15

Proportionality in EU Law: A Balancing Act?

WOLF SAUTER*

Abstract

The proportionality principle plays a key role in constitutional review of public acts. Its use legitimises the constitutional claims of EU law in the context of a multi-level polity system. The application of proportionality in the EU differs based on whether legal acts of the EU or of its Member States are concerned. In the former case, a manifestly disproportionate test is usually applied, while in the latter case, a least restrictive means test (LRM) is normally used. Both are conditioned by the degree of integration achieved. In future, the use of the principle may involve increasing attention being paid to individual rights.

I. INTRODUCTION

PROPORTIONALITY AS A constitutional principle enables courts to reconcile conflicting rights and norms by considering their relative value (balancing) and imposing requirements such as necessity and the use of the least restrictive means (LRM) test. Its origins can be traced most clearly to the nineteenth-century Prussian courts. Since the end of the Second World War, recourse to the proportionality principle has spread gradually but worldwide as the scope of constitutional review developed in many jurisdictions. Unsurprisingly, therefore, proportionality plays a significant role in comparative constitutional law and legal theory.[1]

* I am grateful for the comments of Angelos Dimopoulos and the participants in seminars at TILEC and the CELS, as well as those by two anonymous reviewers. The views expressed here are personal.

[1] R Alexy, *A Theory of Constitutional Rights* (J Rivers trans, Oxford, Oxford University Press, 2002); A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press, 2012); DM Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004); A Stone Sweet and J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2009) 47 *Columbia Journal of Transnational Law* 73.

This chapter will be limited to the administrative law context of the EU. Within EU law, proportionality is a principle that mainly serves as a framework for decisions to determine whether and/or to what extent rights can be limited by governmental intervention (such as legislation) that is motivated by public interests. The proportionality test applies to acts of the EU institutions as well as to acts of the Member States. It is applied differently at these two levels and with variations at each level.

My thesis is that this is because the EU is a multi-level system of governance where not just the balance between the EU and its Member States but also that between individual rights and public policy is involved. The net effect favours integration.

The following questions will be addressed:

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

I will first discuss the background of the principle in some more detail, including the theoretical and EU constitutional dimension. Second, I will examine the main elements of the proportionality test(s) applied. Third is the application of the principle vis-a-vis acts of the EU. Fourth, I will look at acts of the Member States, taking into account, inter alia, the market access standard and citizenship. The conclusion takes up the research questions again.

II. THE CONSTITUTIONAL CONTEXT

Defining the content and the scope of the proportionality principle is difficult. In the theoretical literature we find the view that proportionality as a balancing test between competing principles is uniquely suited to deciding constitutional disputes, even with mathematical precision.[2] EU law specialists such as de Búrca and Jans suggest the principle can be applied to achieve various degrees of deference.[3] Harbo even charges that in the EU context, it is devoid of meaning altogether.[4] By contrast, another seasoned

[2] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press, 2012); Alexy (n 1).

[3] G de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105, 126; J Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239, 246: 'the nature of the interest to be protected is relevant to the manner in which the Court will apply the proportionality principle'. See also at 253: 'the seriousness of the restriction will affect the intensity of the test'.

[4] TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *European Law Journal* 158.

observer, Schwarze, believes that the proportionality principle is the most important general principle in the field of EU economic law because, in the absence of a detailed system of EU administrative law, it judges measures by the relationship between the objective pursued and the methods used.[5] Below I will look first at legal theory and then at the EU constitutional context.

A. Proportionality and Legal Theory

Legal theorists have developed the principle of proportionality (or balancing, as strict proportionality is also known) as the gold standard of constitutional adjudication which allows all different rights and principles to be weighed against each other in the same dimension. The German constitutional theorist, Robert Alexy, is one of the leading scholars in this respect. According to Alexy: 'Constitutional judgments are only correct if they correspond to the outcome of an appropriate balancing of principles.'[6]

This presupposes that certain individual rights are not attributed trump status, meaning that they cannot be overruled by public policies or submitted to compromise solutions to accommodate such policies—as would be the claim of liberal legal scholars exemplified by Ronald Dworkin.[7] If rights can be absolute, then there is no room for proportionality. An important additional feature of proportionality, as construed by Alexy, is the 'Law of Balancing', which 'requires the increasing intensity of interference with liberty to be matched by an increasing weight of reasons justifying the interference'.[8]

Alexy and others[9] have set out in mathematical notation how the balancing test can be applied. This is based on the notion that the test consists of three rules: first, the value of the interference of the individual interest; second, the value of satisfying the public interest; and, third, whether the importance of satisfying the public interest can justify the detriment to the individual's right.[10] The values assigned range from light to intermediate and serious, and by ranking them in this manner, balancing decisions can be made more rational. This is considered a 'weighted' test.

[5] J Schwarze, *European Administrative Law*, revised edn (London, Sweet & Maxwell, 2006) 664–65, citing J Gündisch and B Schlink. This echoes the claims made for proportionality in the world of constitutionalism at large: see, eg, Alexy (n 1), Barak (n 1) and Beatty (n 1).

[6] Alexy (n 1) 210.

[7] R Dworkin, *Takings Rights Seriously* (London, Bloomsbury, 2011). *Cf* Harbo (n 4) 166.

[8] Alexy (n 1) 231.

[9] Klatt and Meister (n 2).

[10] Ibid 79: 'According to the law of balancing, a three-step test is required: first the degree of non-satisfaction of the first principle is established; secondly, the importance of satisfying the competing principle is established; and thirdly, it is established whether the importance of satisfying the second principle can justify the degree of non-satisfaction of the first principle.'

