

## Proportionality in EU law: a balancing act?

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**Abstract:** *Proportionality is a legal principle that plays a key role in constitutional review of public acts. In the EU it legitimizes the constitutional claims of EU law in the context of a multi-level legal system. The application of proportionality in the EU differs based on whether EU legal acts or legal acts of the Member States are concerned. In the former case a manifestly disproportionate test is applied, in the latter case a least restrictive means test. The stringency of the test depends in large part on the degree to which the relevant powers have been centralised. This can be considered to reflect the integration variable. There are almost no instances where strict balancing of (weighted) principles occurs. So far this is consistent with a narrative of constitutionalisation and its limits in the EU. It remains an open question how the application of the principle will develop in future, for example whether it will become more focused on balancing in cases involving individual rights.*

**Key words:** EU law; European Court of Justice; judicial review; legal principles; proportionality; balancing; least restrictive means test; manifestly disproportionate

**JEL codes:** K10, K30, K40

### I Introduction

Proportionality is a legal principle that can be traced most clearly to the 19<sup>th</sup> century Prussian courts. After the Second World War it has spread gradually but worldwide as the scope of constitutional review developed in many jurisdictions. Proportionality plays a significant role in comparative constitutional law and legal theory<sup>1</sup> 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. In the setting of international economic integration proportionality is not just found in the EU but also in the WTO.<sup>2</sup>

This paper will be limited to the administrative law context of the European Union. 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. As we will see a proportionality test also applies to undertakings in the context of competition law.

Defining the content and the scope of the proportionality principle appears to be tricky. In the theoretical literature we find the view that proportionality as a balancing test between competing principles is uniquely suited to deciding constitutional disputes, even with

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<sup>1</sup> R. Alexy, *A theory of constitutional rights*, translation J. Rivers (Oxford University Press, Oxford 2002); A. Barak, *Proportionality: Constitutional rights and their limitations* (Cambridge University Press, Cambridge 2012); D.M. Beatty, *The ultimate rule of law* (Oxford University Press, Oxford 2004); A. Stone Sweet and J. Matthews, "Proportionality balancing and global constitutionalism", (2009) 47 *Columbia Journal of Transnational Law* 73.

<sup>2</sup> P. Delimatsis, Protecting public morals in a digital age: revisiting the WTO rulings on US – Gambling and China – publications and audiovisual products (2011) *Journal of International Economic Law* 257, at 261ff.

mathematical precision.<sup>3</sup> Several EU law specialists suggest the principle can be plied to achieve various degrees of deference.<sup>4</sup> It is also subject to the charge that in the EU context it is devoid of meaning altogether.<sup>5</sup> By contrast one seasoned observer, Schwarze, believes the proportionality principle is the most important general principle in the field of EU economic law because in the absence of a detailed system of EU administrative law it judges measures by the relationship between the objective pursued and the methods used.<sup>6</sup>

These apparently disparate views may be due to the fact that because the EU is a multi-level system of governance not just the balance between the EU and its Member States but also that between individual rights and public policy is involved. In this context a proliferation of different proportionality tests appears to have occurred, which remains to be explained. In addition to the application of proportionality at the EU level and vis-à-vis the Member States, for comparative purposes we will look at proportionality in the context of EU competition law. Here the test is to what extent private infringements of these rules are justified by competing benefits that are generally defined in economic terms. The objective of this exercise is to see whether there is room for cross-fertilisation between the public and the private spheres.

The questions addressed in this paper are as follows:

- How is proportionality defined in EU law, notably the case law?
- How is it applied in the different spheres, for what reasons and with what results?
- To what extent can disparate results be explained by the context of EU integration?

We will first discuss the background of the principle in some more detail including the theoretical and EU constitutional dimension. Here the role of proportionality in the Treaty and Protocol on Subsidiarity and proportionality as a principle for the division of legislative power is also considered briefly. Second, we will examine the main elements of the proportionality test(s) applied. Third we will look at the application of the principle vis-à-vis the EU level. The fourth section concerning the Member States will look inter alia at the market access standard versus citizenship. Fifth, we will examine proportionality in relation to private parties (undertakings) in EU competition law. The conclusion (which is at this stage tentative) takes up the research questions again.

First an aside may be in order. Because the objective of this paper is to discuss proportionality in EU law in general I have tried to use cases that provide a broad mixture of examples. This has succeeded only in part. As is well known especially in the early years of the EU the common agricultural policy was at the cutting edge of legal developments, and this includes those regarding proportionality. A different bias is that in favour of the healthcare today which is the sector with which I am most familiar and which illustrates the opposite case: here the Treaty prescribes subsidiarity (yet individual rights play a mitigating role).

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<sup>3</sup> M. Klatt and M. Meister, *The constitutional structure of proportionality* (Oxford University Press, Oxford 2012); Alexy, above note \*\*.

<sup>4</sup> G. de Búrca, “The principle of proportionality and its application in EC law”, (1993) *Yearbook of European Law* 105, at 126; J. Jans, “Proportionality revisited”, (2000) *Legal Issues of Economic Integration* 239: “(...) the nature of the interest to be protected is relevant to the manner in which the Court will apply the proportionality principle” at 246. And “(...) the seriousness of the restriction will affect the intensity of the test”. *Ibid*, 253.

<sup>5</sup> T.I. Harbo, “The function of the proportionality principle in EU law”, (2010) *European Law Journal* 158.

<sup>6</sup> J. Schwartz, *European administrative law*, revised ed (Sweet&Maxwell, London 2006), at pp. 664-665, citing J. Gündisch and B. Schlink. This echoes the claims made for proportionality in the world of constitutionalism at large, see e.g. Alexy, Barak, and Beatty above note \*\*.

## II Background

### *Proportionality and legal theory*

Legal theorists, foremost the German constitutional scholar Robert Alexy and his followers have developed the principle of proportionality (or balancing: strict proportionality) as the gold standard of constitutional adjudication which allows all different rights and principles to be weighed against each other in the same dimension. According to Alexy:

Constitutional judgments are only correct if they correspond to the outcome of an appropriate balancing of principles.<sup>7</sup>

This presupposes that certain individual rights are not given trump status meaning that they cannot be overruled by public policies or submitted to compromise solutions to accommodate such policies – as would be the claim of liberal legal scholars that is exemplified by Ronald Dworkin.<sup>8</sup> If rights can be absolute then there is no room for proportionality. An important additional feature of proportionality as construed by Alexy is the following:

The Law of Balancing requires the increasing intensity of interference with liberty to be matched by an increasing weight of reasons justifying the interference.<sup>9</sup>

Alexy and others<sup>10</sup> have set out in mathematical notation how the balancing test can be applied. This is based on the notion that the test consists of three rules, that is the value of the interference of the individual interest, second the value of satisfying the public interest and third whether the importance of satisfying the public interest can justify the detriment of the individual's right.<sup>11</sup> The values assigned range from light to intermediate and serious, and by ranking them in this manner balancing decisions can be made more rational.

This paper does not aim to enter into the legal theoretical debate as such, but to be informed by it. A good example of the application of the legal theory on proportionality to the EU is provided by Harbo, who claims there is no discernible pattern to proportionality testing in the EU: “The dissection of the principle reveals that the principle has no clear or fixed substantial meaning”<sup>12</sup> and “(A)t some stage one could even question whether the court, although claiming to do so, is really applying the principle of proportionality in the first place.”<sup>13</sup> He suggests the explanation of the pattern found by a number of scholars (De Búrca, Craig, Jans, and Tridimas) of manifestly disproportionate testing of EU measures and LRM testing of the Member States instead of balancing is provided by the promoting of European integration. His conclusion is that the manifestly disproportionate test is in fact a reasonableness test in disguise, which leads to problems for the legitimacy of EU judicial making or at least creates

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<sup>7</sup> Alexy, above note 1, at 210.

<sup>8</sup> R. Dworkin, *Takings rights seriously* (Bloomsbury, London 2011, first published 1977). Cf. Harbo, above note 5, at 166.

<sup>9</sup> Alexy, above note 1, at 231.

<sup>10</sup> Klatt and Meister, above note 3.

<sup>11</sup> “According to the law of balancing, a three-step test is required: first the degree of non-satisfaction of the first principle is established; secondly, the importance of satisfying the competing principle is established; and thirdly, it is established whether the importance of satisfying the second principle can justify the degree of non-satisfaction of the first principle.” *Ibid.*, at 79.

<sup>12</sup> Harbo, above note 5, at 160.

<sup>13</sup> *Ibid.*, at 171.

a presumption of strong legislative sovereignty. As regards the existence of balancing in the EU the mainstream approach appears to be formulated by Lenaerts and Gutiérrez-Fons:

Given that no principle encapsulating an individual right in the general interest is absolute, the courts must engage in balancing to evaluate whether a legal norm is consistent with a general principle.<sup>14</sup>

This suggests that balancing is taking place but perhaps not in the specific form advocated by Alexy and in the EU context by Harbo. We will get back to Harbo's criticism in the conclusion especially as regards the integration variable and now move on to look at the origins of proportionality in EU law, followed an examination of the EU dimension.

#### *The origins of proportionality in national law*

Together with supremacy, direct effect and state liability, proportionality is one of the core general principles of EU law. However the former three principles were derived from the EU legal order itself whereas in the EU context proportionality has been derived from the laws of the Member States. In this context usually especially Germany – *Verhältnismässigkeit* – and France – with various general principles of administrative law such as *erreur manifeste d'appréciation*, and *détournement de pouvoir* are generally mentioned.<sup>15</sup> A milder version of the principle is arguably found in UK common law as *Wednesbury* unreasonableness.<sup>16</sup> We will not examine the nature of these national tests and their relation to EU law further, but is useful to say a few words about the setting.

