

n. 5, 2011

HOW PROPORTIONATE IS THE PROPORTIONALITY PRINCIPLE?

Norbert Reich**

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*Paper to be presented at the University of Sao Paulo Law School on 19 October 2011 / Conferência junto ao Programa de Pós-Graduação da Faculdade de Direito da Universidade de São Paulo em 19.10.2011.

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Cadernos de Pós-Graduação em Direito : estudos e documentos de trabalho / Comissão de Pós-Graduação da Faculdade de Direito da USP, São Paulo, n. 1, 2011-.
Mensal

ISSN: 2236-4544

Publicação da Comissão de Pós-Graduação em Direito da Faculdade de Direito da Universidade de São Paulo

1. Direito 2. Interdisciplinaridade. I. Comissão de Pós-Graduação da Faculdade de Direito da USP

CDU 34

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Presidente da Comissão de Pós-Graduação da
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Norbert Reich**

*Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ, with an addendum related to the citizenship case law. Paper to be presented at the University of São Paulo Law School on 19 October 2011.

Updated paper first presented at the EUI Workshop "The European Court of Justice (ECJ) and the Autonomy of Member States", Florence 20-21 April 2009; an abbreviated version was published in: Festschrift Günther Roth, 2011, pp. 325-344; a German version under the title "Verhältnismäßigkeit als 'Mega-Prinzip' im Unionsrecht?" will be published in the Festschrift für Hans-Peter Bull, 2011.

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HOW PROPORTIONATE IS THE PROPORTIONALITY PRINCIPLE?*

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I. From admiration to frustration?

In the shaping years of the than EEC, the case law of the ECJ was greatly respected for its contribution to European integration in general and to the promotion of the idea of creating a truly single market in particular. Such important principles as “supremacy”, “direct effect”, “effet utile”, “mutual recognition”, “effective judicial protection” and even “*Francovich* liability”¹ were usually accepted by Member state legislatures and courts, maybe after some hesitation and criticism. The emerging conflicts with Constitutional courts first of old, later of new member countries could be evened out by referring to a specific EU fundamental rights catalogue, based on the common constitutional traditions and the European Convention on Human Rights (ECHR). The continuous “competence creep” of the EU into Member state “reserved areas” was halted by the well known *tobacco advertising* judgment of 5.10.2000², even though somewhat softened by later judgments³.

Lately, however, the tide seems to have changed. Some cases like “*Mangold*”⁴ (even though recently confirmed by an order of the German Bundesverfassungsgericht⁵), “*Commission v. Austria*”⁶ (lately somewhat “softened” by *Bressol*⁷), “*Watts*”⁸, “*Viking and Laval*”⁹ have become symbols of a seemingly overarching and overstepping European jurisdiction which must be put to order because of not respecting Member states prerogatives, social models, legal certainty or whatever the critical labels

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¹Case C-6 and 9/90 *Francovich and Others v Italy* [1991] ECR I-5357.

²Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419.

³Case C-380/03 *Germany v EP and Council* [2006] ECR I-11573: most recently and very controversial C-301/06 *Ireland v Parliament and Council* [2009] ECR I-593 concerning retention of data. For a more general discussion see WEATHERILL, St. Competence and legitimacy. In: BARNARD, C.; ODUSU, O. (Eds.). *The outer limits of European Union law*. Oxford: Hart Publishing, 2009, 17 at p. 19; same, The limits of legislative harmonisation ten years after tobacco advertising: how the Court’s Case Law has become a “Drafting Guide”. *The German Law Journal*, v. 12, n. 3, p. 827, Mar. 2011.

⁴Case C-144/04 *Mangold v Helm* [2005] ECR I-9981; for a recent discussion see DOUGAN, M. ‘In defence of Mangold’. In: ARNULL, A. et al. (Eds.). *A constitutional order of States?: essays in EU law in honour of Alan Dashwood*. Oxford: Hart Publishing, 2011, p. 219.

⁵2 BvR 2661/06 of 6 July 2010, EuZW 2010, 828 insisting on a “European law friendly” review towards ECJ judgments by the BVerfG.

⁶Case C-147/03 *Commission v Austria* [2005] ECR I-5969.

⁷Case C-73/08 *Nicolas Bressol et al v Gouvernement de la Communauté française*, [2010] ECR I-(13.4.2010), comment Hilpold, EuZW 2010, 471; I had critically commented on the opinion of AG Sharpston of 25.6.2009, REICH, N. Herkunftsprinzip oder Diskriminierung als Maßstab für Studentenfreizügigkeit? *Europäische Zeitschrift für Wirtschaftsrecht*, S. 637, 2009.

⁸Case C-372/04 *Yvonne Watts v Bedford Primary Care Trust et al* [2006] I-4325.

⁹Cases C-438/05 *International Transport Workers Federation (ITF) and Finnish Seaman’s Union (FSU) v. Viking Line* [2007] ECR I-10779 and C-341/05 *Laval v Byggnads et al.* [2007] ECR I-11767.

are. The ECJ, formerly the engine of integration, is it now the one-sided “ultra- or neo-liberal” agent of a “turbo-capitalism”, irresponsible to respect societal demands and social policy objectives? This ongoing political debate is to some extent dangerous in our time of economic crisis because it may engage in an unhappy marriage with a felt “need” towards protectionism, national seclusion, promotion of national champions etc.

This paper will not go into the political or/and social debate nor discuss in detail all of the so called “horror cases”, only to mention that I have been very critical myself to the judgments in *Mangold*¹⁰ and *Viking*¹¹ (not in *Laval*¹², to the regret of some goods friends of mine!). My approach will rather take as starting point a methodological analysis which at the same time acknowledges the developments in the case law of the internal market (I not go into citizenship issues of student mobility like in *Commission v. Austria* and *Bressol* because the reasoning may be different due to the inherent personality element coming close to fundamental rights protection – see now Art. 21 (2) of the EU Charter of Fundamental Rights) while trying to correct some of the so-called “excesses” by reshaping the well-known proportionality principle. The paper will therefore first give an overview on how the ECJ, in its case law in particular of the last 10 years, continuously expanded the scope of application of the EU fundamental freedoms – free movement of goods, establishment, services, and capital, therefore more and more intruding into “reserved areas” of Member states powers, a process not really halted by the Lisbon Treaty. Even though there is some incoherence, in my opinion the case law as such rests on a firm constitutional basis which however may need some modifications. The decisive testing ground will than be on a second, more complex but at the same time more promising level, namely the proportionality principle itself where indeed, as I will try to show, a deeper methodological critique is justified and corrections to the existing case law will be recommended.

II. Widening the scope of application of the fundamental freedoms beyond market access – how wide?

Any discussion on the internal market must start with its basic premise as guaranteeing *market access* to economic agents – workers, producers of goods, providers of services, persons wanting to get established in professional activities or as undertakings, and investors as well as clients in financial and capital markets. That market access is not unlimited, that it can and many times must be regulated by secondary law, that Member state limitations to access should be interpreted strictly, and that the ECJ is the guardian on the functioning of the market forces and in carefully monitoring “clandestine protections” under the phrase of public interest concerns should be out of doubt now. The “Economic Constitution” of the EU is indeed a market economy where national markets merge as far as possible to a single market – this basic objective had been expressed by the ECJ as early as in the *Grundig* case of 1966 in competition and the *Schul* case¹³ of 1982 regarding the abolition of internal trade restrictions.

¹⁰Reich, comment EuZW 2006, 20-22.

¹¹REICH, N. Fundamental Freedoms vs. Fundamental Rights: Did *Viking* get it wrong? In: *Europarättslig Tidskrift*, 2008. S. 851-873.

¹²REICH, N. Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ. *German Law Journal*, v. 9, n. 2, p. 125-160, 2008.

¹³Joined cases 56 + 58/64 [1966] ECR 299 at 30; 15/81 [1982] ECR 1409 para 33.

So far so good. The problem of today is a remarkable extension of this basic concept of the constitutional structure of the internal market far beyond market access *strictu sensu*. We will briefly analyse this legal evolution pushed forward by the ECJ in three steps:

1. Beyond market access¹⁴

The first step concerns the *widening of the scope of the fundamental freedoms* themselves far beyond market access. I will give some examples without even trying to be exhaustive in looking at the rich case law of the ECJ:

- The fundamental freedoms also protect the *recipients* of goods, services, and capital. Already in 1984 in *Louisi and Carbone*¹⁵ the Court found the freedom to provide services also to protect potential recipients. At the same time it liberalised “on its own” payment services which at this time were still restricted and came under primary law only with the Maastricht Treaty. This so-called “passive freedom” was extended to employers (*Clean-Car*¹⁶), recipients of health services (*Kohll*¹⁷, *Watts*), tourists (*Cowan*¹⁸).
- The fundamental freedoms are not only concerned with “moving in”, but also with economic activities of “moving out”. This becomes particularly relevant in the case law on citizenship which we will not discuss here. Regarding the freedom to provide services, the early *Alpine Investment* case¹⁹ will be remembered. In company law where the *Centros*²⁰ litigation was only concerned with companies moving into another jurisdiction, the *Cartesio* case²¹, under a very outspoken opinion of AG Poiares Maduro of 17.7.2008, seems to take a similar step with regard to companies moving out of a jurisdiction, even though the consequences of the Court judgment are more restrictively worded and therefore less than clear. *Viking* concerning social action to prevent the re-flagging of a ferry to a country with lower social standards can be read in a similar direction. More important seems to be the recent *Gysbrecht* judgment²² applying for the first time Art. 29 (now Art. 35 TFEU) on export restrictions also to national rules making cross-border payment transactions more difficult. AG Trstenjak in her opinion of 17.7.2008 even goes further and wants to put Art. 28 (now Art. 34 TFEU) – import restrictions and measures of equivalent effect – and Art. 29 – measures of equivalent effect as export restrictions – on the same footing, thus implicitly overruling earlier case law (*Groenveld*²³). The Court did not go quite that far, but there seems to be a tendency to apply Art. 34 and 35 TFEU both for restrictions on market access *and on market exit*, in conformity with the criteria of the

¹⁴For a recent critique of this concept see SNELL, J. The notion of market access: a concept or a slogan? *CMLRev*, v. 47, p. 437, 2010; see also BACHMANN, G. Nationales privatrecht im Spannungsfeld der Grundfreiheiten. *Archiv für die Zivilistische Praxis (AcP)*, S. 424 at S. 428-438, 2010.