A good example of the application of the legal theory on proportionality to the EU is provided by Harbo, who claims that there is no discernible pattern to proportionality testing in the EU: 'The dissection of the principle reveals that the principle has no clear or fixed substantial meaning'[11] and 'at some stage one could even question whether the court, although claiming to do so, is really applying the principle of proportionality in the first place'.[12] He suggests that the explanation of the pattern found by a number of scholars (de Búrca, Craig, Jans and Tridimas) of manifestly disproportionate testing of EU measures and LRM testing of the Member States instead of balancing is provided by the desire to promote European integration. His conclusion is that the manifestly disproportionate test is in fact a reasonableness test in disguise, which leads to problems for the legitimacy of EU judicial making or at least creates a presumption of strong legislative sovereignty.

As regards the existence of balancing in the EU, the mainstream approach appears to be formulated by Lenaerts and Gutiérrez-Fons: 'Given that no principle encapsulating an individual right in the general interest is absolute, the courts must engage in balancing to evaluate whether a legal norm is consistent with a general principle.'[13]

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

B. The EU Constitutional Dimension

Together with supremacy, direct effect and state liability, proportionality is one of the core general principles of EU law. However, while the former three principles were derived from the EU legal order itself, proportionality has been derived from the laws of the Member States. In this context, *Verhältnismässigkeit* in Germany and various general principles of French administrative law such as *erreur manifeste d'appreciation* and *détournement de pouvoir* are generally mentioned.[14]

[11] Harbo (n 4) 160.
[12] Ibid 171.
[13] K Lenaerts and J Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629, 1650.
[14] N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (The Hague, Kluwer, 1996). For a broader comparison, *cf* B Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Groningen, Europa Law Publishing, 2013).

As mentioned above, the development of the proportionality principle is generally associated with constitutional review of public acts. In other words, there is review of the legality of secondary EU law and of the compatibility with EU law of national law that falls within the scope of EU law.[15] I will therefore discuss briefly in what sense EU law has a constitutional dimension. Over time, the EU treaties have come to be regarded as having taken on constitutional characteristics as the result of the 'constitutionalisation' of case law of the European Court of Justice. This is defined most concisely in the Court's 1991 Opinion on the EEA Agreement:

> [T]he EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals … The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[16]

Because the successive EU treaties were open-textured framework treaties, the use of legal principles was required to fill out the structure of EU law. Aside from the abovementioned (i) separate legal order and the (ii) concepts of direct effect, supremacy and state liability for charges of violating EU law, the building blocks of the EU constitution include (iii) the respect of general principles of law including fundamental rights—and proportionality—and (iv) the effective enforcement of Community law in national courts.[17] Notwithstanding the failure to ratify an explicit EU Constitution in 2005, we may therefore assume that an implicit constitution was already in place.

Two relevant legal perspectives are the early market-based 'economic constitution' focusing on such rights as property and the principle of free competition (an idea derived from the German law and economics school of ordoliberalism),[18] and more recently the constitution based on broader

[15] Lenaerts and Guttiérez-Fons (n 13) 1649.

[16] *Opinion 1/91 of the Court Pursuant to Article 228 of the EEC Treaty on the Draft Treaty on the Establishment of the European Economic Area* [1991] ECR I-6079 [21]. *Cf* Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339 [23].

[17] C Timmermans, 'The Constitutionalisation of the European Union' (2001) 20 *Yearbook of European Law* 1.

[18] *Cf* ME Streit and W Mussler, 'The Economic Constitution of the European Community: From "Rome" to "Maastricht"' (1995) 1 *European Law Journal* 1; W Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27; C Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *European Law Review* 461.

individual rights.[19] The latter has been bolstered first by the introduction of EU citizenship with the Maastricht Treaty in 1993 and next by the Charter of Fundamental Rights of the European Union that was adopted in 2000 and became binding by way of Article 6(1) TEU with the entry into force of the Lisbon Treaty in December 2009.[20] Fundamental rights derived from other common sources are recognised as legal principles according to Article 6(3) TEU.[21] At the same time, and in part as a consequence of the broadening of the project of European integration, the ordoliberal economic constitution has declined.

This is the broader context in which constitutional review can be said to take place at the EU level when the proportionality principle is applied—notwithstanding that even if the constitutionalisation thesis is not accepted (which is difficult to do while remaining in the mainstream of EU legal commentary in view of the above-mentioned case law), the proportionality principle is still used in practice when EU law is applied. In any event, it has been held that the proportionality principle plays a key role:

> After the consolidation of the CJEU's 'constitutional' doctrines of supremacy and direct effect, the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration.[22]

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

[19] The attempt to create an explicit EU Constitutional Treaty failed and was replaced by the Lisbon Treaty in 2007, leading to the Treaty on European Union (TEU), and the Treaty on the functioning of the European Union (TFEU). Nevertheless, the treaty framework has long been seen as a constitution; *cf* A Rosas and L Armati, *EU Constitutional Law: An Introduction*, 2nd edn (Oxford, Hart Publishing, 2012); C Joerges, 'Law, Economics and Politics in the Constitutionalisation of Europe' (2002–2003) 5 *Cambridge Yearbook of European Legal Studies* 123.

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

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

[22] Stone Sweet and Matthews (n 1) 140–41.

involves both establishing the limits of EU law and balancing between different rights and principles recognised in EU law.

In the next section I will discuss how adopting proportionality review of EU acts in relation to principles of EU law has been necessary in order to ensure the acceptance of supremacy and thereby the construction of the EU constitution. This role of proportionality is specific to the EU context and is directly linked to the integration variable. As we will see, the application of proportionality in the EU context has other specific features. Balancing between conflicting principles is often regarded as the main purpose of proportionality in current discussions of legal theory and constitutional law. However, strict 'weighted' balancing between principles to which relative values have been assigned (such as light, intermediate and serious) is not frequently encountered in the EU setting; instead, a truncated test is generally used. This is a feature that I will also try to explain with reference to the integration context. First, we will look at the twin tracks along which proportionality is applied in the EU.

