Level*, p. 127-128, remarks that this mechanism acts «as a "hidden" ground for refusal», that «does not require a check of the necessity and proportionality of the different measure by the issuing authority»; in this sense, see also C. HEARD-D. MANSELL, *The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases*, in *NJEurCrimL*, 2011, p. 359.

[42] In particular, if applicable, the executing authority may invoke the ground set out in Article 11, par. 1, letter f: «the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO».

10 in fact allows for the measure to be replaced only when the first condition is at stake. In accordance with the principle of mutual trust, the cost-benefit analysis is a prerogative of the issuing authority, unless, again, a ground for non-recognition or non-execution can be invoked[43].

A particular regulation is provided exclusively for the economic costs of the execution (Article 21). Where the executing authority considers that "the costs for the execution of the EIO may be deemed exceptionally high, it may consult with the issuing authority on whether and how the costs could be shared or the EIO modified". Only if "no agreement can be reached" may the issuing authority decide to "withdraw the EIO in whole or in part", or to "keep the EIO, and bear the part of the costs deemed exceptionally high". Therefore, economic lack of proportionality does not constitute a ground for non-execution[44]; Article 21 aims to reach an agreement between the two opponents.

6. The lack of proportionality

One final problem needs to be addressed. What happens when the issuance of the EIO was not "necessary and proportionate" (Art. 6, par. 1), but the evidence has been gathered and transferred by the executing authority? In which cases must such evidence be considered inadmissible in the criminal proceedings carried out in the issuing State?

Article 14, par. 1, states that "Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO". This paragraph thus contains an equivalence clause: judges are obliged to take the same decision they would adopt if the evidence had been gathered within their national borders[45].

Thus, in the first place, the inadmissibility of the evidence gathered with an EIO must be declared where, in a similar domestic case, such a consequence is prescribed by law or is usually accepted by the national Courts. If, under domestic law or case law, a certain lack of "necessity" or "proportionality" *stricto sensu* implies the inadmissibility of the evidence, the same must occur in relation to evidence obtained through the EIO[46]. This is surely one of the "substantive reasons for issuing the EIO" that Article 14, par. 2 allows to be challenged "in an action brought in the issuing State".

Two other provisions of the Directive must be cited. According to paragraph 7 of Article 14, "without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO". In addition, Article 1, par. 4

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[43] See L. BACHMAIER WINTER, *European investigation order for obtaining evidence in the criminal proceedings*, p. 586: «the authorities of the executing State are bound to trust the issuing State's assessment […]. The only ground for opposition, in application of the general clause contained in art. 1.3 PD EIO, is that the executing State deems that the measure in question would violate fundamental rights or certain constitutional rules».

[44] See D. HELENIUS, *Mutual Recognition in Criminal Matters and the Principle of Proportionality*, p. 358.

[45] Regarding the interpretation of this provision, see recently CJE, 11 November 2021, C-852/19, ECLI:EU:C:2021:1020. For a comment on this decision, see O. CALAVITA, *Un mezzo di impugnazione per ogni atto di indagine? da Gavanozov II un ulteriore stimolo della Corte di Giustizia verso l'armonizzazione dei sistemi processuali penali europei*, in *www.lalegislazionepenale.eu*, 8 March 2022.

[46] In these circumstances, the order should probably not even have been issued. See Article 6, par. 1, letter b («the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case»).

confirms that the Directive "shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings".

In light of these provisions, two scenarios may affect the admissibility of evidence[47]: firstly, when the lack of the aforementioned conditions ("necessity" and "proportionality" *stricto sensu*) results in a violation of a fundamental right (e.g. a violation of Art. 8 ECHR); secondly, when the use of the evidence gathered by disproportionate means would infringe the fairness of the proceedings[48].

The judge at this stage is also entitled to verify whether the methods adopted in the evidence-gathering violated the procedural rights of the accused person under domestic law. This latter issue is very sensitive: gathering a piece of evidence abroad is not the same as gathering it within the national borders. Nevertheless, such an obvious fact cannot always imply a renunciation of cooperation. However, as required by Article 52 CFR, at least the "essence" of the domestic rights of the defence must be preserved and this control is also a duty of the judge of the issuing State[49].

In summary, it appears from the text of the Directive that the lack of necessity/proportionality *stricto sensu* – not previously noticed by the authorities of the issuing and executing States – does not always affect the admissibility of the evidence. This only happens in the cases identified above, i.e. a similar domestic case or the infringement of a fundamental right.

Other possible factors of disproportion, such as the excessive complexity of the execution, do not seem relevant at this stage. In fact, the executing State has performed the required measure and these particular aspects are without prejudice to the position of the accused person. Nothing changes when the executing authorities activated the consultations envisaged by Articles 6, par. 3, and 10, par. 4, but the issuing State confirmed the original request. The principles of mutual recognition and mutual trust prevail once again and the will of the requesting authority must, in principle, be respected.

