BALANCE OF COMPETENCES REVIEW: CALL FOR EVIDENCE ON SUBSIDIARITY, PROPORTIONALITY, AND ARTICLE 352 TFEU

PROPORTIONALITY

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1. The proportionality principle has long formed one of the cornerstones of the European legal order, and remains an intuitively comprehensible notion.[1] But for all that, its application remains uncertain and ill-defined. Domestic courts frequently struggle to apply the proportionality principle in any consistent fashion, and judges may disagree not only on the results of the application of the test to a given set of circumstances, but on the principles to be applied in seeking to arrive at the correct result. And the outcome of the EU courts' deliberations can be unpredictable.

2. In the recent Supreme Court case of *Bank Mellat v HM Treasury (No 2)* [2013] 3 WLR 179, Lord Reed recognised as much (at paragraph 66). He offered a concise but valuable summary of the origins of the concept of proportionality and its place in EU law, at paragraphs 68-69:[2]

> "68. The idea that proportionality is an aspect of justice can be traced back via Aquinas to the *Nicomachean Ethics* and beyond. The development of the concept in modern times as a standard in public law derives from the Enlightenment, when the relationship between citizens and their rulers came to be considered in a new way, reflected in the concepts of the social contract and of natural rights. As Blackstone wrote in his *Commentaries on the Laws of England*, 9th ed (1783), Vol 1, p 125, the concept of civil liberty comprises "natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". The idea that

[1] Don't use a sledgehammer to crack a nut.

[2] Before going on to explain its application by the ECtHR, and the development of a common law standard as expressed in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69, 80 and more recently in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 and *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45.

> the state should limit natural rights only to the minimum extent necessary developed in Germany into a public law standard known as *Verhältnismäßigkeit*, or proportionality. From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada it spread to a number of other common law jurisdictions.
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> 69. Proportionality has become one of the general principles of EU law, and appears in article 5(4) of the Treaty on European Union ("TEU"). The test is expressed in more compressed and general terms than in German or Canadian law, and the relevant jurisprudence is not always clear, at least to a reader from a common law tradition. In *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* (Case C-331/88) [1990] ECR I-4023, the European Court of Justice stated (para 13):
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> > '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.'
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> The intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker – depends upon the context."

3. As it appears in Article 5(4) TEU, "compressed and general" it certainly is: "*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".* But that statement, taken alone, is not a complete statement of the principle of proportionality (as the well known citation from *Fedesa* in itself demonstrates), and is not even particularly accurate on its own terms. As Lenaerts and van Nuffel point out, "action founded upon a legal basis afforded by the Treaties can hardly go beyond the objectives *of the Treaties* without at the same time exceeding the confines of the legal basis in question, which would mean that the action would be ultra vires. Rather, the principle of proportionality requires a given action not to go beyond what is necessary to achieve the objectives *of that action*."[3]

[3] K. Lenaerts & P. van Nuffel, *European Union Law* (3rd edition, 2011), para 7-040.

4. Protocol (No 2) on the application of the principles of subsidiarity and proportionality adds little if anything of substance, so far as the content of the principle of proportionality is concerned.

5. Instead, the full content of the principle must be derived from the case law of the EU courts, as it has been applied over time. Classically, the principle entails the following tests:

    a. Does the measure pursue a legitimate objective? Where applicable, is it one which is capable of justifying a derogation from a fundamental freedom (i.e. the Treaty acknowledges the interest to be worthy of protection and sufficiently important to justify a derogation, or else the Court has recognised it to be so)?

    b. Is the measure suitable to achieve the desired end?

    c. Is the measure necessary to achieve the desired end (i.e. is it no more restrictive than is necessary to produce that result)?

    d. Are the disadvantages caused disproportionate to the aims pursued? (or sometimes, depending on context: Does the measure impose an excessive burden on the individual in relation to the desired end?)