C. The Dual Tracks of Proportionality in EU law

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

In EU law a proportionality test is applied both to EU acts and to acts of the Member States. In both cases the consistency with EU law is reviewed. However, in the case of secondary measures taken at the EU level, the compatibility with the rules of the treaties is at stake, whereas in the case of the Member States, both their implementation of EU measures and the compatibility of national measures with EU law (notably the provisions on free movement) are involved. As I will illustrate in detail, the nature of the proportionality test involved differs significantly, with the EU usually being subjected to a manifestly disproportionate test and the Member States to (modified versions of) an LRM test.

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

I will use two classic cases, *Internationale Handelsgesellschaft*[23] and *Cassis de Dijon*,[24] to illustrate the integration and constitutional context of the two strands of proportionality case law. With this I mean the strand that concerns the EU level and that concerning the national level:

i) *The EU level*: the first application of proportionality with respect to EU legislation is usually associated with the *Internationale Handelsgesellschaft* case in the context of the common agricultural policy (CAP). Here the CJEU also embraced the fundamental rights as principles of EU law for the first time:

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[25]

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

ii) *The national level*: the second landmark decision was *Cassis de Dijon*, where the Court held that minimum alcohol content requirements

[23] Case 11/70 *Internationale Handelsgesellschaft, bH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 [12]. An earlier instance in the Coal and Steel Community context was Case 8/55 *Fédération Charbonnière de Belgique v High Authority* [1954–56] ECR English special edn 292 (cited in Emiliou (n 14)). *Cf* also Case 29/69 *Erich Stauder v City of Ulm* [1969] ECR 419.

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

[25] *Internationale Handelsgesellschaft* (n 23) 3.

for spirits imposed by German law were disproportionate compared to informing consumers by way of labelling. Here, the application of proportionality regarded the invocation by a Member State of an exception to EU law. It is worth noting that at the same time *Cassis de Dijon* is linked to: (a) the introduction of the principle of mutual recognition which subsequently inspired the 1992 internal market drive; as well as (b) the concept of mandatory requirements of public interest (also called the 'rule of reason')—an open-ended category of non-discriminatory exceptions not listed in the Treaty.[26] Thus, as the scope for the application of EU law was widened, so was the scope for the available exceptions.[27] The last element that merits highlighting is the 'information approach' that was used here to determine that the LRM of attaining the desired end had not been deployed.[28] This is because labelling was seen as an equally effective alternative.

These initial cases show the application of an LRM standard both to measures that are taken at the EU level and at the national level. As I will discuss in the next two sections, this is not how the proportionality case law has developed over the years, at least with regards to EU acts, and also regarding the Member States, the LRM test is frequently modified.[29] To provide a broader perspective, however, I will first look briefly at the most general statement of the proportionality test in EU law.

D. The Overall Standard for Proportionality Review under EU Law

In EU law, necessity and proportionality in the narrow sense (as balancing) are linked under the overarching concept of proportionality in the broad sense. However, in practice, proportionality in the narrow sense is often skipped and necessity generally forms the substance of the test at the national level, whereas only a mild form of balancing is applied at the EU level instead. Effectively there are different proportionality tests for the EU and the national level, and that is how they will be discussed here. But we

[26] Non-discrimination is not always adhered to. *Cf* Case C-157/99 *BSM Geraets-Smits v Stichting Ziekenfonds VGZ and HTM Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *VG Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and EEM van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509.

[27] *Cf* W Sauter and H Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market Before the EU Courts* (Cambridge, Cambridge University Press, 2009).

[28] The impact on EU market integration aside, in terms of effectively influencing consumer behaviour, packaging information ranks low in the accounts of behavioural economics that have emerged more recently. *Cf* RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (New Haven, Yale University Press, 2008).

[29] *Cf* T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006).

will first look at the most general statement of the test in EU law, which consists of four elements. Under *necessity* come the first three steps set out below. Fourth, under proportionality in the strict sense comes the balancing test. In EU law this is not finely tuned balancing in the sense of legal theory: here a thumb is firmly placed on the scale in favour of EU discretion (in particular where the relevant powers have been centralised). The four steps are as follows:

1) an appropriate (or suitable) measure,
2) in pursuit of a legitimate objective (legality—this is sometimes not counted as a separate step in the test),
3) among the appropriate measures that measure which constitutes the LRM.
4) not manifestly disproportionate in terms of a costs versus benefits balance.

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

> The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[30]

It should be noted that not all of these steps are applied in all cases, and in particular the LRM test and the manifestly disproportionate standard (steps three and four) are often applied as alternatives rather than complements. Even where proportionality in the strict sense is applied, an explicit balancing of costs versus benefits is rare—the manifestly disproportionate test, as its wording suggest, forms a rough measure of justice. It is designed to leave a relatively wide margin of discretion to the authorities whose measures are reviewed. Below we will examine how proportionality is applied to acts of the EU institutions. In the next section I will discuss its application to the Member States.

[30] Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health ex parte Fedesa et al* [1990] ECR I-4023 [13]. *Cf* Joined Cases C-133/93, C-300/93 and C-362/93 *Antonio Crispoltoni v Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v Donatab Srl* [1994] ECR I-4863 [40]; Case C-180/96 *UK v Commission* [1998] ECR I-2265 [96]; Case C-189/01 *H Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij (Foot and Mouth Disease)* [2001] ECR I-5689 [80].

III. PROPORTIONALITY APPLIED TO THE EU INSTITUTIONS

According to Tridimas, EU measures are generally judged sympathetically under the manifestly disproportionate test, whereas Member State measures are subjected to the procrustean LRM test.[31] De Búrca holds that 'when action is brought against the Community in an area of discretionary policy-making power, a looser form of the proportionality inquiry is generally used'.[32] She also sums up reasons for deference, including the importance of the aim of the measure, the existence of broad discretionary powers and the nature of the interest or the right affected. Schwarze identifies eight different types of setting where proportionality is applied, without however providing a clear distinction explaining the differences in the test used.[33] Craig suggests the proportionality test is increasingly strict when moving from discretionary policy choices to cases involving rights and to cases regarding penalties, which are the three types of cases that he distinguishes.[34] I will first examine the proportionality test as applied against the EU institutions in general terms before looking more closely at the variety found in practice, and looking at the emerging role of individual rights.

