

The Principle of Proportionality in the Jurisprudence of the Court of Justice of the European Union

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Abstract:

In this paper the author will assess and analyze the proportionality principle in EU law from a legal perspective of the Treaties of the EU and in particular from the perspective of the jurisprudence of the Court of Justice of the European Union (the Court) with the aim of discovering the role of the Court on the interpretation and determination of this principle.

The Court with its jurisprudence has played a pivotal role regarding the principle. From its early decisions the Court has referred to proportionality and then has recognized proportionality as a general principle of EU before it was set up in the European Community Treaty (ECT). In determining the elements of the observance over proportionality the Court has referred to Member States' law, especially Germany, distinguishing three elements required to pass the proportionality test and sometimes only two of them are needed.

In analyzing the jurisprudence of the Court the article will distinguish two major groups of cases: cases asking the annulment of an act of a Community institution and cases that examine the legality of acts of the institutions of the Member States. From the assessment of the Court's decisions, it can be understood that its approach on proportionality differs on the fact to which group the case belongs.

Key words: principle, proportionality, treaty, jurisprudence, Court.

1. Introduction

Proportionality plays a significant role in comparative constitutional law and legal theory as well as in the context of the international law of conflict, where it is used to determine the appropriate use of force. It is also found in criminal law to determine the appropriate measure of punishment or the limits of the permissible use of force in self-defence.¹ Within EU law proportionality is a principle that mainly serves as a framework for decisions to determine whether and/or to what extent rights can be limited by governmental intervention (such as legislation) that is motivated by public interests. The proportionality test applies to measures taken at Union level as well as at the level of the Member States.²

The proportionality principle has been adopted notably by the Court of Justice of the European Union (the Court), which with its jurisprudence has played a fundamental role in the development of European Union (EU) law, as well as the institutional triangle Council-Commission-Parliament. This role is particularly evident in the elaboration and formulation of EU law principles.

The Court has recognized the proportionality as a general principle of law still before it was set out in Article 5 (3) of the European Community Treaty (ECT). The word ‘general’ in general principle of law refers, first, to the fact that the respective principle of law is inherent in a series of infinite applications of the law.³

Second, the word ‘general’ refers to the fact that the principle of law must be perceived as having some universal quest. What makes a principle of law general or universal in

¹ W. Sauter (2013) “*Proportionality in EU law: a balancing act*”, Nederlandse Zorgautoriteit, pg 1

² *Ibid*

³ Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer, 1996), pg 115 (cited in T. Harbo “*The Function*

the context of EU law is, in other words, the fact that the principle of law is also present in other national or international systems of law. When the Court holds that the proportionality principle is a general principle of law it means that the proportionality principle is also part of other systems of law and, in that respect, transcends the barriers of contextuality erected between them. More concretely, the Court has found support for its proposition that proportionality is a general principle of law with reference to (some of) the Member States' legal orders. The proportionality principle can thus be found both in German and French administrative law, and German constitutional law.⁴

In the Treaty of Lisbon, the principle is included in paragraphs 1 and 4 of Article 5 of the Treaty of the European Union (TEU) as following : " 1. *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (. . .)* 4. *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. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality*"

According to the Treaty provisions, the principle of proportionality, similarly to the principle of subsidiarity, is related to the exercise of powers by the EU. The institution of the EU shall take actions within specified bounds and the content and form of that action must be in accordance with the aim pursued. The involvement of the institutions must be limited to what is necessary to achieve the objectives of the Treaties.

of the Proportionality Principle in EU Law" European Law Journal, Vol. 16, No. 2, March 2010, pg 159)

⁴ *Ibid.*

According to Emiliou “Proportionality, as a principle stated in the Treaty, not developed by the Court, is designed to apply primarily at the legislative rather than the implementation stage”. This appears to be confirmed by the Protocol “On the application of Subsidiarity and proportionality” (the Protocol) mentioned in Article 5 TEU. It requires the institutions of the EU to consult their legislative proposals widely, to justify them with regard to the abovementioned principles and to take into account the views of the national parliament. This said, the Protocol focuses largely on subsidiarity and it is difficult to identify the proportionality aspects of the procedure. Compared to the political nature of subsidiarity, proportionality seems more suitable for judicial application.⁵

