Proportionality Revisited

By Jan H. Jans*

1. Introductory remarks

In 1992 I reported, unfortunately only in Dutch, on a study of the function of the proportionality principle in assessing the admissibility of national import and export restrictions.¹ The central question was what must be proportionate to what. Must the justification relied on by the Member State (public policy, safety, public health, consumer protection, environmental protection etc.) be reasonably commensurate with the interest of free movement of goods? In other words is proportionality concerned with the interests that must be balanced against each other when the principle is applied? Or does the proportionality principle only concern the instruments a State may apply where public policy, safety, public health etc. are at stake; and more particularly in the sense that the State may only take that measure which least restricts the free movement of goods? Or perhaps both types of application are possible?

The conclusion I reached in that article was, perhaps somewhat disappointingly, that the case law of the Court of Justice did not provide an unambiguous answer. Against that background I argued at the time for judicial self-restraint in reviewing the proportionality of national legislation. The main thrust of my argument was that in a situation in which the Community legislator had not yet proved able to capture complex considerations in a directive or regulation it was not up to the Community judiciary to set itself up as a quasi-legislator, using the proportionality principle for justification, and then subject the national balancing of interests to overly intensive scrutiny.

The purpose of the present contribution is primarily to examine whether it is now possible to detect a clear line in the decisions of the Court of Justice since 1992, but also whether the Court has thereby exercised the judicial self-restraint I then advocated.

I shall not specifically be considering the case law on the testing of Community legal acts for proportionality. Nor that on the proportionality

* Prof. Jan H. Jans, Professor of the Law of the European Union, Europa Institute, University of Amsterdam.

principle in the context of equal treatment. However I shall occasionally 'borrow' from that case law.²

2. What in fact is the problem?

Today it is fairly generally accepted that three elements of the proportionality principle can be distinguished in the case law of the Court of Justice, even though the Court does not always apply them as such.³ And sometimes the Court forgets (?) to apply them at all.⁴ These three elements, which are also encountered in the Opinions of Advocate General Van Gerven, are the following.⁵ In the first place the national measure must be suitable actually to protect the interest that requires protection. There must, as it were, be a causal relationship between the measure and its object. Not surprisingly this hurdle rarely causes problems. After all, why should a Member State desiring to protect a particular interest adopt a measure which is not effective? This criterion gives the Court of Justice a means of acting against national measures which are essentially protectionist but are presented as being necessary to protect a legitimate interest.⁶

In the second place the proportionality principle implies that the measure must be necessary. This implies, among other things, that there must be no measure less restrictive, but adequate, available to attain the objective pursued. In other words the familiar criterion of the 'least restrictive alternative'. Possible alternative national instruments will first be assessed in the light of the question: would they or would they not protect the interest equally effectively? If the answer is that they would, the question must then be addressed which of these instruments would entail the least negative effects for market integration.

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³ Cf. de Búrca (1994), p. 146, Van Gerven (1999) p. 37, Tridimas (1999) p. 68 and Jacobs (1999) p. 1. A typical formula used by the Court is 'that the national measure must be proportionate to the aim pursued, and that this aim could not be attained by measures less restrictive to intra-Community trade.' It is worth noting that the case law on the application of the proportionality principle as a means of reviewing Community legislation employs a formula which more consistently refers to all three elements; see case C-331/88 The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and others [1990] ECR I-4023, para. 13.
⁶ An example of a case where the Court intervened in this way is Franzén, where a licensing system for the import of alcoholic beverages was held to be in breach of Article 28 of the EC Treaty. This case will be discussed in more detail below.
I would suggest that this element also covers the situation where there is in fact nothing to protect. Thus an import ban on a particular product ‘to protect the public health’ will not be necessary if scientific research shows that the banned product does not constitute a danger to health. It could of course be argued that this element falls outside the scope of a proportionality test and really concerns the question of whether there is an ‘Article 30 (ex Article 36) or Rule of Reason interest’ at issue. However the Court of Justice usually considers this question in the context of a proportionality test.

The third element of the proportionality principle is generally referred to in the literature as the proportionality principle *sensu stricto*. In this sense a measure will be disproportionate when the restriction it causes intra-Community trade is out of proportion to the intended objective or the result achieved. It could also be said that this is the proportionality principle in its true sense. In summary, the proportionality principle concerns the suitability, the necessity and the proportionality *sensu stricto* of a measure.

It may be asked: what exactly is the problem with the application of the proportionality principle? You could say that the above three elements constitute an ascending series in terms of the intensity with which the Court of Justice can review national measures. Testing the ‘suitability’ of a measure may be regarded as a normal judicial activity. There is nothing particularly unusual about a judge examining whether an instrument can be considered an effective means of attaining its objective. However, determining whether there is a ‘less restrictive alternative’ is a little more complex. This requires a, sometimes detailed, appreciation of the degree to which national legislation is effective in an often complex national context. The third element is the most problematic, as it requires a balancing of various often conflicting interests. For example, the proper functioning of the Internal Market must be balanced against public safety or consumer protection or public health or whatever else may be at stake. Not only the traditional reluctance of the judiciary to put itself in the place of the legislature is at issue here. This could be overcome using the familiar formulas of ‘marginal’ review (i.e. was the legislative act reasonable?) and respecting the policy discretion of the legislature. No, in the European context application of the proportionality principle

7. Van Gerven (1999) p. 38. Or, as the Court of First Instance referred to it, proportionality ‘in the narrow sense of the term’ case T-125/96 Boehringer, n.y.o.r., para. 102.

8. This is made quite explicit in the case law of the Court of Justice and the Court of First Instance when reviewing Community measures on grounds of proportionality. In the BSE case, C-180/96 UK v. Commission [1998] ECR I-2265, the Court emphatically noted the ‘discretionary power’ of the Council and its ‘political responsibilities’, following which it concluded that ‘the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue’, para. 97. Incidentally, on this point see case C-331/88 The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and others [1990] ECR I-4023.
involves yet another ‘separation of powers’ question, namely the separation of powers between the EC as such and its Member States. After all, application of Article 30, Rule of Reason etc. is by definition only at issue in a situation where the European legislature has not taken any action, or at least not yet. A balancing of interests in the context of proportionality therefore implies that a court first comments on the degree of protection in the Community and then balances this against the interest of market integration. And that in a situation in which the Community legislator has as yet proved unable to pass legislation on the matter at hand and sometimes has only very limited powers to set European standards at all. In 1992 this given prompted me to suggest that the Court should exercise extreme self-restraint when applying this variant of the proportionality principle.