6. Expressed as such, there is no substantial difference to the formulation adopted by Lord Reed in *Bank Mellat* at paragraph 74, where he held that it was necessary to determine:

    a. whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

    b. whether the measure is rationally connected to the objective;

    c. whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and

    d. whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

7. However one expresses these tests, they can be taken as well settled. So why the confusion?

    a. The first step is relatively straightforward, and in EU law terms can often be settled by the terms of the Treaty itself.

    b. Similarly, the second step may not be difficult to apply in practice (and may be indistinguishable from a rationality assessment).

    c. But greater difficulties are encountered at the third step. The language of "desired" ends or objectives is inherently imprecise and unclear, masking an important question of *effectiveness* which a court is usually ill equipped to judge, and may in large part be a value judgment. The fact that a measure has been acknowledged at the first step to be in the interests of public health or the protection of the environment, for example, says nothing about the level of effectiveness of the measure which is desired, but only its broad purpose. Analytically, it is impossible to answer the question as to whether a measure is more restrictive than is necessary, without first ascertaining how effective in achieving its aim the measure is desired to be (such as, for example, a public health measure which will reduce tobacco use and hence tobacco-related illness, but only to an uncertain extent). That is first and foremost a question which the primary decision-maker must judge. But under what circumstances should a court substitute its own judgment for that of the primary decision-maker?

    d. At the fourth step, an assessment of proportionality inevitably also involves a value judgment concerning the balance to be struck between the importance of the objective pursued and the value of the right intruded upon.[4]

8. It is therefore at the third and fourth steps that the "intensity of review" will be critical: the concrete results of the application of the proportionality principle may vary greatly according to the "intensity of review" adopted. But the "intensity of review" is deceptively difficult to analyse or pin down. Familiar to all EU lawyers will be the fact that sometimes the EU courts will adopt a "strict" approach to proportionality; at

[4] See *Bank Mellat* at paragraph 71, per Lord Reed.

others, they will allow a wide discretionary area of judgement and will only strike a measure down if it is manifestly inappropriate having regard to the objective which is sought to be achieved (as in *Fedesa* itself). But under what precise circumstances will (or should) one standard be adopted over the other? And where is the middle ground?

9. Part of the answer to those questions may depend on how the concept of "intensity of review" is conceptualised.

    a. Traditionally, one may think of a strict review as being warranted where the court has decided that the breadth of the primary decision-maker's discretion is very narrow, such as where there is a very substantial interference with a fundamental right or freedom. By contrast, where there is no more than a relatively mild restriction on a right, the court may hold that the decision-maker is operating with a wide margin of discretion, and will accordingly find the measure to be disproportionate if it is manifestly inappropriate to its purpose. Cast in this way, the "intensity of review" will depend on the breadth of the discretion that the primary decision-maker enjoys in that particular context. The CJEU's judgments tend to adopt this language. But the language itself doesn't provide any guide as to when a discretion may be broad or narrow.

    b. The notion of "intensity of review" can be cast also in terms of the degree of weight or respect given to the assessment of the primary decision-maker: see Lord Reed's account in *Bank Mellat* at paragraph 69 cited above. This analysis more readily lends itself to an explanation of the manner in which courts will "defer" to the institutional competence of the legislative and executive branches in certain areas, or alternatively (in areas in which they feel themselves to be equally competent) will undertake a strict review on the basis of its own function as a guardian of a particular right.

10. For the purpose of the Balance of Competences Review, it is submitted, any debate over the effectiveness of the proportionality principle and its future scope, interpretation or application is most likely to be productive if focused on the principles on which the "intensity of review" will be determined in any particular case, and on

what a "strict" standard of review entails (or should/should not entail) in the context of the third and fourth steps of the test in particular.

11. How to predict what level of intensity of review will/should be applied? The key variables are (at least):

    a. whether the primary-decision makers are the EU institutions or a Member State;

    b. whether the nature of the power is legislative in nature or affects an individual directly;

    c. the nature of the objective pursued and/or interests affected;

    d. the degree to which the subject-matter falls within the technical competence of the court;

    e. whether (and to what extent) the measure interferes with individuals' fundamental rights;

    f. whether the focus of assessment is on the third stage of the assessment (no less restrictive means) or the fourth stage of the assessment (overall balance).

