

ECB Legal Conference 2021

Continuity and change – how the challenges of today prepare the ground for tomorrow

**25 November 2021**

*Keynote speech*

**Proportionality as a matrix principle promoting the effectiveness of EU law  
and the legitimacy of EU action**

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Dear President Lagarde,  
Dear colleagues,  
Ladies and Gentlemen,

The Court of Justice has incorporated several constitutional traditions common to the Member States into the constitutional fabric of the European Union ('the EU'). The principle of proportionality is one of them. According to it, public authorities, when they are competent to act, cannot do it in a manner that exceeds the limits of what is necessary to achieve the objectives of public interest that they pursue. Very early on, the Court of Justice took up proportionality in its case-law,<sup>1</sup> before establishing it as a general principle of EU law.<sup>2</sup> With the Maastricht Treaty, the principle of proportionality was 'constitutionalised' and is now reflected in Article 5(4) of the Treaty on European Union ('TEU'). That provision requires that any action of the EU '[does] not exceed what is necessary to achieve the objectives of the Treaties'.

The proportionality principle has undeniably gained in importance over time in the EU legal order. It originally focused on justifications put forward by the Member States when they introduced or maintained restrictions to fundamental freedoms of the internal market. However, it quickly 'spread' to other situations

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<sup>1</sup> Judgment of 29 November 1956, *Fédération charbonnière de Belgique v High Authority*, 8/55, EU:C:1956:11.

<sup>2</sup> Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114.

falling within the scope of EU law. Thus, various expressions of proportionality can be identified in the EU legal order.

The *first* results directly from the first subparagraph of Article 5(4) TEU, which provides that '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. That horizontal requirement applies not only to legislative or regulatory action by the EU institutions or bodies but also to situations where they adopt decisions entailing adverse effects for individuals or undertakings, such as a decision whereby the Commission imposes a fine on an undertaking for a breach of EU competition law.<sup>3</sup>

*Second*, as a general principle of EU law, proportionality also applies to the Member States when they implement EU measures or when their action entails a restriction of fundamental freedoms. For example, as I will explain later on, the Court applied the principle of proportionality in a case in which it was asked under what conditions a Member State can deprive a national of that Member State of his nationality and, by extension, of his rights as an EU citizen.

*Third*, proportionality is an essential tool for protecting fundamental rights both when EU institutions or bodies act and when the Member States implement EU law, namely when the EU Charter of Fundamental rights ('the Charter') applies. That function of proportionality is essentially reflected in Article 52, paragraph 1, of the Charter, which requires that any limitation on a fundamental right is proportionate to the objectives pursued.

I will come back on each of these aspects in this speech, which will be divided as follows. Firstly, I will define what the principle of proportionality is in EU law, and explain what it is not (1). I will then examine into more detail the scope of the proportionality principle and the extent to which an EU measure can be subject to judicial review from that perspective (2). In a third part, I will focus on the proportionality principle applied to the Member States in cases falling within the scope of EU law (3).

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<sup>3</sup> Judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie v Commission*, T-446/05, EU:T:2010:165, para. 171.

## (1) THE FUNCTIONS OF THE PROPORTIONALITY PRINCIPLE IN EU LAW AND ITS RELATIONSHIP WITH THE PRINCIPLES OF CONFERRAL AND SUBSIDIARITY

Article 5 TEU describes the main principles governing the Union's competences, namely the principles of (i) conferral, (ii) subsidiarity and (iii) proportionality. Its first paragraph sets out the respective functions of these principles: '[t]he limits of Union competences are governed by the principle of conferral', while '[t]he *use* of Union competences is governed by the principles of subsidiarity and proportionality'.<sup>4</sup>

It follows from that distinction that an issue of *proportionality* of a given EU measure arises downstream from the issue whether its author had *competence* to adopt it. The wording of Article 5(4), first subparagraph, TEU, plainly confirms that when it relates to the 'content and form of *Union action*'. Since the EU legal order is based on the principle of conferral,<sup>5</sup> there can be no 'Union action' when the Treaties provide no sufficient basis for it. Conversely, proportionality should play no role when assessing whether the Union had a competence to adopt the measure at issue.