Application of the proportionality principle in the European law context thus has dual constitutional implications: it concerns the relationship between the judiciary and the legislature and it concerns the division of powers between the EC and its Member States. The more intensive the Court of Justice’s scrutiny of national restrictions in the light of the proportionality principle, the greater the shift in powers from the national legislatures to the European judiciary.

3. The Treaty status of the proportionality principle

The proportionality principle is not simply one among many principles; it has Treaty status. The third sentence of Article 5 of the EC Treaty provides that ‘Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’ One of the protocols to the Treaty of Amsterdam contains a number of guidelines further specifying the meaning of the sentence. However, from the description of the principle in the Treaty it is clear that this concerns a variation of the proportionality principle other than the one which forms the subject of this article. Article 5 of the EC Treaty is concerned with the consequences of the proportionality principle for the Community. Moreover, it is clear from the case law of the Court of Justice that the legal basis for application of the proportionality principle in respect of the free movement of goods is not Article 5 but ‘the last sentence of Article 30 of the Treaty’.11

Even a closer examination of the Amsterdam Protocol reveals only tenuous links with our study. Under the Protocol any burden falling upon the Community, national governments, local authorities, economic operators


and citizens must be minimised and proportionate to the objective to be achieved. Community measures should leave as much scope for national decision as possible, and should respect Member States' legal systems. As much use as possible must be made of minimum standards, though the Member States have a discretion to impose more stringent national standards. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Where possible measures such as recommendations, which are not binding, should be used as should voluntary codes of conduct. As I have already noted, Article 5 of the Treaty and the Protocol are of no direct relevance to a study of the proportionality principle in the context of national market restrictions. Nevertheless, in a more general sense it can be implied from the above that the proportionality principle does say something about the degree of Community interference; where possible Member States' legal systems should be respected. In itself this is an idea which can be extrapolated to the assessment of national market restrictions. In examining the case law of the Court of Justice it will be necessary to consider to what extent this can be used as a guideline for application of the proportionality principle.

4. Court of Justice case law since 1992

Legal writers have on more than one occasion pointed out the different functions the Community principle of proportionality fulfils. On the one hand it is used as an instrument of market integration, on the other hand to protect individual rights. When the proportionality principle is applied to assess national market restrictions we see both functions at work. On one hand it operates to prevent 'unnecessary' restrictions of free movement; at the same time it offers a guarantee to market participants that the rights they derive from the provisions on free movement cannot be violated without justification.

4.1. Suitability

The requirement of suitability implies that the national measure must be appropriate to protect the interest in question and presupposes a degree of causal relationship between the measure and the objective pursued. Nevertheless, it is not entirely clear how suitable a national measure must be. ‘Suitable’ seems to imply a less strict causal relationship than ‘indispensable’, while at the same time being less flexible than merely ‘useful’. Nor is it immediately clear whether determining the suitability of a measure is a matter of objective appraisal or whether Member States have a degree of

subjective discretion in determining a measure's suitability for a particular purpose.

A most interesting case in this connection is Zenatti, which concerned Italian legislation which made betting on sporting events subject to a licensing requirement. A month earlier, in its decision in the Läärä case, which will be discussed in more detail below, the Court had allowed the Member States a wide discretion to decide for themselves what kind of legislation was necessary to prevent compulsive gambling, crime and fraud. The general rule is the one given in Schindler that the financing of benevolent or public interest activities cannot as such justify restrictive measures. Apparently the Court was not entirely convinced in Zenatti that the Italian measures were in fact appropriate to achieve the official objective, namely to limit the possibilities of betting on sporting events. It instructed the referring court to examine whether the national legislation, in view of its 'specific modalities of application', actually fulfilled the objectives which would justify it. It added that 'the funding of social activities from the income from permitted games' was no more than a beneficial side-effect of the legislation and not, I might add, the true objective.

In Franzén, which concerned the legality of the Swedish monopoly of the retail trade in alcoholic beverages, the Court applied the criterion of suitability, though without actually referring to it in those terms. The Swedish legislation made the import of alcoholic beverages subject to a production or wholesale licence. The conditions for obtaining these licences were fairly restrictive. Moreover applications for licences were subject to payment of a high fixed charge and an additional annual fee for monitoring the premises concerned. It also became clear that only a very limited number of licences had been issued and those almost exclusively to traders established in Sweden. The Swedish Government argued that the measure was justified to protect the health of individuals against the harmful effects of alcohol. The Court gave this argument short shrift: it had not been demonstrated 'that the licensing system set up by the Law on Alcohol, in particular as regards the conditions relating to storage capacity and the high fees in charges which licence holders are required to pay, was proportionate to the public health aim pursued or that the same could not have been attained by measures less restrictive of intra-Community trade'. Apparently, reading between the lines, the Court was not entirely convinced that the measures were really suited to the objective of protecting public health.

Another interesting example concerning the suitability of a national measure

13. Case C-67/98 Zenatti, n.y.o.r.
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is the Court’s decision in case C-317/92. Under the relevant legislation, medicines in Germany were allowed to show only one of two expiry dates: 30 June or 31 December. The purpose of the measure was protection of public health by preventing the use of expired products. The Court held that the German system, which involved bringing forward the date of expiry fixed by the pharmaceutical company, was ineffective and was not a measure capable of protecting public health. Merely advancing the date was not sufficient, as it did not involve any check on the date fixed by the pharmaceutical company.

As I have said, this aspect of the proportionality principle is the least problematic. The Court of Justice, like any other judicial authority, is perfectly well able to assess the causal relationship between measures and their objectives. The case law I have discussed seems to indicate that ‘suitability’ falls somewhere between ‘indispensability’ and ‘usefulness’. Moreover, there is no evidence from the above cases to suggest that the Member States have any autonomous discretion to decide the suitability of a measure. A measure is either suitable or it is not. Normally the Court will be able to decide the suitability of a measure, as long as it has been provided with the necessary factual information by the national court and the parties to the case. However, in certain cases a further examination of the facts at the national level will nevertheless prove to be necessary. In those cases the Court would be well advised to enable the national court to apply the suitability criterion within a framework indicated by the Court of Justice.

