

EUROPEAN
CRIMINAL JUSTICE AT 30



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EUROPEAN
CRIMINAL JUSTICE AT 30

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The principle of proportionality and the European Arrest Warrant: future perspectives

Claudia Cantone

In my presentation, I would deal with the principle of proportionality in the context of the European Arrest Warrant ("EAW"). The topic can be addressed from two points of view: on one side, the so-called "prospective proportionality" when the EAW is issued to prosecute minor offences and, on the other side, the "retrospective proportionality" when the penalties applied by the issuing State of the EAW are regarded as disproportionate by the executing State.

The first category I am focusing on is the "prospective proportionality", namely when the EAW is used by State authorities to prosecute minor offences, regardless of the human and financial costs associated with the surrender procedure. It has been asserted that the EAW has been a victim of its own success. Although it was originally designed as a tool to repress serious transnational criminality, States have increasingly relied on EAWs to prosecute all kinds of offences, also harmless and petty offences.

In this regard, the major problem remains the lack of any provision in the Framework Decision on the EAW ("FD EAW") on proportionality. Despite some efforts over the years, it seems to be little to no hope for a "proportionality check" to be included in the EU legislation. Indeed, the Commission has showed its reluctance to re-open the discussion on the core European arrest warrant legislation, ruling out the possibility of introducing a proportionality test in the FD EAW.

Accordingly, a viable solution to the disproportionate use of the EAW is to be found elsewhere. As matters currently stand, the assessment of proportionality is left in the hands of States. It has been pointed out that judicial authorities could resort to less intrusive tools of mutual legal assistance ("MLA") - such as the use of videoconferencing for suspects, the transfer of proceedings, and the use of summons. Put differently, in the very near future, the (dis)proportionate use of EAWs will depend on both the sensitivity of domestic authorities to the issue and the availability of alternatives instruments of MLA in legislation.

As far as Italy is concerned, the Italian legislator has been quite responsive to the issue of proportionality. Italy has set into domestic legislation a different threshold for the issuing of EAW for the execution of sentence to preclude the use of the warrant for the enforcement of low penalties. Namely, Article 28(1)(b) of Law no. 69/2005 provides that the Italian authorities shall issue an EAW for the enforcement of a final conviction only if the sentence is no less than one year and that the execution was not suspended (instead of the four months threshold set forth in the FD EAW). Furthermore, in very recent times, by judgement no. 14927 of 14 April 2022, the Italian Court of Cassation has refused to execute a warrant issued by the Polish authorities for the only purpose of conducting an investigation. Notably, the Italian judges have stressed that the EU States should not use the EAW for investigative needs, but they should resort to less invasive tools such as the European Investigation Order.

The other aspect of proportionality that I would like to address in my presentation is the so-called "retrospective proportionality", namely when the executing State deems the penalties imposed by the issuing State to be disproportionate. By the same token, States are not allowed to assess proportionality of the penalties applied by the issuing authorities or to refuse a warrant on this ground. Since the EAW is an instrument based on the principle of mutual recognition and mutual trust, the issuing Member State's decision must be recognised without further formalities.

Last year, the issue of "retrospective proportionality" has been referred to the ECJ by the French Court of Cassation (Case C-168/21). Basically, the French judges asked the ECJ whether, Article 49 (3) of the European Charter of Fundamental Rights ("ECFR") - according to which "the severity of penalties must not be disproportionate to the criminal offence" - leave some leeway to the executing Member State to refuse an EAW on the basis of the disproportionality of the sentence applied by the issuing State.

To date, the above case is still under examination before the ECJ. However, on March 31 the Advocate General ("AG") delivered its opinion in the case. With specific regard to the issue of proportionality, the AG, quite predictably, put a lid on the idea of a proportionality check in the context of EAW. He underlined that the possible disproportionality of the sentence is not among the grounds for non-execution laid down by EU law and that the circumstances of the case at hand did not constitute new "exceptional circumstances" where fundamental rights are in danger. To cut a long story short, the AG has stated that, leaving room for a "proportionality test" would undermine the very fundamental principles of mutual trust and recognition underpinning the system of the European Arrest Warrant. Now, the ball is in the ECJ's court.

