

THEMIS COMPETITION
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THE PRINCIPLE OF PROPORTIONALITY
IN THE DIRECTIVE ON EUROPEAN INVESTIGATIVE
ORDER AND ITS INFLUENCE ON THE PRINCIPLE OF
MUTUAL RECOGNITION OF JUDICIAL DECISIONS

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I. INTRODUCTION

According to Article 82 and 83 of the Treaty on the Functioning of the European Union, Member States are obliged to develop judicial cooperation in criminal matters based on the principle of mutual recognition of judgements and judicial decisions, and to approximate the national laws in this area.

The need to accelerate international cooperation in criminal matters in effect of both loosening the formality of the proceedings and direct communication between the competent authorities of the Member States is the source of the change that has distanced the European Union from the Mutual Legal Assistance model. The said model, which was based on the European Convention adopted in Strasbourg in 1959, turned out to be insufficient for the states that had been developing closer economic, cultural and social bonds for decades of coexistence within the European Community and now within the European Union. A smooth, fast and certain cooperation between Member States had to be introduced. The Mutual Recognition model of cooperation meets all the requirements in this area.

As part of the Mutual Recognition instrument the European Parliament and the Council of the European Union have adopted the directive number 2014/41/EU which stipulates the European Investigation Order in criminal matters (hereinafter Directive). In terms of Article 1 paragraph 1 of the Directive, the European Investigation Order (hereinafter EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State (the Issuing State) to have one or several specific investigative measure(s) carried out in another Member State (Executing State) to obtain evidence in accordance with this Directive. The EIO may also be issued for the purpose of obtaining evidence that is already in the possession of the competent authorities of the Executing State. Consequently, the Directive governs the procedure of obtaining evidence located beyond the borders of the state that hosts the proceedings.

The Directive cannot be perceived as the first instance now that European law (formerly Community law) has raised the issue of obtaining evidence. Before the Directive had been adopted, this scope of cooperation was regulated by Framework Decisions 2003/577/JHA and 2008/978/JHA. Prior to that, Member States became parties to international agreements on obtaining evidence, namely to the European Convention on Mutual Assistance in Criminal Matters (adopted in Strasbourg on 20th April 1959) and Council Act of 29th May 2000 establishing, pursuant to Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States

of the European Union. The above-mentioned legal acts constitute a great example of enhancing international cooperation. International agreements, framework decisions and ultimately directives represent different levels of international cooperation, starting from the conventional system, via the 3rd pillar of EU integration structure, to the Mutual Recognition model.

The undesirable fragmentation of the regulations on gathering evidence in criminal cooperation within the European Union was what urged the Member States to adopt the Directive. As stated in recitals 5 and 6, the Directive aims to create new and more comprehensive approach to obtaining evidence in cases with a transnational dimension.

Contrary to what is postulated in the Directive, a study of its regulations raises a justifiable question whether cooperation in this area is truly based on the principle of Mutual Recognition of judicial decisions. The way the principle of proportionality is introduced to the Directive, i.e. the formulation of the grounds for non – recognition and non – execution of an order, is the reason for such a doubt.

II. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality has been reflected in article 5 paragraph 4 of the Treaty on European Union. According to this regulation, under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties¹. The aim of this regulation is to protect Member States from excessive activity of the European Union². The fact that the article in question does not relate to Member States' activities does not mean that Member States are not bound by this provision. The principle of proportionality, as depicted in article 5 of the Treaty on European Union, is not the only version of this principle³.

Another dimension of the principle of proportionality has been introduced to the Charter of Fundamental Rights of the European Union, namely to article 49 (3) and article 52 (1). Under these provisions, Member States must take into account the proportionality principle when it comes to decide on the severity of penalties and when the issue is a

¹ The principle of proportionality was first expressed in the Treaty of Maastrich (7th February 1992). The wording of the principle was analogous to the current one.

² Maliszewska-Nienartowicz J., *Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym*, „Studia Europejskie” 2006/1, p. 66.

³ Paul Craig P., de Búrca G., *EU Law. Text, Cases and Materials*, Oxford 2008, p. 544.

limitation on the exercise of the rights and freedoms recognised by this Charter. It is worth emphasizing that this dimension of the principle does not reflect its full content, either⁴.

Taking into account the above-mentioned circumstances, the question of the general meaning of the principle of proportionality seems to be justified. First and foremost it should be noted that the said principle is present within the whole system of law – both European law and national laws. Another argument for the general meaning of the proportionality principle is that it is impossible to determine the categories of cases in which it could be applicable. In this sense the opportunity of application thereof is unlimited, which might be described as universal⁵.

What is the content of the principle of proportionality? The general assumption that is the foundation of the principle is that all human actions are taken in order to reach a goal that has already been established. Simultaneously one has to consider that merely the assessment of the objective as desirable does not justify the means that have been chosen to reach the pursued objective. Consequently, the role of the principle cannot be described solely as an estimation of the objective from an axiological point of view, but rather as an estimation of the measures that should serve the purpose.