¹⁵Joined cases 286/82 + 26/83 *Luisi & Carbone/Ministerio del Tesoro* [1984] ECR 377.

¹⁶Case C-35/96 *Clean Car Autoservice v Landeshauptmann Wien* [1998] I-2521.

¹⁷Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931.

¹⁸Case 186/87 *Cowan v Trésor public* [1989] ECR 195.

¹⁹Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141.

²⁰Case C-212/97 *Centros Ltd. v Erhvervs og Selskabsstyrelsen* [1999] ECR I-1459.

²¹Case C-210/06 *Cartesio Oktató és Szolgáltató* [2008] ECR I-9641; comment Szydło, *CMLRev* 2009, 703

²²Case C-205/07 *Gysbrechts* [2008] ECR I-9947; comment W.-H. Roth, *CMLRev* 2010, 509.

²³Case 15/79 *Groenveld* [1979] ECR 3409.

earlier *Keck* case²⁴ law differentiating between “product regulations” and “selling arrangements”.

- As a consequence of this development, the traditional “cross-border” element in the free movement case law, thus distinguishing “purely internal situations” where EU law does not apply, from those where at least one element has a link with the internal market, becomes blurred and to some extent obsolete. The “fundamental freedoms” tend to become “*fundamental rights*”, at least insofar as EU citizens (including EU-undertakings) are concerned. This is particularly important in the age of the internet where the traditional distinction between “purely internal” and “cross-border” matters cannot be maintained any more. Take as an example the *Carpenter* case²⁵ where the road to Art. 49 (now Art. 56 TFEU) was opened by the simple fact that Mr. Carpenter who lived with his Philippine wife in the UK where the case against her extradition was brought, got part of his business (acquisition of advertising messages for medical journals) from other EU countries. *Parking Brixen*²⁶ concerned litigation about a concession contract in the town of Brixen where all elements related to Southern Tirol in Northern Italy, *Mobistar*²⁷ a Belgian local tax regulation imposed on Belgian MP-companies. Most striking have been the “golden share” cases brought by the Commission against several Member countries under free movement of capital-provisions. In none of the cases, if I am correctly informed, has there been a distinction between “internal capital transactions” and “cross border investments”. I am tempted to take a closer look at these cases with regard to the proportionality criteria used by the ECJ but space does not allow me to do so. But the entire problem might have been decided already on the first level regarding the scope of the free movement of capital provisions, as the UK government had proposed in the case²⁸ re privatization of the Heathrow Airport which - similar to *Keck* - should not be applicable to mere “investment conditions” not precluding market entry – a proposition flatly rejected by the Court. In the *German VW* litigation²⁹, the conflict was really concerned with an internal (unsuccessful!) take-over bid by the German Porsche company which seemingly was made less attractive by the still existing blocking minority of 20 % in shares held by the Land Niedersachsen under special legislation. Is the case really concerned with “free movement of capital between Member States”, as required by Art. 56 EC(now 63 TFEU), or rather with a purely German take over case? Shouldn’t the matter be left to German law as it happened in the meantime by slightly modifying the VW-law still allowing the Land Niedersachsen a blocking minority of 20%?
- It is also well known and widely debated that the Court extended the protective scope of the fundamental freedoms beyond a mere discrimination to a *broad restriction test*. Any Member state rule which is capable of making less attractive or more onerous the use of a fundamental freedom will come under its protective scope. The somewhat more restrictive case law in the area of free movement of goods after *Keck* is not really a proof to the contrary because the finely knit distinction between “product regulations” to which Art. 34 TFEU applies in full (without detailed discussion of the cross-border element) and “selling arrangements” has

²⁴Joined cases C-267 + 268/91 *Bernhard Keck and Daniel Mithouard* [1993] ECR I-6097.

²⁵Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

²⁶Case C-458/03 *Parking Brixen v Gemeinde Brixen/Stadtwerke Brixen* [2005] ECR I-8585.

²⁷Case C-544 + 545/03 *Mobistar et al v Commune de Fleuron* [2005] ECR I-7723 with reference to the *Keck* criteria.

²⁸Case C-98/01 *Commission v UK* [2003] ECR I-4641 para 45.

²⁹Case C-112/05 *Commission v Germany* [2007] ECR I-8995.

become rather blurred in the follow-up case law. Mere “use” restrictions have recently been included in Art. 34.³⁰

- As a consequence of this broad reading, also *ancillary restrictions* which are not impeding market access as such, but only put some limitations or qualifications on it, come under the scope of the fundamental freedoms. Take as an example the case of *Caixa-Bank*³¹, a French subsidiary of a big Spanish bank which complained of French regulations forbidding to offer interest for sight accounts. There was really no impediment to market access because *Caixa* was, under the relevant EU banking legislation, already established in France. It could market its financial products under the same terms as French banks; there was no discrimination inherent in the French regulation because it applied equally to all banks and was not in violation of secondary EC law. Notwithstanding the Court found a violation of the establishment rules; it confused to my mind “market access” with “marketing methods”, without taking a look at the parallel case law in *Keck*, where market access and freedom of marketing methods were put on a different legal footing. Similar methodological problems can be found in *Centros* – a case which did not concern market access as such but a particularly “cheap” form of doing business exclusively in Denmark by registering as a branch of a letter-box company in the UK to which I will turn later. The “*golden share*” cases also did not concern access to capital markets and investment services; they may have made certain types of investment less attractive to (national or foreign) investors, but given transparency wouldn’t the market take care of this impediment by discounting the price of shares?
- Finally, the fundamental freedoms have also moved in the direction of restrictions induced by private associations. The *Bosman* case³² is well known and has protected workers (as well paid professional football players!) also against restrictions imposed by “collective regulations” of professional football associations registered under private law. This has been extended to similar restrictions regarding establishment and freedom to provide services; the extent of this case law with regard to capital movements limited by company by-laws is not yet clear but will certainly pop up in the future. Most controversial have been the recent *Viking* and *Laval* judgments mentioned above where also social action aiming at collective regulation, eg in a collective bargaining agreement under national labour law, was said to come under the scope of application of Art. 43 and 48 EC (now Art. 49, 56 TFEU). While I have defended this approach as a logical consequence of the earlier *Bosman* case law³³, they have aroused strong protest among labour lawyers who thought themselves immune from the EU internal market law so far³⁴. As a result, EU fundamental freedoms have entered – some say intruded

³⁰Case C-110/05 *Commission v. Italy* [2009] I-519.

³¹Case C-442/02 *Caixa Bank France v Ministère*, [2004] ECR I-8961.

³²Case C-415/93 *ASBL v Bosman* [1995] ECR I-4921.

³³Reich, supra notes 10 and 11; DANWITZ, T. von. Grundfreiheiten und Kollektivautonomie. *EuZA*, 2010, 6. Concerning the question of compensation for social action violating the fundamental freedoms see now judgment of the Swedish Arbetsdomstolen (Labour Court) of 2.12.2009, in Reich, *Laval* “4. Akt”, *EuZW* 2010, 454; case comment by Bernitz/Reich, *CMLRev*, 2011, 603.

³⁴For an overview see HÖS, N. *The principle of proportionality in the Viking and Laval cases: an appropriate standard of judicial review?* European University Institute, 2009. (EUI Working Papers Law, 2009/06). For a detailed critical account see JOERGES, Chr.; RÖDL, F. Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umgang mit dem “sozialen Defizit” des Integrationsprojekts – Ein Beitrag aus Anlass der Urteile des EuGH in den Rs. *Viking* und *Laval*. Bremen: Zentrum für Europäische Rechtspolitik, 2008. (ZERP-Diskussionspapier, 2/2008) = Informal politics, formalised law, and the, social deficit’ of European integration: reflections after the judgments of the ECJ in *Viking* and *Laval*. *European Law Journal*, v. 15, n. 1, p. 1, Jan. 2009; RODIÈRE, P. Les arrêts *Viking* et *Laval*, le droit de grève et le droit de négociation collective. *Revue Trimestrielle de Droit Européen*, n. 1, p. 47, Jan./Mar. 2008; KOCHER, E. Kollektivverhandlungen und Tarifautonomie – welche

- into areas which usually remained subject to very different social models of the Member states with little or no legal regulation. In *Raccanelli*³⁵ concerning a complaint of discrimination by a doctoral student from Italy having only received a stipend instead of a regular contract for allegedly similar work done as German employees against the private (though publicly financed!) German Max Planck-Gesellschaft, the ECJ extended the scope of fundamental freedoms of Art. 45 TFEU also “to (employment, NR) contracts between individuals” (para 45).

2. No “reserved” or “exempted” areas

The second step concerns the persistent claim of the ECJ that the Treaty does not recognise any *reserved areas* to Member states where the fundamental freedoms cannot be applied in the broad sense as developed above.