Likewise, the principle of *subsidiarity* 'operates' prior to that of proportionality. Although both relate to the 'use' of EU competence, instead of its 'existence', subsidiarity determines whether, in areas of non-exclusive competence, it is the Union or the Member States that should address the issue. Thus, Article 5(3) TEU allows the EU to act, in an area which does not fall within its exclusive competence, 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level'. The proportionality principle set out in Article 5(4) TEU only becomes relevant if a given EU measure satisfies that requirement, the focus shifting to the correlation between the objective of public interest that that measure pursues and the means used to achieve it.

That specific function of proportionality is also reflected in Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality. According to that provision, any draft legislative act should take account of 'the need for any burden', financial or administrative, that that legislative act is

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<sup>4</sup> Emphasis added.

<sup>5</sup> Whilst that principle is set out in Article 5(1) TEU, Article 4(1) clarifies its main consequence, namely that 'competences not conferred upon the Union in the Treaties remain with Member States'.

likely to create, in particular for the Member States, ‘to be minimised and commensurate with the objective [pursued]’.<sup>6</sup> That principle does not therefore aim to protect Member States’ competences as such.

The Court applies the methodology that I have just described consistently. For example, in *Poland v Parliament and Council*, a Member State challenged the new Directive on posted workers<sup>7</sup> inter alia on grounds of an allegedly incorrect legal basis. The Court first examined whether the relevant provisions of the TFEU concerning harmonisation in the internal market<sup>8</sup> constituted an appropriate legal basis for adopting that directive, before separately addressing the issue whether the directive constituted a proportionate restriction on the freedom to provide services.<sup>9</sup>

Similarly, in *Czech Republic v Parliament and Council*,<sup>10</sup> the Court confirmed in a first step that Article 114 TFEU constituted the appropriate legal basis for adopting a new directive on the marketing of firearms in the internal market. It is only in a subsequent part of the judgment that the Court verified the proportionality of various measures in that directive limiting contractual or commercial freedom in order to reconcile the objectives of facilitating cross-border trade and protecting public order and national security.

The same methodology applies to monetary policy. Like the other institutions, bodies and agencies of the EU, the European Central Bank (‘the ECB’) must comply with both the principle of conferral and the proportionality principle.<sup>11</sup> Its actions are therefore subject to judicial review of proportionality by the Court of Justice, which is all the more important since the ECB has a central role in European economic and financial governance.

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<sup>6</sup> Article 5, Protocol (No 2) on the application of the principles of subsidiarity and proportionality (*OJ* C 115, 9.5.2008, p. 206-209).

<sup>7</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (*OJ* 2018 L 173, p. 16, and corrigendum, *OJ* 2019 L 91, p. 77).

<sup>8</sup> Namely Articles 53(1) and 62 TFEU.

<sup>9</sup> Judgment of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000.

<sup>10</sup> Judgment of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035.

<sup>11</sup> Subsidiarity is admittedly of lesser relevance here because the monetary policy for the Member States whose currency is the euro falls within the scope of the Union’s exclusive competence [Art. 3(1)(c) TFEU].

In *Gauweiler*,<sup>12</sup> a case concerning the validity of decisions of the ECB establishing the OMT ('Outright monetary transactions') programme<sup>13</sup>, the Court first recalled the EU's exclusive competence in this field for Member States whose currency is the euro. It then relied both on the objective of the disputed OMT programme and on the means available to the ESCB to conclude that such a programme fell within the area of monetary policy.<sup>14</sup> Only then did the Court deal with proportionality. A similar methodology can be seen in the *Weiss* judgment.<sup>15</sup> The Court relied on the objective of the PSPP ('public sector asset purchase programme')<sup>16</sup> at issue and on the means used to achieve that objective to conclude that that programme was a monetary measure.<sup>17</sup> The Court addressed the question of proportionality only once it had confirmed, in essence, that the ECB was competent to adopt the PSPP.