In national law the introduction of proportionality is linked to the late 19<sup>th</sup> and early 20<sup>th</sup> century emergence of the social state under the rule of law.<sup>17</sup> This involved new encroachments on private freedoms that required new constraints on public power and judicial balancing between these two variables. In this manner the rule of law was extended at the same time as property rights were reduced. Subsequently the principle became engrained in national administrative law. More recently among constitutional lawyers proportionality has been hailed as the primary principle that enables constitutional review of state action.<sup>18</sup>

#### *The EU constitutional dimension*

As we have seen the development of the proportionality principle is generally associated with constitutional review of public acts. That is to say there is review of the legality of secondary EU law and of the compatibility with EU law of national law that falls within the scope of EU law.<sup>19</sup> It is therefore necessary to discuss briefly in what sense EU law has a constitutional dimension. Over time the EU Treaties have come to be regarded as having taken on constitutional characteristics as the result of the “constitutionalisation” case law of the

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<sup>14</sup> K. Lenaerts and J. Gutiérrez-Fons, “The constitutional allocation of powers and general principles of EU law” (2010) *Common Market Law Review* 1629, at 1650.

<sup>15</sup> N. Emiliou, *The principle of proportionality in European law: A comparative study* (Kluwer, The Hague 1996).

<sup>16</sup> However *Wednesbury* unreasonableness appears to be something far less intrusive and more respectful of governmental discretion. Not the merits of the decision are tested but a “sanity check” is applied. Cf. P. Craig, “Unreasonableness and proportionality in UK law”, in E. Ellis (ed), *The principle of proportionality in the laws of Europe* (Hart Publishers, Oxford 1999), 85-106; and Lord Hoffmann, “The influence of the European principle of proportionality upon UK law”, in Ellis, op. cit., 107-115, at 108.

<sup>17</sup> Emiliou, above note 15.

<sup>18</sup> Cf. Barak, Stone Sweet and Matthews, above note 1.

<sup>19</sup> Lenaerts and Gutiérrez-Fons, above note 14, at 1649.

European Court of Justice. This is defined most concisely in the Court's 1991 Opinion on the EEA Agreement:

(...) the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (...). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.<sup>20</sup>

Because the successive EUE Treaties were open-textured framework treaties the use of legal principles was required to fill out the structure of EU law. Aside from the abovementioned (i) separate legal order and the (ii) concepts of direct effect, supremacy and state liability for charges of violating EU law the building blocks of the EU constitution include (iii) the respect of general principles of law including fundamental rights – and proportionality – and (iv) the effective enforcement of Community law in national courts.<sup>21</sup> Notwithstanding the failure to ratify an explicit EU Constitution in 2005 we may therefore assume that an implicit constitution was already in place. Two relevant legal perspectives are the early market based “economic constitution” focusing on such rights as property and the principle of free competition (an idea derived from the German law and economics school of Ordoliberalism),<sup>22</sup> and more recently the constitution based on broader individual rights.<sup>23</sup> The latter has been bolstered first by the introduction of EU citizenship with the Maastricht Treaty in 1993 and next by the Charter of fundamental rights of the European Union that was adopted in 2000 and became binding by way of Article 6(1) TEU with the entry into force of the Lisbon Treaty in December 2009.<sup>24</sup> Fundamental rights derived from other common sources are recognised as legal principles according to Article 6(3) TEU.<sup>25</sup> At the same time and in part as a consequence of the broadening of the project of European integration the Ordoliberal economic constitution has declined.

<sup>20</sup> *Opinion 1/91 of the Court pursuant to Article 228 of the EEC Treaty on the Draft Treaty on the establishment of the European Economic Area* [1991] ECR I-6079, para 21. Cf. *Case 294/83 Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para 23.

<sup>21</sup> C. Timmermans, “The constitutionalisation of the European Union”, (2001) *Yearbook of European Law* 1.

<sup>22</sup> Cf. M.E. Streit and W. Mussler, “The economic constitution of the European Community: From ‘Rome’ to ‘Maastricht’” (1995) *European Law Journal* 1; W. Sauter, “The economic constitution of the European Union”, (1998) *Columbia Journal of European Law* 27; C. Joerges, “What is left of the European economic constitution? A melancholic eulogy” (2005) *European Law Review* 461.

<sup>23</sup> The attempt to create an explicit EU Constitutional Treaty failed and was replaced by the Lisbon Treaty in 2007 (TEU and TFEU). Nevertheless the Treaty framework has long been seen as a constitution, cf. A. Rosas and L. Armati, *EU constitutional law: An introduction*, 2<sup>nd</sup> Ed (Hart Publishing, Oxford 2012); C. Joerges, “Law, economics and politics in the constitutionalisation of Europe (2004) *Cambridge Yearbook of European Legal Studies* 123.

<sup>24</sup> Cf. Article 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

<sup>25</sup> Article 6(3) TEU: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

This is the broader context in which constitutional review can be said to take place at EU level when the proportionality principle is applied – notwithstanding that even if the constitutionalisation thesis is not accepted, the proportionality principle is still used in practice when EU law is applied. In any event it has been held that the proportionality principle plays a key role:

After the consolidation of the ECJ’s “constitutional” doctrines of supremacy and direct effect, the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration.<sup>26</sup>

Adopting a constitutional perspective may help to explain the development of proportionality as a part of wider developments in the integration context. As is illustrated by the quotation from the 1991 Opinion on the EEA Agreement, the emergence of the doctrines of supremacy and direct effect were key elements of the constitutionalisation process. As will be developed further in the next sections it appears logical that proportionality can be seen as a counterpart to these doctrines as it does not concern assertions of EU level competence (which the principles of direct effect, supremacy and state liability are assertions of) but instead involves both establishing the limits of EU law and balancing between different rights and principles recognised in EU law.

As discussed in the next section adopting proportionality review of EU acts against principles of EU law has been necessary in order to ensure the acceptance of supremacy and thereby the construction of the EU constitution. This role of proportionality is specific to the EU context and is directly linked to the integration variable. As we will see the application of proportionality in the EU context has other specific features. Balancing between conflicting principles is often regarded as the main purpose of proportionality in current discussions of legal theory and constitutional law. However strict “weighted” balancing between principles is not frequently encountered in the EU setting. Instead a truncated test is generally used. This is a feature that I will also try to explain with reference to the integration context. First we will look at the twin tracks along which proportionality is applied in the EU.

#### *The dual tracks of proportionality in EU law*

In EU law the integration context adds a dimension to proportionality review that clearly differs significantly from the purely national context. This is because in the EU system the allocation of rights and responsibilities between the different levels of government is at issue, in addition to the more general setting of public intervention which encroaches upon individual freedoms.

In EU law a proportionality test is applied both to EU acts and to acts of the Member States. In both cases the consistency with EU law is reviewed, albeit in the case of secondary measures taken at EU level the compatibility with the rules of the Treaties and in the case of the Member States both their implementation of EU measures and the compatibility of national measures with EU law (notably the provisions on free movement) are at stake. As we will see later in more detail, the nature of the proportionality test involved differs significantly, with the EU usually being subjected to a manifestly disproportionate test and the Member States to (modified versions of) a least restrictive means test.

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<sup>26</sup> Stone Sweet and Matthews, above note 1, at 140-141.

Both with regard to the EU and regarding the Member States the degree to which the relevant polices have been centralised plays a role in determining the standard of review. An example is where the Member States invoke national public policy exceptions to principles of EU law such as the market freedoms. The degree to which this is possible depends inter alia on the degree of harmonisation that has been achieved. Likewise the strictness of the test to which EU measures are subjected depends in part on whether common policies are involved.

Two classic cases can be used to illustrate the two strands of proportionality case law with regard to the EU level, respectively the national level.

- In the EU the first application of proportionality as a principle with respect to EU legislation is usually associated with the *Internationale Handelsgesellschaft* Case (1970) in the context of the common agricultural policy (CAP).<sup>27</sup> In this case the Court also embraced the fundamental rights as principles of EU law:

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.<sup>28</sup>

The context was that of warding off a challenge that Community measures would be tested against fundamental rights under national law in Germany, which would have undermined the supremacy of EU law and the authority of the ECJ. By adopting both fundamental rights and proportionality as principles of EU law the ECJ averted this threat and strengthened the constitutional credentials of the EU. The proportionality of the relevant measures could now be tested against the relevant principles purely in EU law terms. Proportionality therefore emerged as an EU legal principle to avoid national constitutional review trumping EU law and in effect reconciled fundamental rights and supremacy. Although the Court in its reasoning did not name the proportionality principle as such the substantive test of necessity and appropriateness was nevertheless used to judge the EU measure at stake (less restrictive means such as declaration system and ex post fines were not held to be equally effective) and the costs involved in the deposit system were not found to be excessive in relation to the value of the traded goods (a balancing test). The principle itself was also dealt with at length by Dutheillet de Lamothe AG in his Opinion.

- A second landmark was the *Cassis de Dijon* Case (1979)<sup>29</sup> where the Court held that minimum alcohol content requirements for spirits imposed by German law were disproportionate compared to informing consumers by way of labelling. Here, the application of proportionality regarded the invocation by a Member State of an exception to EU law. It is worth noting that at the same time *Cassis de Dijon* is linked to (i) the introduction of the principle of mutual recognition which subsequently

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<sup>27</sup> Case 10/70 *Internationale Handelsgesellschaft, bH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 12. An earlier instance in the Coal and steel Community context was Case 8/55 *Fédération Charbonnière de Belgique v High Authority* [1954-1956] ECR English special edition 292 (cited in Emiliou, above note 15). Cf. also Case 29/69 *Erich Stauder v City of Ulm* [1969] ECR 419.

<sup>28</sup> Case 10/70 *Internationale Handelsgesellschaft*, above note \*\*, at 3.

<sup>29</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649. Cf. similarly Case 178/84 *Commission v Germany (Beer purity)* [1987] ECR 1227.

inspired the 1992 internal market drive as well as (ii) the concept of overriding reasons of public interest (also called the “rule of reason”) – an open-ended category of non-discriminatory exceptions not listed in the Treaty.<sup>30</sup> Thus as the scope for the application of EU law was widened so was the scope for the available exceptions.<sup>31</sup> The last element that merits highlighting (iii) is the “information approach” that was used here to determine that the least restrictive means (LRM) of attaining the desired end had not been deployed.<sup>32</sup> This is because labelling was seen as an equally effective alternative.

This dual track proportionality case law has been steadily developed over the years.<sup>33</sup> Before examining this further we will briefly look at proportionality and individual rights and its codification as a legislative principle.