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Towards a holistic principle of proportionality of criminal penalties in EU criminal justice? The emerging role of Article 49(3) of the Charter

Lorenzo Grossio

The principle of proportionality of penalties constitutes a key criminal law principle in contemporary legal orders. As a result of the profound evolution of EU criminal justice over the last thirty years, this principle is no more confined to Member States' criminal systems. Instead, it emerges as a specific application of the general principle of proportionality underpinning the EU legal order. The presentation aims at assessing the current state of this evolution.

Even though the principle at issue is enshrined in Article 49(3) of the Charter, according to which “the severity of penalties must not be disproportionate to the criminal offence”, the ECJ has long abstained from enhancing this provision in its case law. The Court has usually construed its proportionality assessment by relying on different parameters, namely Article 52(1) of the Charter, the TFEU provisions implying proportionality scrutiny over domestic measures interfering with the enjoyment of EU fundamental liberties, and secondary law provisions enshrining a proportionality requirement under the framework of the *Greek maize* obligation.

Yet, the most recent case-law discloses a structural paradigm shift: the Court has started to rely on Article 49(3) jointly with the above-mentioned alternative sources. One example is particularly explicative of the Court's new approach: while affirming that the *Greek maize* proportionality requirement enshrined in EU secondary law is endowed with direct effect, the Court recently ruled that such a provision “merely reiterates” the one enshrined in Article 49(3) of the Charter (Court of Justice, Judgment of 8 March 2022, Case C-205/20 *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (Effet direct), para. 31).

Against this profound transformation, the presentation will assess whether such an increased relevance of Article 49(3) of the Charter may disclose the rise of a holistic understanding of the principle of proportionality of penalties in EU criminal justice. To address this research question, the analysis will consider both the principle's theoretical construction and its application in judicial practice.

The presentation will firstly unveil that the rise of Article 49(3) of the Charter entails noteworthy advancements in the theorisation of the principle of proportionality of penalties. In fact, previous ECJ jurisprudence showed an incomplete definition of that principle, which appeared as not clearly discernible from the general proportionality principle underpinning the EU legal order as a whole. However, by relying on the wording of Article 49(3) of the Charter, the ECJ has recently insisted on the negative nature of the principle of proportionality of criminal sanctions, to be thus construed as the “prohibition on adopting disproportionate penalties” (Court of Justice, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, cit., para. 24). The analysis will explore the implications of this latter stance, thus discussing how the *revirement* in the conceptual structure of the principle is likely to foster a more coherent theorisation under EU criminal law. Moreover, the presentation will contend that the negative theoretical understanding of the principle of proportionality of the penalty is likely to pave the way to recognising direct effect upon Article 49(3) of the Charter, thus maximising the principle's influence over domestic criminal systems.

Focusing on judicial practice – and in strict connection with this quest for a more fine-grained theorisation – the proposed analysis will secondly disclose some discrepancies in the application of the principle. In fact, two different streams of ECJ case-law may be identified. When scrutinising domestic sanctions potentially interfering with the enjoyment of rights secured by EU law, the Court typically

employs a strict necessity assessment. In this perspective, no criminal penalty may be held proportionate unless limited to what is necessary to attain a genuine dissuasive effect. The same approach has been followed by the Court in its jurisprudence on *ne bis in idem*, where Article 49(3) of the Charter has played a pivotal role in defining in which circumstances the duplication of criminal and administrative sanctions may be compatible with Article 50 of the Charter. Such a “dissuasive effect” paradigm, however, appears to play a decisive role when national criminal sanctions tackling violations of EU law are subject to proportionality scrutiny. In this latter regard, the Court stressed the need to pay due regard to “the relationship between the amount of the fine [...] and the economic benefit derived from the infringement committed, in order to deter offenders” (Court of Justice, Judgment of 11 February 2021, C-77/20 *K.M. (Sanctions infligées au capitaine de navire)*), para. 48).