- This concerns specific provisions of the EU Treaty where secondary legislation is excluded or made subject to unanimity, for instance Art. 114 (2) TFEU (ex-Art. 95 (2) EC) on direct taxation, Art. 153 (5) TFEU (ex-Art. 137 (5) EC) on social action, Art. 166 (4) TFEU (ex-Art. 149 (4) EC) on education, Art. 168 (5) TFEU (ex-Art. 152 (4) EC) on health, Art. 345 TFEU (ex-Art. 295 EC) on the property regime. The Court uses the standard formula that in areas of limited Community/Union competence the Member states must still, in the exercise of their powers, respect the fundamental freedoms³⁶.
- This is also true in areas where secondary law expressly excludes its application to activities which therefore remain in the legislative competence of states. Examples concern the exclusion of gambling from Art. 1 (2) d) of the E-commerce Dir. 2000/31 and in Art. 2 (2) h) of the Service Directive 2006/123³⁷. The Court frequently will limit certain reservations contained in secondary law by reference to the fundamental freedoms. An example has been Art. 22 of (old) Reg. 1408/71³⁸ requiring prior authorisation by their national social security system before migrant persons are able to get reimbursement for health treatment abroad. *Kohll* and

Rolle spielt das europäische Recht? *AuR* (Arbeit und Recht) 2008, S. 13; REBHAIN, R. Grundfreiheiten und Arbeitskampf. *ZESAR* (Zeitschrift für europäisches Sozial- und Arbeitsrecht), 2008, S. 109; DAVIES, A.C. L. One step forward, two steps back? The *Viking* and *Laval* Cases in the ECJ. *ILJ - Industrial Law Journal*, v. 37, n. 2, p. 126, 2008; MALMBERG, J.; SIGMAN, T. Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the ECJ. *CMLRev*, v. 45, p. 1115, 2008; AZOULAI, L. The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization. *CMLRev*, v. 45, n. 5, p. 1335, Oct. 2008; HÖPNER, M. Usurpation statt delegation – Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf. Köln: Max-Planck-Institut für Gesellschaftsforschung, 2008. (MPIfG Discussion Paper 08/12); DEAKIN, S. Regulatory competition after *laval*. *Cambridge Yearbook of European Legal Studies*, v. 10, p. 581, 2008; DÄUBLER, W. ITF-Aktionen gegen Billig-Flaggen-Schiffe – im Widerspruch zum EG-Recht? *AuR*, S. 409, 2008.

³⁵Case C-94/07 *Raccanelli v Max-Planck-Gesellschaft*, [2009] ECR I-5939.

³⁶For a recent example see joined cases C-171 + 172/07, *Apothekerkammer des Saarlands v Doc Morris* [2009] ECR I-4171 at para 18 concerning social security systems; similar *formulae* can be found in other areas of reserved Member state competences.

³⁷Directive 2000/31/EC of the EP and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178, 17.7.2000, 12; directive 2006/123/EC of the EP and the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, 36.

³⁸Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (last amended by Council Regulation (EC) No 592/2008 of 24.7.2008, OJ L 177/1 of 2008); case C-211/08 *Commission v Spain* [2010] ECR I-(15.6.2010) limited however compensation in case of a temporary stay in another country to the sums due in the home country of the hospitalised person. See now Directive 2011/24/EU of the European Parliament and the Council of 9 March 2011 on the application of patient’s rights in cross-border healthcare, OJ L 88, 4.4.2011, 45.

Watts practically set aside this requirement by allowing patients to receive health services abroad under certain limited circumstances without prior authorization, followed by an *ex-lege* right to reimbursement based on similar services at home. Other examples are the extension of the recognition directives on diploma beyond formal professional qualifications also to certain university diploma (*Kraus*³⁹, *Morgenbesser*⁴⁰).

To avoid misunderstandings: I do not object to the Court's approach as such and the results of its case law, but rather to the methodology used which frequently lacks convincing argument concerning the relationship between primary law – which is only “interpreted” by the Court –, and secondary law providing for a legislative procedure in which Member states can fully participate and make their policy priorities known. This interplay between primary and secondary law should in my opinion be respected by the ECJ in the existing system of distribution of powers under Art. 5 (1) EU Lisbon (ex-Art. 5 EC) which binds *all EU institutions*.

3. A broad and at the same time a narrow reading of “public interest” justifications

Here we have seemingly contradictory developments: on the one hand an (almost open-ended) extension of public interest provisos, on the other a substantial narrowing-down in the area of only “economic” or/and administrative interests of Member states:

- The Treaty had inserted rather limited catalogues of justified restrictions of the free movement provisions in Art. 36, 45 (3/4), 45, 52, 65 TFEU (ex-Art. 30, 39 (3) (4), 46, 55, 58 (2) EC) which usually refer to public policy, public security, and public health. This catalogue was interpreted *strictly* by the Court.
- Ever since the seminal *Cassis*-case⁴¹, the Court extended this *numerus clausus* of justified restrictions to genuine concerns of public interest or public policy like consumer protection (*Cassis*), environmental protection (*Radlberger*⁴²), social protection (*Rush Portuguesa*⁴³), protection of clients of legal services (*Broede*⁴⁴, *Cipolla*⁴⁵), road safety (*Commission v. Italy*⁴⁶). Later case law added fundamental rights protection (*Schmidberger*⁴⁷), even if it was recognized only in one Member country (*Omega*⁴⁸). Recent case law refers to the EU Charter of Fundamental Rights in order to justify restrictions on free movement (*Dynamic Medien*⁴⁹).

³⁹Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663.

⁴⁰Case C-313/01 *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova* [2003] ECR I-13467.

⁴¹Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649; for an overview see BARNARD, C. Derogations, justifications, and the four freedoms: is state interest really protected. In: BARNARD, C.; ODUSU, O. (Eds.), supra note 3 at p. 273.

⁴²Case C-309/02 *Radlberger Getränkegesellschaft v Land Baden-Württemberg* [2004] ECR I-11763.

⁴³Case C-113/89 *Rush Portuguesa v Office national d'immigration* [1990] ECR I-1417.

⁴⁴Case C-3/95 *Reisebüro Broede v Gerhard Sandker* [1996] ECR I-6511.

⁴⁵Joined cases C-94 + 202/04 *Frederico Cipolla et al v Rosaria Fazari, née Portolese et al* [2006] ECR I-11421.

⁴⁶Supra note 30.

⁴⁷Case C-112/00 *Eugen Schmidberger v Austria* [2003] ECR I-5659.

⁴⁸Case C-36/02 *Omega* [2004] ECR I-9609.

⁴⁹Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505.

- As a somewhat opposing trend, the Court excluded mere “*economic grounds*” from the scope of the public interest test like business, workplace or job protection, or the shielding certain professions from competition by “*numerus clausus*” provisions. Surprisingly, the (prevention of a) diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services” (*Gambelli*⁵⁰). Accordingly, mere administrative expediency is not a ground for justifying restrictions on fundamental freedoms. However, restrictive regulations to secure supply of energy in times of crisis by “national champions” were regarded as a justified public interest⁵¹.
- This approach put the Court in conceptual problems with regard to the financing of health services which may become problematic once patients can freely choose where to get medical care (whether ambulant or hospital treatment). The Court therefore accepted that Art. 46 (now Art 52 TFEU) which allows a protection of public health to be one of the overriding reasons in the general interest which can justify restrictions of the freedom of establishment or provision of services. This includes rules guaranteeing a balanced financing of the public health system, for instance by restrictions on access to certain health services⁵². Surprisingly the Court did not accept a similar argument related to the financing of higher education in the litigation against Austrian restrictions on access to its universities to foreign student not having complied with their home requirements.

This is not the place to evaluate the existing case law. Suffice it to say that the Court, in broadly extending the scope of application of the fundamental freedoms, at the same time must have felt the need to also broaden the scope and extent of justifications. One may wonder whether this judicial extension/retreat is methodologically more promising than a traditional discrimination test which seems to be more in the line of the wording of the relevant EC Treaty provisions⁵³. But the case law “stands as it stands”. It probably cannot be avoided to be accepted as an attempt to conform the imperatives of the internal market with the prerogatives and regulatory powers of Member states, unless changed by adding a Protocol to the Treaty which seems highly unlikely.

The fine-tuning of this conflictual relationship however must be done by using the *flexibility inherent in the proportionality* criteria to which we will turn now. In this context it should be emphasized that the widening of the field of application of the fundamental freedoms put the Court in the difficult role to be the final arbiter on Member state measures which in their eyes are usually justified by a public interest test, which have undergone a political bargaining process subject to their constitutional requirements, and which first will be subject to scrutiny by the national jurisdictions including their EU conformity. In taking a stand for or against a national measure by using the proportionality criteria as described below, the Court necessarily becomes involved in Member state policies. This warrants a

⁵⁰Case C-243/01 *Piorgiorgio Gambelli et al* [2003] ECR I-13031 para 61.

⁵¹Case 72/83 *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727.

⁵²For a recent restatement see case C-169/07 *Hartlauer*, [2009] ECRI- 1721, comment HANCHER, L; SAUTER, W. One step beyond? From *Sodemare* to *DocMorris*: EU’s freedom of establishment case law concerning health care. *CMLRev*, v. 47, n. 1, p. 117 at 136, Feb. 2010.

⁵³For a discussion see CRAIG, P.; BÚRCA, G. de. *EU law: text, cases and materials*. 4th ed. Oxford: Oxford University Press, 2008, at 831.

certain caution on the side of the Court, particularly in areas where either primary or secondary law has clearly stated a prerogative of Member states.

I will try to show that a proportionality test can serve this objective if it is handled with some care which has not always been the case if looking at the extended jurisprudence of the Court. Very recent case law seems to be somewhat more cautious in this respect – the *autonomy of Member states* becomes reinstated against an earlier “over-activist” Court.

III. The proportionality principle as the “super-norm”?

1. Some preliminary methodological reflections

In an interesting recent article, Harbo⁵⁴ shows that the proportionality principle can be interpreted in several ways, depending on the interrelation of a liberal theory of rights with the (supra-) national commitment to a welfare state. He distinguishes a “weak” and a “strong” rights regime within the proportionality principle. In the first reading based on the theoretical work of Alexy⁵⁵, the “proportionality principle is a tool in which a balance between individual and group interests, on the one hand, and the public interest, on the other hand, can be struck in the best possible way.” Under the second – liberal - reading, greatly influenced by a Dworkinian/Habermasian understanding of rights⁵⁶, “there is no room for weighting mechanisms like the one laid down in the proportionality principle.”