4.2. Necessity

A measure is not necessary when less drastic means will suffice. In Schindler it turned out that the Court was prepared not to test the necessity of a measure at all, if the matter was sufficiently ‘sensitive’. That case concerned a ban on holding certain large-scale lotteries. The fact that it was a sensitive case is clear from paragraph 32 of the judgment, where the Court stated that it was not for it to substitute its assessment of the morality of lotteries for that of legislatures of the Member States. Responding to the Commission’s argument that the United Kingdom could have achieved the objectives it pursued by less restrictive measures, the Court listed the objectives of the legislation: to prevent crime and to ensure that gamblers would be treated honestly, to avoid stimulating demand in the gambling sector, which has damaging social consequences and to ensure that lotteries could not be operated for personal and commercial profit, but for charitable purposes. Moreover, it held, those considerations must be taken together. It went on

18. When determining the necessity of a measure, the Court does sometimes allow Member States a measure of discretion, see the next section.
to add that it is not possible to disregard the moral, religious or cultural aspects
of lotteries in the Member States. These factors justify national authorities
having a sufficient degree of latitude to determine what is required. It is for
the Member States to assess not only whether it is necessary to restrict the
activities of lotteries but also whether they should be prohibited, provided that
those restrictions are not discriminatory.

In contrast with Schindler is the decision in Familiapress.20 This case
concerned Austrian legislation prohibiting the distribution of periodicals
containing games or competitions for prizes. As the legislation concerned
the actual content of a product, the Court held that this was a measure having
an effect equivalent to a quantitative restriction. The legislation was designed
to maintain press diversity, an interest the Court had already held to be capable
of constituting an ‘overriding requirement’ for the purposes of Article 30. The
dispute focused on the question whether the Austrian legislation was com-
patible with the proportionality principle. The Court’s judgment contains a
number of interesting features. In the first place it explicitly distinguished
the approach adopted in Schindler.21 As has already been noted above, the
Court held there that the Member States must have sufficient latitude to
determine what is necessary to protect those who take part in lotteries. And
that it is for the same national authorities to determine whether it is neces-
sary to restrict lotteries or whether they should be prohibited altogether.
However the facts in Familiapress were different: the scale of the draws were
smaller, they involved smaller sums of money and they did not constitute
an economic activity in their own right. The latitude the Court allowed
Member States in Schindler was justified because of the high risk of crime
or fraud. Such concerns for the maintenance of order in society were not
present in Familiapress, which was a reason to subject the national measures
to stricter scrutiny.22 From this it can be concluded, in my opinion, that
the nature of the interest to be protected is relevant to the manner in which
the Court will apply the proportionality principle. Combating crime and fraud
are clearly interests which, even post-Amsterdam, are primarily within the
jurisdiction of the Member States rather than of the EU. This is something
the Court will take into account as far as the intensity of its scrutiny of a
measure’s necessity is concerned.

Unlike Schindler, the Court in Familiapress was prepared to apply the
criterion of the least restrictive alternative. It examined whether the national

22. Incidentally, it should be noted that, because the freedom of expression was also an issue in
Familiapress, the justification also had to be interpreted in the light of the ECHR (see para. 24). The existence of the ECHR provides the Court with an additional normative legal
framework, as a result of which more intense scrutiny of the national legislation becomes less
of a problem.
prohibition of distribution was ‘proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.’ Rather than testing the effectiveness of the measure itself, the Court enumerated a number of conditions to be taken into account in determining this. It then left it to the national court to determine whether, on the basis of a study of the Austrian press market, those conditions were satisfied. In other words, where it turns out that it is necessary to carry out a detailed study of the market in order to establish whether the measure in question is the least restrictive alternative, the Court wisely confines itself to indicating the ‘ground rules’ and leaves the actual examination of the facts to the national court.

An important consideration in applying the least restrictive alternative criterion is that when comparing the national measure with a potentially less restrictive alternative, it must be assumed that both measures will protect the interest in question equally effectively. This naturally implies, first, that the existence of alternatives which are not suitable to protect the interest is irrelevant.23 The second implication is that the mere fact that other Member States employ less restrictive measures will not necessarily lead to the conclusion that a more restrictive measure in another Member State24 is disproportionate. Evidently, so the argument goes, the degree of protection provided in the other Member State is less. But when applying Article 30 and the Rule of Reason, Community law does not require Member States to adopt the lowest level of protection in the Community. This view is supported by the Court’s decision in Alpine Investment.25 In that case the Dutch Government argued that a ban on ‘cold calling’ was designed to protect the reputation of the financial sector and the investing public against aggressive selling techniques. Alpine pointed out that there were alternatives, such as controls imposed by the Member State of the recipient and the prohibition of cold calling only for those undertakings which had overstepped the mark in the past. The Court held that such measures were not suitable. Alpine also referred to legislation in the United Kingdom which imposed less restrictive rules. The Court rejected this argument, too, observing that the fact that one Member State imposes less strict rules than another does not make the latter’s legislation disproportionate.26

23. Cf., for example, case C-389/96 Aber-Waggon [1998] ECR I-4473. This decision will be discussed in more detail below.
24. Obviously the situation will be different where the legislation in the Member State in question also contains less restrictive measures, which are apparently equally effective. See the German Crayfish case, C-131/93 Commission v. Germany [1994] ECR I-3303.
4.3. Proportionality

There are few examples of Court of Justice decisions where the Court has explicitly formulated the proportionality principle as an obligation to balance interests. The best known example is Stoke-on-Trent, where the Court was again asked to give a decision on English Sunday trading legislation.\(^{27}\) This was because the English courts were interpreting an earlier Court of Justice decision, particularly on the issue of proportionality, in totally different ways. This was unacceptable to the Court, which proceeded to carry out the proportionality review itself. It described the proportionality principle as follows: ‘Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods.’ The Court then balanced the interest of employee protection against that of free movement of goods and arrived at the conclusion that the restrictive effects ‘were not excessive in relation to the aim pursued.’

In my note to this decision I concluded that the question whether the proportionality principle required a true balancing of interests had been answered with this decision.\(^{28}\) I am no longer entirely convinced of the correctness of this conclusion, at least not put in such general terms. After all, I have not come across a similar explicit application of the proportionality requirement (in the narrow sense) in the case law on Articles 28–30 since then. I do not mean to imply by this that the Court has changed its mind. What I do mean, is that the Court is apparently extremely cautious about applying the proportionality principle in this way and that it will take exceptional circumstances to justify it. Of course, these exceptional circumstances were clearly present in this case. It was the fourth time the Court had been asked to consider the British Sunday trading legislation and it must be assumed that by this time the Court had acquired a full appreciation of the situation, even in the national context. To ensure that the English courts did not apply the European case law in a non-uniform manner again, the Court was basically obliged to carry out a full review of the proportionality of the measure.

My conclusion would now be that, though the Court will not rule out a genuine balancing of interests in the context of a proportionality test, as a general rule it will not carry out such a test. This too seems to me a sensible approach from a constitutional point of view.

