

The impact of the European Court of Justice on the principle of proportionality

Abstract

One of the most important principles of EU administrative law is that of proportionality. The principle of proportionality is defined in Article 5 of the Treaty on European Union (TEU), but the legal concept has been recognised by the European Court of Justice since the 1950s as one of the general principles of EU law. Proportionality regulates the exercise of authority in terms of adjudicating whether the actions undertaken by EU institutions are within set limits. According to this rule, the action of institutions should be limited to that which is necessary to achieve the objectives of the treaties. In other words, the degree of action by the institutions must be in line with the goal being pursued. This article starts with an analysis of the meaning of proportionality, drawn from the approaches in practice of EU judges, and proceeds to an examination of the three types of issues that can be detected from their judgments: cases involving discretionary political choice, or which are of a social, political or economic nature; those related to the violation of rights under EU law; and those involving a disproportionate fine or imposition.

Keywords: proportionality, European Court of Justice, EU institution

Introduction

Proportionality is an important principle in EU administrative law (de Búrca 1993; Ellis 1999; Tridimas 2006: chapter 3; Sweet and Matthews 2008; Craig 2012: 590; and others). It is one of the principles expressed openly in the EU's treaties and it has been widely applied within the EU's legal system (Yagüe and Mancini 2015; Qerimi (2019). Consequently, it is one of the principles which underpins the EU itself (Maliszewska-Nienartowicz 2006: 59; Szpringer 1998: 116).

Furthermore, it is one of the fundamental concepts of European constitutionalism and, as such, it is also of significant relevance for the countries of south-east Europe and, more specifically, the EU-aspiring western Balkans countries which ought to be gradually aligning their policies and regulations with those of the EU (Qerimi and Sergi 2013; Sergi and Qerimi 2007, 2008).

The principle of proportionality, as a constitutional and general principle of administrative law, requires that every decision and measure should be based on a fair judgement and balancing of interests as well as aimed at providing a reasonable resolution of complaints (Thouvenin 2013). Accordingly, the actions taken must not go beyond what is strictly necessary to achieve the specified objective (Yagüe and Mancini 2015). Proportionality is, on top of the specific reference to it in the treaties,

a general principle of the law with a role to determine the substantive content of other rights (Thouvenin 2013). It can be considered as one of the main mechanisms for appeal over EU actions and those of the member states.

At the heart of proportionality

One of the roots of proportionality is in German law, settled in the nineteenth century in the area of public law and, in particular, in the field of the law on policing before being extended to the administrative field (Iannunzio 2016; Craig 2012; Długosz 2017; Sauter 2013). This German doctrine originally came to be accepted within the jurisprudence of the European Court of Justice via the *Internationale Handelsgesellschaft* case; this was the first case judged by the ECJ on this principle, and it proved to have a deep influence on the development of EU legislation, being a cornerstone of the application of the principle of proportionality. The *Internationale Handelsgesellschaft* case was key in relating the principle of proportionality to the principle of the respect for fundamental rights (Çani 2017).

In its modern German formulation, the principle of proportionality includes three factors, as follows in terms of how EU courts of law should approach its definition (Schwarze 1992):

Appropriateness

Firstly, the courts should investigate whether the measure is appropriate in achieving its objective.

Here, adaptability is the key to deciding what the most appropriate means to pursuing the objectives, with the Community institutions having the duty to evaluate their path of action in accordance with adaptability criteria. Indeed, that chosen path can – and should – be considered illegal if the institutions could have chosen another, more effective act to achieve its purpose (Sandulli 1998: 361).

Necessary

Secondly, they will consider whether the measure is necessary in terms of there being no other option less restrictive as regards the rights of the individual.

This is intended to prompt the choice of the most appropriate measure, limiting the field only to those actions that are least restrictive concerning individual rights (Malinicon 2001: 54). Therefore, adjudicating whether a measure is necessary comes into play where there are some instruments that are likely to be used and which are equally suitable in terms of pursuing the objective but which can be distinguished by assessing how they limit interests. In these cases, the choice of the Commission should fall upon the least restrictive measure (Yagüe and Mancini 2015).