This theoretical distinction may not always be easy to prove in practice and may appear in more or less combined or “mixed” forms. In a somewhat broader and more theoretical context, it is well known that constitutional doctrine in many jurisdictions based on democratic principles and the rule of law extended the proportionality principle to a general and broad instrument to control state powers interfering with individual, constitutionally guaranteed, mostly fundamental rights like liberty, property, and judicial protection⁵⁷. Its basic methodological approach is not an abstract but a concrete and pragmatic one to « balance » opposing constitutional propositions: “L’objet principal des arguments

⁵⁴HARBO, T.-I. The function of the proportionality principle in EU law. *European Law Journal*, v. 16, n. 2, p. 158 at 166-168, 2010; a detailed account of the use of the proportionality argument has been given in the German monograph by KOCH, O. *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des EuGH*. Berlin, 2003, then counting 800 judgments referring to the proportionality argument, which certainly has increased beyond 1000 by the time of writing.

⁵⁵See SWEET, A. Stone; MATHEWS, J. Proportionality balancing and global constitutionalism. *Columbia Journal of Transnational Law*, v. 47, p. 76, 93, 2008 for a theoretical justification of this balancing test, referring to Alexy’s optimization concept supra note 54 at 44-61; RIVERS, J. Proportionality, discretion and the second law of balancing. In: PAVLAKOS, G. (Ed.). *Law, rights and discourse: the legal philosophy of Robert Alexy*. Oxford: Hart Publishing, 2007, at 168 referring to “public interests” as principles which may justify a limitation of rights under “optimization requirements”.

⁵⁶DWORKIN, R. *Taking rights seriously*. London: Duckworth, 1977, p. 81; HABERMAS, J. *Between facts and norms: contributions to a discourse theory of law and democracy*. Translated by William Rehg. Cambridge UK: Polity Press, 1998, p. 259-260 criticising the so-called “value jurisprudence” against the “deontological character of basic rights, which are withdrawn from such a cost-benefit analysis.”

⁵⁷For comparative overviews see ELLIS, E. (Ed.). *The principle of proportionality in the laws of Europe*. Oxford: Hart Publishing, 1999; EMILIOU, N. *The principle of proportionality in European Law: a comparative study*. Kluwer Law International, 1996; its importance for the case law of the ECJ had already been stressed by its former President (and former judge of the German BVerfG) KUTSCHER, H. Der Grundsatz der Verhältnismäßigkeit im Recht der Europäischen Gemeinschaften. In: KUTSCHER, H.; RESS, Georg u.a. (Hrsg.). *Der Grundsatz der Verhältnismäßigkeit in europäischen Rechtsordnungen*. Heidelberg: C.F. Müller Juristischer Verlag, 1985. p. 80.

juridiques est la justification des propositions empiriques avancées au soutien des prétentions concurrentes relatives à la proportionnalité des équilibres⁵⁸. It plays a great role in the case law of the European Court of Human Rights to balance on the one hand the human rights guarantee of the Convention with the legitimate governmental concerns prescribed therein. Most notably States enjoy a certain *margin of appreciation* when performing this balancing test which is only limited when the very essence of fundamental rights is at stake⁵⁹.

2. The origin in the early case law of the ECJ

The “transplant” of the proportionality principle into the case law of the ECJ has a somewhat different structure. Its original source: a specific understanding of the dualistic relationship between the state and the individual, had to be transposed on a more complex, *triangular* relationship between the individual (the than EEC “market citizen” – *Marktbürger* - engaged in using the market freedoms under the EEC Treaty), the Member state imposing certain burdens on that individual which may impede his freedom to act in the “Common” and later the “Internal market”, and the role of the ECJ to monitor the respect of these “fundamental freedoms” as they were called later. Since this “market citizen”, under the theory of “direct effect” of E(E)C law as developed by and after *Van Gend and Loos*⁶⁰, could invoke his market freedoms as subjective rights against the state⁶¹, and since Member state courts as “European courts” had to ensure the protection of these rights granted under E(E)C law, the ECJ became the *final arbiter* on the extent of these directly applicable market freedoms, either under the reference procedure of Art. 267 TFEU (ex-Art. 234 EC), or, legally less importantly, by the infringement procedure of the Commission under Art. 258 TFEU (ex-Art. 226 EC). Conflicts arose both on the administrative and on the legislative level of Member states. The ECJ had to fine tune and balance the scope of the fundamental freedoms as interpreted extensively, against the still allowed restrictions under the broad public interest test. This balancing had to be done by using the ever more important *proportionality principle*.

The methodological origins of this important principle are however modest, if we look again at the seminal *Cassis* case⁶² whose legal argumentation looks rather poor from today’s perspective, even though it created the very fundamentals of the internal market law.⁶³ The balancing test⁶⁴ followed by an “information approach”⁶⁵ is the result of the above mentioned search for an equilibrium between the

⁵⁸TREMBLAY, L. *Le fondement normatif du principe de proportionnalité en théorie constitutionnelle*. Paper delivered at the EUJ conference on reasonableness. 8.10.2008.

⁵⁹A. Stone Sweet; J. Mathews, *supra* note 55 at 145; CHRISTOFFERS, J. *Fair balance: a study of proportionality, subsidiarity and primarity in the European Convention on Human Rights*. Leiden; Boston, Mass.: Martinus Nijhoff Publishers, 2009. (International Studies in Human Rights, v. 99).

⁶⁰Case 26/62 *Van Gend en Loos v Nederlandse Administratie van Belastingen* [1963] ECR 1.

⁶¹REICH, N. ‘System der subjectiven öffentlichen Rechte’ in the Union: a European constitution for citizens of bits and pieces. In: ACADEMY OF EUROPEAN LAW (Ed.). *European Community Law*, 1995. p. 157-241. (Collected Courses of the Academy of European Law, VI/1).

⁶²*Supra* note 41.

⁶³For a appraisal see REICH, N. et al. *Understanding EU internal market law*. 3rd ed. Antwerpen: Intersentia, 2011, at paras 1.2, 7.6.

⁶⁴UNBERATH, H.; JOHNSTON, A. The double-headed approach of the ECJ concerning consumer protection. *CMLRev*, v. 44, n. 5, p. 1237 at 1250, Oct. 2007.

⁶⁵STUYCK, J. European consumer law after the treaty of Amsterdam: consumer policy in the internal market. *CMLRev*, v. 37, p. 367 at 384, 2000; REICH, N. Crisis or future of European consumer law? *British Yearbook of Consumer Law*, p. 3 at 6-18, 2008/2009; MICKLITZ, H.-W.; REICH, N. Cronica de una muerte anunciada: the Commission proposal for a “Directive on Consumer Rights”. *CMLRev*, v. 46, n. 2, p. 471 at 485, Apr. 2009, criticising the new legislative proposal by the Commission.

producer or importer invoking his market freedoms, and the state promoting a legitimate public interest, namely consumer protection: both objectives should be adequately attained by information provision without mandatory standard setting. This has been labelled somewhat incorrectly as the “*information*” vs. the “*regulation*” – approach to protect consumers (or other legitimate interests, where appropriate). At the same time, the use of the proportionality argument can also be justified on economic efficiency grounds⁶⁶ even though the Court in this and the many later judgments (mostly concerning so-called “purity laws”, for instance of German beer) hardly referred to it.

It was only in the *Gebhard* case⁶⁷ that the Court set out a more sophisticated approach to the proportionality test to be used in checking Member state restrictions on the fundamental freedoms. Restrictions to establishment (and other fundamental freedoms) must fulfill a four step test:

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

In *Gebhard*, the Court did not mention „proportionality in the narrow sense“ which is known in German Constitutional law as *Übermaßverbot* as a third stage of the proportionality test⁶⁸. It means that, even if a state measure is *suitable* to attain the given objective (relationship between means and end), and if the chosen measure is *necessary* to achieve the proposed goal, it still should not put an *excessive burden* on the individual, implicitly inherent in the “less restrictive alternative” test.⁶⁹ A state measure which puts an unreasonable burden on the individual and can easily be substituted by a less intrusive measure able to attain the same objective (a financial instead of a criminal sanction) will not be regarded as being “necessary”.

3. Later methodological sophistication or aberration? The different and sometimes incoherent tests of the ECJ

The *Gebhard* test has been used many times in later cases, sometimes with slight variations in the wording which we will not follow up here. With regard to the “imperative requirements in the general interest”, I refer to what was said in the preceding section: since the catalogue of these interests is an open-ended one (perhaps with the exception of “purely economic interests” which do not justify

⁶⁶See the contributions in GRUNDMANN, St.; KERBER, W.; WEATHERILL, St. *Party autonomy and the role of information in the internal market*. Walter de Gruyter, 2001.

⁶⁷Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e procuratori di Milano* [1995] ECR I-4165 para 57.

⁶⁸GRIMM, D. Proportionality in Canadian and German constitutional jurisprudence. *University of Toronto Law Journal*, v, 57, n. 2, p. 383, Spring, 2007; LEPSIUS, O. Die Maßstabsetzende Gewalt. In: JESTAEDT, M. et al. *Das entgrenzte Gericht – Eine kritische Bilanz nach sechzig Jahren BVerfG*. Suhrkamp Verlag GmbH, 2011, p. 203 ff. critically discussing the three steps (*Geeignetheit, Erforderlichkeit, Angemessenheit*) of the proportionality test of the BVerfG.