### *Proportionality and individual rights*

In the EU context the issue is not just policing the border between the exercise of public powers and the rights of private individuals as would be the case in constitutional review or administrative review at the level of a nation state. In the EU proportionality also concerns the balance between the different levels of government even when EU law based rights of individual citizens are involved.<sup>34</sup> This is because the individual rights vis-à-vis Member States are also EU law based (and may eventually affect citizenship). Examples are exceptions to the Treaty rules invoked by the Member States that affect individuals, such as the healthcare mobility (or patients’ rights) cases *Kohll* (1998), *Decker* (1998) and *Watts* (2006).<sup>35</sup> Here even if the principle of state intervention to protect healthcare planning is accepted an assessment of the health status and socio-economic factors such as employment effects of the individual patients are required to determine whether reimbursement of cross-border care is indicated under the freedom to provide and receive services. Hence even where public policy exceptions are accepted the individual rights may function as a trump.<sup>36</sup>

### *Article 5 TEU and the proportionality protocol*

Apart from its status as a general legal principle and a principle of EU law developed primarily in the case law of the Court the proportionality principle has also been set out in the Treaty. Article 5 TEU however is not so much a codification of the case law as the addition of a procedural test in the legislative context and even in that setting its likely impact appears

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<sup>30</sup> Non-discrimination is not always adhered to. Cf. Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509.

<sup>31</sup> Cf. W. Sauter and H. Schepel, *State and Market in European Union law: the Public and Private Spheres of the Internal Market Before the EU Courts* (Cambridge University Press, Cambridge 2009).

<sup>32</sup> The impact on EU market integration aside, in terms of effectively influencing consumer behaviour packaging information ranks low in the accounts of behavioural economics that have emerged more recently. Cf. R.H. Thaler and C.R. Sunstein, *Nudge: improving decisions about health, wealth and happiness* (Yale University Press, New Haven 2008).

<sup>33</sup> Cf. T. Tridimas, *The general principles of EU law*, 2<sup>nd</sup> Ed (Oxford University Press, Oxford 2006).

<sup>34</sup> Cf. E. Spaventa, “From Gebhard to Carpenter: towards a (non-) Economic Constitution” (2004) *Common Market Law Review* 743-773. Cf. Schwarze, above note 6, at 864; Jans, above note 4, at 243.

<sup>35</sup> Case C-158/96 *Raymond Kohll v Union des caisses de maladie (Kohll)* [1998] ECR I-1931; Case C-120/95 *Nicolas Decker v Caisse de maladie des employés privés (Decker)* [1998] ECR I-1831; Case C-372/04 *The Queen, ex parte Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325.

<sup>36</sup> Case C-372/04 *Watts*, above note 35. Cf. Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981



limited or at least secondary to that of the principle of subsidiarity. The relevant parts of Article 5 TEU are the 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 Emiliou “(P)roportionality, 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”.<sup>37</sup> This appears to be confirmed by the Protocol on the application of Subsidiarity and proportionality mentioned in Article 5 TEU.<sup>38</sup> 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.

Having set out the general background, we will now move on to discuss the elements of the proportionality test as applied at EU level, and as applied to the level of the Member States.

### III The elements of the proportionality test at EU and at national level

#### *The proportionality test for the EU level*

In EU law necessity and proportionality are linked under the overarching concept of proportionality in the broad sense. However in practice proportionality in the narrow sense is often skipped and necessity generally forms the substance of the test at national level whereas a modified form of balancing is applied to the EU level instead. Effectively there are different proportionality tests for the EU and the national level and that is how they will be discussed here. We will first look at the most general statement of the test at EU level, which consists of four elements.

Under *necessity* comes

1. an appropriate (or suitable) measure
2. in pursuit of a legitimate objective (legality – this is sometimes not counted as a separate step in the test)
3. and among the appropriate measures that which constitutes the least restrictive effective means (LRM)

Finally under *proportionality* in the strict sense comes the balancing test. In EU law this is not finely tuned balancing in the sense of legal theory: here a thumb is firmly placed on the scale in favour of EU discretion (in particular where the relevant powers have been centralised).

4. not manifestly disproportionate in terms of a costs versus benefits balance

<sup>37</sup> Emiliou, above note 15, at 267.

<sup>38</sup> Protocol No. 2 On the application of the principles of subsidiarity and proportionality, OJ 2010, C83/206.

These steps were set out most clearly in *Fedesa* (1990), a case regarding an EU prohibition of the use of hormonal substances in livestock farming:

The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve 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.<sup>39</sup>

It should be noted that not all of these steps are applied in all cases and in particular the least restrictive means test and the manifestly disproportionate standard (steps three and four) are often applied as alternatives rather than complements. In the *Fedesa* Case however the two tests are conflated and less restrictive alternative measures of consumer information and labelling (the information approach pioneered in *Cassis*) were rejected as less effective, leading the measures also to be regarded as not manifestly disproportionate. Even where proportionality in the strict sense is applied an explicit balancing of costs versus benefits is rare – the manifestly disproportionate test, as its wording suggest, forms a rough measure of justice. It is designed to leave a relatively wide margin of discretion to the authorities whose measures are reviewed.

The balancing of costs versus benefits under the proportionality test in the strict sense of *Fedesa* could arguably be quantified in economic terms.<sup>40</sup> However balancing is more difficult if economic benefits of integration are to be balanced against non-economic benefits of national public policy as will often be the case: efficiency versus equity. In theory it is possible to do so by abstracting from costs and benefits in absolute terms. As mentioned above theorists such as Alexy, Klatt and Meister do this using a basic form of a relative weighting of both of the interests involved each on to a scale of one to three.<sup>41</sup> A strong restriction of a particular right could only be justified by an (at least) equally strong public interest. Before providing more detail to the practical application of proportionality at EU level we will first turn to its application regarding the Member States.

#### *The proportionality test for the Member States*

The most explicit formulation of proportionality regarding the Member States – following a reminder that they retain a certain degree of freedom with regard to what they formulate as a

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<sup>39</sup> Case C-331/48 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et al.* [1990] ECR I-4023, para 13. Cf. Joined Cases C-133/93, C-300/93 and C-362/93 *Antonio Crispoltoni v Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v Donatab Srl.* [1994] ECR I-4863, para 40; Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, para 96; Case C-189/01H. *Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij (Foot and mouth disease)* [2001] ECR I-5689, para 80.

<sup>40</sup> For an economic approach cf. A. Portuese, *Principle of proportionality as principle of economic efficiency*, unpublished manuscript 2012. He refers to the Kaldor-Hicks efficiency rather than Pareto efficiency of ECJ balancing, and sees the LRM test as an efficiency review, balancing as a comparative efficiency review.

<sup>41</sup> Alexy, above note 1; Klatt and Meister, above note 3.

public policy exception under EU law<sup>42</sup> – is found in the Opinion of Van Gerven AG on the Irish abortion information services case *SPUC v Grogan* (1991):

(...) it is not sufficient for a national rule to be in pursuance of an imperative requirement of public interest which is justified under Community law, it must also not have any effects beyond that which is necessary. In other words, it must comply with the principle of proportionality.

That principle has two aspects. First, in order for a national rule to be justified under Community law it must be objectively necessary in order to help achieve the aim sought by the rule: that means that it must be useful (or relevant) and indispensable, in other words, it must not be capable of being replaced by an alternative rule which is equally useful but less restrictive of the freedom to supply services. (...) Secondly, even if the national rule is useful and indispensable in order to achieve the aim sought, the Member State must nevertheless drop the rule, or replace it by a less onerous one, if the restrictions caused to intra-Community trade by the rule are disproportionate, that is to say if the restrictions caused are out of proportion to the aim sought by or the result brought about by the national rule.<sup>43</sup>

The test set out by the AG here bears a strong resemblance to that in *Fedesa*. In *SPUC v Grogan* however the Court held that the provision of information about an economic activity (such as abortion services) was not itself a service but “constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State” and hence did not get around to applying a proportionality test.<sup>44</sup>

Alternative formulations of the proportionality test as applied to the Member States exist, which bear less resemblance to the *Fedesa* standard. The most important of these is arguably found in *Gebhard* Case (1995),<sup>45</sup> although (as had been the case in the grounds of the judgment in the abovementioned *Internationale Handelsgesellschaft* Case) the Court does not actually use the term “proportionality”. The context in *Gebhard* was an appeal to the freedom of establishment by a German lawyer who was operating under the title *avvocato* in Italy without having registered at the local bar as required there. The Court stated there are four requirements that must be fulfilled when a Member State hinders or makes less attractive the exercise of the Treaty freedoms:

1. They must be applied in a non-discriminatory manner
2. They must be justified by imperative requirements in the general interest
3. They must be suitable for securing the attainment of the objective which they pursue
4. And they must not go beyond what is necessary in order to attain it.

*Gebhard*, aimed at the Member States, can be contrasted with the *Fedesa* test set out above regarding the EU level. It is noteworthy not just because it applied to non-discriminatory rules as well but also because it seems to call into question the existence of regulation as such.

<sup>42</sup> Case C-159/90 *The Society for the protection of unborn children Ireland Ltd v Stephen Grogan et al (SPUC v Grogan)*. [1991] ECR I-4685, AG Opinion, para 26, note 41, citing Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999; Case 41/74 *Yvonne Van Duyn v Home Office* [1974] ECR 1337.

<sup>43</sup> Case C-159/90 *SPUC v Grogan*, above note 42, AG Opinion, para 27.

<sup>44</sup> *Ibid.*, judgment para 26.

<sup>45</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. Cf. Spaventa, above note 34.

Hence it has been criticised as making all forms of economic regulation in principle subject to the free movement rules. Spaventa has linked this case to the evolving notion of citizenship as an explanation why in some cases, but not all, this invasive approach is taken. In the healthcare context for instance a similar line of case law can be found for services – as in *Watts* (2006), mentioned above.<sup>46</sup> However regarding establishment in cases such as *Apothekerkammer* (2009)<sup>47</sup> the Court seems cautious to avoid upsetting national healthcare systems by applying a strict LRM test. This may be because Member States remain in charge of the level of health protection they want to provide and indeed in charge of the organisation and delivery of health services and medical care as guaranteed by Article 168(7) TFEU. In other words a competence issue appears to be involved, which influences the proportionality standard that is applied.<sup>48</sup> We will return to these issues below.