Due to the Court of Justice of the European Union rulings, the principle of proportionality has been developed as one of the general principles of the Community (European) law. From the 1950s the Court of Justice started to point to the proportionality principle as an argument for the ruling. Initially, the principle of proportionality was identified with the common interest and with action within the limits of the law⁶. The groundbreaking judgement of the Court that enabled the principle of proportionality to protect not only Member States but also individuals was passed in the case C 11/70⁷. In the said judgement the Court stated that the freedom of an individual's action should not be limited by state in a wider range than is required by public interest. By such an expression the Court showed a new perspective of the principle – a perspective which involves the interests of

⁴ Ostropolski T., *The principle of proportionality under the european arrest warrant – with an excursus on Poland*, *New Journal of European Criminal Law*, Vol. 5, Issue 2, 2014, p. 3-4.

⁵ Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, *European Law Journal*, Vol. 16, No. 2, March 2010, p. 159.

⁶ For instance judgement in cases C – 8/55, C – 15/57, C – 19/61.

⁷ Internationale Handelsgesellschaft mbH case.

individuals⁸. Subsequent judgements of the Court set forth the conditions that should be met to recognize the given activity as proportionate. In this regard, special attention should be paid to FORMA case⁹ in which the Court offered a definition of proportionality. According to the Court, in order to establish whether a provision of the Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement. In the following judgements the Court added the third requirement that should be taken into account when assessing proportionality of a specific measure. This means that a measure chosen to attain an objective should be examined whether it does not exceed what is appropriate and necessary¹⁰.

Summing up, the principle of proportionality may be seen as a comprehensive assessment which consists of three tests. The object to be tested are the measures undertaken to achieve a specific goal¹¹. The first test can be referred to as a suitability test. Its main area of interest is the connection between the measures to achieve an objective and the objective itself. The second stage, which can be defined as a necessity test, has been developed to examine the necessity of a particular measure. In fact it is a subsidiarity test. This test cannot be passed when it is possible to reach the very same objective by means of a less restrictive measure. The final test focuses on proportionality *sensu stricto*. The object tested here is whether the chosen measure does constitute an excessive burden on an individual. The issue that is often raised is that contrary to the suitability test and necessity test, the proportionality *sensu stricto* test does not constitute clear criteria and is difficult to express¹². In fact the assessment whether the burden laid on an individual is excessive may be prone to arbitrariness.

An analysis of the above-mentioned tests leads to the conclusion that the principle of proportionality has a preliminary character. This quality of the principle makes it a perfect

⁸ Double dimension (perspective of Member State and of an individual) of the principle was reflected also in Cassis de Dijon case (C-120/78).

⁹ C-66/82, Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA).

¹⁰ Denavit Nederland BV case, C – 15/83

¹¹ Tor-Inge Harbo, *op. cit.*, p. 165.

¹² Tor-Inge Harbo, *op. cit.*, p. 165.

candidate for a ground for non-recognition or non-execution of any measure within international cooperation in criminal matters.

In spite of the fact that the principle of proportionality is part of the constitutional law system of many Member States, initially the proportionality test was not expressed in any of the legal acts involving mutual legal assistance on gathering evidence (neither in European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 nor in Council Act of 29 May 2000). Furthermore, European laws and regulations that deal with other forms of cooperation in criminal matters than obtaining evidence, especially concerning the European Arrest Warrant, do not contain any expressly stated reference to the proportionality test as a ground for issuing or recognizing the measure in question.

The approach to assessing proportionality of a specific measure had changed even before the EIO Directive was adopted. The ground for this change was the enactment of other legal acts concerning international cooperation in respect of gathering evidence. The Framework Decision 2003/577/JHA did not make the issue, recognition or execution of a decision conditional upon securing evidence or fulfilling any of the demands that derive from the proportionality test. In accordance with recital 4 of this act, the proportionality test could not be used as a ground for non-recognition or non-execution of an order. This is due to the mutual trust between the Member States that arises from the principle of mutual recognition. Article 7 of the Framework Decision 2008/978/JHA represents a new approach, according to which the issuing authority has an obligation to assess whether obtainment of items, documents or data is necessary and proportionate in relation to the objectives of the proceedings. The provision under discussion incorporates a clear reservation that only the issuing State is entitled to assess whether these conditions have been met.

It must be emphasized that the Framework Decision 2008/978/JHA did not have opportunity to operate in practice¹³. Therefore, there exist no experiences of the application of the proportionality principle in international cooperation in respect of gathering evidence.

¹³ Mangiaracina A., *A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order*, Utrecht Law Review, Volume 10/2014, p. 115.

III. THE NEED TO EXPRESS THE PRINCIPLE OF PROPORTIONALITY BASED ON THE EXPERIENCE OF THE EUROPEAN ARREST WARRANT APPLICATION.