As I have explained, that methodology is required by the Treaties themselves. For that reason, I cannot accept the objection raised by the *Bundesverfassungsgericht* in its decision of 5 May 2020 in *Weiss*,<sup>18</sup> arguing that proportionality should have been applied by the Court already when distinguishing between the EU's competences in the areas of monetary and economic policy. Proportionality cannot influence that distinction, nor have a "corrective function" for the purpose of protecting the Member States' competences.<sup>19</sup> Such an interpretation would be at odds with the principle of conferral set out in Article 5(1) TEU.<sup>20</sup>

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<sup>12</sup> Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400.

<sup>13</sup> Decisions of the Governing Council of the European Central Bank (ECB) of 6 September 2012 on a number of technical features regarding the Eurosystem's outright monetary transactions in secondary sovereign bond markets.

<sup>14</sup> *Gauweiler and Others*, above at n. 12, paras. 41 to 56.

<sup>15</sup> Judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000.

<sup>16</sup> Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (*OJ* 2015 L 121, p. 20). "Public sector purchase programme".

<sup>17</sup> *Weiss and Others*, above at n. 15, paras. 53 to 70.

<sup>18</sup> BVerfG, 5 May 2020, 2 BvR 859/15.

<sup>19</sup> *Ibid*, para. 133.

<sup>20</sup> M. WENDEL, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', 21 *German Law Journal* (2020) p. 979. See also T. MARZAL, T., 'Making sense of the use of proportionality in the Bunderverfassungsgericht's PSPP decision', *Revue des Affaires Européennes*, 2020(2), pp. 441-452, p. 445.

## (2) THE SCOPE OF PROPORTIONALITY AND JUDICIAL REVIEW OF THAT PRINCIPLE APPLIED TO EU MEASURES

In a Union based on the rule of law, compliance with the proportionality principle should be subject to judicial review. However, proportionality relates to *substantive* choices made by a public body, including the legislator. It is therefore essential to keep such judicial review within limits to avoid that the Court decides in opportunity and thus becomes a political organ. As early on as in the *Meroni* case of 1958,<sup>21</sup> the Court referred to the ‘balance of powers’ as a ‘characteristic of the institutional structure of the Community’. A specific expression of that balance is to be found in Article 19(1) TEU, which provides that the Court ‘shall ensure that in the interpretation and application of the Treaties the law is observed’. Like any other court, the Court of Justice decides the cases brought before it in accordance with the law *and only* the law.

It comes as no surprise in that context that the Court carefully avoids to encroach upon the margin of assessment which other institutions or bodies enjoy within the limits of their competences, when ascertaining whether their action complies with the proportionality principle. That is the context in which judicial review limited to manifest errors of assessment started to develop (2.1). Even within that broad margin, however, EU institutions or bodies must fully comply with fundamental rights (2.2). Moreover, ‘process-oriented’ review counterbalances the limits of judicial review of proportionality (2.3).

### *2.1. The idea of a ‘broad margin of (political) assessment’ coupled with ‘limited’ judicial review*

The Court has regularly referred to the political margin of assessment of the EU legislature when carrying out judicial review. Thus, in two famous cases concerning a directive setting out conditions which cigarettes must satisfy in order to be sold in the internal market, the Court stressed that the objective of ensuring a high level of human health protection involves ‘political, economic and social choices’<sup>22</sup> which it is not for a judicial body to call into question. The Court also referred to such wide margin of assessment in the areas of

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<sup>21</sup> Judgment of 13 June 1958, *Meroni v High Authority*, 9/56, EU:C:1958:7.