An interesting example of a ‘proportionality test’ outside the field of the free movement of goods is the Pastoors case.\(^{29}\) In the context of national


\(^{28}\) SEW 1995/3, pp. 196-206.

legislation to enforce secondary Community law (relating to road transport) the Court was scathing in its criticism of the Belgian legislation. That legislation contained a provision under which non-resident offenders were required to pay a sizeable deposit if they wanted to pursue normal criminal proceedings rather than pay an immediate fine. The Court held this discriminatory measure to be ‘excessive’ and ‘manifestly disproportionate’, qualifications the Court is not quick to employ. Jacobs considers that this decision must be explained as concerning measures which gave effect to Community legislation.30 He does not believe that the Court would have reached the same conclusion if the criminal proceedings in question had had no direct connection with Community law.

4.4. Who decides the level of protection?

The question ‘who decides the level of protection’ is one that goes to the heart of the proportionality principle. If the answer is: it is for the Member States to determine what is necessary to protect a given interest, that is tantamount to saying that there is no room for application of the proportionality principle in the narrow sense. The power of the Member States to determine the level of protection makes the national legislation as it were immune to any further balancing of interests, or so it transpired in the Läärä case.31

In Läärä the legality of Finnish legislation was challenged under which the exploitation of gaming machines was reserved exclusively to a single public body. To the extent such legislation prevented operators from other Member States from making gaming machines available to the public with a view to their use for payment, the Court held that such legislation constitutes an impediment to the freedom to provide services. However, the Finnish legislation was intended ‘to limit exploitation of the human passion for gambling’ and ‘to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.’ The Court accepted these as being ‘overriding reasons relating to the public interest.’ Nevertheless, it was still necessary to carry out a proportionality test, in other words to ensure that ‘measures based on such grounds guarantee the achievement of the intended aims and do not go beyond that which is necessary in order to achieve them.’ In Van Gerven’s typology what was being tested was the first and second elements of the proportionality prin-

30. Jacobs (1999) pp. 9–10. Cf. also case C-348/96 Calfa [1999] ECR I-11, where the Court of Justice observed, against the background of Directive 64/221, that where expulsion for life automatically followed a criminal conviction for drugs-related offences, this was incompatible with Articles 17 and 18 of the Treaty. It did however accept that a Member State might consider the use of drugs a danger to society which would justify special measures.

31. Case C-124/97 [1999] ECR I-6067; see also the similar case C-67/98 Zenatti, n.y.o.r.
ciple. This is quite clear from the Court’s next observations. In the first place it noted that ‘the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities’ power of assessment, recognised by the Court …’. Where a Member State has the power, apparently exclusive,\(^{32}\) to determine the level of protection a test of the proportionality stricto sensu (Van Gerven’s third element) is ruled out. After all such at test presupposes a balancing of the various interests at stake. A test of proportionality in the narrow sense might, given the internal market effects, result in the level of protection having to be ’adjusted’. As the Court remarked ‘the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end.’ Once Member States have been granted that discretion, the inevitable result is that different levels of protection must be accepted.

It is also clear from this decision that excluding a proportionality test in the narrow sense also has consequences for a test in terms of the criterion of ’least restrictive alternative’. Paragraph 39 in particular is interesting in this respect, where the Court notes that the question whether it might not be easier to achieve the aims of the Finnish legislation with different, less stringent regulations, is also a matter to be assessed by the Member States, ’subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.’ At first sight this would appear to be a circular argument. However it becomes clear what the Court meant from paragraph 41. It was true that there were other means of achieving the aims pursued, but the means chosen were ’certainly more effective’. The mere fact that less restrictive alternatives are available is not relevant if they are not sufficient to achieve the same level of protection. Or, as the Court put it in paragraph 36, ’the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.’

Such self-restraint in the application of the proportionality principle is found only rarely in the Court’s decisions. The explanation is of course self-evident. The grounds put forward in justification of the measure here (regulating the passion for gambling, avoiding gambling-related crime, collecting funds for charity) do not as such constitute policy areas in which the Community could take regulatory action. Such matters only come within

\(^{32}\) To which I would add: excessive levels of protection might be tackled by the Court by arguing that any margin of discretion is subject to the limits of the law. It goes without saying that in such extreme cases review by the Court will be only marginal.
the scope of the Treaty to the extent they have a negative impact on the ‘freedoms’. In other words, these are policy areas which must primarily be promoted by the Member States and only in the margin by the Community. Where the powers are so divided self-restraint in the application of the proportionality principle by the Court is appropriate.

In a similar vein is the Leifer case, where the Court ruled that the national authorities have a ‘certain degree of discretion’ when adopting measures which they consider to be necessary in order to guarantee public security. 33 Leifer was charged with having delivered plant and chemical products, so-called ‘dual use’ (civil and military) goods, to Iraq without having the necessary export licences. Here too, the policy areas in question (foreign policy, defence etc.) are primarily reserved to the Member States. Self-restraint on the part of the Court would then seem appropriate. In Heinonen, too, the Court took a remarkably tolerant view of the Member State’s legislation. 34 The case concerned Finnish restrictions on imports of alcohol in the personal luggage of travellers coming from third countries. Under the legislation it was in principle permissible to import alcohol on returning from travel abroad only if the journey had lasted 24 hours and only in very small quantities. The purpose of the measure was to avoid disturbances of public order connected with the consumption of alcohol, particularly on ferries between Finland and Russia and the Baltic States. The Court acknowledged that the Member States ‘retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security [...] enjoy a margin of discretion in determining, according to particular social circumstances and to the importance they attach to a legitimate objective under Community law, the measures which are likely to achieve concrete results.’ Partly in view of the limited nature of the Finnish restrictions, and the fact that they did not restrict intra-Community movement of goods, but that the aims at issue were the more restricted ones of Community customs and tax provisions, the Court was persuaded to consider the Finnish legislation to be proportionate.

One very specific application of the proportionality principle is found in those cases which concern consumer protection and misleading advertising. That the protection of the consumer against misleading advertising is an ‘overriding requirement’ which may justify trade restrictions is no longer open to discussion. But which consumer is it that must be afforded protection? The cautious one, the average one, or perhaps it is precisely the reckless consumer that needs protecting? The case law has by now been consolidated and accordingly the Court has observed that it is necessary to take into account ‘the presumed expectations of an average consumer who is reasonably well

informed and reasonably observant and circumspect. Here it is clearly the Court which ultimately establishes the level of protection in the Community. Higher levels of consumer protection in the Member States will be deemed to be contrary to the proportionality principle. What is not clear, however, is whether the Court in determining the level of protection carries out only an objective reasonableness test, or also considers the effects on the free movement of goods. In my earlier publication I advocated that in those cases where the Court determines the level of protection, it should do this on the basis of the intrinsic value of the interest to be protected. And that in taking that decision the effects on free movement should not be taken into account. I would argue the same thing now.