A. LRM Testing of the Acts of the EU Institutions

The explicit use of the LRM test of measures taken at the EU level appears to be rare. An exception is *Swedish Match*,[35] where an absolute prohibition on tobacco for oral use included in the Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194/ 26) was nevertheless found to be proportionate. At issue were the rights to property and the freedom to pursue a trade or profession. In exchange, the Community objective of ensuring a high level of protection of human health was invoked. The Court held that other measures such as imposing technical standards on manufacturers or regulating labelling could not have had an equal preventive effect as removing the product from the market. Implied in this analysis is that such a far-reaching remedy was in fact necessary given the importance of the policy goal (as a high level of health protection was an objective of harmonisation). This is therefore an

[31] *Cf* Tridimas (n 29) 138.
[32] De Búrca (n 3) 146.
[33] Schwarze (n 5).
[34] P Craig, *EU Administrative Law*, 2nd edn (Oxford, Oxford University Press, 2012) 560–615.
[35] Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd* [2004] ECR I-11893 [56]–[58].

example where the LRM test stumbles on the question whether alternative measures deliver the same level of protection. It is also an example where the information approach (labelling) did not provide a LRM.

B. Manifest Inappropriateness Testing

In the previous section we saw the four elements of the proportionality test as they were set out with regard to the scrutiny of an EU measure in *Fedesa*.[36] However, in this case the Court also held that because this Case regarded the common agricultural policy where the EU legislature has been given discretionary powers 'judicial review must be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of discretion'.[37]

Hence, the not manifestly disproportionate (or not manifestly inappropriate) standard applied. The LRM test was not used here, although (as had been the case in *Cassis de Dijon* involving the application of the proportionality test in respect of Member State action) less restrictive means such as labelling would arguably have been available (the 'information approach'). The manifestly disproportionate and LRM tests thus appear to be presented as alternatives, with the latter being applied to the Member States' action and the former being applied to the EU. In subsequent cases the CJEU has clearly established that where the EU has discretion, the manifestly disproportionate test is appropriate.[38] Because the manifestly disproportionate test sets the bar so high, this means in practice only marginal review of the EU's actions, which generally promotes integration (if we assume that is what the EU measures examined tend to do).

There are only few instances of an EU measure being declared manifestly disproportionate. For example, in *ABNA*,[39] the precise composition of animal feedstuffs was required to be disclosed on demand by Community legislation seeking to protect against contamination of the food cycle. The Court found that this requirement needlessly infringed the economic interests of the

[36] *Fedesa* (n 30).

[37] Ibid [8]. *Cf Foot and Mouth Disease* (n 30) [80].

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

[39] Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd et al v Secretary of State for Health et al* ECR I-10423 [80]–[84].

manufacturers. Indicating a range (an approximation of '5 to 10 per cent' instead of a precise figure such as seven per cent) for the components involved would have sufficed for information purposes without revealing their trade secrets.

In the *Cotton Support Scheme* case, the Court spelled out that given the wide discretion of the Community legislature where the CAP is concerned: 'What must be ascertained is therefore not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate.'[40] In this case, the Council had neglected to present the basic data necessary for the Court to verify whether the objectives of the scheme under consideration had been met. Consequently, the principle of proportionality was infringed. The manifestly disproportionate standard took on the quality of a failure to state reasons.

C. Justification and Procedural Guarantees

Finally, the existence of procedural guarantees of individual rights can play a role in the proportionality assessment of the Court with regard to EU acts.

The *Food Supplements* case[41] revolved around the question whether a positive list (permitted substances) could be proportionate. This was deemed to be the case because an appropriate procedure for adding new items to the list existed or in any event could still be created by the Commission as part of its implementing measures (even though in his Opinion, AG Geelhoed said that this procedure 'in so far as it may exist and in so far as it may deserve this title' had all the transparency of a black box). Hence, its existence was held to be implicit. The existence of procedural guarantees can therefore be significant in finding measures that are proportionate in the context of a manifestly disproportionate test even if proportionality itself may not be well suited to establishing procedural rights.[42]

A contrasting case revolving around procedural safeguards is *Kadi*,[43] which involved fundamental human rights and the Common Foreign and Security Policy. Here private assets had been frozen as anti-terrorism measures.

[40] Case C-310/04 *Spain v Council (Cotton Support Scheme)* [2006] ECR I-7285 [99].

[41] Joined Cases C-154/04 and C-155/04 *The Queen, on the Application of Alliance for Natural Health and others v Secretary of State for Health and National Assembly for Wales (Food Supplements)* [2005] ECR I-6451.

[42] *Cf* S Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35 *Legal Issues of European Integration* 201, who advocates the general principles of effective judicial administration and sound administration as a more appropriate foundation for procedural rights than proportionality.

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

The freezing of these assets was in principle held to be justified by the EU courts:

> [T]he right to property is one of the general principles of Community law. It is not, however, absolute, but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.[44]

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

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

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

IV. PROPORTIONALITY APPLIED IN RESPECT OF ACTS OF THE MEMBER STATES

We will now consider the variables that determine proportionality testing at the level of the Member States. In particular, the LRM test will be examined in greater detail. This involves looking at the thesis that the degree of harmonisation is crucial for determining the standard that is applied.

[44] *Kadi* (n 43) [355]. *Cf* Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 [23].

A. The Degree of Harmonisation

For the Member States, proportionality is important, especially in the context of treaty-based public policy exceptions or unwritten mandatory requirements that they invoke to justify limits on the free movement rules.