<sup>22</sup> Judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, para. 123 and of 14 December 2004, *Arnold André*, C-434/02, EU:C:2004:800, para. 46.

environmental protection<sup>23</sup>, consumer protection,<sup>24</sup> or the common transport policy.<sup>25</sup>

The degree of complexity of a given area will usually trigger also limited judicial review. For example, in a case concerning the directive on deposit guarantee schemes, the Court recognised that ‘the Community legislature was seeking to regulate an economically complex situation’.<sup>26</sup> On medical matters<sup>27</sup> and environmental protection, the EU legislature equally has a broad discretion in ‘the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures that it adopts’.<sup>28</sup> That complexity is further illustrated in relation to the precautionary principle. Thus, the uncertainty of the effectiveness of oral tobacco products as an aid to the cessation of smoking and the risk of a gateway effect justified to consider their ban proportionate.<sup>29</sup> In certain areas, we can find a combination of both these political and technical aspects regulating the scope of discretion. Monetary policy provides a good illustration. The Court observed that policy-making in that area involves not only ‘technical choices’ but also ‘complex assessments’, emphasising that ‘questions of monetary policy are usually of a controversial nature’.<sup>30</sup>

These choices, whether political or technical, do not fall within the jurisdiction of the Court of Justice. Faced with such discretionary power, judicial review must be limited ‘to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion’.<sup>31</sup> According to that standard, a measure is invalid only if manifestly inappropriate in relation to the objective pursued.<sup>32</sup>

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<sup>23</sup> Judgment of 8 July 2010, *Afton Chemical*, C-343/09, EU:C:2010:419, para. 46.

<sup>24</sup> Judgment of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, para. 76.

<sup>25</sup> Judgment of 12 March 2002, *Omega Air and Others*, C-27/00 and C-122/00, EU:C:2002:161, para. 63. See also, judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, para. 80 and of 2 September 2021, *Irish Ferries*, C-570/19, EU:C:2021:664, para. 151.

<sup>26</sup> Judgment of 13 May 1997, *Germany v Parliament and Council*, C-233/94, EU:C:1997:231 para 55.

<sup>27</sup> Judgments of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paras. 52 and 64, and of 5 July 2017, *Fries*, C-190/16, EU:C:2017:513, para. 59.

<sup>28</sup> Judgment of 13 March 2019, *Poland v Parliament and Council*, C-128/17, EU:C:2019:194, para. 95.

<sup>29</sup> Judgment of 22 November 2018, *Swedish Match*, C-151/17, EU:C:2018:938, para. 47.

<sup>30</sup> *Gauweiler and Others*, above at n. 12, para. 75 and *Weiss and Others*, above at n. 15, para. 91.

<sup>31</sup> See *Glatzel*, above at n. 27, para. 52.

<sup>32</sup> *Poland v Parliament and Council*, C-626/18, above at n. 9, para. 95.

That wide margin of assessment is recognised to the legislature in the different stages of the legislative process. Thus, it covers not only the ‘definition of the objectives to be pursued [...] and choice of the appropriate means of action’,<sup>33</sup> ‘but also, to some extent, to the finding of the basic facts’.<sup>34</sup> The EU judge is thus not allowed to ‘substitute [his] assessment of scientific and technical facts for that of the legislature on which the Treaty has placed that task’.<sup>35</sup>

In addition, the Court will take into account the evolving nature of the available data. When ‘the [EU] legislature has to assess the future effects of legislation to be enacted although those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the legislation’.<sup>36</sup> The validity of an EU measure ‘cannot depend on retrospective assessments of its efficacy’.<sup>37</sup>

The methodological approach followed in the *Gauweiler* and *Weiss* judgments reveals no novelty or even originality in this respect. In these judgments, the Court made clear, first, that ‘the principle of proportionality requires that acts of the EU institutions should be suitable for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is necessary to achieve those objectives’.<sup>38</sup> However, ‘since the ESCB is required, when it prepares and implements an open market operations programme [such as the PSPP], to make choices of a technical nature and to undertake complex forecasts and assessments, it must be allowed, in that context, a broad discretion’.<sup>39</sup> Moreover, in *Weiss*, the Court added that the assessment of the PSPP must be made based on the elements available ‘at the date of adoption of [the disputed decision]’,<sup>40</sup> thus applying the principle that I have just recalled. In other words, the ECB decisions establishing the OMT programme and the PSPP concerning purchase of public sector assets on secondary markets touch on an

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<sup>33</sup> Judgment of 15 April 1997, *Bakers of Nailsea*, C-27/95, EU:C:1997:188., para. 32.