⁶⁹TRIDIMAS, T. *The general principles of community law*. 2nd.ed. Oxford European Union Law Library, 2006, 193 at pp. 209-220 (Proportionality – review of national measures); T.-I. Harbo, *supra* note 54.

restrictions unless they can be upgraded to a “legitimate public interest” as in the case of health care financing systems), Member states will usually be able to find a justified public interest which legitimises restrictions on the exercise of fundamental freedoms by EU market citizens. The debate in the many cases which have been decided under the *Gebhard* or closely related tests will therefore usually concentrate

- first on the “*adequacy*” of a certain restrictive regulation (is it suitable at all to attain the proclaimed general interest objective?);
- second on its “*necessity*” with regard to its intrusive elements (does it not go beyond what is required to attain this objective, eg as in the case of “information” vs. “regulation” to protect consumers or guarantee fair commercial practices).

Obviously the *Gebhard* test is more complex than it looks on paper. It refers to a *balancing* between competing policies, interests, arguments, instruments. The specific structure of proceedings before the ECJ makes this balancing a rather complex process. How will the ECJ as a court of law with very limited information input, in particular in the reference proceedings under Art. 267 TFEU where only the parties to the original litigation, the Commission, Member States and eventually the Council and the EFTA surveillance authority, but not independent experts, public interest groups, NGOs, national parliaments responsible for the legislation under scrutiny etc., can submit observations, and where the referring court may only provide little factual information, be able to decide matters of “suitability” and, even more complicated, “necessity” of a regulation said to violate fundamental freedoms? Isn’t this really a “*black box procedure*”? And how do we define the interdependence of protected interests and the intensity of state measures to protect them?

In order to allow a more enlightened and at the same time critical methodological discussion, I will scrutinise the abundant case law – which cannot be taken up in its entirety – as follows. I will distinguish four approaches of the Court:

- an approach where the Court does the balancing “pro” or “contra” itself;
- a “margin of discretion” approach, frequently putting the judgment on proportionality back to the referring court, lately supplemented by the requirement of “consistency of state measures”⁷⁰;
- a “fundamental rights” approach where the freedoms must be balanced against fundamental rights which may lead to rather ambivalent results;
- a “quasi-legislative” approach where the Court uses the “proportionality” principle to impose measures of legislative nature on Member states, even though formally the Court is only “interpreting” EU law and thus seemingly not invading into legislative competences of Member states.

⁷⁰Case C-169/07 *Hartlauer* supra note 52 at para 55 writing: “...it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued (health protection, NR) only if it genuinely reflects a concern to attain it in a consistent and systematic manner...” ; also case C-73/08 *Bressol* supra note 7 at para 71 requiring “solid and consistent” data to support a claim that a restriction of access of foreign students to studies of medicine may lead to “genuine risk to public health”; see the remarks by L. Hancher; W. Sauter supra note 52 at 119.

The few cases which I mention – no complete case analysis is intended here - are supposed to illustrate the approach chosen and should at the same time allow to understand and to critically evaluate the methodological argument of the Court. This is particularly true with what I call the “quasi-legislative approach”.

a. Examples for the “autonomous balancing” approach

Looking at the many cases decided under the proportionality principle, I submit that the “autonomous balancing” approach first developed in *Cassis* is still the dominant one and usually has been accepted more or less enthusiastically by Member states; it will and should not serve as a basis for the somewhat diffuse criticism mentioned in the beginning of my paper because it can be found also in the constitutional traditions common to the Member countries. I will refer to just some examples without going into details, namely *Schindler*⁷¹ concerning restrictions on the cross-border marketing of games of chance, *Überseering*⁷² denying standing of a foreign company having transferred its business activity to Germany under the old „seat-theory“ , *Doc Morris*⁷³ differentiating between (unjustified) restrictions on cross-border marketing of OTC medicines and (justified) restriction for prescription drugs, and *Watts*⁷⁴ on health-care services taken abroad by British citizens subject to the authorisation requirement of the NHS.

A good recent example is *Case X*⁷⁵ which discussed different recovery periods and fines for unpaid wealth taxes in the case of assets held outside the Member state of residence. The relevant EC directive 77/799/EEC sets up an information system between tax authorities, but only in case of a request in particular cases; Member states can invoke bank secrecy provisions to refuse information. Dutch law provided for a 5 year recovery period for undeclared assets held in the Netherlands, 12 years for assets held in another Member country. The Court, in its broad approach to the interpretation of fundamental freedoms concerning services and capital according to Art. 49 and 56 EC, decided first that the Dutch regulations could be regarded as a restriction because it made the provision of cross-border services more difficult, and it dissuaded residents from obtaining loans or making investments in other Member countries (paras 32 + 33). Interestingly it did not discuss the issue of (direct) discrimination. The case thereby turned about the justification which the Court found in the need to guarantee the effectiveness of fiscal supervision and the prevention of tax evasion (para 45). The regulation must however comply with the principle of proportionality, where the Court had no problem with the “appropriateness” test, but discussed at length the “necessity” criteria because the extension of the recovery period would not guarantee recovery as such. But due to the weak regulation on information exchange in Dir. 77/799 and the difficulty to get information about foreign assets the provision of a longer period for discovery and recovery of taxable assets does not go beyond what is necessary to guarantee the effectiveness of fiscal supervision and to prevent tax evasion (para 70). An exception was only made in cases where the mechanisms of Dir. 77/799 could be said to work, eg. the Member state of residence has evidence of tax evasion and can therefore launch an investigation, provided this is not hampered by reasons of bank secrecy. Without directly saying so, the Court tries to compensate the weakness of the system of information exchange among tax authorities under Dir. 77/799 by allowing

⁷¹Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECRI- 1039.

⁷²Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

⁷³Case C-322/01 *Deutscher Apothekenverband v Doc Morris NV and Jacques Waterval* [2003] ECR I-14887.

⁷⁴Supra note 7.

⁷⁵Case C-155 + 157/08 *X et al v Staatssecretaris van Financien*, [2009] ECR I-5093.

Member states a “second level remedy”, thereby indirectly amending Dir. 77/799. This shows the amazing flexibility of the proportionality argument of the Court by allowing it to amend existing (incomplete and ineffective) EC legislation.

b. Examples for the (limited) “state margin of appreciation” approach

Several cases on proportionality expressly allow Member states a (limited!) “margin of appreciation” or a “discretion” in order to determine whether a measure restricting free movement of “market citizens” is adequate and necessary. Usually there is a correlation between the relevance of the protected public interest and the extent of discretion. I just mention some examples without going into details: *Broede*⁷⁶ concerned the (legitimate) monopolisation of debt collection services to lawyers. *Cipolla*⁷⁷ concerned Italian rules on minimum fees for lawyers which were said to have a negative effect on entry of foreign lawyers into the Italian market, but possibly justified by overriding concerns of the protection of consumers, in particular recipients of legal services, and the safeguarding of the proper administration of justice. This must be decided by the national judge.

Health and safety interests have played a similar privileged role in the proportionality case law of the ECJ. The *Gourmet* case⁷⁸ concerned a Swedish ban on advertising of alcoholic drinks. In case C-110/05⁷⁹ *Commission v Italy* an Italian regulation forbidding the use of trailers being towed by motorcycles was attacked by the Commission. For the first time the Court applied Art. 28 (now Art. 34 TFEU) also to use restrictions: Against the opinion of AG Bot of 8 July 2008, this could be justified by concerns of road safety where Member states enjoy “a margin of appreciation” (para 67). In *Kattner*⁸⁰, the Court had to decide about the conformity of the German compulsory work accident insurance system restricting the freedom of employers to receive services from competing foreign insurance companies. The decisive question turned to the proportionality of this scheme which the Court basically left to be determined by the national court. It gave some interesting guidance in this direction based on risk assessment. The story was continued by *Apothekerkammer des Saarlands v Doc Morris*⁸¹. It concerned a challenge to the German rule (sanctioned by Constitutional Law) that a pharmacy can only be operated by a pharmacist, not by a company even if employing a qualified pharmacist. In a very carefully worded judgment, the Court referred to the importance of health protection as “one of the overriding reasons in the general interest” (para 27) which allows Member States “discretion” (para 19).

Most spectacular has been the recent “clarification” in the case law concerning State imposed restrictions on games of chance marketed via the internet. In *Gambelli*⁸², the Court held that restrictions on the activities of the Italian agencies to take bets for Stanley (UK) constituted obstacles to the freedom of establishment. The prohibition imposed on Italian customers and sanctioned by criminal law indeed restricts their possibility to freely receive services from other EU countries. The decisive question was therefore one of justification of the restrictions which must meet the criteria set out in *Gebhard*. In the opinion of the Court, the mere collection of revenue for the state does not serve as such as a justification. The restriction must rather “reflect a concern to bring about a genuine diminution of

⁷⁶Supra note 43.

⁷⁷Supra note 44.

⁷⁸Case C-405/98 *Konsumentenombudsmanen (KO) v Gourmet International products* [2001] ECR I-1795.

⁷⁹Supra note 30.

⁸⁰Case C-350 *Kattner Stahlbau v Maschinen- und Maschinenbauberufsgenossenschaft*, [2009] ECR I-1513.

⁸¹Joined cases C-171 + 172/07, [2009] ECR I-4171.

⁸²Supra note 50; see Barnard, supra note 41 at p. 284.

gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted” (para 62). If a Member state follows a policy of inciting betting for revenue purposes, it cannot claim the consumer protection and fraud prevention argument to forbid cross border betting. The rules on licensing must be applied without discrimination, eg. foreign companies must have access to the national betting market (which was not the case in Italy because of a state monopoly). This argumentation seems to be convincing at first sight. However, the main problem of the argument seems to be the somewhat *artificial separation* of the Court between legitimate Member states’ action to combat fraud including to protect consumers against illegal betting activities, and the seemingly illegitimate collection of revenue via monopolising betting and preventing access of foreign providers which the Court had regarded with much more positive eyes in its *Schindler* judgment. The later *Placanica*⁸³ judgment followed this line of argumentation by critically considering the different elements of the Italian system of betting regulation. The Court insisted that a rule in the national licensing scheme which excluded operators in the form of companies whose shares are quoted on the regulated markets (blanket exclusion) goes beyond what is necessary to achieve this objective, vaguely referring to “other ways of monitoring the accounts and activities of operators in the betting and gaming sector which impinge to a lesser extent on the freedom of establishment and the freedom to provide services, one such possibility being the gathering of information on their representatives or their main shareholders” (para 62). Again the question remains: How and wherefrom did the ECJ know that the exclusion of public stock companies (whether registered in Italy or in other EU countries) from penetrating the betting market was not “necessary” to avoid betting fraud? In particular: how can the persons behind a foreign stock company be effectively controlled in case of illegal betting activities, when the country of origin (UK) seemingly imposed rather lax standards of supervision?