Despite the fact that there exist no experiences regarding the application of the proportionality principle, when it comes to the Framework Decision in which this principle is contemplated some experience can be found in the practice of issuing and executing the European Arrest Warrant. This situation can be seen as a paradox, since legal acts which regulate the European Arrest Warrant do not contain any provisions indicating the possibility or need to assess the proportionality of this measure.

The practice of applying the European Arrest Warrant provided the grounds for proposals that prior to deciding on the issue of a Warrant a Member State should assess whether this measure is proportionate in relation to the nature of the crime committed by the requested person. The position of the Council of European Union is an example of such a proposal. The Council recommended a modification to paragraph 3 of the Handbook on how to issue a European Arrest Warrant. In accordance with that modification, the issuing authorities should assess the proportionality of issuing a European Arrest Warrant in each case before making their decision¹⁴.

In this respect, the issuing authorities should particularly focus on the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority, and the cost/benefit analysis of the execution of the EAW. The principle of proportionality was also used as an argument in a broad discussion on abusing and misusing the European Arrest Warrant.

The possibility of application of the proportionality principle has been noticed also at the stage of recognizing and executing a Warrant. The judgement handed down by a German court in the case of Mr C. is a good example thereof. In this case the court considered refusing to execute a Warrant pointing to article 1 (3) of the Framework Decision, as well as to article 49 of the Charter of Fundamental Rights. Ultimately, the German court declined to apply the proportionality principle and decided to execute the order, emphasizing the primacy of the principle of mutual recognition of the judgements and mutual trust. The case of Mr C. was not the only instance that provided the grounds for refusal to enforce a European Arrest Warrant

¹⁴ Revised Version of the European Handbook on how to issue a European Arrest Warrant, 17195/1/10, REV 1, COPEN 275 EJM 72 EUROJUST 139, Brussels, 17 December 2010.

due to the lack of proportionality. A similar way of reasoning was presented in the British judgement passed in the Assange case.

In the next step proportionality was recognized as a ground for non – execution of a Warrant. In the case of Mr. Ostrowski, an Irish court decided not to execute the Warrant, claiming disproportionality of the required measure¹⁵. The legal considerations of the court focused on the conclusion that both the issuing and the executing authorities are entitled and obliged to assess the proportionality of the Warrant in question. At the same time the court did not indicate the legal basis for such a conclusion. In the court's point of view such a possibility derives strictly from the spirit of European law, according to which a European Arrest Warrant should not be issued and executed in minor cases. Emphasizing the importance of the principle of mutual recognition and mutual trust between Member States, the Irish court explained that there is no possibility to double check the proportionality of issuing a European Arrest Warrant, because it had already been subject to assessment by the Issuing State. According to the court, one has to notice the significant difference between assessing the proportionality of issuing a Warrant and assessing the proportionality of its execution. Only by assessing the proportionality of enforcement of the warrant against Mr. Ostrowski did the Irish court come to the conclusion that, taking into account the circumstances of the case, the execution of this particular warrant would constitute an excessive burden to the accused¹⁶.

¹⁵ According to the Irish court the principle of proportionality was not met because of the following circumstances: The accused Mr. Ostrowski faced the accusation of possession of 0.72 grams of marijuana. The Polish authorities did not contact the accused for approximately 3 years, although Mr. Ostrowski gave them his address and his place of residence in Ireland was known to them. As a result, the accused was not aware that the proceedings against him was still being carried on. The warrant the Irish court decided on was the second one issued in the same case. The first Warrant against Mr. Ostrowski was rejected by Irish authorities due to some mistakes that occurred during the filling of the form by Polish authorities.

¹⁶ It is worth mentioning that the court assessed the burden not only from the perspective of the accused, but also from the executing State's point of view. Considering the costs of the proceeding, the court pointed to p. 7 Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (COM/2011/175, Final, 11 April 2011).

Based on the experience of the European Arrest Warrant application one may conclude that the principle of proportionality was taken into account not only by the issuing authority, but also by the state executing the measure in question. What is more, the assessment of proportionality has gone beyond the scope of the three stages of proportionality test connected with the general principle. This is justified by the fact that proportionality was examined not only from the perspective of an individual, but from that of Member States, as well. Member States assessed whether it is necessary to get another Member State involved, taking into account the financial burden that is inevitably linked to international cooperation.

The original draft of the European Investigation Order Proposal made no mention of the principle of proportionality as a ground for issuing the Order¹⁷. The experiences of applying the European Arrest Warrant, whose text contains no provision relating to proportionality in issuing the arrest warrant, caused an urgent need to regulate the issue of proportionality in future regulations on international cooperation in criminal matters.