The presentation will discuss whether this dichotomy actually reflects a duality of standard of review. While the divide in the ECJ approaches will be hardly overstepped in the near future, the presentation will discuss its implications for the potential emergence of a coherent understanding of the principle of proportionality of penalties under Article 49(3) of the Charter.

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Rule of Law and Mutual Trust in the application of the European Arrest Warrant

Angela Festa

The well-known historian Yuval Noah Harari teaches that for any form of cooperative organization to function two alternative conditions should be met: either that all the members know each other intimately – in this way they will know if they can trust each other and if it would be worthwhile to help each other –, or that the group finds its unity around common and shared values.

If the first condition is possible to achieve in small groups, the other one becomes vital in wider compositions.

An organization of integration, particularly wide as the European Union, although constituting a new legal order of international law, is no exception to this rule and requires for its proper functioning its members to respect and promote a complex of fundamental values. Among them, the Rule of law plays a central role.

Indeed, even though the Rule of Law is a broad and interdisciplinary concept that can difficultly be encapsulated in a general or universally accepted academic definition – with the various designations of *État de droit*, *Rechtsstaat*, *Stato di diritto* reflecting different contents according to different legal traditions – its respect is essential to a Community which aims at being a “Community of Law”.

As an umbrella principle including, inter alia, the principles of legality, legal certainty, separation of powers and equality before the law, the ultimate purpose of the Rule of law that can be inferred at EU level is the guarantee of human rights, ensured by an independent and impartial judiciary.

This assumption, which finds its consecration in EU primary law in Article 2 TEU, is becoming increasingly crucial in the last few years, in the light of the worrisome deviations from its respect prominent in some Member States, such as Poland and Hungary.

The reiterated attacks to the independence of the judiciary – which represents a core pillar of the concept of Rule of law irrespective of the thin or thick approach taken with regard to the notion – are seriously putting a strain on the mutual trust that binds together Member States and that, founded on the presumptive adherence to common values (article 49, para. 2, TEU), constitutes the main driver of the integration process and forms the basis of the cooperation between the Member States.

That it is particularly true in the field of criminal cooperation, where the presumption that a judicial system ensures an adequate protection of fundamental rights justifies the recognition and the enforceability of any decision adopted by another national authority.

In this context, the European Arrest Warrant is proving as a very useful tool to verify the implications that the Rule of law violations, particularly with regard to the independence of judiciary, is currently having on cooperation in the criminal field and on mutual trust.

Indeed, by replacing the multilateral extradition procedures with a system of automatic surrender under EU law that rests solely in the hands of judicial authorities, the EAW constitutes a form of judicial cooperation in which judicial independence is right at the center as an essential precondition for the healthy functioning of the instrument. This is the reason why the Court of Justice of the European Union has recognized in several occasions that a lack of independence of the issuing judicial authority is capable of determining the suspension of the cooperation.

Looking for a balance between the need to preserve mutual trust and foster cooperation, by guaranteeing the respect for the Rule of law, the Court has developed a “two-step test” that, in order to preserve the constitutional fabric of the Union when the basic common vision appears to falter, is aimed at promoting a deeper understanding of national systems, in accordance with the already mentioned need that the members of a group know each other intimately, so that the cooperation can work.

However, trying to make coexist mutual trust with systemic deficiencies in the Rule of law, the Court is drawing a fragile balance, that works as long as the political institutions will not adopt a serious position on the Article 7 procedures (still pending against Poland and Hungary) and as long as that balance is called into question by further developments in national contexts.

In the light of the above, the brief intervention intends to focus on the dimension that both Rule of law and mutual trust are assuming in the European legal order and on the implications that the Rule of law violations is currently having on the latter in the light of the evolutionary jurisprudence of the Court of Justice, by making use of the European Arrest Warrant in the attempt to verify whether mutual trust emerges strengthened or completely compromised from the violations of the Rule of law stress test.