2. Proportionality in the jurisprudence of the Court

The Court, in developing principles of Community law was addressed to the national legal systems. In recognition of proportionality as a general principle of law it was referred especially to the German law, in which is found a complete version of the principle. Under German law, proportionality involves three criteria:

1. Appropriateness of the measure taken with the objective it seeks to achieve,
2. The necessity of the measure, which means that the administrative body could not use another mean less restrictive, and
3. Measures should be proportionate to the objective to be achieved.⁶

The first two criteria of classical German concept on proportionality are expressed in Community law.⁷ Regarding

⁵ W. Sauter (2013) “ *Proportionality in EU law: a balancing act*” , Nederlandse Zorgautoriteit , pg. 9

⁶ J. Schwarze (1992) “European Administrative Law”, pg. 685 – 686, (cited in P. Craig (2006) “EU Administrative Law”, pg.655)

the third criterion, also known as proportionality in *strictu sense*, there was often a confusion about whether it is part of the review of observance of the principle in Community law. If proportionality would only include the criteria of appropriateness and necessity, and these are respected, measures will be assessed legitimate even if the obligation that it imposes to the individual is not proportional to the objective.⁸ The Court has first referred to the concept of proportionality in 1954 in its two decisions regarding the provisions of the Treaty establishing the European Coal and Steel Community. But, as a general principle of EU law, proportionality was held by the court in the case *Internationale Handdeslgesellschaft*.⁹ The Court recognized proportionality as a general principle of law and an integral part of Community law when it states that:

the principle of proportionality which forms part of the general principles of law, ... As these principles are recognized by all Member States, the principle of proportionality forms an integral part of the EEC treaty.

Also, the respect of proportionality was closely related to the respect of the principal of fundamental rights in Community law. Regarding the respect of fundamental rights the Court stated:

In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

⁷ P. Craig (2006), "EU Administrative Law", pg. 657

⁸ *Ibid*

⁹ Case 11/70 (ECJ) "*Internationale Handdeslgesellschaft mbH kundër Einfhur-und Vorrastsstellec fur Getreide und Futtermittel*", 1970.

Moreover, the Court refers also to the national law¹⁰ when it comes to establish the justification of a method used by the Community to attain a given objective:

But both in Community law and in national law there is violation of the principle of proportionality only where no objectively defensible consideration can justify recourse to a specific method intended to attain a given objective. In this instance, therefore, it is merely a question of establishing whether or not the economic assessment on which the legislature of the EEC based the regulations in dispute is vitiated by obvious errors.

Regarding the observance of the criteria of the principle of proportionality, the Community courts in their decisions do not always refer to the third criterion contained in the German concept. In general they do this in the case when the applicant submits arguments directly related to this criterion.¹¹

In *Fromançais*,¹² the applicant asked for the incompatibility with the principle of proportionality of a provision in a regulation which totally excluded the release of security if butter for which the security was paid was processed after the expiry of the period prescribed. The Court found the measure taken by the institution of the Community “proportionate to the aims of the regulations concerned. The Court held:

In order to establish whether a provision of 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 the aim correspond to the importance of the aim and in the second place, whether they are necessary for its achievement.

Such an approach was also held in "Germany vs European Parliament and Council of the European Union", which is

¹⁰ German Basic Law

¹¹ P. Craig, “*EU administrative law*”, pg. 657

¹² Case 66/82 (ECJ) “*Fromançais v FORMA*”, 1983.

analysed below. The expression “correspond to the importance of the aim” may relate as well to the first element (suitability) as to the third element (disproportionate character).¹³

However, the Court referred to three criteria of proportionality in *Fedesa*¹⁴ case. The Court was asked to examine the validity of a Community directive imposing an outright prohibition on the administration of certain hormone substances to animals. In its judgement the Court Stated that:

The principle of proportionality ... requires that the prohibitory measures are appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question, when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. However, with regard to judicial review of compliance with those conditions it must be borne in mind that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty.

The Court relied on the applicant's arguments in its reference to the three criteria of the principle of proportionality, but without stopping in the definition of each of them. At the conclusion of the review, it found no violation of the principle of proportionality. Rather, it held that although the prohibition may have brought some financial loss to some traders it can not be seen as manifestly disproportionate.