A third group of cases concerns import restrictions on products which might entail a possible health risk. The decision in case C-375/90 will serve as an example. That case concerned a ban on the import of frozen chicken from France because of the presence of salmonella on the skins. The Court confirmed its Melkunie doctrine and ruled that where the data available at the present stage of scientific research did not make it possible to determine with certainty when the number of micro-organisms on a food product represented a danger to health, it was for the Member States to determine the level at which they wished to ensure that human life and health were protected. The Commission did not dispute the application of this doctrine, but nevertheless argued that the Greek measures were not in keeping with the principle of proportionality. It asserted first that the method used to examine similar products was rejected by all the Member States, including Greece itself. Second, the risk of salmonella could be eliminated by hygiene measures and, in particular, by high-temperature treatment. Third, the traces of salmonella found on the samples taken were well below the minimum quantity capable of causing food poisoning. The Court rejected all three arguments. The first because it had no basis in fact. The second because it was clear from the scientific literature that the presence of salmonella on the skin may constitute a danger to human health even before the meat is cooked. And the third because the method used only makes it possible to ascertain the presence or absence of salmonella, not the precise quantity. Even if the quantity was relatively small, certain sections of the population are particularly vulnerable, such as children, old people and people who are already ill. It followed that the measure was not disproportionate.

35. Case C-220/98 Estée Lauder, n.y.o.r., para. 27. At least where the products cannot pose a risk to public health (para. 28). Apparently the Court feels that in such cases the level of protection may be set higher.
4.5. The effect of harmonisation directives on the application of the proportionality principle

It is clear that Member States cannot rely on one of the grounds for justification once a matter has been exhaustively harmonised. However where a harmonisation directive lays down only minimum standards, Member States retain the power to adopt more stringent national measures. The question is what effect the minimum level of protection laid down in the directive has on the manner of application of the proportionality principle.

Directive 95/29 lays down rules to protect animals during transport. Austrian legislation required that animals intended for slaughter should be transported to the nearest suitable domestic abattoir. Monsees, a haulage contractor, was charged with an offence under that legislation. However, at the time of his offence the time limit for implementation of the directive had not yet expired. Monsees argued that the legislation must be regarded as a measure having an effect equivalent to a quantitative restriction, and this the Court accepted. In its consideration of the proportionality of the measure the Court was brief. First it observed that the Austrian legislation in fact made all international transit by road of animals for slaughter almost impossible in Austria. It then noted that measures appropriate to the objective of protecting the health of animals and less restrictive of the free movement of goods were conceivable, as the provisions contained in Directive 95/29 demonstrated. This indicates that the seriousness of the restriction will affect the intensity of the test. To all intents and purposes the restriction in this case amounted to an export ban. The reference to Directive 95/29 is also interesting. The directive had entered into force even though the time limit for implementation had not yet expired. In other words, by issuing the directive the Community legislator had been able to achieve agreement on the desired level of protection for animals during transport in the Community. The interests of animal protection had as it were been balanced against the interests of transport in the directive. Review by the Court against the criterion of the least restrictive alternative was facilitated because the directive supplied sufficient grounds for this.

It is implicit in the approach adopted in Monsees that Community directives must in principle be considered to be effective means of attaining their objectives. As the less far-reaching obligations of Directive 95/29 are deemed

38. Established case law of the Court. See, for example, case C-1/96 Compassion in World Farming [1998] ECR I-1251.
41. Cf. also case C-77/97 Österreichische Unilever [1999] ECR I-431, where the existence of a directive apparently gave the Court sufficient handholds to carry out a more intensive test of the necessity of the measure.
to protect animals, so must Directive 80/51 be deemed suitable to provide protection against the noise nuisance caused by aircraft.\textsuperscript{42} This directive was at issue in \textit{Aher-Waggon}.\textsuperscript{43} There the German authorities were in principle entitled to lay down stricter requirements for the registration of aircraft, as the directive provides only for minimum harmonisation. However, even if the Community standards could only be regarded as minimum standards, their very existence enabled the Court to carry out a more intensive review of the proportionality of the requirements.

Noteworthy, partly in view of \textit{Monsee}, is that the Court in \textit{Aher-Waggon} hardly addressed the German Government’s contention that, as Germany is a very densely populated State, it attached special importance to ensuring that its population was protected from excessive noise emissions. Apparently the Court considered that the requirement of necessity was satisfied. After all, if the Court had felt that the directive was sufficient to protect the German population against noise nuisance from aircraft, it could have settled the matter on that count.

The Court then accepted the German Government’s argument that its legislation was ‘the most effective and convenient means of combating the noise pollution which they generate.’ The alternative, carrying out work in the vicinity of airports, would entail extremely costly investment. The Court added that the restriction only applied to the possibility of registering aircraft in Germany and did not prevent aircraft registered in another Member State from being used in Germany. It accepted the German contention that the number of aircraft not meeting the stricter noise standards was necessarily going to fall and that therefore the overall level of noise pollution could not fail to diminish gradually. It went on to state that the effectiveness of that policy of progressively eliminating from the national fleet aircraft not meeting the stricter noise standards would be undermined if their number could be increased, to an extent not foreseeable by the national authorities, by aircraft from other Member States.

In \textit{Aher-Waggon} the question ‘Is there a need for stricter standards?’, which is in fact an inquiry as to the necessity of the measure, did not give rise to problems. The examination of the measure’s proportionality, which followed, was carried out primarily on the basis of whether there were any alternatives available at all. In fact the German measures were the only suitable instruments available; because of the cost, the alternatives could hardly be regarded as realistic alternatives. For lack of such an alternative it was impossible to apply the criterion of ‘least restrictive alternative’. All that remained was a true balancing of interests. The only consideration which played a part in this respect was that the German legislation did not impede the use

\textsuperscript{43} Case C-389/96 \textit{Aher-Waggon} [1998] ECR I-4473.
in Germany of aircraft registered in other countries. Nevertheless, this can hardly be considered a thorough, measured balancing of interests.

Finally it is clear from Società italiana petroli that the proportionality principle does not figure in the review of stricter national measures, if these measures do not imply a restriction of free movement.44 This is an exercise of powers retained by Member States and there is therefore no reason to test such national measures against the proportionality principle.