It bears repeating that in the *Gebhard* test there is no costs versus benefits analysis, or balancing, that is to say no proportionality test in the strict sense. A legitimate objective, an appropriate measure and LRM testing appear to be all that is required. This is worth noting because while it may reflect what occurs in the practice of EU law this is the opposite of what constitutional theorists claim who focus on balancing as the guiding principle to resolve conflicts between constitutional norms and individual rights and hold that constitutional judgments necessarily require the appropriate balancing of principles.<sup>49</sup>

Having set out these preliminary observations we will now examine more closely, first, the application of the proportionality principle at EU level, and next its application to the Member States.

#### **IV Proportionality applied v the EU**

We will now look at the standard of the proportionality test as applied to EU measures. For reasons of space and complexity no attempt is made to distinguish between the various types of measures, although these may well be relevant (such as strict scrutiny of penalties and milder scrutiny of policies).

##### *The literature*

According to Tridimas EU measures are generally judged mildly under the manifestly disproportionate test – whereas Member State measures are subjected to the procrustean least restrictive means test.<sup>50</sup> De Búrca holds that “(...) when action is brought against the Community in an area of discretionary policy-making power, a looser form of the proportionality inquiry is generally used”.<sup>51</sup> She also sums up reasons for deference including the importance of the aim of the measure, the existence of broad discretionary powers and the nature of the interest or the right affected. Schwarze identifies eight different types of setting where proportionality is applied, without however a clear distinction as to the differences in the test used.<sup>52</sup> Craig suggests the proportionality test is increasingly strict when moving from

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<sup>46</sup> Above note 45.

<sup>47</sup> Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes et al v Deutscher Apothekerverband and Helga Neumann-Siewert v Saarland* [2009] ECR I-4171. Cf. Case C-89/09 *Commission v France (medical laboratories)* [2010] ECR I-12941; Case C-84/11 *Marja-Liisa Susisalo, Olli Tuomaala and Merja Ritala*, judgment of 21 June 2012.

<sup>48</sup> L. Hancher and W. Sauter, “One step beyond? From *Sodemare* to *Docmorris*: The EU’s freedom of establishment case law concerning healthcare” (2010) *Common Market Law Review* 117

<sup>49</sup> Alexy, above note 1, at 210.

<sup>50</sup> Cf. Tridimas, above note 33, at 138.

<sup>51</sup> De Búrca, above note 4, at 146.

<sup>52</sup> Schwarze, above note 6,

discretionary policy choices, to cases involving rights and to cases regarding penalties (as in the case of the competition rules, see further below), which are the three types of cases that he distinguishes.<sup>53</sup> We will now look at the various proportionality tests as applied vis-à-vis the EU, without duplicating the detailed work already done by the authors cited above.

#### *LRM testing at EU level*

The explicit use of the LRM test of measures taken at EU level appears to be rare. An exception is *Swedish Match (2004)*<sup>54</sup> where an absolute prohibition on tobacco for oral use included in the EU Directive on the manufacture, presentation and sale of tobacco products was nevertheless found to be proportionate. At issue were the rights to property and the freedom to pursue a trade or profession. In exchange the Community objective of ensuring a high level of protection of human health was invoked. The Court held that other measures such as imposing technical standards on manufacturers or regulating labelling could not have had an equal preventive effect as removing the product from the market. Implied in this analysis is that such a far-reaching remedy was in fact necessary given the importance of the policy goal (as a high level of health protection was an objective of harmonisation). This is therefore an example where the LRM test stumbles on the question whether alternative measures deliver the same level of protection or not. It is also an example where the information approach (labelling) did not provide a LRM.

#### *Manifest inappropriateness testing*

In the previous section we have seen the four elements of the proportionality test as they were set out with regard to the scrutiny of an EU measure in *Fedesa (1990)*.<sup>55</sup> However in this case the Court also held that because the EU legislature has been given discretionary powers in the field concerned, the CAP,

(...) judicial review must be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of discretion.<sup>56</sup>

Hence the not manifestly disproportionate (or not manifestly inappropriate) standard applied. The LRM test was not used here although (as had been the case in the abovementioned *Cassis de Dijon (1979)* involving the application of proportionality versus a Member State) less restrictive means such as labelling would arguably have been available (the “information approach”). The manifestly disproportionate and LRM tests thus appear to be presented as alternatives with the former applied to the EU: in subsequent cases the Court has established clearly that where the EU had discretion the manifestly disproportionate test is appropriate.<sup>57</sup> Because the manifestly disproportionate test is difficult to fail this means marginal review, which generally promotes integration (if we assume for the sake of simplicity that is what the EU measures examined tend to do).

<sup>53</sup> P. Craig, *EU administrative law*, 2<sup>nd</sup> Ed (Oxford University Press, Oxford 2012), at 560-615,

<sup>54</sup> Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd* [2004] ECR I-11893, paras 56-58

<sup>55</sup> Case C-331/88, above note 39.

<sup>56</sup> *Ibid.*, para 8. Cf. Case C-189/01 *Foot and mouth disease*, above note 39, para 80.

<sup>57</sup> Cf. Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. [2002] ECR I-11453, para 123 and the references cited there. Earlier even in the context of the CAP a necessity test was sometimes applied. Cf. the Skimmed-milk powder cases: Case 114-76 *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG*. [1977] ECR 1211; Case 116-76 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten* [1977] ECR 1247; Joined cases 119 and 120-76 *Ölmühle Hamburg AG v Hauptzollamt Hamburg-Waltershof and Kurt A. Becher v Hauptzollamt Bremen-Nord* [1977] ECR 1269.

A rare example of an EU measure being declared manifestly disproportionate occurred in *ABNA* (2005)<sup>58</sup> where the precise composition of animal feedstuffs was required to be disclosed on demand by Community legislation seeking to protect against contamination of the food cycle. The Court found this requirement needlessly infringed the economic interests of the manufacturers especially. Indicating a range for the components involved would have sufficed for information purposes without revealing their trade secrets.

In the *Cotton support scheme* Case (2006) the Court spelled out that given the wide discretion of the Community legislature where the CAP is concerned

What must be ascertained is therefore not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate.<sup>59</sup>

In the *Cotton support scheme* Case the Council had neglected to present the basic data necessary for the Court to verify whether the objectives of the scheme under consideration had been met. Consequently the principle of proportionality was infringed – another rare example of such a verdict on an EU measure. The manifestly disproportionate standard took on the quality of a failure to state reasons.

#### *Justification and procedural guarantees*

Finally, the existence of procedural guarantees of individual rights can play a role in the proportionality assessment of the Court.

The *Food supplements* Case (2005)<sup>60</sup> revolved around the question whether a positive list (allowed substances) could be proportionate. This was deemed to be the case because an appropriate procedure for adding new items to the list existed or in any event could still be created by the Commission as part of its implementing measures. Hence its existence was held to be implicit. The existence of procedural guarantees can therefore be significant in finding measures proportionate in the context of a manifestly disproportionate test even if proportionality itself may not be well suited to establishing procedural rights.<sup>61</sup>

Two more recent cases with a different procedural dimension involved fundamental human rights and the common foreign and security policy: *Kadi* (2008; 2010). These cases arose when private assets were frozen as anti-terrorism measures.<sup>62</sup> In both cases the freezing of assets was in principle held justified by the EU Courts.

(...) the right to property is one of the general principles of Community law. It is not, however, absolute, but must be viewed in relation to its function in society.

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<sup>58</sup> Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd et al. v Secretary of State for Health et al.* ECR I-10423, paras 80-84.

<sup>59</sup> Case C-310/04 *Spain v Council (cotton support scheme)* [2006] ECR I-7285, para 99.

<sup>60</sup> Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales (Food supplements)* [2005] ECR I-6451.

<sup>61</sup> Cf. S. Prechal, “Free movement and procedural requirements: proportionality reconsidered”, (2008) *Legal Issues of European Integration* 201. She advocates the general principles of effective judicial administration and sound administration as a more appropriate foundation for procedural rights than proportionality.

<sup>62</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 369ff; Case T-85/09 *Yassin Abdullah Kadi v Commission* [2010] ECR II-5177, para 194.

Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.<sup>63</sup>

However the Courts held that because there was no procedural safeguard enabling the individuals affected to put their case to the competent authorities an unjustified and therefore disproportionate restriction of their (individual) fundamental right to property was involved. Consequently the contested regulations were annulled. Perhaps because in *Kadi* the essence of individual rights (the right to be heard) was at issue the test applied was more strict than in *Food supplements* where primarily economic entities were concerned (although essentially similar property rights and rights to appeal administrative discretion were involved).

*Kadi* may also be seen as a manifestly disproportionate balancing case because the Court sets out to balance the public interest (although recognising a wide balance of appreciation) and the private interest involved: it declares the freezing of property as not per se disproportionate in relation to the antiterrorism goals and goes into the exceptions to the freezing of property rights that have been made available under the contested regulation – which are then deemed insufficient regarding the absence of the right to be heard).

The handful of cases reviewed above illustrates the predominance of the manifestly disproportionate test, with exceptions, such as the enforcement of minimum procedural guarantees. It therefore appears that limited judicial review prevails with regard to EU measures. This is in line with the literature and suggests a strong position of the Union legislature and executive, as well as, potentially, a pro-integration bias in the standard of judicial review.

## V Proportionality applied v the Member States

Below we will be looking at the variables that determine proportionality testing at the level of the Member States. In particular the LRM test will be examined in greater detail. So will the thesis that the degree of harmonization is crucial for determining the standard that is applied.

### *The degree of harmonisation*

Regarding the Member States proportionality plays an important role especially in the context of Treaty based public policy exceptions or unwritten overriding reasons of general interest that they seek to invoke against the free movement rules.

The fact that thereby the interests of different levels of government are balanced and not just those between individuals and the state may be one of the reasons why there seems to be a greater variety in the different versions of the test applied than where the EU level is involved. The literature provides some indications how to explain this. However these are not easily reconciled. Tridimas cites respect for the constitutional value of the internal market freedoms as an important factor in imposing a strict LRM test.<sup>64</sup> Craig however points out the accommodation of different priorities – or levels of public intervention – set at national level between Member States.<sup>65</sup> Jans holds that the more important the restriction, the stricter the

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<sup>63</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, above note 62, para 355. Cf. Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 23.

<sup>64</sup> Tridimas, above note 33, at 193.