Although the Court made reference to the three criteria, it held a least restrictive means test/approach considering that the legality of a measure adopted in the sphere of common agriculture policy can be affected only if the measure is

¹³ W. Van Gerven “The effect of proportionality on the actions of Member States of the European Community: National viewpoints from Continental Europe” in E.Ellis (ed) (2000) “The principle of proportionality in the laws of Europe”, pg. 40

¹⁴ Case 331/88 (ECJ) “*Fedesa v Komisionit*”, 1990.

manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.

In the wide jurisprudence of the Court related to the principle of proportionality, the decisions can also be divided into two groups: the cases in which is contested the Community acts and cases that examine the legality of acts of the institutions of the Member States.

In the first group, the most contentious community acts on the basis of proportionality are those in the areas of social and economic policies, respect for the rights recognized by EU law and regulations that impose financial obligations. These judgments relate to the rejection of Community acts and more specifically the legality of the provisions of regulations or directives. Most of them are approved by the Council or the European Parliament in cooperation with the Council. Consequently, it is clear that, under the principle of proportionality, may be required not only review the legality of administrative acts adopted by the Commission but also of legislative acts.

Thus, in the case *United Kingdom v the Council*¹⁵, it was asked the annulment of a directive¹⁶ of the Council adopted under Article 118 (a) of the ECT concerning certain aspects of the organization of working time. United Kingdom submitted that under this Article the Council: "may adopt, by means of directives minimum requirements applicable step by step, considering the conditions and technical rules that exist in each of the Member States . . ." and that these guidelines "do not decide administrative, financial and legal constraints, to prevent the creation and development of small and medium enterprises".

The United Kingdom contention's to annul the directive on the grounds, in particular, that there was an error as to the

¹⁵ Case 84/94 (ECJ) "*United Kingdom v Council*", 1996

¹⁶ Council Directive, 93/104/EC, 23 November 1993

choice of legal basis and that the principle of proportionality had been infringed. was rejected by the Court.

After examining the scope of Article 118 (a), the Court holds that:

where the principal aim of a measure is the protection of the health and safety of workers, that article must be the legal base, albeit such a measure may have ancillary effects on the establishment and functioning of the internal market. It also considers, on the basis in particular of the wording of Article 118a, that this provision cannot, contrary to the United Kingdom's contention, be given a restrictive interpretation.

Subject to that finding, the Court considers that in terms of its aim and content, the directive's principal objective is the protection of the health and safety of workers by the imposition of minimum requirements for gradual implementation.

As regards the principle of proportionality, once again the Court held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.

The Court's reasoning continued stating that the Council has a broad discretion in an area which includes, as in this case, social policy choices and requires it to perform an evaluation in complex. Moreover, The Court finds that, in the sphere of the protection of the health and safety of workers, the minimum requirements laid down by the Council may go beyond the lowest level of protection established by the various Member States. Consequently, judicial review of this discretion should be limited and can only be realized if the Council 'commits a manifest error, or is responsible of a misuse of powers and manifestly exceeds the bounds of its discretion. Within the confines of its limited power of judicial review, the Court holds that the Council did not commit any manifest error,

was not guilty of a misuse of powers and did not manifestly exceed the bounds of its discretion.

Regarding the first condition, it is sufficient that, according to the Court, the measures on the organization of working time which form the subject-matter of the directive, contribute directly to the improvement of health and safety protection for workers within the meaning of Article 118 (a), and cannot therefore be regarded as unsuited to the purpose of achieving the objective pursued.

The second condition is also fulfilled. Contrary to the view taken by the applicant, the Council did not commit any manifest error in concluding that the contested measures were necessary to achieve the objective of protecting the health and safety of workers and the harmonization of national legislation on health and safety of workers cannot be achieved by less restrictive measures than those provided in the Directive in question. Consequently, the Court found no violation of the principle of proportionality by the Council.

Even in the case *Binder*¹⁷ the Court rejected the objection of a Council regulation on protective measures applicable to imports of frozen fruits. In its assessment of the effects and justification of measures the Court concluded that the applicant's arguments on proportionality of protective measures were unfounded, because:

“First, it was no breach of the principle of proportionality for the Commission to set a minimum import price under Regulation No 2198/90 which did not take account of the quality of the strawberries imported but only of the method by which they had been processed...