4.6. Who is to apply the proportionality test: the Court of Justice or the national court?

One question which inevitably has to be answered when a case is referred to the Court of Justice for a preliminary ruling is who is to apply the proportionality test: the Court of Justice or the national court? Advocate General Van Gerven pointed out the importance of this question in his combined Opinion in cases 306/88 and C-169/91.45 I would like to underscore his view that this question must be answered against the general background of the relative jurisdictions of the Court of Justice and the national court. Briefly, this implies that the national court must provide the Court of Justice with all the necessary factual information and an appreciation of the national legal framework of the dispute. The Court of Justice must provide the national court with all relevant information with regard to Community law and it is then for the national court to apply this to the dispute before it and determine the necessary consequences under national law. This prompts me to make the following observations concerning the application of the proportionality principle.

My first observation would be that the Court of Justice should only proceed to assess the suitability and necessity of a measure when it is convinced that it has all the relevant facts at its disposal. If that is not the case it will have to supply the national court with the criteria and conditions, but leave the actual assessment to the national court.46 This will particularly apply in situations where it is necessary, for a determination of the suitability of a national measure, to carry out a thorough examination of the precise aims of that measure, and where an appreciation of the effectiveness of national legislation in a complex national context is required to be able to determine the necessity of the measure. It seems to me that the national court is better

able to do this, and that even preliminary reference proceedings – and this is how most cases of this type come before the Court of Justice – are not really suitable for a detailed consideration of facts and consequences.47 The case law of the Court seems to support the above position. As was apparent in the *Familiapress* case, the Court seems to prefer to leave it to the national court to apply the necessity test to the facts of a case, indicating appropriate criteria.48 The degree of latitude left to the national court is sometimes considerable.49 Another thing that became clear in *Familiapress* was that, in suggesting criteria to the national court, the Court may also indicate that if an examination of the facts leads to a particular outcome, the measure will be disproportionate. This is a means of managing the risk of an unacceptable divergence of national case law. Thus the Belgian and Dutch Governments argued that the Austrian legislature could have adopted measures less restrictive of free movement of goods than an outright prohibition of distribution, such as blacking out or removing the page on which the prize competition appeared in copies intended for Austria or a statement that readers in Austria did not qualify for the chance to win a prize. The documents before the Court were apparently not clear on that point, but the Court stated that if the national court were to find that even newspapers which had taken one of these measures was affected by the prohibition, it would be disproportionate. The Court can also, as in *Lehtonen*, indicate that the national measure appears on the face of it to be disproportionate, but nevertheless leave the national court free to decide that the measure is proportionate.50 It goes without saying that in such a case the Court would provide the national court with strict criteria.

In particularly sensitive cases the Court of Justice is inclined to give the national court even more latitude. *Leifer* concerned the legality of German legislation making the export of ‘dual use’ goods dependent on an export licence.51 Although this was not a case concerning an intra-Community trade restriction, the basic proposition stated in that decision does seem to be applicable to this study. The German Government argued that the legislation was necessary to protect public security. Advocate General Jacobs indicated in his Opinion that although he considered the principle of proportionality to be fully applicable, as external security was at stake this might prevent a court of law from applying a strict proportionality test.52 The Court adopted his approach. It held that the threat to public security is a circumstance that the national court can objectively verify. It is worth noting that the Court

48. This approach is also encountered in the other case law I have examined; see, for example, Joined cases 34, 35 and 36/95 *De Agostini* [1997] ECR I-3843, and case C-220/98 *Estée Lauder*, n.y.o.r.
50. Case C-176/96 *Lehtonen*, n.y.o.r.
52. His Opinion at 65.
did not even supply the national court with criteria with which to decide whether or not there was a threat to public security. This question was apparently left entirely to the national court.

As regards the third element of the proportionality principle (the balancing of interests) I would nevertheless like to suggest a different approach. In the first place I would be extremely cautious about including this in the proportionality principle at all. But if there should, in spite of everything, be a reason to carry out a genuine balancing of interests, whether in the form of a reasonableness test or otherwise, this should be left to the Court of Justice.53 After all, such a balancing of interests implies that it is necessary to decide what level of protection should apply within the Community. That is a decision I would prefer not to leave to a random national court.

As I have said, it is possible to make an exception to the rule that it is for the national court actually to apply the proportionality principle, where the Court of Justice takes the view that it has all the facts at its disposal and that no further examination of the facts is therefore necessary.54 These are cases in which there can be no doubt as to how the proportionality test should turn out. The Van der Veldt case offers a particularly interesting example.55 The Court was apparently so convinced that Belgian legislation fixing a maximum salt content in bread was unacceptable, that it concluded that 'the legislation in dispute' (instead of the usual, more abstract formulation 'national legislation prohibiting ...') did not satisfy the proportionality requirement.56 Outside the field of free movement of goods the Baxter case provides an example.57 There the Court held that effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of the freedom of establishment and that a 'Member State may therefore apply measures which enable the amount of costs deductible in that State as research expenditure to be ascertained clearly and precisely. However, national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred cannot be justified [...]. The taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the levy to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States.' Here, too, the matter was clear enough for the Court to cut the proportionality knot itself.

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56. My italics.
Another example is provided by the *Debus* case.\(^{58}\) Italian legislation provided for a maximum content of sulphur dioxide in beer. Italy sought to justify the legislation on grounds of protection of the public health and of the consumer. Advocate General Van Gerven considered that the Italian Government’s unsupported reliance on consumer protection would not satisfy the requirements of proportionality laid down by the Court’s case law, since there were measures capable of ensuring consumer protection whilst being less restrictive, such as appropriate labelling. This could therefore have been decided by the Court itself. As regards the protection of public health, he suggested leaving it to the national court to determine whether the legislation infringed the principle of proportionality, indicating in general terms the criteria it should take into account.\(^{59}\) The Court, however, found the matter quite straightforward: the rules in question amounted to a general, absolute prohibition of all beers with a higher sulphur dioxide content, without any exception. The disproportionate nature of such a prohibition was also evidenced by the fact that the rules did not apply to wine, suggesting that protectionist aims might well have been involved.

On this point, the *Franzén* case is also illustrative.\(^{60}\) The Swedish licensing system for the import of alcohol, and the high fixed charge and inspection fees traders were expected to pay, apparently bore no relation to the interest put forward by the Swedish Government of protecting the health of humans against the harmful effects of alcohol. As a result the Court proceeded to apply the proportionality principle itself.