IV. THE FUNCTION OF THE PRINCIPLE OF PROPORTIONALITY IN THE EIO DIRECTIVE - INTERPRETATION PROBLEMS.

In the EIO directive the principle of proportionality is reflected in article 6 and 10(3) as well as in the recitals.

In recital 11, the three proportionality assessment tests developed on the basis of the general principle of proportionality are modified by indicating that "the EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain 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".

What is the modification of the general test of proportionality is an open question. One possibility is that while assessing whether the evidence sought is necessary and proportionate for the purpose of the proceedings, the issuing authority has to carry out the three tests indicated above and subsequently has to repeat these tests during the analysis whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence

¹⁷ Bachmaier Winter L., *European Investigation Order for obtaining evidence in the criminal proceedings. Study of proposals for a European Directive*, 2010 ZIS, no. 9, p. 584-585.

concerned. The alternative is that these three tests should only be adapted to these two stages ("evidence check" and "investigative measure check"), but not each of them should be used at every stage¹⁸. The modification under discussion does not finish upon exercising the three tests twice or conducting them at two stages. The assessment of proportionality has been enriched by ascertaining whether by means of issuing an EIO, another State should be involved in the gathering of that evidence. It is a very vague and all-encompassing formula. Hence, it is hard to anticipate the criteria to be used by a competent authority empowered to perform the assessment of proportionality.

One of the criteria that could be taken into account during the analysis of excessive difficulty for another Member State are costs related to the execution of an EIO. However, from recitals 21 and 23 it follows that within the assessment of proportionality the possibility of considering the costs is excluded. This solution should be viewed favourably, although – despite the assurances indicated in recital 23 – it does not eliminate potential conflict with the mutual recognition principle.

Recital 12 indicates the necessity of taking into consideration the interest of the individual in question, especially from the perspective of their fundamental rights, particularly the presumption of innocence and the rights of defence. Any limitation of such rights by an investigative measure can be recognized as proportionate only if it serves an important objective, such as the protection of the rights and freedoms of others.

Before a detailed discussion of the articles of the Directive, in which we find references to the principle of proportionality, we must first recall their content.

Article 6 (1a) provides that the issuing authority may only issue an EIO when the issuing of an EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4, taking into account the rights of the suspected or accused person. Art. 6 (2) provides that the above condition shall be assessed by the issuing authority in each case. Where the executing authority has a 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 (art. 6 (3)). The executing authority may also have recourse to an investigative

¹⁸ Particularly it is difficult to imagine the application of the proportionality *sensu stricto* test on the stage of assessing the proportionality of the evidence sought in relation to the purpose of the proceedings. The proportionality *sensu stricto* test applies on the second stage, which relates to assessing the proportionality of the investigative measure chosen.

measure other than that indicated in the EIO, where 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 (art.10 (3)).

From the provisions mentioned it follows that the examination of proportionality is not reserved for the issuing authority alone. However, the extent to which the executing authority may assess proportionality may be disputed. In particular, there is a body of opinion that the principle of proportionality can constitute a "hidden ground for refusal of recognition and enforcement"¹⁹. Is it possible to interpret the EIO directive in such a way that disproportionality of the indicated measure would be one of the grounds for refusal?

The first step is to consider what it means exactly that the grounds for refusal in the form of disproportionality are hidden. Recital 11 states that the execution of an EIO should not be refused on any grounds other than those stated in this Directive. So there is no cross-reference to a specific provision which would contain a closed list of the grounds for refusal, but only a general statement relating to the whole directive.

The grounds for non-recognition or non-execution are indicated in Art. 11, which does not mention the principle of proportionality. In this context, the question arises whether this provision contains a closed list of the grounds for refusal. Art. 11 indicates that the specification of the grounds for non-recognition shall be interpreted without prejudice to art. 1 (4), which in turn provides that this directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles, as enshrined in art. 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected. This reservation could be puzzling taking into account that, among other grounds for refusal, Art. 11 also indicates the existence of "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". This should not be considered an accidental repetition, but a deliberate emphasis on the difference between facultative grounds for refusal and obligatory grounds for refusal. An obligatory refusal would take place under Art. 1 (4), if execution of an investigative measure infringed upon the fundamental rights and legal principles as enshrined in art. 6 of TEU. In a situation in which there are only substantial grounds – probability, not certainty – to suppose that such an infringement can happen, especially in an indirect way, the executing authority can refuse to recognize or

¹⁹ Mangiaracina A., *op.cit.*, s. 127-128.

execute EIO. If Art. 11 does not contain a closed list of the grounds for refusal, such grounds can be inferred from other provisions of the Directive, e.g. the provisions where the principle of proportionality in such a role is hidden.

Invoking other provisions than Art. 11 as a justification for refusal is not the sole example of hiding disproportionality as a ground for refusal. The hiding of the proportionality principle may also be a consequence of such an interpretation of Art. 11, according to which the proportionality principle is implicitly included in this article, without having been expressed explicitly.