The fact that thereby the interests of different levels of government are balanced and not just those between individuals and the state may be one of the reasons why there seems to be a greater variety in the different versions of the test applied than where the acts of EU institutions are involved. The literature provides some indications as to how to explain this. Tridimas cites respect for the constitutional value of the internal market freedoms as an important factor in imposing a strict LRM test.[45] Craig, however, points out that different priorities—or levels of public intervention—set at the national level between Member States are accommodated by the Court.[46] It is Jans' view that the greater the impact of the restriction imposed at the national level, the stricter the test is likely to be.[47] The same is suggested by de Búrca.[48] If this means that the more serious the infringement of competing rights involved, the stricter the test that is applied becomes, it squares with Alexy's constitutional theory referred to above.

An important variable appears to be the degree to which a certain policy domain has been harmonised—or pre-empted (where there is shared competence) by the EU level.[49] This means the degree to which a common policy exists and/or the degree to which the Member States have acceded to a common regime corresponds to a reduction of scope for independent action, even in pursuit of a legitimate purpose. Hence, it seems likely that the application of the least restrictive means and manifestly disproportionate tests is subject to variation that may be based not just on the existence of discretionary EU powers but also on the existence or otherwise of harmonisation: in the absence of harmonisation, the LRM test is unlikely to be applied to the actions of the Member States.[50]

[45] Tridimas (n 29) 193.

[46] Craig (n 34) 616.

[47] Jans (n 3) 253: 'the seriousness of the restriction will affect the intensity of the test'.

[48] De Búrca (n 3) 126: 'The more severe the impact on the Community interest or aim, the lower the degree of deference to the national measure which the Court will display, even if the nature of the State's justification for that measure is one which would generally lead the Court to respect the State's assessment of necessity.'

[49] Sauter and Schepel (n 27). *Cf* art 2 TFEU and D Chalmers, G Davies and G Monti, *European Union Law*, 2nd edn (Cambridge University Press, Cambridge, 2010) 206–07.

[50] For an argument emphasising the majoritarian tendency of the Court, *cf* M Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998).

B. Market Access versus Citizenship

As regards the application of the exceptions and mandatory requirements, there appear to be two leading alternative interpretations of the case law of the Court:

i) The first reading is about market access as the predominant value, which is sometimes associated with the idea of the treaty framework as an economic constitution. The market access test has been debated especially in the context of the *Keck* case law, where it is explicitly mentioned.[51] It also fits in with economics-based theories in industrial organisation with regard to the importance of the (threat of) effective market entry. Does the market access test exist in reality? Snell argues that the concept of market access is devoid of meaning and does not resolve the question whether free movement law is about discrimination or about economic freedom.[52] The case law does not appear to provide a consistent answer.

ii) The second reading is oriented more towards citizenship and individual rights, especially in the context of freedom of establishment. Spaventa's theory based on cases such as *Gebhard*[53] and *Carpenter*[54] is that the explanation of why some restraints are acceptable in EU law and others are not is based on the evolving citizenship dimension rather than market access.[55] This seems broadly plausible. For instance, in the area I know best, healthcare, it appears to work with respect to services, but not vis-a-vis establishment (unlike in *Gebhard*).[56] The distinction on the basis of individual rights is difficult to make because in the end, individuals (often healthcare professionals) are also involved in establishment.[57] In the healthcare setting,

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

[52] J Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CML Rev* 437.

[53] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

[54] Case C-60/00 *M Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. *Cf* also Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

[55] E Spaventa, 'From Gebhard to Carpenter: Towards a (Non-)Economic Constitution' (2004) 41 *CML Review* 743. *Cf* Schwarze (n 5) 864; Jans (n 3) 243.

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

[57] *Cf* L Hancher and W Sauter, 'One Step Beyond? From *Sodemare* to *Docmorris*: The EU's Freedom of Establishment Case Law Concerning Healthcare' (2010) 47 *CML Rev* 117.

however, services are favoured over establishment—which could be explained not only by the trump value of citizenship[58] but also by a desire not to upset the applecart of national market organisation in the absence of an EU competence to provide an alternative. In these cases the right of Member States to determine their standard of health-care protection unilaterally is generally cited. The standard for testing their interventions tends to be not balancing or LRM, but internal consistency. The latter test can be seen as a variety of a suitability or appropriateness test.

The market access and citizenship theories are not necessarily at odds with each other. This is consistent with Jans' claim that whereas the principle of proportionality is used as an instrument of market integration, it also functions to protect individual rights.[59] The same view is held by Tridimas.[60] My reading is that market access works where this does not clash with national policies that are genuinely in pursuit of a legitimate public interest and in the absence of harmonisation, but that where market integration halts because the relevant competencies remain at the national level, this situation can still be trumped by individual rights based on EU law. The latter are increasingly inspired by citizenship. In this interpretation the competing theories are therefore not mutually exclusive either.[61] I will now examine the case law in more detail in order to provide a more granular picture of the manner in which the proportionality principle is applied.

C. Necessity and Consistency

The test set out in *Gebhard* concerning requirements for legal practice is that national measures must be: (i) non-discriminatory; (ii) justified by mandatory requirements; (iii) suitable for attaining the objective pursued; and (iv) not go beyond what is necessary.[62] Here no balancing test is mentioned (nor is the principle of proportionality named) and the focus is on necessity: generally an LRM test.

An exception is provided by the cases where suitability—and sometimes necessity—is tested in the sense of the consistency of the national framework at issue. Where the consistency test is applied, LRM testing is

[58] *Cf* Case C-345/09 *JA van Delft et al v College voor zorgverzekeringen* [2010] ECR I-9879.

[59] Jans (n 3) 243.

[60] Tridimas (n 29) 193–94.

[61] Snell (n 52) 472 suggests opting for one standard for situations 'without physical movement where subsidiarity-related concerns predominate and another for free movement of natural persons where fundamental rights are in issue'.