12. In practice, it can be difficult to isolate the individual elements of these variables, as all cases inevitably engage more than one of those variables to differing and overlapping extents. But they are well illustrated in the general formulations used by the CJEU in explaining the standard of review that it is adopting when considering a proportionality challenge. For example:

    a. **Union legislature making broad policy choice:** With regard to judicial review of compliance with [the proportionality principle] the Court has accepted that in the exercise of the powers conferred on it the Union legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is

manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraphs 82 and 83; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123; *Alliance for Natural Health and Others*, paragraph 52; and Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-0000, paragraph 42). However, even though it has a broad discretion, the Union legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators (see, to that effect, Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 48; Case C-86/03 *Greece* v *Commission* [2005] ECR I-10979, paragraph 96; and Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 37).

b. **Union legislature making broad policy choice but affecting property rights:** As regards infringement of the right to property, the Court has consistently held that, while the right to property forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paragraph 23, Case 265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15, and Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 78).

c. **Union legislature making broad policy choice but affecting individuals' fundamental rights of privacy and data protection:** With regard to judicial review of compliance with [the proportionality principle], where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue

guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V). In the present case, in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict. … So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the Court's settled case-law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (Case C-473/12 *IPI* EU:C:2013:715, paragraph 39): Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources*, 8 April 2014, paragraphs 47-48, 52).

d. **National legislature restricting freedom of establishment for reasons of public health within margin of discretion**: it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a margin of discretion. … Nonetheless, it is also necessary that the way in which [the law] pursues those objectives is coherent. According to the Court's case-law, the national legislation as a whole and the various relevant rules are appropriate for ensuring attainment of the objective relied upon only if they genuinely reflect a concern to attain that objective in a consistent and systematic manner: Case C-539/11 *Ottica New Line di Accardi Vincenzo v Comune di Campobello di Mazara*, 26 September 2013, paragraphs 44 and 47).

e. **National legislature restricting free movement of goods for reasons of prevention of crime and road traffic safety outside margin of discretion:** a ban on the sale of tinted window film (to allow passenger compartments to be inspected) was disproportionate in view of the fact that vehicles sold with

tinted windows were permitted, leading to the inference that other less restrictive means of protecting those interests were available: Case C-265/06 *Commission v Portugal* [2008] ECR I-2245, paragraphs 37-47. [NB – no margin of appreciation where the basic requirements of rationality were not fulfilled.]

13. The recent *Digital Rights Ireland* case provides a model of a strict proportionality review, notably conducted on the basis of interference with Charter rights and by reference to ECtHR case law. Declaring the Data Retention Directive to be invalid, the court found a series of deficiencies in the scope and extent of the obligations imposed by it in relation to communications data. The Court accepted that the directive genuinely satisfied an objective of general interest, namely the fight against terrorism and organised crime, and ultimately public security. Traditionally, such matters might have attracted a wide margin of discretion, but in view of the "particularly serious" interference with rights of privacy and data protection, a strict review was conducted.

14. The balance struck by the Court between those competing interests rested largely on its finding of the failure of the EU legislature to lay down clear and precise rules governing the scope and application of the measure (such as objective criteria to determine the limits of access to it by the competent national authorities and their subsequent use, and review by a court or administrative body) and to impose minimum safeguards protecting data against the risk of abuse and unlawful access and use of that data.

15. On the assumption that the EU legislature proceeds to adopt a Data Retention Directive mark II, it will remain for it to consider precisely what any such objective criteria should be. Should such criteria be devised, there may ultimately be limits to how far the court would go in assessing any such objective criteria to be disproportionate in future, notwithstanding the adoption of a strict review.

16. Even where the substance of a decision does not easily admit of a proportionality review by the Court, the EU courts have, as Paul Lasok QC points out, "tended to shift the focus of judicial control to controllable factors, in very much the same way as the English courts approach the judicial review of the exercise of a discretionary power under national law. Thus, in recent years, more and more attention has been paid to the

question whether or not the decision-maker has equipped itself with the information that it requires in order to exercise its power lawfully and proportionately and has followed the correct procedures. That includes the requirement for the decision-maker to be equipped with the relevant expertise or technical knowledge that is required in order to exercise the power in an informed way: see Case C-269/90 *Hauptzollamt Muenchen-Mitte v Technische Universitat Muenchen* [1991] ECR I-5469, paragraphs 13-14 and 20-22."[5]

17. There remains considerable room for improvement in the clarity with which these competing models of review of proportionality are applied. Less clear still, however, is the basis upon which any such clarity is likely to be, or could be, provided.

[5] K.P.E. Lasok QC, *Proportionality and Reasonableness: the intrusion of legality into the discretionary sphere and the level of intensity of review* (2013)