In searching for a provision capable of being "hidden grounds for refusal", attention should be turned to the above-mentioned Art. 1(4) and Art. 11 (1) (f) of the Directive. Both regulations refer to the Charter. In line with the previous findings, the principle of proportionality regulated in Art. 49 of the Charter only relates to penalties. However, this fact did not prevent authorities from invoking this provision during the assessment of proportionality in the application of EAW. Therefore, invoking Art. 49 of the Charter in relation to coercive investigative measures is possible.

In the case of rejecting the possibility of invoking Art. 49 of the Charter, there is another regulation in which the proportionality rule can be hidden as grounds for refusal. It is Article 6 (2) of the Directive. Special attention should be focused on the interpretation problem arising from the way in which the empowered authority and its competence to conduct the assessment of proportionality are termed in the text of the Directive. This interpretation problem is noticeable when comparing Art. 6 (2) of the Directive with its counterpart, Art. 7 of Framework Decision 2008/978/JHA. Although Art. 6 (2) provides that the assessment of proportionality is conducted by the issuing authority, but it does not stipulate – as was the case with the Framework Decision – that it is its exclusive competence. After the comparison of these two provisions, an interpreter whose reasoning is based on their literal meaning would reach the conclusion that the approach that the assessment of proportionality is an exclusive competence of an issuing authority was rejected. Such an interpretation would be supported by the fact that the Directive replaces the preceding Framework Decision and regulates – although in a wider scope – the same area which refers to the gathering of evidence. The interpreter could continue this reasoning by contending that even if the competence to assess the proportionality does not derive from Art. 6, it comes from the principle of proportionality as a general principle of the EU law. In other words an authority, due to the nature of the principle of proportionality as a general principle, could apply this principle as long as its competence to do so were not excluded by a special

provision. Art. 6 does not contain such a direct exclusion²⁰. In such a situation the question arises why does this article indicate that the issuing authority has to assess proportionality. Since the issuing authority can derive its competence from the general EU principle, creating a special legal basis for assessing proportionality causes doubts about the purposefulness of such a solution. In what way should Art. 6 (2) be interpreted in this context?

As it has already been mentioned, there is a difference between Art. 7 of Framework Decision 2008/978/JHA and Art. 6 of the Directive. The difference comes down to the word "only", which was used in Art. 7 and omitted in Art. 6. What is the possible explanation of regulating the competence to assess proportionality in a new way? One interpretation is the consultation procedure regulated in Art. 10 (3) and Art. (4). It is during this procedure that the assessment of proportionality is conducted. Stressing in Art. 6 (2) that only the issuing authority can assess proportionality would be incompatible with the possibility of having recourse to an investigative measure other than indicated in the EIO, because of its less intrusive nature and its capacity to achieve the same result. If the assessment of proportionality is a necessary condition for exercising the competence specified in Art. 10(3), the stipulation in Art. 6 (2) that proportionality must be assessed only by the issuing authority would make it impossible to exercise the competence within Art. 10 (3). There would be a logical incompatibility in the form: N1-A1²¹ is forbidden to perform action P, N2-A1²² is allowed to perform action P. If A1 acts in accordance with norm N2, he will infringe the prohibition from N1. It is possible to avoid this contradiction only when A1 resigns from taking action permitted under N2. On the other hand, it can be reasoned that adding to Art. 6 (2) a stipulation that the assessment is only conducted by the issuing authority would not result in such an incompatibility. Art. 6 (2) does not regulate assessment of proportionality in a general way – both at the issuing and recognition/execution stage. It regulates this

²⁰ It can be argued that the exclusion of the competence of the executing authority to assess proportionality would not infringe the general principle of proportionality, because its application would not be excluded. There would only be the limitation of authorities entitled to apply this principle to the same situation – the assessment of a judicial decision in the form of an EIO. It can also be argued that there would be infringement of the general principle of proportionality because "the situation" is not the same. This interpretation enhances the difference between issuing an EIO and its recognition and execution.

²¹ Addressee no. 1 of Legal Norm 1.

²² Addressee no. 1 of Legal Norm 2.

assessment only at the stage of issuing an EIO. Hence, if the idea of Art. 6 (2) was to reserve the competence for the issuing authority, that would only exclude the executing authority from assessing proportionality during the examination of conditions for issuing an EIO. Lack of competence for assessing proportionality in the case of checking the conditions for issuing an EIO would not be incompatible with possessing the competence to assess proportionality in the case of checking the accuracy of the investigative measure chosen, which takes place at a later stage, the stage of executing an EIO.

It results from the above that, due to the wording of Art. 6 (2), it is impossible to determine whether the competence of the issuing authority to assess proportionality as a condition for issuing an EIO is its exclusive competence.