[62] *Gebhard* (n 53).

substituted by a more holistic approach to the system of which the contested intervention allegedly forms part.[63] This is illustrated by several more recent healthcare cases. As set out in *Dermoestética* and *Hartlauer*, inconsistent rules are inappropriate to their stated purpose.[64] Consistency requires that exceptions are applied in line with the stated objectives of the restrictions involved. Here necessity is used as a standard that is interchangeable with appropriateness. In *Chao Gómez* the aim was to promote access to pharmacies as part of a system aiming at an equitable spatial distribution of pharmaceutical services, which was in principle accepted as necessary.[65] Similarly, in the *Hospital Pharmacies* case, the free movement of goods restrictions involved (only pharmacists based in the immediate vicinity were allowed to supply hospitals with pharmaceutical products) were held to be necessary in the interest of 'the unity and balance of the system'.[66] In these cases the individual rights of parties wishing to establish themselves were disregarded.

D. Necessity and LRM

The LRM test as necessity is stricter than consistency. It was clearly set out in *de Peijper* (1976) regarding parallel imports of pharmaceuticals.[67] Here the Court held that reliance on the incumbent competitor (who could easily refuse access) to provide the required documentation:

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

Since then, the necessity test has developed and spread. In *Cassis* the Court stated that obstacles to free movement other than the exceptions set out in the Treaty could be accepted insofar as they were necessary in order to attain a legitimate objective.[68] In addition, packaging information was found to be a less restrictive alternative for the protection of public health

[63] Similarly, with respect to the principle of equality, see Lenaerts and Gutiérrez-Fons (n 13) 1662, with reference to Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet* [2009] ECR I-10567.

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

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

[66] Case C-141/07 *Commission v Germany (Hospital Pharmacies)* [2008] ECR I-6935 [58].

[67] Case 104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 613.

[68] *Cassis de Dijon* (n 24).

and of consumers than the mandatory fixing of alcoholic content. As I have discussed above, *Cassis* simultaneously expanded the scope of EU law by introducing the principle of mutual recognition and restricted it by accepting non-codified mandatory requirements.

An example of the application of this test is found in *Danish Bottles*, where environmental protection by means of recycling was recognised as a mandatory requirement that may justify necessary, proportional and non-discriminatory restrictions of the free movement of goods. In this context the Court stated that: 'If a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods.'[69] The Danish recycling system could only accommodate a limited number of bottle types. For non-approved bottles, however, a system of returning them to the original retailer could have been set up. Consequently, the Court struck down a limitation on the quantity of non-recyclable imported bottles as not necessary and therefore disproportionate.

Similarly, in *Franzén*, a case with regard to a licensing system for the import of alcoholic beverages, the Court held that the Swedish government had not established that such a system was proportionate to the public health aim pursued or that this aim could not have been pursued by less restrictive means, especially as regards storage capacity requirements and the payment of fees and charges.[70] Hence, the Swedish measures were found to have infringed the free movement rules. By contrast, in *Apothekerkammer* a German rule that, in the interest of the reliability and safety of the provision of pharmaceutical products, all pharmacies must be owned by professional pharmacist was upheld because it had not been shown that a less restrictive means would be equally effective.[71] The latter judgment seems to rely on a reversal of the burden of proof (where the plaintiff would have to show an equally effective and less restrictive means existed), which is related to the 'no hypothetical measures' rule that will be discussed below.

Finally, in *Mickelsson and Roos*,[72] Swedish legislation restricting the use of personal watercraft ('jet skis') to general navigable waterways failed the necessity test. According to the Court, the prohibition clearly went further than what was necessary because it also established a regime of exemptions by which other than general navigable waterways could be designated for use by personal watercraft. Although this regime had not been implemented, the very fact that it had been provided for in itself demonstrated

[69] Case 302/86 *Commission v Denmark (Danish Bottles)* [1988] ECR 4607 [6].
[70] Case C-189/95 *Criminal Proceedings against Harry Franzén* [1997] ECR I-5909 [76].
[71] Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and others and Helga Neumann-Seiwert v Saarland and Ministerium für Justiz, Gesundheit und Soziales* [2009] ECR I-4171.
[72] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273.

that an absolute ban beyond general navigable waterways could not be justified based on environmental concerns.

The cases briefly reviewed above show that under the heading of necessity, the LRM test is applied to a variety of national measures, and with varying results that appear to be case-specific. We will now add a further level to the analysis by looking more closely at the various dimensions of the LRM test. These include in particular the standard of equally effective measures, the ban on reading across jurisdictions and the ban on hypothetical measures. This section on the application of proportionality to Member States' acts will be concluded following the discussion of a number of aspects that are not related to LRM as such: balancing, the role of private parties, fundamental rights and failure to act.

E. LRM: No Equally Effective Measure is Available

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

Thus, in the *Motorcycle Trailers* case, after recalling that in the absence of full harmonisation, Italy retained the competence to determine its level of road safety, the Court held with regard to a complete ban on such trailers that:

> [N]either the terms of the International Convention on Road Traffic nor those of the recitals in Directives 93/93 and 97/24, referred to by the Italian Republic, allow the presumption that road safety could be ensured at the same level as envisaged by the Italian Republic by a partial prohibition of the circulation of such a combination or by a road traffic authorisation issued subject to compliance with certain conditions.[73]

In the *Medical Laboratories* case the LRM test was found to be met regarding a ban on ownership shares over 25 per cent in medical laboratories for parties that were not medical biologists. This was because, in combination with the voting rules on key decisions, it uniquely achieved the objective of safeguarding the independence (and thereby allegedly the quality) of medical laboratories run by medical biologists.[74]

[73] Case C-110/05 *Commission v Italy (Motorcycle Trailers)* [2009] ECR I-519 [67]–[68].
[74] Case C-89/09 *Commission v France (Medical Laboratories)* [2010] ECR I-12941 [88]–[89].