<sup>65</sup> Craig, above note 53, at 616.

test is likely to be.<sup>66</sup> The same is suggested by de Búrca.<sup>67</sup> If this means the more serious the infringement of competing rights, the stricter the test that is applied it squares with Alexy's constitutional theory referred to above.

An important variable appears to be the degree to which a certain policy domain has been harmonised – or pre-empted (where there is shared competence) by the EU level.<sup>68</sup> That is because this indicates the degree to which a common policy exists and/or the degree to which the Member States have acceded to a common regime, sacrificing part of the scope for independent action, even in pursuit of a legitimate purpose. Hence it seems likely that the application of the least restrictive means and manifestly disproportionate tests is subject to variation that may be based not just on the existence of discretionary EU powers but also on the existence or not of harmonisation: in the absence of harmonisation the LRM test is unlikely to be applied to the actions of the Member States.

### *Market access versus citizenship*

As regards the application of the exceptions and overriding reasons of general interest there appear to be two leading alternative interpretations of the case law of the Court.

- The first reading is about market access as the predominant value, which is sometimes associated with the idea of the Treaty framework as an economic constitution. The market access test has become debated especially in the context of the *Keck* case law where it is explicitly mentioned.<sup>69</sup> It also fits in with economics based theories in industrial organization with regard to the importance of the (threat of) effective market entry.<sup>70</sup> Does the market access test exist in reality? Snell argues that the concept market access is devoid of meaning and does not resolve the question whether free movement law is about discrimination or about economic freedom.<sup>71</sup> The case law does not appear to provide a consistent answer.
- The second reading is oriented more toward citizenship and individual rights especially in establishment context. Spaventa's theory based on cases such as *Gebhard* (1995)<sup>72</sup> and *Carpenter* (2002)<sup>73</sup> is that the explanation of why some restraints are acceptable in EU law and others are not is based on the evolving citizenship dimension rather than market access.<sup>74</sup> This seems broadly plausible. It appears to work for instance in the context of healthcare with respect to services but not vis-à-vis establishment (unlike in *Gebhard*). The distinction on the basis of individual rights is

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<sup>66</sup> Jans, above note 4, at 253: "(...) the seriousness of the restriction will affect the intensity of the test."

<sup>67</sup> De Búrca, above note 4, at 126: "The more severe the impact on the Community interest or aim, the lower the degree of deference to the national measure which the Court will display, even if the nature of the State's justification for that measure is one which would generally lead the Court to respect the State's assessment of necessity."

<sup>68</sup> Sauter and Schepel, above note 31. Cf. Article 2 TFEU and D. Chalmers, G. Davies and G. Monti, *European Union law*, 2<sup>nd</sup> Ed (Cambridge University Press, Cambridge 2010), at 206-207.

<sup>69</sup> Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para 17: "Provided that those conditions [non-discrimination] are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty."

<sup>70</sup> Hancher and Sauter, above note 48.

<sup>71</sup> J. Snell, "The notion of market access: a concept or a slogan?", (2010) *Common Market Law Review* 437.

<sup>72</sup> Case C-55/94, above note 45.

<sup>73</sup> Case C-60/00 *M. Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

<sup>74</sup> Above note 34.



difficult to make because in the end individuals (often healthcare professionals) are involved in establishment also.<sup>75</sup> In the healthcare setting however services are favoured over establishment – which could be explained by the trump value of citizenship<sup>76</sup> but also by a desire not to upset the applecart of national market organisation in the absence of a Union competence to provide an alternative. In these cases the right of Member States to determine that standard of healthcare protection unilaterally is generally cited (“no reading across jurisdictions”). The standard for testing their interventions tends to be not balancing or LRM but internal consistency. This is a variety of suitability or appropriateness.

The two theories are not necessarily at odds. This is consistent with Jans’ claim that whereas the principle of proportionality is used as an instrument of market integration it also functions to protect individual rights.<sup>77</sup> The same view is held by Tridimas.<sup>78</sup> Another interpretation is that market access works where this does not clash with national policies that are genuinely in pursuit of a legitimate public interest and in the absence of harmonisation, but that where market integration halts because the relevant competencies remain at national level this situation can still be trumped by EU level individual rights. The latter are increasingly inspired by citizenship. In this reading the competing theories are therefore not mutually exclusive either.<sup>79</sup> We will now look at the case law in more detail.

#### *Necessity and consistency*

As mentioned above the *Gebhard* test requires measures to be (i) non-discriminatory; (ii) justified by imperative requirements in general interest; (iii) suitable for attaining the objective pursued; and (iv) not to go beyond what is necessary. Here no balancing test is mentioned and the focus is on necessity: generally an LRM test. An exception is provided by the cases where suitability – and sometimes necessity – are tested in the sense of the consistency of the national framework at issue.

Where the consistency test is applied LRM testing is foregone in favour of a more holistic approach to the system of which the contested intervention allegedly forms part.<sup>80</sup> Several healthcare cases may again be used as an example. As set out in *Dermoestética* (2008) and *Hartlauer* (2009) inconsistent rules are inappropriate to their stated purpose.<sup>81</sup> Consistency requires that exceptions are applied in line with the stated objectives of the restrictions involved. In the relevant cases necessity is used as a standard that is exchangeable with appropriateness. In *Chao Gómez* (2010) the aim was to promote access to pharmacies as part of a system aiming at equitable spatial distribution of pharmaceutical services, which was in principle accepted as necessary.<sup>82</sup> Similarly in the *Hospital pharmacies* Case (2008) the free

<sup>75</sup> Cf. Hancher and Sauter, above note 48.

<sup>76</sup> Cf. Case C-345/09 *J. A. van Delft et al. v College voor zorgverzekeringen* [2010] ECR I-9879.

<sup>77</sup> Jans, above note 4, at 243.

<sup>78</sup> Tridimas, above note 33, at 193-194.

<sup>79</sup> Snell suggests opting for one standard for situations “(...) without physical movement where subsidiarity-related concerns predominate and another for free movement of natural persons where fundamental rights are in issue.” Above note 71, at 472.

<sup>80</sup> Similarly with respect to the principle of equality *Lenaerts and Gutiérrez-Fons*, above note \*\*, at 1662, with reference to Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet* [2009] ECR I-10567.

<sup>81</sup> Case C-500/06 *Corporación Dermoestética SA v To Me Group Advertising Media* [2008] ECR I- 5785. Case C-169/07 *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] ECR I-1721.

<sup>82</sup> Joined cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)* [2010] ECR I-4629; Case C-84/11 *Marja-Liisa Susisalo, Olli Tuomaala and Merja Ritala*, judgment of 21 June 2012, nyr.

movement of goods restrictions involved (only pharmacists based in the immediate vicinity were allowed to supply hospitals with pharmaceutical products) were held to be necessary in the interest of “the unity and balance of the system”.<sup>83</sup> These are also cases where the individual rights of parties wishing to establish themselves were disregarded.

#### *Necessity and least restrictive means*

The least restrictive means test was clearly set out in the parallel imports of pharmaceuticals case *de Peijper* (1976). Here it was held that reliance on the incumbent competitor (who could easily refuse access) to provide the required documentation

(...) must be regarded as unnecessarily restrictive and cannot therefore come within the exceptions specified in Article 36 of the Treaty, unless it is clearly proved that any other rules or practice would obviously be beyond the means which can reasonably be expected of an administration operating in a normal manner.

In *Cassis* (1979) the Court stated that obstacles to free movement other than the exceptions set out in the Treaty could be accepted in so far as they were (i) necessary in order to attain (ii) a legitimate objective.<sup>84</sup> Packaging information (iii) was found to be a less restrictive alternative for the protection of public health and of consumers than mandatory fixing of alcoholic content (the abovementioned information approach). As was already discussed the *Cassis* Case simultaneously expanded the scope of EU law by introducing the principle of mutual recognition and restricted it by accepting non-codified overriding reasons in the public interest.

In *Danish bottles* (1988) environmental protection by means of recycling was recognised as an essential requirement that may justify necessary and proportional, and non-discriminatory, restrictions of the free movement of goods. In this context the Court stated

If a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods.<sup>85</sup>

The Danish recycling system could only accommodate a limited number of bottle types. For non-approved bottles however a return system to the original retailer could have been set up. Consequently the Court struck down a limitation on the quantity of non-recyclable imported bottles as not necessary and therefore disproportionate.

In *Franzén* (1997), a case with regard to a licensing system (including storage capacity requirements and the payment of fees and charges) for the import of alcoholic beverages the Court held that the Swedish government had not established that such a system was proportionate to the public health aim pursued nor that this aim could not have been pursued by less restrictive means.<sup>86</sup> Hence the Swedish measures were found to have infringed the free movement rules. In *Apothekerkammer* (2009) a German rule that in the interest of the reliability and safety of the provision of pharmaceutical products all pharmacies must be owned by professional pharmacist was upheld because it had not been shown that a LRM

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<sup>83</sup> Case C-141/07 *Commission v Germany (Hospital pharmacies)* [2008] ECR I-6935, para 58.

<sup>84</sup> Case 120/78 *Cassis de Dijon*, above note 29.

<sup>85</sup> Case 302/86 *Commission v Denmark (Danish bottles)* [1988] ECR 4607, para 6.

<sup>86</sup> Case C-189/95 *Criminal proceedings against Harry Franzén* [1997] ECR I-5909, para 76.

would be equally effective.<sup>87</sup> This seems like a reversal of the burden of proof. It is related to the “no hypothetical measures” rule that will be discussed below.

In *Mickelsson and Roos* (2009)<sup>88</sup> Swedish legislation restricting the use of personal watercraft (“jet skis”) to general navigable waterways failed the necessity test. According to the Court the prohibition clearly went further than what was necessary because it also established a regime of exemptions by which other than general navigable waterways could be designated for use by personal watercraft. Although this regime had not been implemented the very fact that it had been provided for in itself demonstrated that an absolute ban beyond general navigable waterways could not be justified based on environmental concerns.

As is illustrated by the cases above the LRM test is widely applied with respect to the Member States. We will now look at the various dimensions of the LRM test. These include in particular the standard of equally effective measures, the ban on reading across jurisdictions and the ban on hypothetical measures. Finally strict proportionality – balancing – is examined.