Art. 6 (3) can give another argument for the interpretation that the competence within Art. 6(2) is stipulated exclusively for the issuing authority. Empowering the executing authority with the competence to assess proportionality of an EIO issued as a whole would in effect lead to empowering this authority with the competence to conduct re-assessment of the test conducted by the issuing authority. This re-assessment would be tantamount to establishing other grounds for refusal. In such a situation a question arises about the sense of the consultation proceedings regulated in art. 6 (3). From this regulation it follows that the executing authority can launch this procedure just when it has reasons to believe that the proportionality condition has not been met. In this context the executing authority could only signalize its own different assessment of proportionality and could perform this assessment for this purpose alone. This assessment would not have a binding character for the issuing state. The provision under discussion provides that after that consultation the issuing authority may decide to withdraw the EIO. However, there is another possible interpretation according to which consultations regulated in Art. 6 (3) are not the result of proportionality assessment carried out by the executing authority, but they are merely the result of preliminary assessment of the correctness of the assessment conducted by the issuing authority. There is a difference between assessment of proportionality and verification of the correctness of this assessment. In this context the initiation of consultation proceedings under Art. 6 (3) would be a warning signal for the issuing authority that in the case of insufficient arguments demonstrating that the application of EIO is proportionate, the executing authority may refuse to recognise the EIO or recourse to an investigative measure other than indicated. In this interpretation communication proceedings are not merely an instrument of influencing the decision of the issuing authority, but conversely of the executing authority. The issuing authority has a chance to provide the executing authority with relevant information before its

decision whether or not to execute an EIO. Because of these two alternative interpretations, Art. 6 (3) itself cannot justify a claim about the limited competence of the executing authority to assess proportionality .

Also, the legislative history would not suffice to justify such a claim. The fact that in the course of legislative works on the Directive a majority of Member States took the position that the executing authority should not have the competence to check proportionality in the context of the conditions of issuing an EIO, should not have an important implication²³. During the interpretation the ECJ virtually pays no attention to the legislative history of the provisions²⁴.

The above considerations did not give straightforward answer to the question whether Art. 6 (3) gives the issuing authority an exclusive competence to assess proportionality in the context of the issuing of an EIO. Its source is the principle of mutual recognition, which is the pivotal argument for an interpretation in which the executing authority is not competent to check proportionality already assessed by the issuing authority and refuse to recognize or execute the EIO on these grounds.

V. MUTUAL LEGAL ASSISTANCE VS MUTUAL RECOGNITION. A CONFLICT BETWEEN THE PRINCIPLE OF MUTUAL RECOGNITION AND THE PRINCIPLE OF PROPORTIONALITY.

In the context of international cooperation in criminal matters two types of cooperation can be distinguished: one based on the principle of mutual legal assistance and the other - based on the system of mutual recognition.²⁵

In the mutual legal assistance model, one Member State offers legal help to another one by e.g. acquiring evidence. The support is requested via the central authority, e.g. Ministry of Justice. The requested state has at its disposal a vast range of the grounds on which to refuse such support and, what is more, there is no time limit for execution. Legal assistance is provided in accordance with the law of the executing state. Such a solution may

²³ 15329/10 COPEN 230 EJM 56 EUROJUST 118 CODEC 1117, p. 10.

²⁴ Borgers M.J., *Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters*, 18 Eur. J. Crime Crim. L. & Crim. Just. 99 / 2010, p. 103.

²⁵ Borgers M.J., *op.cit.*, p. 99.

cause problems with procedural admissibility of evidence from the requesting state's perspective²⁶.

Moving on to the mutual recognition model, it is worth emphasizing that the executing state automatically recognizes the decision of the issuing state and executes it as its own. In the theoretical form of this model there are no such cases in which the executing state could refuse to recognize a decision. The system of mutual recognition was presented as the basis for international cooperation with the European Union during the Tampere European Council - the first meeting of the Council solely dedicated to justice and internal affairs of states. As a result, it was stated that decisions of the issuing state should be carried out in the same manner as decisions made by the state of execution. Since a decision of the issuing state should be treated as an act of the executing state, it seems that the executing state should enforce the decision in accordance with its national law. This does not apply to cooperation based on mutual legal assistance. In this case, the executing state shall act in accordance with the law of the issuing State. As suggested by its very name, the model of mutual legal assistance is based on assistance only. To characterize the mutual recognition model it is worth indicating that model is easy to use, free of excessive formalism, and flexible enough to help adopt uniform criteria to be considered in respect of all the Member States.

Historically, the mutual legal assistance regime was introduced before the mutual recognition regime in the European Convention on Mutual Assistance in Criminal Matters, 20th April 1959. The Schengen Agreement and the Council Act of 29th May 2000 establishing the Convention on Mutual Assistance in Criminal Matters improved some of the characteristics of existing Mutual Legal Assistance regime which hindered cooperation between Member States of the European Union. The Convention of 2000 established the obligation to inform the requesting state about the date of executing the assistance²⁷ and

²⁶ Mangiaracina A., *op.cit.*, p. 3-5.