The later case law of the ECJ in the *Liga Portuguesa* judgment of 8 September 2009⁸⁴ was concerned with Portuguese legislation giving the public charity Santa Casa the exclusive right to take bets. It prohibited entry of an operator established in another EU country into the national market for games of chance and of co-operation with sports associations. There was obviously a restriction to the freedom to provide services; the question therefore turned on the proportionality of the justification on the basis of the public interest to combat fraud. The Court insisted that „(t)he Member States are ... free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality” (para 59). The Portuguese scheme in difference to the Italian passed the strict proportionality test because the control of betting by the country of origin was not regarded as being sufficient to prevent fraud, and because the co-operation of the operator with a sporting association may put him “in a position to influence their outcome (of soccer games) directly or indirectly, and thus increase its profits” (para 71). This line of case-law was continued in *Ladbroke*⁸⁵ concerning an exclusive license for internet betting given to a Dutch company and excluding betting services from a UK company which was supervised according to UK law: The Court added that the fight against consumer addiction to betting as a justified public interest reason justifies proportionate restrictions on cross-border services. This would even allow advertising for its activities, unless “it were established that the Kingdom of the Netherlands is pursuing

⁸³Joined cases C-338, 359 + 360/04 Mssimo Placanica [2007] ECR I-1891.

⁸⁴Case C-42/07 *Liga Portuguesa de Futebol Profissional & Bwin Int v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633; see the recent analysis of this case in the opinion of AG Bot of 31.3.2011, case C-347/09, *Staatsanwaltschaft Linz v Jochen Dickinger und Franz Ömer* and my comment in *EuZW* 2011, 454.

⁸⁵Case C-238/08 *Ladbrokes Betting & Gaming Lt. et al v. Stichting de Nationale Sporttotalisator* [2010] ECR I-(3.6.2010) para 28.

a policy of substantially expanding betting and gaming, by excessively inciting and encouraging consumers to participate in such activities, principally with a view to obtaining funds, and that, for that reason, the financing of social activities through a levy on the proceeds of authorised games of chance constitutes not an incidental beneficial consequence but the real justification for the restrictive policy adopted by that Member State...” (para 28), thus putting the *evidence of proportionality* not on Member States but on UK companies challenging it!

However, the German state monopoly of lotteries ran foul of its *inconsistent* implementation. It rather incited the public to other forms of games of chance instead of restricting it by truly combating consumer addiction under the proportionality case law of the ECJ, arguing that “the case-law of the Court of Justice also shows that the establishment, by a Member State, of a restriction on the freedom to provide services and the freedom of establishment on the grounds of such an objective is capable of being justified only on condition that the said restrictive measure is suitable for ensuring the achievement of the said objective by contributing to limiting betting activities in a *consistent and systematic manner* (italics NR)”⁸⁶.

c. Examples for the - rather ambivalent – “fundamental rights approach”

Another development concerns the use of fundamental rights arguments in the free movement case law. I cannot adequately go into the many aspects of this development. The case law developed in two seemingly contradictory directions⁸⁷: Some cases like *Familiapress*⁸⁸, *Carpenter*⁸⁹, and *Karner*⁹⁰ try to combine free movement with fundamental rights to reinforce the position of the individual. Other cases allow Member states to use fundamental rights’ concerns to restrict fundamental freedoms and to avoid a unilateral use of the proportionality argument against them. I will only be concerned with the latter cases. The landmark case was and still is *Schmidberger*⁹¹. It uses a complex “double proportionality” balancing of “free movement” vs. “fundamental rights” under Art. 10/11 ECHR in justifying the temporary closure of the Brenner Autobahn by the Austrian regional government to allow an ecological demonstration. *Omega*⁹² went even further. It concerned a German regulation prohibiting certain games which involved firing on human targets, considered to be in breach of the fundamental principle of human dignity enshrined in the German Constitution. In *Dynamic Medien*⁹³ a German prohibition of distance selling of image store media was attacked which had not received clearance for children’s use by the competent German authority, disregarding prior clearance in another Member country. The restriction was caught by Art. 28 EC (now Art 34 TFEU). With regard to justification, the Court pronounced itself in favour of child-protection which is based on international treaties to which the EU is a member. The Court also referred to the (than non-binding) Charter of Fundamental Rights in the EU. Member states enjoy a “definite margin of discretion” in the field of protecting the rights of the child (para 44).

⁸⁶Case C-46/08 *Carmen Media Group v Land Schleswig Holstein* [2010] ECR I-(8.9.2010) para 64; see also C-316/07 et al. *Markus Stoß et al Wetteraukreis et al* [2010] ECR I-(8.9.2010); comment by G. Spindler et al, EJRR 2011, 135.

⁸⁷SHUIBHNE, N. Margins of appreciation: national values, fundamental rights and EC free movement law. *European Law Review*, v. 34, n. 2, 2009, 230 at 24-235 distinguishes four groups which in the end boil down to the two mentioned above.

⁸⁸Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

⁸⁹Supra note 25.

⁹⁰Case C-71/02 *Herbert Karner v Troostwijk GmbH* [2004] ECR I-3025.

⁹¹Supra note 47.

⁹²Supra note 48; Comment Ackermann, CMLRev 2005, 1107; critique Shuibhne, supra note 87 at 244.

⁹³Supra note 49.

The most controversial case in this respect is known as *Viking*⁹⁴. As mentioned above, the Court applied the fundamental freedoms also to social action intending to prevent an undertaking – Viking-line Finland – to re-flag its ferryboat “Rosella” to Estonia to allow for wage cutting. The rather complex litigation will be examined here only under proportionality aspects which the Court surprisingly held to be applicable to social action even though it recognized the fundamental right of strike to be protected also by EU law under Art. 6 (2) referring to the ECHR and its Art. 11, as well as Art. 28 of the Charter, thus justifying restrictions on free movement. In its judgment, the Court found it necessary to distinguish between the social action of the Finnish Seaman’s Union (FSU) on the one hand and the call for solidarity action by International Transport Worker’s Federation (ITWF) on the other. With regard to FSU, the Court insisted that the social action must truly service the protection of workers which would not be the case “if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat (para 81)”, eg if the undertaking which takes over the re-flagged vessel would be bound by the prior collective agreement or statutory provisions protecting workers. The action taken by FSU which is as such a legal means of defending rights of workers must meet the requirements of proportionality. This must be established by the national court; the ECJ can (only?) give guidance. In particular, the ECJ stressed the *ultima ratio* principle to justify social actions against re-flagging as an infringement of the freedom of establishment. A stricter ruling concerned the boycott and solidarity action by ITWF where it was suggested that it might be disproportionate because it would cover situations where the policy against “flags of convenience” would also hit outsourcing activities which however did not deteriorate the social position of workers – a somewhat improbable result where the Court seemed to misunderstand the economic logic of outsourcing. But is the ECJ authorised to second-guess social action by referring to the proportionality principle which may be justified in relation to state action? What is the place of the autonomy concept in social action of labour unions and their umbrella organisations, protected by the freedom of association provisions of the ECHR and by the EU Charter? Is EU law in general and the ECJ in particular competent to regulate social action unless it pursues clearly illegal objectives, eg by enforcing “closed shops”, discriminating against certain groups of workers, or segregating job markets, as AG Poiares Maduro seemed to suggest in his opinion of 23.5.2007, and as can be deduced from the case law of the ECtHR in the *Gustavson and Rasmussen* insisting on the “negative right of association”⁹⁵?

d. Examples for the “quasi-legislative approach”

When I refer to a “quasi-legislative approach” of the Court to the application of the proportionality principle, I seem to indicate a point of critique which indeed will be developed further in looking at some problematic cases. This approach is “quasi-legislative” insofar, as certain elements of a state measure may be excessive if seen in isolation, but may still be justified in a complex policy area where different public interests are at stake and choices have to be made respecting democratic procedures which will however not be accepted by the Court, for instance on arguments of consistency as mentioned above⁹⁶. The Court has been criticized for substituting the national legislators’ evaluation (and solution!) of a certain problem area by its own understanding of the legislative process. I have in

⁹⁴Supra note 9.

⁹⁵Recueil des Arrêts de la Cour, 1996-II, 637 paras. 44–45 ; Judgment of 11 January 2006, applications No. 52656 and 52620/99, paras. 58. Available at: <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>; also ECJ case C-499/04, *Werhof v Freeway Traffic Services GmbH & Co KG*, [2006] ECR I-2397 para. 33. For a more detailed discussion see my paper supra note 11 at 858.