#### *Least restrictive means – equally effective*

A measure typically passes the LRM test where the same level of protection cannot be provided by the alternative measures available. This can have significant consequences: for instance a complete ban is on occasion found justified as the most effective (rather than the least restrictive) means, as had been found with respect to the EU ban on tobacco products for oral use in *Swedish Match*.

Thus in the *Motorcycle trailers* Case (2009) after recalling that in the absence of full harmonisation Italy retained the competence to determine its level of road safety the Court held with regard to a complete ban on such trailers that

(...) neither the terms of the International Convention on Road Traffic nor those of the recitals in Directives 93/93 and 97/24, referred to by the Italian Republic, allow the presumption that road safety could be ensured at the same level as envisaged by the Italian Republic by a partial prohibition of the circulation of such a combination or by a road traffic authorisation issued subject to compliance with certain conditions.<sup>89</sup>

In the *Medical laboratories* case (2010) the least restrictive means test was applied in the sense that an over 25% share ownership ban for others than medical biologists was found to be proportional because due to the voting rules on key decisions it sufficed in the pursuit of the objective: to guarantee the independence (and thereby allegedly the quality) of medical laboratories run by medical biologists.<sup>90</sup>

#### *Least restrictive means – no reading across jurisdictions*

The notion of no reading across jurisdictions seems to argue against the market access standard that was discussed above. As was stated in *Alpine Investments* (1995) the existence of a prohibition (in this case of cold calling in order to market investment products) does not

<sup>87</sup> Joined cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others (C-171/07) and Helga Neumann-Seiwert (C-172/07) v Saarland and Ministerium für Justiz, Gesundheit und Soziales* [2009] ECR I-4171

<sup>88</sup> Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273.

<sup>89</sup> Case C-110/05 *Commission v Italy (motorcycle trailers)* [2009] ECR I-519, paras 67-68.

<sup>90</sup> Case C-89/09 *Commission v France (medical laboratories)* [2010] ECR I-12941, paras 88-89.

mean there is a restriction of the internal market freedoms just because other Member States apply less strict rules or that are more open to market entrants.<sup>91</sup> The same applies at the level of justifications where restrictions are found: if they retain the right to determine the level and or scope of protection of the public interest concerned,

Member States must be allowed a margin of appreciation and, consequently the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate.<sup>92</sup>

In *Lääri* (1999) the Court held that where the Member States have retained the power to determine the scope of protective measures – in this case the control of gambling:

(...) the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.<sup>93</sup>

Similarly with regard to the degree of healthcare protection provided by the Member States the Court held in *Mac Quen* (2001):<sup>94</sup>

(...) that the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law. (...) The mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal of the need for and the proportionality of the provisions adopted.

In this type of setting (where national competence to establish the level of policy intervention in the market is retained) there is thus not a trace to be found of a LRM test, let alone a standard one. At this level the proportionality test no longer involves a necessity test (the necessity is in effect taken for granted), but evolves into an inherent consistency test.

#### *Least restrictive means – no hypothetical measures*

In the context of the proportionality test of Article 106(2) TFEU on services of general economic interest (SGEI) in the Dutch *Electricity import monopoly* Case (1997) the Court has held that the burden of proof on the Member State for the application of this provision cannot be so extensive as “to (...) prove positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions”.<sup>95</sup>

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<sup>91</sup> Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141

<sup>92</sup> Case C-110/05 *Commission v Italy*, above note 89, para 65.

<sup>93</sup> Case C-124/97 *Markku Juhani Lääri, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjät (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067, para 37.

<sup>94</sup> Case C-108/96 *Criminal proceedings against Dennis Mac Quen et al. (Mac Quen)*. [2001] ECR I-837, paras 33 and 34, With reference to Case C-384/93 *Alpine Investments*, above note \*\*, para 51 and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, para 42; Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289, para 34.

<sup>95</sup> Case C-157/94 *Commission v the Netherlands (electricity import monopoly)* [1997] ECR I-5699, para 58.

Similarly under least restrictive means testing more generally not only is reading across Member States ruled out (at least in the absence of harmonisation, pre-emption and common policies) but the standard does not include any conceivable measure either. Hence in the abovementioned *Motorcycle trailers* Case (2009) the Court held that the

(...) burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.<sup>96</sup>

In conjunction with the no reading across jurisdictions rule this means that the least restrictive means test becomes strictly context dependent – and consequently is more easily satisfied. It may also involve a shift in the burden of proof onto the party that opposes the status quo who may have to demonstrate alternatives are feasible – without reading across jurisdictions. This appears a difficult task. Hence the no hypothetical measures approach seems to work against integration, much as the LRM test taken in isolation would promote integration (as it is more strict than the manifestly disproportionate approach), and a form of balancing of powers more so than just principles or policies seems at issues here.

#### *Least restrictive means – pre-emption*

It has been held that the use of the LRM test may be explained by pre-emption: that is to say in the case of shared competencies the freedom of the Member States is reduced when the EU has occupied the field by taking positive measures.<sup>97</sup> Pre-emption is not unique in this respect: it can simply be regarded as part of a variety of forms that reflect the degree to which policies have been harmonised and/or centralised.

At the same time when implementing measures in order to transpose EU directives the Member States must “make sure that they do not rely on an implementation of them which would be in conflict with (...) fundamental rights or with other general principles of Community law, such as the principle of proportionality”.<sup>98</sup>

#### *Proportionality in the strict sense: balancing*

In spite of the theoretical view of balancing as the essence of proportionality and of the significance assigned to proportionality as a principle of EU law its strict application in a balancing test is rare. This is even so regarding the Member State level. Nevertheless sometimes balancing of rights is carried out without an explicit reference to proportionality, as in *Scarlet* (2011)<sup>99</sup> where on the one hand the right to intellectual property, and on the other hand the right to protection of personal data and the freedom to receive or impart information were involved. In the context of a request for an injunction involving rights under various EU directives the Court held that “a fair balance” was required, which would not be set by the responsible court in the Member State if it required an internet service provider to install the contested traffic filtering system.

#### *Proportionality and fundamental rights*

<sup>96</sup> Case C-110/05 *Commission v Italy*, above note 89, para 65.

<sup>97</sup> Cf. Sauter and Schepel, above note 31, at 182-186. The context here is that of proportionality and services of general economic interest (SGEI) under Article 106(2) TEFU.

<sup>98</sup> Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271, para 70.

<sup>99</sup> Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, judgment of 24 November 2011, nyr, para 53. Cf. P. Larouche, *Legal emulation between regulatory competition and comparative law*, TILEC Discussion Paper 2012-017.

The relationship between proportionality and fundamental rights came up in relation to the approval by the Austrian public authorities for a demonstration concerning environmental issues that blocked the Brenner Pass between Austria and Italy for almost 30 hours in *Schmidberger* (2003).<sup>100</sup> This involved a clash between free movement and fundamental rights, notably the freedom of expression and of assembly. The Court recalled that

(...) since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods<sup>101</sup>

Hence the Court stated that “the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.”<sup>102</sup>

Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.<sup>103</sup>

The fundamental rights of freedom of expression and the freedom of assembly were subject to balancing with the Treaty freedoms and in this case priority was assigned to the fundamental rights concerned.<sup>104</sup> In effect however an LRM test was applied. As the Austrian authorities had claimed uncontradicted that all alternatives would have been more disruptive of trade on balance the Court held that LRM could not have achieved the legitimate aim of the demonstration. Paradoxically therefore it reverted to LRM testing under the head of balancing – and therefore did not apply balancing as such.

#### *Proportionality and private parties*

It should be noted that the action in *Schmidberger* was an appeal against the approval by the Austrian authorities and not against the organizers of the demonstration.<sup>105</sup> Proportionality has also been applied directly in relation to private parties, in the context of industrial action. In *Viking* (2007),<sup>106</sup> and *Laval* (2007)<sup>107</sup> the Court agreed that the right to take collective action is a fundamental right which in principle justifies a restriction of free movement<sup>108</sup> – likewise

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<sup>100</sup> Case C-112/00. *Schmidberger, Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659.

<sup>101</sup> *Ibid.*, para 74.

<sup>102</sup> *Ibid.*, para 81.

<sup>103</sup> *Ibid.*, para 83.

<sup>104</sup> Similarly in Case C-16/02 *Omega Spielhallen – unda Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundestadt Bonn* [2004] ECR I-9609, para 35ff with respect to the respect for human dignity.

<sup>105</sup> The Court recalled that the internal market freedoms also apply where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State. *Ibid.*, para 57, citing Case C-265/95 *Commission v France* [1997] ECR I-6959, para 30.

<sup>106</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, paras 77 and 84ff.

<sup>107</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767, para 93ff.

<sup>108</sup> Earlier collective agreements had been held exempt from the competition rules. Cf. Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751; Case C-350/07 *Kattner*

viewed as fundamental freedoms – provided that it is exercised in accordance with the principle of proportionality.

That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.<sup>109</sup>

That is to say the action taken is suitable to attaining its objective and does not go beyond what is necessary, in other words: a LRM test applies here too. In a loose sense these cases can perhaps be seen as involving a balancing exercise between collective economic rights and individual freedoms based on the TFEU but in a practical sense LRM testing determines the outcome of the exercise, just as it would for restrictions imposed by a Member State.

#### *Proportionality and failure to act*

Finally, the failure by a Member State to act in a necessary and proportionate manner can infringe the proportionality requirement. An example is the case *Commission v France* (1997)<sup>110</sup> where farmers had been allowed to run amok obstructing the free movement of fruit and vegetables without an adequate response by the authorities. Here the Court found France had violated the free movement provisions in conjunction with the good faith clause of Article 5(3) TEU because it had manifestly and persistently abstained from adopting appropriate and adequate measures.<sup>111</sup> This case provides a counterpoint to the abovementioned *Schmidberger* Case (2003) where the rights to freedom of expression and of assembly of peaceful demonstrators were at odds.

What we have seen above is frequent recourse to LRM testing – which would work in favour of integration – albeit with deferential treatment of the market organisation at national level. There is no reading across jurisdictions, instead of which a consistency test – that would work against integration – has developed. Market access (hence establishment) appears to play a secondary role compared to individual rights (hence services). We will now move on to look at the role of proportionality in the framework of competition law.