7. Final remarks

The adoption of a proportionality check to ascertain the legitimacy of the EIO brings with it some advantages. "Proportionality" is a notion that all jurists abstractly understand: every legal system knows this concept and makes use of it more or less explicitly[50]. In summary, proportionality represents a common language between Member States[51] and its flexibility

[47] See L. BACHMAIER WINTER, *Towards the Transposition of Directive 2014/41*, p. 52.
[48] Indeed, in some of these cases, the executing State should already have invoked the ground for non-recognition or non-execution envisaged by Article 11, par. 1, letter f, according to which recognition or execution must be refused where «there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter».
[49] For a practical application of this judicial control, see M. DANIELE, *Evidence Gathering in the Realm of the European Investigation Order*, pp. 190-194.
[50] See M. DANIELE, *I chiaroscuri dell'OEI e la bussola della proporzionalità*, p. 69.
[51] See, in this sense, M. CAIANIELLO, *L'OEI dalla direttiva al decreto n. 198 del 2017*, in M. Daniele-R.E. Kostoris (eds.), L*'ordine europeo di indagine penale*, p. 45.

allows proportionality to be adapted to any concrete situation both in terms of applicable law and factual issues[52].

However, there are also negative aspects. As already stated, proportionality can be interpreted in many ways[53]; thus, similar cases risk being treated in many different ways[54]. Secondly, not every legal system formally provides for such broad judicial discretion, especially when the admissibility of evidence is at stake[55]. Where admissibility of evidence is strictly regulated by the law, the acceptance of a proportionality test could be troublesome[56].

Lastly, some problems may also occur with regard to the parameters sometimes adopted for carrying out the control in question; in particular, the seriousness of the investigated crime may be questionable. In most cases, evidence located within the national borders is collected regardless of the seriousness of the crime. Thus, the proportionality check adds a new requirement to the evidence-gathering that could sometimes be decisive for ascertaining the facts and therefore for prosecuting the offence. This problem is more serious in countries – such as Italy – where the prosecution is mandatory and should not be influenced by reasons of expediency.

However, as already stated, cooperation in criminal matters is a fragile network and it can only work if every Member State agrees to soften some of its peculiarities.

In this regard, it is remarkable that Italy – in which the principle of mandatory prosecution is enshrined in the Constitution (Article 112) – seems to have partly agreed to this compromise. Art. 7 of the national implementing law on the EIO (Italian Legislative Decree 108/2017) defines proportionality and explicitly mentions the concrete features of the crime as a factor to be considered: "the investigation order is not proportionate if its execution may result in a sacrifice of the rights and freedoms of the accused or of the other persons involved in the execution of the requested acts, which is not justified by the investigative or evidentiary needs of the specific case, taking into account the seriousness of the offences and the penalty provided for them". It is therefore clear that an intrusive measure requested for the prosecution of a minor offence may be "disproportionate".

Finally, we can outline an answer to our initial question: can the proportionality test (necessity and worthiness) be the pillar of EU evidentiary cooperation in criminal matters?

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[52] With regard to this issue, see I. ARMADA, *The European Investigation Order*, p. 8; L. BACHMAIER WINTER, *The Role of the Proportionality Principle in Cross-Border Investigations*, p. 105; Z. KARAS-S. PEJAKOVIC DIPIC, *Evaluation of the Results of the European Investigation Order*, in *EU and Comparative Law Issues and Challenges Series*, 2019, p. 492.

[53] See F. ZIMMERMAN-S. GLASER-A. MOTZ, *Mutual Recognition and Its Implications for the Gathering of Evidence in Criminal Proceedings*, p. 71: «Member States will not always agree on what is proportionate - carefully put, some of them are certainly rather "generous" than others when it comes to investigating a breach of the law».

[54] See A. MANGIARACINA, *A New and Controversial Scenario in the Gathering of Evidence at the European Level*, p. 132.

[55] See M. CAIANIELLO, *To Sanction (or not to Sanction) Procedural Flaws at EU Level? A Step Forward in the Creation of an EU Criminal Process*, in *EurJCrimeCrLCrJ*, 2014, p. 322: «there are […] insurmountable differences in the way of conceiving the proceedings, which play a crucial role in shaping the procedural sanction's doctrine of each State».

[56] With regard to this issue in the Italian legal system, see M. DANIELE, *I chiaroscuri dell'OEI e la bussola della proporzionalità*, pp. 71-72; R.E. KOSTORIS, *Ordine di investigazione europeo e tutela dei diritti fondamentali*, in *Cass. pen.*, 2018, pp. 1146-1448; G. UBERTIS, *Equità e proporzionalità versus legalità processuale: eterogenesi dei fini?*, in *Arch. pen.*, 2017, p. 389.

The answer should be positive. Finding a common language is mandatory, in order to keep together so many systems having their own laws, political choices and different traditions. Nevertheless, much can be done to improve this instrument and to mitigate the shortcomings presented above. The EU lawmaker must make the concept of proportionality less vague and standardise its application as much as possible across the Union; this is the only way that mutual trust can grow and evidentiary cooperation can become more and more efficient.

Therefore, the European Union should develop a common definition of proportionality, to be inserted in every legislative act in which the proportionality test is adopted as a cornerstone of cooperation[57]. The explicit contents of the EAW Handbook are a first step in this direction.

[57] See, in this regard, R. BELFIORE, *Riflessioni a margine della direttiva sull'ordine europeo di indagine penale*, in *Cass. pen.*, 2015, p. 3294.