F. LRM: No Reading across Jurisdictions

The case law which holds that regulatory solutions applied to similar problems in different Member States is not accepted as evidence to demonstrate that a particular measure is disproportionate seems to argue against the market access standard that was discussed above. As was stated in *Alpine Investments*, the existence of a prohibition (in this case, cold calling in order to market investment products) does not mean that there is a restriction of the internal market freedoms just because other Member States apply less strict rules or are more open to market entrants (which can be viewed as a ban on 'reading across jurisdictions').[75] The same applies at the level of justifications where restrictions are found: if they retain the right to determine the level and/or scope of protection of the public interest concerned, 'Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate'.[76]

In *Läärä* the Court held that where the Member States have retained the power to determine the scope of protective measures, in this case the control of gambling:

> [T]he 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.[77]

Similarly, with regard to the degree of healthcare protection provided by the Member States the Court held in *Mac Quen*:

> [T]hat the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law … The mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal of the need for and the proportionality of the provisions adopted.[78]

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

[76] *Commission v Italy* (n 73) [65].

[77] Case C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067 [37].

[78] Case C-108/96 *Criminal Proceedings against Dennis Mac Quen et al* [2001] ECR I-837 [33]–[34], with reference to *Alpine Investments* (n 74) [51] and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511 [42]; Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289 [34].

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

G. LRM: No Hypothetical Measures

In the context of the proportionality test of Article 106(2) TFEU on services of general economic interest (SGEI) in the Dutch *Electricity Import Monopoly* case, the Court held that the burden of proof on the Member State for the application of this provision cannot be so extensive as 'to … prove positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions'.[79]

Similarly, under least restrictive means testing more generally, not only is reading across Member States ruled out (at least in the absence of harmonisation, pre-emption and common policies), but the standard does not include any conceivable measure either. Hence, in the above-mentioned *Motorcycle Trailers* case, the Court held that the 'burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions'.[80]

In conjunction with the no reading across jurisdictions rule, this means that the LRM test becomes strictly context-dependent—and consequently is more easily satisfied. It may also involve a shift in the burden of proof onto the party who opposes the status quo, who may have to demonstrate that alternatives are feasible—without reading across jurisdictions. This appears to be a difficult task. Hence, the 'no hypothetical measures' approach seems to work against integration, much as the LRM test taken in isolation would promote integration.

H. LRM: Pre-emption

Harm Schepel and I have argued that the use of the LRM test may be explained by pre-emption: that is to say, in the case of shared competencies, the freedom of the Member States is reduced when the EU has occupied

[79] Case C-157/94 *Commission v The Netherlands (Electricity Import Monopoly)* [1997] ECR I-5699 [58].
[80] *Commission v Italy* (n 73) [65].

the field by taking positive measures.[81] Pre-emption is not unique in this respect; it can simply be regarded as part of a variety of forms that reflect the degree to which policies have been harmonised and/or centralised.

At the same time, when implementing measures in order to transpose EU directives, the Member States must 'make sure that they do not rely on an implementation of them which would be in conflict with … fundamental rights or with other general principles of Community law, such as the principle of proportionality'.[82] Before concluding, I will now discuss a number of aspects of the proportionality testing of Member States' acts that do not mainly revolve around the LRM test.

I. Proportionality in the Strict Sense: Balancing

In spite of the theoretical view of balancing as the essence of proportionality and of the significance assigned to proportionality as a principle of EU law, its strict application in a balancing test is rare. This also applies at the Member State level. Nevertheless, sometimes the balancing of rights is carried out without an explicit reference to proportionality, as in *Scarlet*,[83] where, on the one hand, the right to intellectual property and, on the other hand, the right to protection of personal data and the freedom to receive or impart information were involved. In the context of a request for an injunction involving rights under various EU directives, the Court held that 'a fair balance' was required, which would not be set by the responsible court in the Member State if it required an Internet service provider to install the contested traffic filtering system.

J. Proportionality and Fundamental Rights

The relationship between proportionality and fundamental rights came up in relation to the approval by the Austrian public authorities for a demonstration concerning environmental issues that blocked the Brenner Pass between Austria and Italy for almost 30 hours in *Schmidberger*.[84] This

[81] *Cf* Sauter and Schepel (n 27) 182–86. The context there is that of proportionality and services of general economic interest (SGEI) under art 106(2) TFEU.

[82] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271 [70].

[83] Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (ECJ, 24 November 2011) [53]. *Cf* P Larouche, Legal Emulation between Regulatory Competition and Comparative *Law* (2012) TILEC Discussion Paper 2012/17.

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

involved a clash between free movement and fundamental rights, notably the freedom of expression and of assembly. The Court recalled that:

> [S]ince both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.[85]

Hence, the Court stated 'the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests'.[86] Moreover:

> Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.[87]

The fundamental rights of freedom of expression and the freedom of assembly were subject to balancing with the treaty freedoms, and in this case priority was assigned to the fundamental rights concerned.[88] In effect, however, an LRM test was applied. As the Austrian authorities had claimed uncontradicted that all alternatives would have been more disruptive of trade, on balance the Court held that a less restrictive measure could not have achieved the legitimate aim of the demonstration. Paradoxically, therefore, it reverted to LRM testing under the heading of balancing—and therefore did not apply balancing as such.

K. Proportionality and Private Parties

It should be noted that the action in *Schmidberger* was an appeal against the authorisation of the protest by the Austrian authorities and not against the organisers of the demonstration.[89] Proportionality has also been applied directly in relation to private parties in the context of industrial action.

[85] Ibid [74].
[86] Ibid [81].
[87] Ibid [83].
[88] Similarly, see Case C-36/02 *Omega Spielhallen—unda Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundeststadt Bonn* [2004] ECR I-9609 [35] ff, with regard to the respect for human dignity.
[89] The Court recalled that the internal market freedoms also apply where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods that are not caused by the state. See *Schmidberger* (n 84) [57], citing Case C-265/95 *Commission v France* [1997] ECR I-6959 [30].