## **VI Competition law and proportionality**

The relevance of proportionality under the competition rules has not been widely examined yet in the literature.<sup>112</sup> Nevertheless as we shall see proportionality is of considerable and increasing significance in this framework.

Proportionality in competition law differs from what we have so far discussed in relation to EU law in general. This is because: (i) it regards undertakings and therefore primarily private parties, adding a third category of entities alongside the EU and the Member States which are subject to proportionality requirements; and (ii) it generally involves economic rather than public policy based justifications. The exceptions to these rules are formed by the rule on inherent restrictions and by the services of general economic interest (SGEI) that are assigned

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*Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513; Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL*, judgment of 3 March 2011, 44<sup>nyr</sup>.

<sup>109</sup> Case C-438/05 *Viking*, above note 106, para 91.

<sup>110</sup> Case C-265/95 *Commission v France (Spanish strawberries)* [1997] ECR I-6959.

<sup>111</sup> Case C-265/95 *Commission v France*, above note \*\*, para 52 and 65-66.

<sup>112</sup> A notable exception is J. Steenberg, “Proportionality in competition law and policy”, (2008) *Legal Issues of Economic Integration*, 259. Schwarze, above note 6, at 833-842 only discusses the application of proportionality vis-à-vis the Commission’s powers, not the behaviour of undertakings.

by the Member States to undertakings and where it is the relevant constraints on competition (or for that matter free movement) that must be justified in proportionality terms by the Member State, and not by the undertaking carrying out the SGEI.

This concerns first the test whether the competition rules do not apply in spite of the existence of certain restraints (or boundary issues)<sup>113</sup> decided under Article 101(1) TFEU and second, exceptions to competition rules such as Article 101(3) TFEU.

The two examples of boundary criteria are:

- Ancillary restraints (objective necessity), this is a threshold issue
- Article 101(1) TFEU (inherent restrictions; objective justification)

The three types of exceptions that are primarily concerned with efficiency are:

- Article 101(3) TFEU (suitability, indispensability (LRM), balancing)
- Objective justification for dominance abuse<sup>114</sup>
- Efficiency defence in merger control

Finally there is SGEI Article 106(2) TFEU which forms an exception to the competition and (less often) the free movement rules.

In addition in the context of competition law the proportionality test is applied to the European Commission regarding commitments and fines. Steenbergen distinguishes between one-dimensional proportionality in the fining context (balancing a fine and an infringement) and a multidimensional test where pro-and anticompetitive effects of behaviour must be balanced.<sup>115</sup> He also believes that with the recent ascent of effects-based criteria in competition law the relative importance of proportionality is likely to increase.<sup>116</sup>

Below we will briefly cover these various aspects of the application of proportionality in the competition law context

#### *Ancillary restraints*

An ancillary restraint in EU law is a restriction of competition that is directly related (insubordinate and directly linked) and necessary and proportionate to a non-restrictive transaction that is not objectionable from a competition policy point of view. In the words of the General Court “(T)he concept of an ancillary restriction covers any restriction which is directly related and necessary to the implementation of a main operation”.<sup>117</sup>

The test is not based on balancing (strict proportionality), which is reserved to the framework of Article 101(3) TFEU but on a form of LRM necessity testing from the perspective of the transaction involved. As stated by the Commission in its 2004 Guidelines on the application of (now) Article 101(3) TFEU:

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<sup>113</sup> For examples of this approach see O. Odudu, “Economic activity as a limit to Community law”, in O. Odudu and C. Barnard (eds) *The Outer Limits of European Union Law* (Hart Publishers, Oxford 2009) 225 and O. Odudu, *The boundaries of EC competition law: The scope of Article 81* (Oxford University Press, Oxford 2006).

<sup>114</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7, paras 28-31.

<sup>115</sup> Steenbergen, above note 112, at 266.

<sup>116</sup> *Ibid.*, at 268.

<sup>117</sup> Case T-112/99 *M6 et al. v Commission* [2001] ECR II-249, para 104; Case T-111/08 *MasterCard Inc and MasterCard Europe v Commission*, judgment of 24 May 2012, nyr, para 77.



If on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it.<sup>118</sup>

Hence, if a less restrictive solution could have enabled implementation of the agreement (not ensured its broader success in the marketplace) the ancillary restraint imposed is unacceptable. Objective necessity is therefore applied as a LRM test.

### *Inherent restrictions*

Generally competition cases which involve proportionality revolve around efficiency. However in a number of the competition cases (“boundary cases”) where a public interest was invoked an inherent restriction/necessity test was used. This approach included the deontological rules for lawyers in *Wouters* (2002),<sup>119</sup> as well as anti-doping controls for sports in *Meca-Medina* (2006).<sup>120</sup> It dates back to farming cooperatives in *Gøttrup-Klim* (1994):

(...) the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.<sup>121</sup>

This suggests LRM testing.

In *Wouters* the Court focused solely on the inherent restriction – or necessity in relation to a legitimate objective, without mentioning proportionality as such. In *Meca-Medina* it started out from the test whether an inherent restriction was involved but moved on to include proportionality explicitly: “(I)t has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (..) and are proportionate to them.”<sup>122</sup> However as far as the actual test applied it stated that “(...) the restrictions thus imposed by those rules must be limited to what is necessary.”<sup>123</sup> That is to say the inherent restrictions by definition involve a necessity test. The proportionality test in this case could also have been applied to the question whether the penalties imposed by the sporting body were excessive, but the applicants failed to raise this point.

More recently in the *Pierre Fabre* Case (2011)<sup>124</sup> a selective distribution system was considered in the context of Article 101(1) TFEU analysis whether an objective justification or an unjustified restriction by object was involved. Once the system of restrictions was established as based on objective criteria “(...) it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner”.<sup>125</sup> This

<sup>118</sup> Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ 2004, C101/97, para 31. Cf. Case T112/99 *M6*, above note 117, paras 104-114 and Case T-111/08 *Mastercard*, above note 117, paras 77-82.

<sup>119</sup> Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 (para 97).

<sup>120</sup> Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991. In both *Wouters* and *Meca-Medina* the restrictions involved were also submitted to an internal market test.

<sup>121</sup> Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarerelskab AmbA* [1994] ECR I-5641, para 35.

<sup>122</sup> *Ibid.*, para 42.

<sup>123</sup> *Ibid.*, para 47.

<sup>124</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la Concurrence, Ministre de l’Économie, de l’Industrie et de l’Emploi*, judgment of 13 October 2011, nyr.

<sup>125</sup> *Ibid.*, para 43.

involved an individual and specific examination of the contractual clause involved in its legal and economic context which led to the conclusion it was not objectively justified, without however specifying the type of proportionality test used, such as LRM.

Under Article 101(1) TFEU therefore we see an increasing use of the term proportionality for a test that does not appear to involve balancing as much as LRM.

#### *Balancing under Article 101(3) TFEU*

Article 101(3) TFEU sets four cumulative conditions for an exemption (now: a directly effective legal exception) from the cartel prohibition in Article 101(1) TFEU. These are (i) the creation of efficiencies; (ii) which are passed on to consumers; (iii) with only indispensable restrictions; and (iv) no elimination of all competition in the market. The test for indispensability checks whether the LRM standard is met. The test of the negative and positive effects of an agreement on consumers can be seen as a classic balancing requirement, that is, the application of proportionality in the strict sense.<sup>126</sup> Taken together this suggests the application of a proportionality test which is as detailed as that found in *Fedesa* and more demanding than that in *Gebhard*. Unlike either of them balancing actually appears to apply in practice here.

Unlike the situation in the internal market area where the case law itself is the predominant form of guidance, the Commission has published detailed guidelines on the application of this test (as is the case to a somewhat lesser degree in the area of market power for exclusionary abuses and for the efficiency defence in mergers, discussed below).<sup>127</sup> This is logical because until the modernization of antitrust in 2004 the application of Article 101(3) TFEU was centralised in the hands of the Commission, but following modernisation undertakings (and national courts as well as national competition authorities when applying the EU rules) have to make their own assessment whether the exception applies.

#### *Objective justification in dominance abuse*

In its 2009 guidance on the application of Article 102 TFEU to exclusionary abuses (there has been no similar guidance for exploitation or discrimination) the Commission has set out a four-part test with regard to objective necessity and efficiencies.<sup>128</sup> The approach taken clearly mirrors that of Article 101(3) TFEU and involves the two main elements of the proportionality test: both LRM and balancing. Efficiencies must (i) be the result of the conduct, which itself must be (ii) indispensable to the realisation of those efficiencies (a LRM test). They must also (iii) outweigh any likely negative effects on competition and consumer welfare (a balancing test). Finally (iv) the conduct concerned may not eliminate effective competition.

#### *The efficiency defence in merger control*

Merger control has a comparable three part test for efficiencies that can result in clearance of transactions that might otherwise be regarded as problematic. These are the existence of

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<sup>126</sup> Cf. Portuese, above note 40, who sees such tests as an efficiency review, respectively a comparative efficiency review (but does not refer to the competition law context).

<sup>127</sup> Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ 2004, C101/97. Cf. J. Faull and A. Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> Ed (Oxford University Press, Oxford, 2007), paras 3.420-3.460.

<sup>128</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7, paras 28-31.

efficiencies which (i) benefit consumers (that is, a balancing test); (ii) are merger-specific (hence, a LRM test) and (iii) are verifiable.<sup>129</sup>

### *Competition decisions and fines*

The final category of the application of proportionality in the framework of competition law is that of Commission enforcement decisions. In this case therefore the powers of the Commission are under review, not the behaviour of undertakings. Article 7 of the modernization Regulation includes an explicit proportionality test, stating that the Commission may impose on undertakings

(...) any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.<sup>130</sup>

Article 9 of the same Regulation provides that the Commission may make commitments by undertakings that are intended to remedy competition problems binding on them, and does not include an explicit reference to proportionality. In *Alrosa* (2010) the Court has specified that therefore the applicable proportionality tests differ: whereas Article 7 directly implies LRM testing, in the case of Article 9 under the general principle of proportionality the Court only reviews whether the Commission's assessment is manifestly incorrect.<sup>131</sup> (This would also be in line with the fact that competition policy is a Community policy with a significant degree of harmonization.) In *Mastercard* (2012) the Court again identifies LRM testing of Article 7 decisions.<sup>132</sup> Hence we see a strict review of penalties and a more limited review of Commission discretion with regard to policy decisions to resolve cases by other means – and with the consent of the parties.