⁹⁶See references at supra note 70.

mind those areas where Member state actions may indeed be controversial and differ from a strictly liberal economic model, but where careful analysis will find some “hidden” yet reasonable justification which however was discarded by the ECJ on proportionality reasons:

I will try to limit my argument to the methodological elements of a few controversial cases and not be concerned with the underlying or following political debate: Methodologically most problematic for me always has been and still is the *Centros* case⁹⁷. The facts of the case as well as the final judgment are well known. The case has as usual many aspects: Some relate to international company law respecting different Member state theories known as the “incorporation” or the “real seat theory” where no secondary EU conflict provisions exist so far. The second concerns the autonomy of Member states defining regimes of companies “as products of law” under their jurisdiction, and the failure of the Union to harmonise company law, both recognised in the earlier *Daily Mail* judgment⁹⁸ allowing Member states to impose restrictions on the free movement of companies, and recently reaffirmed in *Cartesio*⁹⁹. A new, “dynamic internal market” element has been added in the interest of “market citizens” to register their business in the least restrictive regime of company law of Member state A (the UK) to do business via a branch in jurisdiction B (Denmark). Can this be justified under a theory of “competition of legal orders” which would allow the parties themselves and not governments to find the best legal regime on “corporate governance”, as AG La Pergola suggested in his opinion of 17.6.1998 (para 20)? As a contrasting argument, there is the interest of states to avoid an “opting out” of their jurisdiction by “wholly artificial arrangements”, as the Court wrote in the later *Cadbury-Schweppes* judgment¹⁰⁰, thus trying to avoid an “abuse of EU freedoms”. Will the proportionality test help to solve this “mixture” of quasi-legislative legal interests? Yes and no: I think that the Court correctly argued that restrictions on the freedom of establishment which indeed were imposed by Danish legislation on companies registered in country A (the UK) doing business via a branch in Denmark can be only justified under the 4-step *Gebhard* test; the mere reference to international company law under the “real seat theory” does not exclude this restriction, as many company lawyers had argued before, and are still arguing.¹⁰¹ On the other hand, creditor protection qualifies for a public interest justifying such restrictions, but the measures must be appropriate and necessary which the Court denied in the case before it. Creditors could be given notice that the company is established under UK law and thereby be warned against certain risks (para 36). Creditor protection could also be achieved by less restrictive means, eg guarantees (para 37). But the question remains: where did the Court get its knowledge from? Is the reference to the *Cassis* principle: “information should be preferred to regulation” justified with regard to complex questions of corporate governance? How can unsecured creditors like workers, social security institutions, tax authorities be protected? Is it really justified to put the information burden concerning the effect of using a foreign company law for business done exclusively in the home country on third parties and not on those which operate the company? Shouldn’t the Court also have left the final decision to the Danish

⁹⁷Supra note 20.

⁹⁸Case 81/87 *R v Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust* [1988] ECR 5483.

⁹⁹Supra note 21 para 104. In the meantime, Art.35-39 of the Commission proposal of a European Private Company of 25 June 2008, COM (2008) 396 contain detailed rules on the transfer of the seat of a company, see BRAAK, S. M. van den. Transferring the registered office. In: ZAMAN, D.F.M.M. et al (Eds.). *The European Private Company (SPE): a critical analysis of the EU Draft Statute*. Antwerp; Oxford: Intersentia, 2010, at p. 175.

¹⁰⁰Case C-196/04 *Cadbury Schweppes(Overseas) v Commissioners of Inland Revenue*, [2006] ECR I-7995; for a general discussion see R. de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax*, CMLRev 2008, 395; see now the opinion of AG Bot of 31.3.2011, supra note 84 at para 65.

¹⁰¹This is the main argument against *Centros* voiced by ROTH, G. *Der EuGH und die Souveränität der Mitgliedstaaten*. Boorberg, R. Verlag, 2008, at p. 427 (453).

court which is much closer to the problems of corporate governance and creditor protection than the ECJ?

*Gybrechts*¹⁰² is the most recent case using a quasi-legislative approach of the proportionality argument. It concerned a Belgian regulation, made possible under the minimum harmonisation concept of the distance selling Dir. 97/7/EC¹⁰³ forbidding the internet provider to ask for advance payments and to request the credit card number of the consumer before the withdrawal period had lapsed. Since criminal action was brought against the Belgian internet provider who had violated this rule it first had to be decided whether the prohibition on measures having an equivalent effect as export restrictions under Art. 29 EC (now Art. 35 TFEU) applied to the case which was confirmed according to the broad interpretation given to fundamental freedoms as mentioned above. The entire debate turned then around the justification under proportionate consumer policy arguments. AG Trstenjak in her opinion of 17.7.2008 condemned the Belgian regulation for not attaining a fair balance between the supplier and the consumer concerning advance payments; “absolute consumer protection” resulted in “*summum ius – summa iniuria*” (?)¹⁰⁴. The Court found “that Article 29 EC does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but Article 29 EC does preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer’s payment card.” The first was regarded as being “necessary”, the second not: “..the value of the prohibition on a supplier requiring a consumer’s payment card number resides only in the fact that it eliminates the risk that the supplier may collect the price before expiry of the period for withdrawal. If, however, that risk materialises, the supplier’s action is, in itself, a contravention of the prohibition laid down by the provision at issue in the main proceedings, a prohibition which must be regarded as an appropriate and proportionate measure to attain the objective pursued,.... It must therefore be held that the imposition on a supplier of a prohibition on requiring that a consumer provide his payment card number goes beyond what is necessary to attain the objective pursued” (para 60-62). The “non-necessity”-argument however remains somewhat a myth. Is a criminal or administrative sanction really enough to protect the consumer whose account was debited by the illegal use of the credit card and who may be at odds to get his money back? Isn’t it a matter of the Member states, expressly authorized to do so by the relevant directive to decide on the means of protection of consumers to make the withdrawal right of Dir. 97/7 effective and avoid an undermining by the request of the credit card number?

IV. Where are we now – a plea for judicial restraint

The paper has hopefully given an overview of the different approaches in the recent ECJ case law on proportionality. There is no doubt about its overarching importance given both the broad interpretation of the fundamental freedoms on the one side and the public interest justifications on the other. Cases brought to the ECJ both under the reference procedure and – less frequent but still important – under the infringement proceedings by the Commission usually have to be decided on the proportionality argument. It is where the Court has developed its own agenda and puts forwards its

¹⁰²Supra note 22.

¹⁰³Directive 97/7/EC of the EP and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6. 1997, 19.

¹⁰⁴MICKLITZ, H.-W.; REICH, N. *Verbraucher und Recht (VuR)*, 2008. S. 349-351.

methodological “Vorverständnisse” which I have classified as “autonomous balancing”, (limited) “state margin of appreciation” “fundamental rights””, and “quasi-legislative” approaches. The Court clearly has developed a *liberal, individual rights oriented agenda*, but has left Member states a differentiated set of regulatory powers which is sometimes difficult to predict and most restricted in the “quasi-legislative approach” cases where usually one element out of a multitude of different arguments runs foul to the Court’s scrutiny, and where States seem to be puzzled on how to comply with rulings of the ECJ. It leads to ambivalent results in the fundamental rights area, if one compares *Schmidberger* supporting autonomy of ecological actions vs. *Viking* severely restricting social action by trade unions.

To sum up *first*, the “autonomous balancing approach” seems to work where on the one hand a clear public policy choice can be determined, but on the other some equally justified opposing state interests can be defined. This is quite clear with cases on health matters: Member states retain responsibility here, but they must respect new marketing methods insofar as they can be made to conform to health imperatives like in *Doc Morris*, and on the other hand allow patients a reasonable choice without overburdening the public finance as in *Watts*. Effective legal protection is another important element in this balancing test which held the Court to do away with the somewhat artificial German consequences of a transfer of the “real seat” of a company as in *Überseering*.

Second, the (limited) “state margin of appreciation approach” which has its roots in the case law of the European Court of Human Rights seems justified wherever the law and facts do not give a clear answer; the Court puts the decision back to Member state courts and instructs them on how the proportionality principle operates on the EU level, particularly on insisting on the consistency of state imposed restrictions. This approach seems to conform to the multilevel system of judicial governance in the EU, but does not guarantee uniform standards for similar restrictions of fundamental freedoms in the entire EU. After some hesitation and confusion, this seems to be the approach now to evaluate Member State restrictions on cross-border games of chance using the Internet (*Liga Portuguesa, Ladbroke* clarifying *Gambelli/Plancanica*) and rejecting the country-of-origin approach regarding control of such activities. But Member states must follow their policies against betting and games of chance in a consistent and transparent manner, as the Court recently restated with regard to the German monopoly on betting and games of chance¹⁰⁵.

Third, the more recent “fundamental rights approach” to some extent continues this type of division of work between Union and national jurisdictions; it underlines the importance of autonomous fundamental rights protection as in *Schmidberger*, but unfortunately did not go “at full length” in *Viking* by not respecting the collective autonomy of labour and management with regard to social action which should not be limited by a simple reference to the proportionality principle which was developed for state, not for private (even though collective) action. This approach is however not without problems in cases where no fundamental rights in the traditional sense as protecting the individual or a group against public interventions are at stake, but where the state simply couches its (possibly legitimate) “public interest” in terms of fundamental rights as in *Omega* or *Dynamic Medien*. The mere reference to “fundamental rights” therefore does not seem to make the application of the proportionality principle easier and more predictable; it remains rather ambivalent.

¹⁰⁵See the judgments of 8 September 2010 supra note 86; the question of whether Member States may limit a monopoly on internet lotteries to public companies established in the state of activity is now before the ECJ in case C-347/09 and has been answered in the affirmative by AG Bot, supra note 84, in distinguishing case C-64/08 *Engelmann*, [2010] ECR I-(9.10.2010).

Fourth, most problematic in this analysis have been cases where the Court has used a “quasi-legislative approach”. It posits on the one hand a broad public policy objective which Member states may pursue like creditor protection in *Centros*, or consumer protection in *Gysbrechts*, but on the other hand, the ECJ will substantially weaken and water down Member state possibilities to attain these objectives by using adequate and effective instruments within their margin of discretion which are condemned as “disproportionate”. Shouldn’t it be left to a Member state¹⁰⁶ how to organize creditor protection, or guarantee consumer protection against prepayment clauses before a lapse of the withdrawal period? Since there is no “positive” EU policy in this field, is the Court allowed to step in by substituting itself as *quasi-legislator*?