Disproportionateness

Thirdly, the courts should review whether the measure is disproportionate in relation to the constraints (proportionality in view of the objective, but viewed in a narrow sense).

The measure may be regarded as disproportionate if there is no reasonable or fair balance between the objectives and the interests both of the Community institutions in pursuing their objective and of those of private citizens, given the concern to operate on the basis of establishing a balance between these (Vipiana 1993: 85).

EU law

The principle of proportionality is actually provided for in Article 5(4) of the Treaty on European Union as a part of subsidiarity, which reads as follows:

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.

It provides that, when Union action is guaranteed on the basis of subsidiarity, it should not go beyond what is necessary to achieve the objectives of the Treaty, with these requirements being further laid down in a Protocol (No. 2) to the Treaty.

The first two elements within the German classical formulation are also there in EU law (Craig 2012: 591). However, there has been greater uncertainty if the third element – disproportionateness – is also part of the EU test. Consequently, some academics acknowledge that precedent is uncertain in this regard (van Gerven 1999: 37-38). This is an important point, since the existence of the third arm delivers a different nature to the test: if proportionality involves only appropriateness and necessity in terms of the obstacles that must be overcome, the measure risks being held as legitimate even where the imposed encumbrance may be disproportionate to the desired target. The addition of the third arm requires the court to undertake a further investigation. The answer as to whether proportionality in its narrowest sense is indeed part of the test can be defined very well when jurisprudence is reviewed. European Union courts do not always refer to this aspect of proportionality, but they will do so when the applicant submits arguments which are specifically addressed to that aspect (van Gerven 1999).

Proportionality is also provided for in Article 52 of the Charter of Fundamental Rights of the European Union ('Scope and interpretation'), which provides that:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Consequently, it is clear that any limitation must respect the essence of the right, as well as be both proportionate, necessary and in the general interest. The principle of proportionality is the main reference point in determining constructive balance in the relationships between freedoms and rights and the limitations of their exercise, which European institutions must respect (Yagüe and Mancini 2015).

The treaties do not contain a clear and detailed set of principles against which to prove, or test, the legality of actions or mechanisms instigated either by the EU itself or by individual member states. Consequently, this is the responsibility of the European Court of Justice and the Court of First Instance, now called the General Court, in modifying the principles of administrative lawfulness. In implementing this task, they have partly decided judgments on the specific provisions of the Treaty, which justify actions or interventions where it is ‘necessary’ or ‘useful’ to achieve a certain conclusion or outcome; but they have also – and perhaps inevitably – drawn certain principles from domestic jurisdictions, modifying them to suit the needs of the EU itself.

Three of the most important judgments of the European Court of Justice in this area are set out in the following sub-sections:

Kingdom of Spain v. Council of the European Union

This case was brought in connection with the cotton support scheme, created after Greece’s accession to the EU in 1981 and expanded in 1986 when Spain and Portugal joined the EU. The scheme was specifically aimed at supporting cotton production in Community regions where it is important for the agricultural economy to enable producers to earn fair revenues, as well as stabilising the market by improving structures at the level of supply and marketing. One part of the reform of the Common Agricultural Policy saw the Council adopt a new Regulation setting down common rules for direct support schemes for cotton producers.

Spain brought a lawsuit before the ECJ requesting the annulment of the regulation, arguing in particular that the amount of specific aid for cotton, and that the criterion for eligibility for it was the maintenance of the land up until the opening of the boll, was inadequate.

The Court dismissed all the claims – except in that it accepted that the principle of proportionality had been violated. Regarding this issue, the ECJ noted that it should be remembered that proportionality requires that acts adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives being pursued; and that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and whose disadvantages caused *must not be disproportionate to the aims pursued* [emphasis added].