²⁷ Art. 5 s. 1, 2000 EU MA Convention states that: "If it is foreseeable that the deadline set by the requesting Member State for executing its request cannot be met, and if the reasons referred to in paragraph 2, second sentence, indicate explicitly that any delay will lead to substantial impairment of the proceedings being conducted in the requesting Member State, the authorities of the requested Member State shall promptly indicate the estimated time needed for execution of the request".

introduced the direct transfer of applications between judicial authorities²⁸. Provisions of the Schengen Agreement have minimized the grounds for refusal of legal assistance and, in some cases, enabled direct contacts between police authorities from different states (when the request could not be made in “good time” and in urgent situations)²⁹. Cooperation based on the mutual legal assistance regime was in fact enriched with some elements of the mutual recognition model³⁰.

Despite the existence of the afore-mentioned instruments, communication between states in some cases was still achieved on the central level, via the central bodies. Additionally, not all Member States ratified the Convention of 2000³¹ and because of that it was absolutely necessary to introduce a new flexible instrument that would simplify the existing inefficient procedure, strengthen the mutual recognition model and extend its application on all the Member States. The answer to all these challenges was the EIO Directive.

According to the Directive’s recitals, the EIO is an instrument of mutual recognition regime. In recital 2 it is explicitly indicated that since the European Council summit in Tampere in 1999, the principle of mutual recognition has become the cornerstone of judicial cooperation between the EU Member States, including criminal matters. Further in recital 3, the European legislator underscores the advantages resulting from the application of this principle - in particular streamlining the proceedings. This is of practical importance when it comes to the EIO, because it helps to prevent evidence from destruction, deformation, movement, transfer, or concealment.

There are some fundamental doubts about qualifying the EIO as an instrument rooted only in the principle of mutual recognition. The reason for such doubts is seen in the grounds for non- recognition and non – execution of the order. Since the executing state treats the issuing state’s decision as its own, the possibility of non-recognition of an order would be irrational. Therefore, it is clear that the presented models do not exist currently in their theoretically pure forms. These regimes have intermingled with each other in the previous

²⁸ There is a wide set of exclusions from this rule, see art. 6 (2) and (8) 2000 EU MA Convention.

²⁹ Art. 39(3) and art. 46(2) Schengen Agreement.

³⁰ Council Doc., 9288/10, ADD 2, COPEN 117, EUROJUST 49, EJM 13, PARLNAT 13, CODEC 384, 23 June 2010, p. 1-3.

³¹ Italy and Greece have not ratified the Convention.

cooperation instruments. Also, the Directive is of a hybrid nature. The difference is that in this act the mutual recognition regime constitutes the basis for cooperation. However, elements of the mutual legal assistance regime are also important, because it can be argued that they allow to create minimum standards that enable trust between states to decisions issued by one another.³²

The broad application of the principle of proportionality in the Directive, as described in Chapter IV, can cause a significant damage to the principle of mutual recognition. As it has already been said, the principle of proportionality allows the executing authority to modify the issuing authority's decision. It is also possible that the principle of proportionality can constitute grounds for refusal. Can the principle of proportionality be reconciled with the principle of mutual recognition, or are the two principles incompatible?

In terms of Art. 10 of the Directive, the executing authority's competence to assess the proportionality cannot lead to refusal to execute an EIO. The executing authority can only refuse to implement a decision in the manner specified by the issuing authority. It should be emphasized that despite the change in the methods of execution, the executing state still has the duty to achieve the objective that was to be achieved by EIO. In fact, it is the rationalization of the principle of mutual recognition. This change reduces the potential negative impact of the decision to be executed (the change replaces more invasive measure by less invasive one), and simultaneously is irrelevant for the issuing authority (despite the change of the decision its execution gives the same result). This rule does not infringe upon the principle of mutual trust of authorities. Assuming the rationality of the authorities it must be presumed that if the same result could be achieved by a less intrusive measure than that indicated in the EIO, an issuing authority would point this measure, if it knew about it. It can be assumed that the issuing authority - as the host of the proceedings - knows better than the executing authority what evidence it needs for the purpose of the proceedings. But it is the executing authority - due to the fact that the decision is made within the framework of its legal system - that would know better what actions - in this case investigative measures - are needed to achieve this goal.

In a nutshell, it is possible to reconcile the test of proportionality regulated in Art. 10 of the Directive with the principle of mutual recognition.

³² Vermulen G., De Bondt W., Ryckman Ch., *Rethinking international cooperation in criminal matters in the EU*, p. 610-628.

A similar conclusion, however, cannot be drawn in the case of assessing proportionality for the purpose of refusing to recognise or execute an EIO. Such an interpretation would interfere too strongly with the principle of mutual recognition, making this rule not a cornerstone of international cooperation within the EU, but only the façade. It has to be underlined that the existence of too many exceptions to the mutual recognition rule causes a blur.