Secondly, the Commission did not act contrary to the principle of proportionality by providing for the conversion of the minimum price, fixed in ecus, into national currency on the basis of the agricultural conversion rates set out in Article 2(1) (b) of Regulation No 1676/85, since that provision specifies

¹⁷ Case 205/94 “*Binder GmbH & Co. International vs Hauptzollamt Stuttgart - West*”, 1996.

that those rates are to be applied in the case of legal instruments relating to the common agricultural policy.

Furthermore, the import price arrived at by that conversion method did not exceed the level required to make the protective measures effective.

Lastly, the period of application of Regulation No 3797/90 cannot be regarded as too lengthy, since throughout that time the conditions of the Community market and, specifically, the conditions for importing frozen strawberries from nonmember countries were not materially altered.”

The principle of proportionality in the jurisprudence of the Court is also analyzed to search the compliance of the acts of the national institutions with Community law¹⁸ and mostly in the context of respect for the four freedoms, parity and how these principles oblige Member States in the implementation of Community law.¹⁹

There are a number of decisions of the Community Court where there was a violation of one of the four freedoms. In these cases, the defendant Member State is protected by arguing that the violation is justified on the basis of specific reasons defined in the relevant article of the Treaty.

Thus, for example, Article 30 of the ECT provides that:

“The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historical or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

¹⁸ W. Van Gerven “The effect of proportionality on the actions of Member States of the European Community: National viewpoints from Continental Europe” in E.Ellis (ed) (2000) “The principle of proportionality in the laws of Europe”, pg. 40.

¹⁹ P. Craig (2006) “EU Administrative Law”, pg. 687.

Such provisions have been strictly interpreted by the Community courts. The objected rule must belong to one of the categories set up in the article and the burden of proof falls on the Member State which requires to refer to the exceptions²⁰. Also, Member States must comply with the proportionality when adopting measures for the implementation of Community legislation²¹ and to prove that they have respected it. In fact, this is not an explicit requirement of the provisions of the Treaty which allow the imposition of restrictions to the four freedoms, but the Court, however, has requested that the objected measures should be as less restrictive as possible to achieve the goal.

The observance of proportionality principle is asserted as a basic requirement. So, the fact that the restriction of freedom of movement, justified for example on grounds of public health protection, should not constitute a mean of arbitrary discrimination or a hidden restriction on trade between Member States is interpreted by the Community courts as a request for the application of proportionality. Therefore, if such a measure has exceeded beyond what was necessary this would enable a control.

The restrictions imposed by Member States on an important right guaranteed by the Treaty are subject to an extended control by the Community courts to determine whether they are really necessary. Such an attitude can be found in their jurisprudence concerning the freedom of movement of goods, people, services and capital.

A large number of Community court's decisions refer to the observance of proportionality in the context of free movement of goods. It is clear in this jurisprudence that, in assessing the proportionality special attention is paid to the facts on which the protection is based. Member States could not

²⁰ Case 17/93 (ECJ) "*Openbaar Ministerie v Van der Veldt*", 1994; Case 14/02 (ECJ) "*ATRAL SA v Belgium*", 2003.

²¹ Case 313/99 (ECJ) "*Mulligan and others v Ministry of Agriculture and Food, Northern Ireland*", 2002.

simply ask to annul a measure on the grounds of public interest, but they have to provide evidence or data to support their claim. Also, a Member State must pass the test of proportionality.

This clearly results from the case *Commission v Italy*.²² The Commission objected before the Court a law of the Italian state which required prior authorization and payment of administrative expenses in connection with the manufacture and importation of food products for sportsmen. The European Court of Justice in accordance with the established jurisprudence stated that Italian law constituted a measure having equivalent effect to quantitative restrictions and therefore it fell in the field of regulation of Article 28 of the ECT. The Italian government was defended by arguing that the measure was justified in order to protect public health as defined in Article 30 of the ECT.

The Court held that the it is for the Italian government to show that their rules are necessary in order to attain one or more objectives mentioned in Article 30 EC, such as the protection of health and life of humans, or to meet imperative requirements relating, inter alia, to consumer protection and, where appropriate, that the marketing of the products in question poses a serious risk to public health and that those rules are in conformity with the principle of proportionality:

Despite the requests of the Commission, the Italian Government has not shown any alleged risk to public health which the products in question are likely to pose. It failed to explain on what scientific data or medical reports the guidelines which it enclosed were based and has not given general information on those alleged risks. Furthermore, it has not made clear the link between the procedure in question and the alleged risk to public health nor explained the reasons why such protection is more effective than other forms of control and thus proportionate to the objective pursue.