A second reason for more active intervention by the Court is where the national court is unable to reach a conclusion using the criteria provided by the Court. The best-known example of this is of course the chaotic situation\(^{61}\) which arose in England following the Court’s pre-*Keck* Sunday-trading decisions.\(^{62}\) Application of the proportionality principle by the various English courts after the Court of Justice’s decision in *Torfaen* produced different outcomes because the various English courts took different views on the purpose of the legislation.\(^{63}\) If the purpose of the legislation was ‘protecting the health and well-being of workers’, it was clearly possible to arrive at the conclusion that there were less restrictive measures conceivable to attain this aim, which were equally effective. However, if the purpose was regarded as

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59. See, for a similar difference of opinion between the AG and the Court, case C-315/92 *Clinique* [1994] ECR I-317. Whether the German legislation to protect the consumer against being misled by the use of the name Clinique was really necessary was a matter Advocate General Gulmann felt should be decided by the national court. However, the Court decided the matter itself.
honouring the traditional English Sunday, Sunday closing might well be considered necessary. From this it is clear that it is normally for the national court to identify as clearly as possible the policy aims of national legislation, but that the Court of Justice will want to cut the knot itself in exceptional cases.

4.7. Who must prove the proportionality of the measure?

A question of some practical importance is who bears the burden of proving the proportionality or otherwise of the national measure? In fact there are two questions at issue:

– who must provide the proof? The Member State? And what is the Commission’s role, especially if proportionality is raised in infringement proceedings and not in preliminary referral proceedings?

– what must be proved? The proportionality of the measure, or the absence of disproportionality?

Theoretically the answer should be that once it has been established that the national measure is a measure having equivalent effect, it is for the Member State to prove that it is proportionate. Krämer makes it clear that the picture is somewhat more complicated and varied in practice. During the proceedings all parties, the Commission, the Member State, the parties, intervening Member States, and sometimes even the Council, present facts and circumstances (scientific reports, practice elsewhere etc.) which shed light on the proportionality or otherwise of the measure. As Krämer puts it, ‘the more substantiated the arguments from the one side are, the more detailed those from the other side have to be’. Only at the end of this process, where factual aspects remain open, does the question of the burden of proof arise. Krämer’s point is largely supported by the case law I have consulted. Take for example the German Crayfish case. This case concerned an absolute ban on the import of crayfish. The aim of the rules was to protect native crayfish in Germany from crayfish disease and prevent faunal distortion. The Court held that less restrictive instruments were conceivable and that the measure was therefore disproportionate. In doing so, it adopted a number of suggestions from the Commission, concerning which the German Government had ‘not convincingly shown that such measures, involving less serious restrictions for intra-Community trade, were incapable of effectively

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66. Case C-131/93 Commission v. Germany [1994] ECR I-3303. This decision is incidentally a good example of the contention that the Court is inclined to carry out a more intensive scrutiny of the necessity of a measure when it amounts to an absolute ban on imports.
protecting the interests pleaded.’ In other words, though the Commission was not actually required to prove that the measure was disproportionate, it nevertheless by its comments and suggestions more less obliged the German Government to respond seriously to them. Failing an adequate rebuttal of the Commission’s suggestions, the Court was able to arrive at the conclusion that less restrictive alternatives were conceivable.

Another good example is the decision in the *Heinonen* case.67 The Finnish Government had argued that it was possible to detect an improvement in the situation (disturbances of public order) as soon as the legislation at issue was implemented. Apparently this was not a matter for further discussion with the Commission because the Court had little difficulty in concluding that ‘it may properly be inferred … that the legislation in question is appropriate.’

A similar approach was adopted in a case concerning Italian nematode larvae.68 This case concerned the systematic inspection of imported fish for the presence of certain nematode larvae. It was not disputed that the measures were intended to protect public health. However, referring to its decision in *De Peijper*, the Court noted that the measure did not fall within the exception specified by Article 30 if the health and life of humans could be as effectively protected by measures which restricted intra-Community trade less.69 In the Italian case the goods had already undergone a health check in the State of dispatch. The Commission presented the findings of international scientific research which confirmed that the ingestion of fish containing dead or devitalised larvae did not constitute a health risk. Italy was unable to refute the Commission’s argument, so the Court held the measure to be disproportionate.

Another decision which tends to underline the Court’s approach is the *Van der Veldt* case, which concerned Belgian legislation imposing a maximum salt content on bread.70 Because of this legislation bread baked in the Netherlands could not be sold in Belgian branches of Hema, a Dutch company. The main purpose of the measure was protection of public health. As the Belgian Government was unable to supply data based on the relevant scientific research which would demonstrate the risk of too high a salt content in the Dutch bread, the Court considered the legislation disproportionate. The Court applied the proportionality principle itself and arrived at the conclusion that ‘The legislation in dispute’ was therefore incompatible with the principle of proportionality (paragraph 20).

Finally I return to the *Debus* case.71 Here too there were uncontested

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assertions by the Commission that FAO and WHO studies showed that the maximum daily dose of sulphur dioxide would not be exceeded even as a result of the consumption of beer containing 36.8 mg/l of that additive. The Italian legislation, which prohibited all beers containing more than 20 mg/l of sulphur dioxide, was clearly not necessary to protect public health.

By contrast, where the Court desires to leave the Member States more latitude, it is more likely to apply the criterion of absence of disproportionality rather than that of proportionality. An example is the Generics case, where the Court held that a judicial prohibition in respect of a patent was not disproportionate.72 Similarly, in Alpine Investment the Court arrived at the conclusion that the Dutch measures prohibiting cold calling were not disproportionate.73 Proportionate or not disproportionate may seem a mere play on words, but it does seem to enable the Court to carry out a more (is the measure proportionate?) or less (is the measure not disproportionate?) intensive review.

5. Application of the proportionality principle within the framework of paragraphs 4 to 6 of Article 95 of the EC Treaty

The Treaty of Amsterdam clarified and changed the old Article 100a(4) procedure. Today Article 95, and in particular paragraphs 4 to 6, of the EC Treaty determine the conditions under which Member States are entitled to depart from harmonisation measures. This is not the place to consider that procedure as such.74 Here I shall confine myself to the role the proportionality principle plays in this respect, as evidenced by its first application in Commission decisions.75

First let me briefly state the procedure: Article 95(4) allows Member States the possibility of maintaining national measures even after harmonisation which are justified by Article 30 of the Treaty as relating to the protection of the environment or the working environment. Under paragraph 5, a Member State may introduce new provisions if they are based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure. The Member State must notify the Commission of these national provisions, and the Commission must decide on the provisions involved within six months of notification after having verified whether or not they are a means of arbitrary discrimination.

75. A first series of Decisions has been published in OJ 1999 L 329.
or disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.