In *Viking*[90] and *Laval*[91] the Court agreed that the right to take collective action is a fundamental right which in principle justifies a restriction of free movement[92]—likewise viewed as fundamental freedoms—provided that it is exercised in accordance with the principle of proportionality:

> That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.[93]

In other words, this is to say that the action taken is suitable to attaining its objective and does not go beyond what is necessary: an LRM test applies here too. These cases can perhaps be framed as involving a balancing exercise between collective economic rights and individual freedoms based on the TFEU. In a practical sense, however, LRM testing determines the outcome of the exercise, just as it would for restrictions imposed by a Member State.[94]

L. Proportionality and Failure to Act

Finally, the failure by a Member State to act in a necessary and proportionate manner can infringe the proportionality requirement. An example is *Commission v France*,[95] where farmers had been allowed to run amok, obstructing the free movement of fruit and vegetables without an adequate response by the authorities. In this case the Court found France had violated the free movement provisions in conjunction with the good faith clause of Article 5(3) TEU because it had manifestly and persistently abstained from adopting appropriate and adequate measures.[96] This case provides a counterpoint to the above-mentioned *Schmidberger* case, where the rights to freedom of expression and of assembly of peaceful demonstrators were at odds.

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

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

[92] Earlier collective agreements had been held to be exempt from the competition rules. *Cf* Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751; Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* [2009] ECR I-1513; Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* (ECJ, 3 March 2011).

[93] *Viking* (n 90) [91].

[94] *Cf* the contributions to (2007–08) 10 *Cambridge Yearbook of European Legal Studies*.

[95] Case C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959.

[96] Ibid [52] and [65]–[66].

The case law discussed above illustrates that the review of national acts is frequently based on LRM testing—which favours integration—albeit combined with deferential treatment of the market organisation at the national level. There is no reading across jurisdictions. Instead, recourse to a mere internal consistency test—working against integration—has emerged.

V. CONCLUSION

Although it is broadly clustered around the two alternative tests of, on the one hand, manifest disproportionality, and on the other hand, LRM the use of the proportionality principle in EU law is as varied as it is widespread. According to de Búrca:

> The way the proportionality principle is applied by the Court of Justice covers a spectrum ranging from a very deferential approach to quite a rigorous and searching examination of the justification for a measure which has been challenged.[97]

Arguably, this variety follows from the needs that the principle must meet. Emiliou states that: 'The usefulness of the proportionality test lies in that it gives the courts maximum flexibility in reviewing administrative discretion within acceptable limits.'[98]

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

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

[97] De Búrca (n 3) 111.
[98] Emiliou (n 14) 273.

As regards its practical application, we have found that the proportionality test as applied in EU law appears to consist of a series of partly overlapping tests that are applied as alternatives rather than cumulatively. The Member States are generally subject to LRM testing, although sometimes in the absence of harmonisation only to appropriateness and consistency. The EU institutions are usually held to a less strict standard: the manifestly disproportionate test. The latter is a mild form of balancing between competing norms. This suggests the existence of two parallel standards, with a greater respect for discretion at the EU level than at the Member State level and therefore an integration bias. The occurrence of strict proportionality as detailed balancing between competing rights and norms is rare. This is remarkable given the importance assigned to the proportionality principle in EU law and also because from the perspective of the leading constitutional theorists on proportionality, Alexy and his followers, detailed balancing ought to be the rule, not the exception. How can we explain these findings?

It is the integration context that seems to determine both the pattern and the variation observed. Within the two categories mentioned, there are differences that can largely be explained by the degree to which a policy area has been harmonised or to which the relevant standards remain to be set at the national level. The reliance on LRM, including the ban on reading across jurisdictions (in the absence of harmonisation), suggests that a more complex process may be involved than that presupposed by the constitutional theorists who focus on balancing as the ultimate rule of law—a theory derived from a single-state model. The EU may not be ready for full proportionality testing and its constitution may not be developed to the point where such testing is feasible. This means that criticism such as that levelled by Harbo may be in part justified (actual balancing is rare, which means that proportionality only partly confers legitimacy on the resulting choices), but also in part beside the point. In the EU context the need to leave room for integration where this is feasible, and to respect Member State autonomy where there is no support for integration, prevails. Both aspects may in themselves be alternative sources of legitimacy.

At the same time, the flexibility of the standard applied may in part also be explained by the fact that when the gravity of the infringement of a right increases, so does the strictness of the standard to which public policy is held. This would be consistent with what the legal theorists have noted.[99] Several EU law specialists suggest that the Court varies its test according to the nature of the interests involved and the perceived severity of the

[99] Alexy (n 1) 231.

https://doi.org/10.5235/152888713809813611 Published online by Cambridge University Press

imputed breach.[100] However, it is not always clear whether this approach serves to protect the interest at risk or to prejudge the desired outcome.

Frequently, the degree of harmonisation or to which the Community has 'occupied the field' by means of pre-emption or a common policy becomes decisive. This appears appropriate in a multi-level polity. It should be noted, however, that such outcomes may be trumped by the rights of individuals. This is consistent with the claim by Jans (among others) that proportionality is used both as an instrument of market integration and to protect individual rights.[101] At the same time, it appears that the market access and individual rights theses need not be alternatives. In the EU these two are often co-extensive. This may well be one of the vectors of further development of the proportionality test.

The application of the proportionality test in EU law is relatively complex and is not always consistent. This is because it is used in widely different contexts and at different levels. It is also a function of the fact that the EU constitution is still under construction. Hence, the application of the proportionality principle in the EU can be characterised as a balancing act not just between principles but also between the levels of government, between the remaining responsibilities of the Member States and integration, and between policies and individual rights.

[100] Such as de Búrca (n 3) and Jans (n 3).
[101] Jans (n 3) 243. *Cf* Tridimas (n 29) 193–94.