### *Services of general economic interest*

SGEI are a special category of public interest exceptions with regard to the competition rules (and, at least in principle, the internal market rules). This exception is invoked by the Member States, although it benefits specific undertakings which are charged with carrying out the public interest task involved. On the one hand regarding the necessity and proportionality of the assignment of such a public interest task and manner in which it is carried out the manifestly disproportionate standard applies. On the other hand the use of SGEI appears to impose a greater or more detailed burden of proof on the Member States than the internal market exceptions, especially regarding the financing arrangements involved. The application of SGEI has been highly structured by policy guidance and secondary legislation especially as regards the relationship to state aid (the Altmark Packages in 2005 and 2011).<sup>133</sup> In cases involving Article 106(2) TFEU on SGEI the legality requirement would arguably involve a

<sup>129</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004, C31/5, paras 76-88; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008, C265/6, para 53.

<sup>130</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

<sup>131</sup> Case C-441/07 P *Commission v Alrosa Company Ltd* [2010] ECR I-5949, paras 36-42.

<sup>132</sup> Case T-111/08, above note 117, paras 323-324.

<sup>133</sup> Cf. W. Sauter, "The Altmark package Mark II: New rules for state aid and the compensation of services of general economic interest" (2012) *European Competition Law Review* 307. Cf. Case C-280/00 *Altmark Trans GmbH and Regierungspräsident Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747; Case T-289/03 *British United Provident Association Ltd (BUPA) et al. v Commission* [2008] ECR II-81; Case T-137/10 *Coordination bruxelloise d'institutions sociales et de santé (CBI) v Commission*, Judgment of the General Court (Fifth Chamber) of 7 November 2012, nyr.

market failure in a more strict economic sense than the loose sense of under-provision in relation to social goals.<sup>134</sup> Also reading across jurisdictions may in some cases be possible in order to establish a manifestly disproportionate claim in those cases that are not already decided by past practice.<sup>135</sup> As referred to above a hypothetical test is however not allowed.<sup>136</sup>

#### *Comparing the internal market and competition case law*

In the cases discussed above we have seen proportionality applied under the boundary test 101(1) TFEU as well as under the exception 101(3) TFEU. The LRM and balancing appear to be applied jointly in the proportionality test under the competition rules whereas they generally form alternatives for the Member States and EU.

The importance of proportionality in the framework of competition law may well increase further as the effects based approach to competition law gains in force at the expense of per se rules which require less evidence.<sup>137</sup> At the same time this means economic arguments will gain in importance. This stands in contrast to the case law with respect to public authorities at the level of EU and that of the Member States where rights and competence based arguments are prevalent and economic arguments rare.

When comparing the internal market and competition case law another key difference seems to be the focus on the consumer interest (at least in recent years) in competition law which may not be easily transferred to free movement, which tends to be more individual rights based (and public interest exception based). Could an economics based proportionality test be quantified for instance in terms of costs to integration and benefits to national public interest values?

Another possibility would be taking up in the context of public policies the tests that are familiar from competition policy (the efficiency defence), such as that the benefits should be

- the result of the measure
- specific to this measure (this is a LRM test)
- verifiable (quantified, but also ex post)
- substantial enough to offset negative effects (this is balancing)
- and should accrue to consumer (reasonable share)

However, especially the latter criterion may be difficult to transpose. It requires further analysis to decide where in this context there can be any meaningful equivalence between consumers and citizens.

### **VIII Conclusion**

The use of the proportionality principle in EU law is as varied as it is widespread. According to de Búrca:

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<sup>134</sup> W. Sauter, “Services of general economic interest and universal service in EU law”, (2008) *European Law Review*. 167

<sup>135</sup> Three scenarios can be foreseen: (i) already provided by the market at sufficient quality and acceptable price – no SGEI imposition; (ii) available in markets in other Member States reading across if self-evident efficiencies (failure to meet demand by SGEI provider); (iii) in all other cases only manifestly-disproportional test.

<sup>136</sup> Case C-157/94 *Electricity import monopoly*, above note 95.

<sup>137</sup> Steenberg, above note 112, at 268. Cf. J. Bourgeois and D. Waelbroeck (eds), *Ten years of effects-based approach in EU competition law* (Bruylant, Brussels 2012).

The way the proportionality principle is applied by the Court of Justice covers a spectrum ranging from a very deferential approach to quite a rigorous and searching examination of the justification for a measure which has been challenged.<sup>138</sup>

Arguably this variety follows from the needs that the principle must meet. Emiliou states:

The usefulness of the proportionality test lies in that it gives the courts maximum flexibility in reviewing administrative discretion within acceptable limits.<sup>139</sup>

The question is whether these limits are indeed acceptable or whether the discretionary margin is too wide for the sake of legal certainty. As we have seen above Harbo criticizes the degree of flexibility from a more general theoretical constitutional perspective as rendering the principle virtually meaningless. This appears too harsh.

What we have found is that the proportionality test as applied in EU law appears to consist of a series of partly overlapping tests that are applied as alternatives rather than cumulatively in a broadly consistent manner. Unexpectedly we see that it is private parties (undertakings) who in the framework of competition law are subjected to the strictest proportionality requirements (both LRM and balancing of costs and benefits). The Member States are generally subject only to LRM testing (although sometimes in the absence of harmonisation only to appropriateness and consistency) and the EU institutions only to the least strict standard of the three, the manifestly inappropriateness test. The latter is a mild form of balancing.

This suggests the existence of three parallel standards with a greater respect of discretion for the EU level than that of the Member States and an even stricter review of undertakings. Altogether the occurrence of strict proportionality as balancing is rare – which is remarkable given the importance assigned to the proportionality principle in EU law and also because from the perspective of the foremost constitutional theorists on proportionality, Alexy and his followers, it ought to be the rule, not the exception. How can this be explained?

In general it appears that in the constitutional context of the EU proportionality can be seen as a counterpart to the founding doctrines of direct effect and supremacy (and state liability) which govern the vertical division of power. This is so as proportionality does not concern assertions of EU level competence but the limitation thereof and the balancing between different rights and principles recognised in EU law. As we have seen it legitimized the EU law doctrines of supremacy and direct effect. It also filled a gap by allowing EU acts to be reviewed against fundamental rights, ensuring that EU instead of national courts would protect such rights in EU law. Proportionality testing therefore helped avoid national law challenges to EU law which would have undermined supremacy and the EU legal order as such. This is why the principle emerged in the context of the recognition of fundamental rights as general principles of EU law.

Moreover the integration context may at least in part be responsible for the variation we have observed: within the three categories there are differences that may be explained largely by the degree to which a policy area has been harmonised or to which the relevant standards remain to be set at national level. The reliance on LRM and for that matter the standards of no reading across jurisdictions (at least in the absence of harmonization or pre-emption) suggest that a more complex process may be involved than that presupposed by the constitutional

<sup>138</sup> De Búrca, above note 4, at 111.

<sup>139</sup> Emiliou, above note 15, at 273

theorists who focus on balancing at the ultimate rule of law, a theory derived from a single state model. The EU may not be ready nor its constitution developed to the point where full proportionality testing in this sense is feasible. This means that criticism such as that of Harbo may be in part justified (there is little balancing which means it only partly confers legitimacy on the resulting choices), but also in part beside the point. In the EU context the need to leave room for integration, respectively for Member State autonomy where there is no support for integration, prevails.

At the same time the flexibility of the standard applied may also be explained by the fact that when the gravity of the infringement of a right increases so does the strictness of the standard to which public policy is held. This would be consistent with what the theorists have noted.<sup>140</sup> Various authors have suggested that the Court varies its test according to the nature of the interests involved and the perceived severity of the imputed breach.<sup>141</sup> However it is not always clear if this serves to prejudge the desired outcome or to protect the interest that is at risk.

Frequently the Court deliberately applies marginal review – starting from the interest of the Member State a less strict standard will be applied the more important the national interest involved is. This may be the opposite of emphasizing the constitutional values involved but in a multi-level polity it could be equally justified from a constitutional point of view. In any event it fits with an integration perspective as well as a multi-level polity perspective. This means that the degree of harmonization, or to which the Community has “occupied the field” by means of pre-emption or a common policy becomes decisive. It should be noted however that such outcomes may be trumped by the rights of individuals in cases like *Watts*.<sup>142</sup> This is consistent with the claim by inter alia Jans that proportionality is used both as an instrument of market integration and to protect individual rights.<sup>143</sup> At the same time it appears that the market access and individual rights theses need not be alternatives. In the EU these two are often co-extensive. This may well be one of the vectors of further development of the proportionality test.

In terms of “pure” or “strict” proportionality our discussion has developed from the initial question “how is balancing carried out” to the premise “there is very little balancing”. So the fact the proportionality test in EU law is complex and not always used consistently appears to be firmly linked to the fact that it is used in different contexts and at different levels. This suggests not only the existence of a working system of judicial review, but also that the EU constitution is still under construction. Hence proportionality in the EU can be characterised as a balancing act not just between principles but between the levels of government, between the remaining responsibilities of the Member States and integration, as well as between policies and individual rights.

However possibly the proliferation of tests reduces legal certainty and arguably compromises the protection of the interests involved, possibly just as much as a less refined test might have done. I have suggested above that the current state of affairs on proportionality reflects the current state of integration and of the EU constitution. But that need not exclude all change. Would more explicit balancing help? In an earlier paper Leigh Hancher and I have favoured a

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<sup>140</sup> Alexy, above note 1, at 231.

<sup>141</sup> Such as *De Búrca*, and *Jans*, above note 4.

<sup>142</sup> Case C-372/04 *Watts*, above note 35. Cf. also Case C-60/00 *Carpenter*, above note 73; C-144/04 *Mangold*, above note 36.

<sup>143</sup> *Jans*, above note 4 at 243. Cf. *Tridimas*, above note 33, at 193-194.

more economic approach – including a real cost benefit analysis.<sup>144</sup> Would transplanting some of the competition law or SGEI criteria help? Should we distinguish between the use of proportionality as a constitutional review tool – for reviewing limitations on individual rights – and as a consistency/legality tool as discussed above? For now these remain questions for future research.

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<sup>144</sup> Hancher and Sauter, above note 48.