<sup>34</sup> *Poland v Parliament and Council*, C-128/17, above at n. 28, para. 97.

<sup>35</sup> *Ibid.*, para. 95 and judgment of 21 June 2018, *Poland v Parliament and Council*, C-5/16, EU:C:2018:483, para. 150.

<sup>36</sup> Judgment of 7 September 2006, *Spain v Council*, C-310/04, EU:C:2006:521, para. 120.

<sup>37</sup> Judgment of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, para. 50.

<sup>38</sup> See *Weiss and Others*, above at n. 15, para. 72.

<sup>39</sup> *Ibid.*, para. 73, quoting para. 68 of *Gauweiler and Others*.

<sup>40</sup> *Weiss and Others*, above at n. 15, para. 75. See also, *Gauweiler and Others*, above at n. 12, paras. 72, 74 and 80.



inherently political and complex area, which justifies limiting the Court's review of proportionality to manifest errors of assessment or misuse of powers. Following a careful examination of the monetary and financial conditions of the euro area, as highlighted in the ESCB's macroeconomic analyses, the Court decided that none of the decisions at issue went manifestly beyond what was necessary to attain the ECB's objective of price stability.

Here, I should insist that in that limited judicial review of proportionality, there is *no room* for an ultimate 'balancing exercise' in which the Court would weigh the benefits for price stability against the negative effects on economic and social policy. Balancing these competing factors requires a complex policy assessment, which lies at the very heart of the ECB's powers under EU primary law and which the Court is simply not entitled to call into question. That approach is *fully consistent with the methodology applied by the Court* when reviewing the legality of EU action in other areas to which I referred. Against that background, I cannot agree with the critical comment that a step in the review of proportionality was 'missing'<sup>41</sup> in the Court's judgment in *Weiss*. The different approach of the *Bundesverfassungsgericht* in its decision of 5 May 2020 might be valid in German constitutional law, but cannot be reconciled with the methodology carefully developed by the Court over the years concerning judicial review of proportionality as a general principle of EU law.

I cannot insist enough, moreover, that it is *for the Court only*, which has an *exclusive competence* to declare EU acts invalid, to determine that scope. If a court in a Member State could declare unilaterally that an EU measure violates the principle of proportionality, following its own assessment of the objectives pursued by that measure weighed against other public interests, there would be no guarantee that the public interests of the EU as a whole would be taken into account. On the contrary, the risk would be very high that the national court takes into account only the interests of the Member State to which it belongs, or what it believes is in the interest of all or part of that Member State's population. Such unilateral course of action would not only show disrespect towards the other Member States and their peoples that continue to honour the Treaties on a reciprocal basis.<sup>42</sup> It would also be plainly incompatible with the

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<sup>41</sup> BVerfG, 5 May 2020, above at n. 18, § 138.

<sup>42</sup> See K. LENAERTS, 'No Member State is More Equal than Others', *Verfassungsblog*, 8 October 2020.

statement made by the Court in its *Opinion 2/13* that ‘[i]n order to ensure that the specific characteristics and the autonomy of th[e EU] legal order are preserved, the Treaties have established a *judicial system* intended to ensure *consistency and uniformity* in the interpretation of EU law’.<sup>43</sup>

As the judgment in the *Berlusconi and Fininvest* case<sup>44</sup> confirms, these structural principles apply with the same force to measures falling within the scope of the economic and monetary union. That case concerned prudential supervision of acquisition of a qualifying holding in a credit institution in Italy under various EU instruments.<sup>45</sup> The Italian Council of State had doubts, in essence, on whether national courts had jurisdiction to review the legality of preparatory acts adopted by the competent Italian supervisory authorities, including the Bank of Italy, in a procedure leading up to a decision of the ECB. The Court ruled out such jurisdiction. It emphasised that intervention of those national authorities formed part of a procedure in which the latter only assume preparatory functions and in which the ECB retains exclusive competence to decide whether to authorise the proposed acquisition or not. In that context, no risk could be taken of judicial review at national level that might cast doubt on the validity of the decision which the ECB ultimately adopts. Such judicial review would undermine the effectiveness of the decision-making process in the context of the banking union’s single supervisory mechanism and ‘compromise the Court’s exclusive jurisdiction to rule on the legality of th[e EU institution’s] final decision [...], in particular where [that] institution’s decision follows the analysis and the proposal of those [national] authorities’.<sup>46</sup>