In this context we should point out a certain paradox. The Court has recognised that “the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments”, even though it is bound by the proportionality principle according to Art. 5 (2) EU Lisbon (ex-Art. 5 (2) EC)¹⁰⁷. Why isn’t this “broad discretion” also applied to Member state legislation in areas where it involves complex (and controversial!) choices particularly in areas under the “quasi-legislative approach”. According to Harbo¹⁰⁸, the Court starts from a “weak rights regime” in controlling Union law measures under the proportionality test by taking a “deferent approach vis-à-vis the legislator”, being based on a “very strong substantial bias, namely that of promoting European integration”, while it employs much more restrictive language – even though not consistently, as we have tried to show – with regard to Member state measures allegedly restricting fundamental freedoms in a “non proportionate” way. In an analysis of recent case law focusing on the dichotomy of commercial purposes and social policy of Member states under EU imperatives, Schiek¹⁰⁹ found that in the opinion of the ECJ “...markets are portrayed as working better than public institutions. This is not always supported by legal rules, but partly also related as eternal truth”.

Two arguments can be added to this critique:

- The very nature of the proceedings before the Court will always result in “negative integration” that is stating the non-conformity of a national measure with EC law. The “positive integration” may not be a necessary consequence, as follow-up litigation frequently shows, like in the area of games of chance.
- The factual input in the above mentioned cases seems rather weak and restricted, particularly in the context of the reference proceedings. I have mentioned the limited number of participants who may submit observations which does not conform to the widespread effects of the judgments of the Court on third parties like national parliaments, business associations, consumer NGOs, labour unions. In some cases the Court indeed has used the

¹⁰⁶In this sense already SNELL, J. True proportionality and free movement. *EBLRev*, p. 50 at 54, 2000.

¹⁰⁷Case C-376/03 *Germany v EP and Council*, supra note 3 at para 145; C-344/04 *IATA and ELFAA v Department for Transport*, [2006] ECR I-403 at para 80, referring to earlier cases like case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, para 58; Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paras 55 and 56; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 61; and case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, para 123.

¹⁰⁸Supra note 54 at 166, 172, 177; similar ALBORS-LLORENS, A. Edging towards closer scrutiny. In: ARNULL, A. et al. (Eds.). *A constitutional order of States?: essays in EU law in honour of Alan Dashwood*. Oxford: Hart Publishing, 2011, 245 at p. 256: “light touch review”.

¹⁰⁹SCHIEK, D. Is there a social ideal behind the ECJ? In: NEERGARD, U. et al (Eds.). *The role of courts in developing a European social model: theoretical and methodological perspectives*. Copenhagen: DØJF Publishing, 2010. p. 63 at p. 96.

argument of judicial restraint and conferred the final power to decide on proportionality to Member states courts by giving interpretative – sometimes rather restrictive! - guidelines, while in others criticised here it has decided more or less by itself with a different set of not always transparent and convincing criteria. While in the “autonomous balancing” and the “fundamental rights” cases the Court seemed to take an implicit ranking between the protected public interests in conflict with fundamental freedoms, and the proportionate use to attain a conceptual equilibrium, the “quasi-legislative approach” cases are much less clear and seem to focus on one element exclusively out of a set of possible criteria to condemn substantial parts of a Member state regulation. An overall balancing of the proposed measures might have allowed a more flexible approach respecting the constitutional powers of Member states under the Treaty.

As a frequent result at least in the “quasi-legislative approach” cases, but also by using some of the other approaches, the Court’s understanding of Member state legislation is not a political one where complex choices and preferences are decided, but a regulatory one where the abstract market rationale prevails over the political bargaining process, despite a different rhetoric in the Preamble of the EU Charter which refers to the “respect of the diversity of cultures and traditions of the people of Europe as well as the national identities of Member states”. Shouldn’t different national identities be taken more seriously in this context without sacrificing them on an overly strict regime of proportionality? In my opinion it seems advisable for the Court to use *judicial restraint*¹¹⁰ in areas where important Member state interests are at stake, including the collection of revenue and the protection of employment by non-discriminatory means, and to be careful to extend the proportionality argument beyond its clear methodological boundaries unless supported by sufficient evidence. Some recent cases all decided in 2009/2010 like *Kattner* on compulsory workplace insurance, the results of the litigations in *Commission vs. Italy* regarding road safety, *Liga Portuguesa* and *Ladbroke* concerning exclusive management of games of chance by national entities, and *Apothekerkammer Saarland* re management of pharmacies in Germany, seem to go in this direction. But it is difficult to find a clear methodological approach in the over-abounding case law of the ECJ.

V. Addendum: The *Römer* case on EU citizenship

From the very wording of the Treaty (Art. 20 TFEU) and the history of its drafting, one is tempted to conclude that Union citizenship is nothing more than a corollary of nationality of one of the Member States. As the German author Kluth has expressed it: “This (citizenship) always attaches to Member State nationality.”¹¹¹ This is in accordance with the ECJ’s *Micheletti* judgment¹¹² handed down in 1992, parallel to the adoption of the Maastricht Treaty. In this judgment the Court made it clear that Member States, and Member States only, may create and abolish nationality. However, they may not put restrictions on it if another Member State has already granted nationality. The Court said:

¹¹⁰See Roth, *supra* note 101 at p. 605.

¹¹¹in: CALLIES, Chr.; RUFFERT, M. (Hrsgs.). *Kommentar zum EUV*. 3rd ed. Neuwied: Ed. Luchterhand, 2007, Art. 17 EG Rdnr. 8.

¹¹²Case C-369/90 *Micheletti v Delegación del Gobierno en Cantabria*, [1992] ECR I-4239; case C-192/99 R v Secretary of State for the Home Dpt. *ex parte Mangjit Kaur* [2001] ECR I-1237.

(...) it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (para 10)¹¹³.

Closa¹¹⁴ therefore comes to the conclusion that citizenship of the Union might be characterized as “a [derived] condition of nationality”. The Union has no competence to establish criteria of its own on granting citizenship as a corollary of nationality.

However, in *Rottmann* the Court held Member states must respect the principle of proportionality when withdrawing nationality from a citizen of the Union. It wrote:

Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality (para 56).

This is said to be the case when nationality has been acquired by deception.¹¹⁵

As a result, the Court upheld the decision of German authorities to withdraw the German nationality of Mr. Rottmann who thus became stateless, losing European citizenship. However, at the same time by controlling this decision under proportionality criteria to be established by the national court on a case-by-case basis, it substantially extended EU jurisdiction into a field which traditionally was outside EU competence. This can be seen by the formulation of Art. 20 TFEU itself, namely that “citizenship of the Union shall be additional and not replace national citizenship”. The methodology used by the ECJ resembles very much the one used in the free movement cases, namely first to extend the scope of EU law, second to allow restrictions under a broad public interest test, and finally to submit it to the strict proportionality criteria of suitability, necessity, and eventually adequacy.

¹¹³At para 10.

¹¹⁴Closa, CMLRev 1995, 487 at 510.

¹¹⁵Case C-135/08 Janko Rottmann v Freistaat Bayern [2010] ECR I-1449 para 58.

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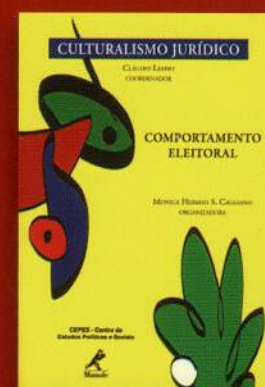
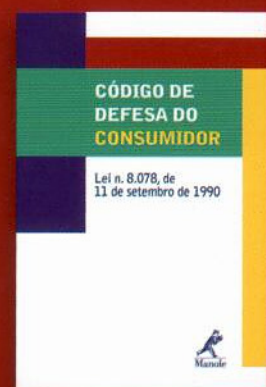
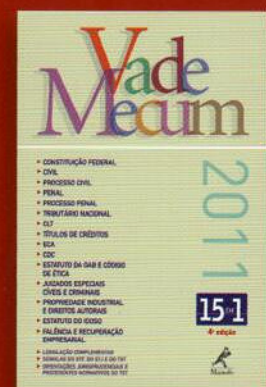
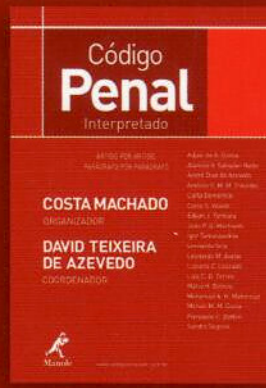
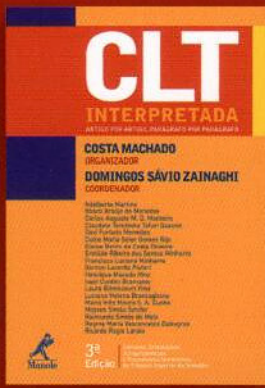
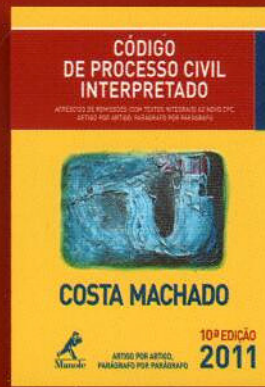
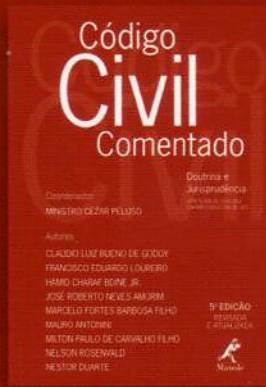
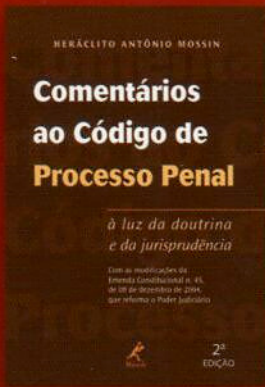
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