It is clear that proportionality will play an important part in the Commission’s decision. This is not surprising given the explicit reference to the Article 30 and Rule of Reason justifications ‘environment’ and ‘working environment’. If proportionality did not play a part, this would imply that review after harmonisation would be more lenient than before. This can hardly be considered logical. Paragraph 6 contains the familiar criteria from Article 30 that there shall be no arbitrary discrimination and no disguised restriction on trade; the formula the Court has on several occasions referred to in its decisions as the basis for application of the proportionality principle. Consequently it is my contention that the Commission is in principle required to take the line of the Court’s case law on proportionality into account in its decisions. If we examine the Commission’s first few decisions, we see that it carries out two and possibly even three different proportionality tests. The first test is what the Commission calls the test of compatibility with the ‘general principle of proportionality’, which implies, according to the Commission, that the measures must not exceed what is adequate and necessary for the pursuit of a legitimate aim. In other words, this is an assessment of the suitability and necessity of the national measures.

In the second place there is a test of compatibility with the criterion of Article 95(6), that the measures must not constitute an obstacle to the functioning of the internal market. The Commission interprets this to mean that the national measure must not have a disproportionate effect in relation to the objective pursued. This does indeed look like application of the proportionality principle *senso strictu*, the proportionality principle as a manner of balancing interests. From the way the Commission actually applies this formula we can see that it reviews in a fairly detailed manner the effects on production, sale and trade of the goods in question. In other words, not only the effects on intra-Community movement of goods are considered, but all the implications the legislation has for the functioning of the Internal Market. In this sense the review is more comprehensive than under Article 30 and the Rule of Reason. However it is worth noting that the Commission does not explicitly balance these effects against the aims the national measures

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76. Cf., for example, para. 34 of case C-400/96 *Harpegnies* [1998] ECR I-5121.
77. See, for example, Decision 1999/832, OJ 1999 L 329/25, at 115. Cf. also, in the context of the application of Regulation 2408/92, OJ 1992 L 240/8, Decision 98/523, OJ 1998 L 233/25, where the Commission considered Swedish measures to limit the level of noise caused by Karlstad airport. The Swedish Government had failed to show that adequate protection could also be attained with less restrictive measures. On the other hand, compare the Commission’s view on the precautionary principle in COM (2000) 1, at p. 3. It considers that the Community, like the other WTO members, has the right to establish the level of protection that it deems appropriate. It is hard to see why the Member States should not have the same right in respect of Article 30 and the Rule of Reason.
are intended to achieve. The formula employed by the Commission does however give reason to suppose that it does not altogether intend to rule out such a balancing of interests in the future.

A possible third form of application of the proportionality principle is to be found in the manner in which the Commission decides in the context of paragraph 5 whether there are ‘circumstances specific to a Member State’ which may justify the application of different national rules.\textsuperscript{78} It was concluded above in the discussion of the decisions in Monsees and Aber-Wöggan that where national legislation has been harmonised it must be assumed that a directive must in principle be deemed an effective means of attaining its objectives. It is therefore appropriate that the Commission should, in the context of paragraphs 4 to 6 of Article 95, examine why the directive is considered not to provide sufficient protection for the Member State desiring to take stricter measures. And it is in this context that the Commission gives a decision on the level of protection adopted. The criterion of ‘circumstances specific to a Member State’ is in fact no more than a special variation on the proportionality theme.

6. Conclusions

To what conclusions does the above lead? In the first place I would like to say that the proportionality principle does not have just one specific form, but is, on the contrary, flexible. Proportionality has various aspects and it is these which allow the Court of Justice to subject national legislation which restricts free movement to a more or less intensive review, or not (\textit{Walloon Waste}). The intensity of review may be reflected in various ways: the Court may itself decide on the suitability of the measure (\textit{Franzén}), or it may leave this to the national court, providing guidelines (\textit{Zenatti}); it may apply the requirement of ‘least restrictive alternative’ itself (\textit{Alpine Investment}), or leave this to the national court, again providing guidelines (\textit{Familiapress}). The Court can even decide, as in \textit{Schindler}, that the entire review of necessity must be carried out at the national level. Equally, the intensity of review may also be reflected in the question who should decide on the level of protection (the Court of Justice, as in \textit{Estée Lauder}, or the national court, as in \textit{Läärä}) and who should in fact apply the proportionality principle (the Court, as in \textit{Van der Veldt}, or the national court, as in \textit{Familiapress}). And the Court can even apply a more less intense form of review when it comes to proving the proportionality or disproportionality of a measure. Finally, as the ultimate form of Community law involvement, the Court can decide to carry out a

\textsuperscript{78} Although this criterion is not contained in paragraph 4, the Commission does apply it when assessing existing national measures; see, for example, Decision 1999/832, OJ 1999 L 329/25, at 81.
balancing of all the interests itself (Stoke-on-Trent) or it can decide not to carry out such a test at all.

How are these differences in the application of the proportionality principle to be explained? One of the factors that serves to explain why the Court sometimes does carry out an intensive review and sometimes does not is, in my opinion, the fact that the proportionality principle has dual constitutional implications. On the one hand the Court is reluctant to substitute its opinion for that of the legislature, while on the other it is unwilling to take it upon itself to form a view about topics which are primarily a matter for national consideration. In those cases it will not carry out an intensive review. The decisions in cases like Leifer, Läära, Heinonen and Schindler are notable examples of this. However, when the Court can be guided by a political balancing of interests at Community level, as in Monsees and Pastoors, it may be expected to adopt a more active approach. The Court may also actively seek other grounds which will justify a more intensive review: the need to cut the knot, as in Stoke-on-Trent, or the presence or absence of international scientific data, as in Van der Veldt and Debus.

Another factor in my view is the seriousness of the infringement of free movement resulting from the national measure. Absolute prohibitions can count on a stern reception from the Court (German Crayfish, Monsees), while less rigorous restrictions may anticipate a more lenient approach (Alpine Investment). National measures which ‘only’ infringe Community customs law or the movement of goods in respect of third countries may, it seems, also receive more lenient treatment as far as proportionality is concerned (Leifer and Heinonen). In other words, the nature and seriousness of the Community interests which are infringed are also relevant to the severity of the test.

In summary, there is no such thing as the application of the proportionality principle. The proportionality principle is an instrument which allows the Court of Justice to make a balanced assessment of the legality of national restrictions of free movement and, in doing so, to take account of the sensitive nature of the division of powers between judiciary and legislature and between the EC and its Member States.

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79. Cf. also de Búrca (1994) who arrived at similar conclusions in her article for YEL.
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Literature