In this context, according to the settled case-law, it is necessary to notice the existence of the obligation to ensure consistent valid interpretation. This means that wherever a provision of national legislation of a Member State falls within the scope of the Directive or the Framework Decision, that provision must be interpreted in accordance with the wording of the EU acts. All Member States are obliged to an EU-friendly interpretation of the provisions that leads to the achievement of the objectives set by the legislation of the EU and, at the same time, also applies to the regulations already existing in the national system.³³

Faced with such a clear case-law that steers the understanding of the national legislation of all the Member States towards the understanding in accordance with the EU law, we may reach the conclusion that all Member States should interpret EU law in the same way that aims to achieve its goals.

At the same time the acts so interpreted set certain minimum standards, compliance with which underlies the principle of mutual recognition based on the principle of trust. In this configuration, the assertion of the need to double-assess proportionality destroys the order described above and consistency of legal harmonization and cooperation between Member States. Given that all Member States comply with the minimum standards elaborated in EU law and at the same time are guided by a pro-EU interpretation, as well as the principle of mutual trust, there is no doubt that it is sufficient to assess proportionality by the issuing authority. Even if adopting the structure that the issuing State evaluates the proportionality issue, and the executing State - proportionality of execution - it is in fact a double assessment of the same circumstances.

Referring to the above, it can be indicated that consent for the possibility of refusing to execute/recognize an EIO based on the principle of proportionality disharmonizes cooperation between authorities from the states that differ on what kind of crimes should be prosecuted - all or only serious. In the context of the EIO, the principle of proportionality will be interpreted differently by authorities from the countries whose laws provide for broad

³³ Borgers M.J., *op.cit.*, p.102.

discretion to cancel the prosecution of a crime, and by authorities which do not have such discretion. Therefore, if the issuing state is a country 'of principle of legality', and the assessment of proportionality will be performed by a country 'of principle of opportunity', it can be indicated in advance that the latter will evaluate proportionality from a different angle, especially in considering the "public interest" in the prosecution.³⁴ Such a system will therefore cause the evaluation of one type of the system from the perspective of the other, which is doomed to failure and puts the country 'of principle of legality' in a worse position in relation to the evaluating state. It also undermines its authority, and above all, destroys the idea of the principle of mutual trust, indicating that the assessing state, despite being bound by the same general principles of EU law and tradition, does not believe in the integrity and legality of the system of another Member State. This will lead to a situation in which a state with the system of principle of legality will execute probably all orders, but will not receive "mutual service." Acceptance of such a situation would require the abandonment of the assumption that all EU states apply an EU-friendly interpretation of the rules and minimum standards (which, after all, they implement to their national systems). Such resignation is not possible, because it would be tantamount to failure and futility of any action that deepens international cooperation.

VI. SUMMARY

The principle of proportionality plays an important role in the EIO Directive. As stated above this principle has been reflected in many provisions of the Directive. Simultaneously the Directive expressly points out to the mutual recognition principle and considers it a cornerstone of the European judicial cooperation. Both principles could not be abided by at the same time. Their full application is mutually exclusive.

It is legitimate to state that the provisions of the Directive are a compromise, because they balance both of the above-mentioned principles. This conclusion in particular applies to such remedies as the obligation laid down on the issuing authority to assess proportionality of an order and competence of the executing authority to recourse to a less intrusive investigative measure, and a wide range of consultation possibilities. Member States assess proportionality of an order applying the above-mentioned instruments. And by treating these instruments as an exception, they fulfill the principle of mutual recognition. It must be noticed

³⁴ Ostropolski T., op.cit., p 6-7.

that exceptions cannot be subject to extensive interpretation. This constitutes a kind of guarantee that the principle of proportionality would not be abused.

Consequently, an assumption that the executing authority would be entitled to refuse to execute an EIO claiming the principle of proportionality is a step too far. Such an assumption would result in negative consequences in terms of international cooperation in criminal matters, and would indeed constitute a step backwards to the conventional solutions. Assessment of the principle of proportionality by authorities of both states would slow down the well developed mechanisms of mutual cooperation and would create a risk of completely unfounded refusals to enforce orders. It should be emphasized that a state's vested interest or different attitude toward a specific issue cannot write off the minimum standards that have been developed by the UE.

To sum up, proportionality assessment on applying a European Investigation Order is an indispensable requirement to activate the mechanism of international cooperation. Simultaneously, mutual trust between Member States that the authorities of another state act in keeping with the laws and regulations that meet certain minimum standards is a ground on which such close cooperation has been developed. Mutual trust should involve the belief that the proportionality assessment done by another state's authorities is accurate. Any interference with this assessment by the executing authority is possible by way of exception only and within the limits laid down by the Directive. Only with this kind of interpretation is it possible to preserve high standards of international cooperation within the European Union.