In particular, the ECJ noted that Community legislature has a wide discretion (above all in connection with the Common Agricultural Policy) and that judicial reviews brought before it have a rather limited scope – i.e. verifying that the measure in question is not impaired by an obvious error of law or a misuse of powers, and that the institution in question has not clearly exceeded the limits of its discretion. However, this requires that the institution is able to show that, in adopting the act, it took into consideration all the relevant factors and circumstances of the situation.

In this case, the Court considered that the Council had not established that, in adopting the cotton support scheme, it had taken into all such relevant factors and circumstances into consideration. In particular, the Regulation setting out the scheme

had not been preceded by a study assessing the probable socio-economic effects of the proposed reform, even though such studies had been carried out in connection with the reform of support schemes in other sectors, including the tobacco sector.

Therefore, the Court was not able to ascertain that the legislature was able to reach a conclusion that fixing the amount of the aid for cotton at 35 per cent of the total existing aid under the previous support scheme would suffice to guarantee the objective it had set, i.e. to ensure the profitability and hence the continuation of the crop. Consequently, the Court concluded that the principle of proportionality had been infringed.

However, in order to avoid any legal uncertainty as to the aid scheme in the cotton industry, the Court resolved that the effects of the annulment be suspended pending the adoption of a new regulation.

Vodafone and others v. Secretary of State for Business, Enterprise and Regulatory Reform

Regulation (EC) No 717/2007 refers to roaming arrangements and the maximum tariffs – Eurotariffs – which may be billed by mobile phone operators for voice calls received or made by a user travelling abroad. The Eurotariff is a charge cap placed on both wholesale and retail voice call charges. Originally planned to expire on 30 June 2010, this Regulation was eventually amended to extend its validity to 30 June 2012, while coverage was also extended at the same time to SMS and other data calls. The original Regulation was contested by some mobile phone operators in the UK, with a reference made to the ECJ as to whether the Community legislature had the power to adopt the Regulation and whether, by fixing maximum retail tariffs, it had violated the principles of subsidiary and/or proportionality.

The decision recalled that proportionality is a general principle of Community law requiring that the measures adopted be appropriate to achieve legitimate objectives and should not go beyond what is necessary to achieve them. The Court also acknowledged the broad discretion of the Community legislature where its actions involve political, economic and social choices. Therefore, the criterion to be applied is not whether a measure was the only, or best, possible measure since legality can be affected only if the measure was manifestly inappropriate in terms of the objective.

The Court confirmed the validity of the Regulation in terms of the high prices charged for roaming and the increasing concerns expressed by public authorities and consumer associations. The heterogeneity of national legislation, and the lack of effective instruments in the hands of national regulators to influence wholesale prices would also be liable to cause significant distortions of competition and undermine the regular functioning of roaming markets. Under these conditions, the Court considered that the object of the Regulation – the improvement of conditions for the functioning of the internal market – was, in the creation of a common and coherent framework at the level of the European Union, within the powers of the legislature.

Having re-emphasised the specific characteristics of roaming markets and, in particular, the relationship between costs and prices, and between retail and wholesale payments, the Court found that the measure was limited in time and proportionate to the aim, regardless of the negative consequences for particular operators. In particu-

lar, the Court highlighted the in-depth analysis contained in the impact assessment that had preceded the submission of the proposal in question and that the Community legislature could legitimately consider that regulation of the wholesale market alone – without reference also to the retail market – would not have achieved the same result in terms of smooth functioning of the domestic market.

Lastly, as regards subsidiarity, the Court concluded that, having regard to the interdependence between retail and wholesale prices, the Community legislature could legitimately consider that, because of the common approach laid down in the Regulation, the objective being pursued could best be achieved at Community level. This did not therefore infringe the principle of subsidiarity.

Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen

This joint case concerned the application of Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the Common Agricultural Policy, and Commission Regulation (EC) No. 259/2008 providing for the annual publication of the beneficiaries of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), together with the amounts received. Farmers challenged the publication of this information on the website of the German Federal Office for Agriculture and Food, arguing that the Regulations constituted unjustified interference in their rights to respect for their private and family life and personal data protection, as defined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

The Court of Justice, pointing out that the right to the protection of personal data refers to natural persons, firstly recognised the existence of such an interference in that the farmers had been referred to by name. This constituted personal data since the publication allowed third parties to find out their personal data and income. The processing of the personal data was not based on consent and it was therefore appropriate to investigate whether the interference was justified having regard to the conditions laid down in Article 52(1) of the Charter. This recognises that restrictions may be imposed on the exercise of Article 7 and 8 rights where these are provided by law, respect the essence of those rights and, according to the principle of proportionality, are both necessary and truly fulfil the objectives of the general public interest recognised by the European Union or the need to protect the rights and freedoms of others.

The applicants argued that the public interest would be satisfied if the information was published anonymously.

The Court accepted that the provisions in question pursue the aim of increasing the transparency of the use of Union funds in the framework of the Common Agricultural Policy and therefore fulfil an objective of general interest. However, it considered that the Commission and the Council had not been able to demonstrate that they had reached a proper balance between the various interests involved before adopting the rules, or that they had not gone beyond what was necessary to achieve legitimate aims in the light of Articles 7 and 8.

Highlighting that alternative measures had been possible, the Court declared that the relevant Regulations were invalid as a whole (and with future effect from the date of the judgment).

Recent legislative initiatives and cases

It is interesting that one of the effects of these landmark cases is that the EU has gone on to stipulate quite openly in recent regulations that it is acting within the bounds of subsidiarity and proportionality. The ECJ will of course continue to be the ultimate arbiter, but the EU's approach to legislation has been clearly not only to learn the lessons of other cases but to seek to ensure that the legislation is watertight with regard to these principles.

For example, Regulation (EU) 2019/4 of the European Parliament and of the Council provides that Member States should lay down rules on the penalties applicable for infringements under the proviso set out in item 35 of the Recital (and Article 22) that these must be effective, proportionate and dissuasive. The Recital goes on to assert in item 37 that the objectives – to ensure a high level of protection of human and animal health via the provision of adequate information for users and strengthening the effective functioning of the internal market – are rather better achieved at Union level and that the measure is thus in accordance with the principle of subsidiarity. Additionally, it states that, in accordance with the principle of proportionality the Regulation does not go beyond what is necessary to achieve those objectives.

Furthermore, the European Court of Justice is still adjudicating on litigation brought on the issue of proportionality – and confirming that, in spite of its greater attention to the issue, the legislature is still capable of making mistakes, warranting the attention of the Court.

In one of its most recent cases (*Czech Republic v European Parliament, Council of the European Union*), the Court re-affirmed that the key test, in the light of the established precedent that measures must be appropriate and not go beyond what is necessary, and in view of the broad discretion allowed the legislature, is not whether a measure was the only, or best, possible one but whether it was 'manifestly inappropriate' in terms of the objective being sought.

However, the Court found that, when it came to proportionality, the legislature had not addressed this question in this case – which concerned the prohibition of certain kinds of automatic weapon, tightening the regulation on minimally-dangerous weapons and possessing magazines above a certain size – and deliberately did not obtain sufficient information (the Court gave the example of conducting an assessment of the consequences) in order to make an informed assessment of whether it was likely to be in compliance. In result, its actions were held to constitute manifestly disproportionate measures.

Conclusion

Proportionality remains one of the most important principles of EU administrative law. From our review of some of the key decisions of the ECJ in this respect, we can say that it is clear that the institutions should be involved only to the degree nec-

essary to achieve treaty objectives, and that the playing field for institutional action must be consistent with the purpose being pursued. Nevertheless, it is equally clear that the criteria for this, in the context of EU integration and the completion of a single market applying to all EU member states, may be drawn sufficiently widely so as to give a broad scope for action even in the content of a principle which is, itself, narrowly drawn.

In the light of this, there will remain considerable opportunity for the ECJ both to act in its role as a check and balance on the power of the EU institutions, as well as to take EU law further.

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