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Interactions between the European Investigation Order and the Principle of Mutual Recognition

István Szijártó

The European Investigation Order (hereinafter referred to as EIO) – as defined by Article 1 of Directive 2014/41/EU – 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 (the executing State) to obtain evidence in accordance with the Directive.

As such, the EIO is a tool of judicial cooperation in criminal matters with a specific focus regarding the investigation phase of the criminal procedure. Directive 2014/41/EU was adopted in 2014 with the objective to create a comprehensive tool which can replace the then applied – rather fragmented – framework of cooperation in the phase of investigation. In an attempt to do so, the EIO is modelled after the European Arrest Warrant (hereinafter referred to as EAW) and is based on the principle of mutual recognition. As a result, the directive applies the usual regulatory techniques which give effect to the principle of mutual recognition. It incorporates the legal obligation of recognition and execution based on a formal assessment. It also sets deadlines for recognition and execution of the EIO. It sets out a form which can be used to issue an EIO, and it also limits the grounds for non-recognition or non-execution of the Order.

Although rules underpinning the application of the principle of mutual recognition incorporated in the Directive are similar to those, set out in the framework decision establishing the EAW, they also incorporate solutions that were not applied before. Besides the fact that grounds for non-recognition and non-execution of the Order necessarily differ to a certain extent from the grounds provided in the EAW framework decision due to the different objectives and nature of the legal instruments, the EIO directive expressly sets out a consultation mechanism for specific cases when the investigative measure ordered in the EIO are either not applicable in a similar case in the executing Member State or the aims of the investigative measures can be achieved through less intrusive measures as well. In such cases, the issuing and executing authorities directly communicate with each other, where the issuing authority may decide to withdraw the EIO if the executing authority cannot execute or decides to have recourse to another, less intrusive investigative measure.

Another added-value of the EIO directive is that it incorporates a so called fundamental-rights-rejection-ground which provides the possibility to reject the EIO if 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. The EIO directive was interestingly the first secondary source in the field of judicial cooperation in criminal matters which expressly incorporated such a rejection ground which even preceded the *Aranyosi and Căldăraru* joined cases in 2016 where the Court of Justice of the European Union (hereinafter referred to as CJEU) basically created a very similar mechanism for the protection of fundamental rights. Even though the fundamental-rights-rejection-ground – in theory – should have a great importance, no recourse to it has yet to be identified. However, the CJEU already weighed in on its applicability in a Bulgarian criminal procedure where the right to an effective legal remedy of the accused was in danger due to Bulgarian transposing legislation regarding the right to legal remedies in connection to the EIO.

This leads us to the final note, namely that the EIO finally expanded the application of the principle of mutual recognition over the investigation phase, while simultaneously establishing the jurisdiction of the CJEU over cases of judicial cooperation in that phase. As a result, the CJEU gained the possibility to provide preliminary rulings in questions of judicial cooperation in the investigation phase. Consequently,

it already delivered judgements in two cases which substantially affect the application of the EIO, and also the protection of fundamental rights in the judicial cooperation in the investigation phase. In the *Gavanozov II* case, it set out a standard of protection regarding the right to an effective legal remedy, while in the *Staatanwaltschaft Wien* case, it clarified the meaning of judicial authority as applied in the EIO framework.

In conclusion, the EIO directive was not only influenced by the model of giving effect to the principle of mutual recognition, but arguably it also contributed novel instruments to the current system of operative cooperation based on that principle by establishing a consultation mechanism between Member States and setting out a fundamental-rights-rejection-ground. In addition, the CJEU gained jurisdiction which it truly practices. By doing so, the current system of operative cooperation already moved, a hopefully will move even more in a direction where mutual trust between Member States is strengthened through the operation of criminal justice systems which are more considerate of fundamental rights.

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