²² Case 270/02 (ECJ) “*Commission v Italy*”, 2004

The court refused even the claim that Italian law could be justified as the protector of consumers:

“Moreover, as the Commission contends, if the procedure in question is, in fact, intended mostly to protect consumers, the Italian Government has also failed to show in what way that procedure is necessary and proportionate to that objective. Less restrictive measures exist for the prevention of such residual risks as misleading consumers, such as notification of the marketing of the product in question of the competent authority by the manufacturer or distributor of that product together with transmission of a model of the labelling and the obligation requiring the manufacturer or the distributor of that product to furnish, if necessary, evidence of the accuracy of the factual data appearing on the label.”

Community courts have had the opportunity to consider the respect of proportionality in the field of complaints for violations of the right to equal pay. The right to equal pay can be overridden by the case of direct and indirect discrimination on bonuses given to men and women. Indirect discrimination is prohibited, unless the defendant proves the existence of objective reasons.

Often, the Court has left the national courts to determine the objective reasons. However, it has provided guidance on this term and the test that it has formulated is very similar to the proportionality test applied in the case law regarding the four freedoms. This is clear in the case *Bilka-Kaufhaus*²³, which concerned the inclusion of part-time workers in pension scheme:

Where therefore statistics which the national court considers significant disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

It is for the national court, which has sole jurisdiction to make findings of fact, to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men.

If the national court finds that the measures selected by the employer correspond to a real need, are appropriate to the objectives and necessary to achieve those, then the fact that they affect a greater number of women than men is not sufficient to determine that they constitute a violation of Article 119.

The instructions given to national courts constitutes a proportionality test review. Thus, a measure of indirect discrimination can be justified only if it refers to a "real need" to employers, whether it is "appropriate" and "necessary" to achieve the objective.

Also, it must be acknowledged that the proportionality acts as an obligation for Member States when they adopt community norms such as regulations²⁴ and directives, regardless of the area of the community action and that they should respect the proportionality in taking measures for the implementation of Community legislation.²⁵

As above, we can assume that the principle of proportionality constitutes a basis for judicial review of national and community legislation or administrative measures.

²³ Case 170/84 *Bilka-Kaufhaus GmbH v Kevin Weber von Hartz*, 1986

²⁴ Case 29/95 (ECJ) *Pastors and Trans-Cap GmbH v Belgium*, 1997.

²⁵ Case 313/99 (ECJ) *Mulligan and others v Ministry of Agriculture and Food, Northern Ireland*, 2002; Case 484/99 (ECJ) *Azienda Agricola Ettoe Ribaldi v AIMA*, 2004.

3. Conclusions

From its early decisions the Court has referred to proportionality and then has recognized proportionality as a general principle of EU, before it was set up in the provision of ECT. However, its role remained important regarding the principle, because it has processed the conditions to be met by a Community or national act to be consistent with proportionality:

1. Appropriateness of the measure taken with the objective it seeks to achieve,
2. The necessity of the measure, which means that the administrative body could not use another mean less restrictive, and
3. Measures should be proportionate to the objective to be achieved.

The Court in its decisions has referred to national law, in particular to German law, in determining the elements of proportionality test review. Thus, unlike other general principles of EU law, such as supremacy or direct effect, which emanate from the legal order of EU, the principle of proportionality stems from the national laws of Member States. From the case law analyzed in this paper results that the Court has not always interpreted the principle of proportionality in the same manner. Also, the degree of intensity of the review and interpretation varies in the Court's decisions.

In some cases, the Court recognizes three elements: suitability, necessity and absence of disproportionate character, whereas in many other instances it refers only to two elements, even without identifying which from the three elements it refers to. Thus in the case law of the Court it can be seen

sometimes a three pronged approach and in others a two pronged approach.²⁶

Finally, the Court's assessment on proportionality varies based on whether the acts under review are acts of EU institutions or acts of national institutions. In the former case a manifestly disproportionate test is applied, in the latter case a least restrictive means test.

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²⁶ W. Van Gerven "The effect of proportionality on the actions of Member States of the European Community: National viewpoints from Continental Europe" in E.Ellis (ed) (2000) "The principle of proportionality in the laws of Europe", pg 40 - 41

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