## 2.2. *Fundamental rights as a limit to limited judicial review*

Respect due to fundamental rights of course limits the margin of assessment which EU institutions or bodies enjoy when they adopt an EU act. It would

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<sup>43</sup> Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 174 (emphasis added).

<sup>44</sup> Judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023.

<sup>45</sup> In particular, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (*OJ* 2013 L 176, p. 338) (known as the ‘CRD IV’ directive) and Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (*OJ* 2013 L 287, p. 63) [known as the Single Supervisory Mechanism (SSM) Regulation].

<sup>46</sup> *Berlusconi and Fininvest*, above at n. 44, paras 49 and 50.

clearly bring us too far to examine that issue exhaustively in this speech, but a few illustrations are certainly worth mentioning.

The *first illustration* that I want to mention is the *Digital Rights Ireland* case,<sup>47</sup> which arose from requests for a preliminary ruling by the *Verfassungsgerichtshof* (Constitutional Court) in Austria and the High Court of Ireland. In that judgment, the Court invalidated the Data Retention Directive.<sup>48</sup> That directive obliged telephone and internet providers to retain bulk metadata that made it possible, in particular, to know the identity of the person with whom the user had communicated and the means by which that communication had been effected, as well as to identify the time and the place of the communication. The Court, without denying the existence of a margin of assessment for the EU legislature, decided that that directive imposed a disproportionate limitation on the rights to privacy and to the protection of personal data in that it failed, in particular, to limit the retention of data to what was strictly necessary to the protection of public interests and also to set out either substantive or procedural criteria determining the circumstances under which national authorities could have access to the data.<sup>49</sup> It noted in that context ‘the important role played by the protection of personal data in the light of the fundamental right to respect for private life’, which implies a reduced discretion of the EU legislature.<sup>50</sup> The Court confirmed that analysis in *Tele 2 Sverige*,<sup>51</sup> a case which raised in essence the same issues but concerned a legislation of a Member State. That judgment offers a first illustration of the fact that the Court applies the proportionality requirement of Article 52(1) of the Charter to limitations of a fundamental right by the EU and by the Member States consistently.

That said, other cases illustrate that the EU legislature keeps a wide margin of assessment to adopt measures involving limitations of a fundamental right in so

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<sup>47</sup> Judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238).

<sup>48</sup> Directive 2006/24/EC of the European Parliament and of the Council, of 15 March 2006, on the retention of data generated or processed in connection with the provision of publicly available communications services or of public communications networks and amending Directive 2002/58/EC (*OJ* 2006 L 105, p. 54).

<sup>49</sup> Judgment in *Digital Rights Ireland and Others*, paras 56 to 65.

<sup>50</sup> Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, para 48. See also, to that effect, judgment of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, para. 77.

<sup>51</sup> Judgment of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, EU:C:2016:970.

far as that limitation is commensurate to the importance of the public interests pursued. The judgment in *Philip Morris Brands* delivered on 4 May 2016 offers an illustration in the area of public health.<sup>52</sup> In the main proceedings, tobacco producers challenged the validity of a number of provisions of a directive concerning tobacco products.<sup>53</sup> One of them precludes cigarettes' producers from including on the labelling of unit packets and on outside packaging, elements and features such as to promote a tobacco product or encourage its consumption. The referring court (the High Court of Justice of England and Wales) asked the Court to examine the validity of that prohibition in the light of the freedom of expression guaranteed in Article 11 of the Charter and the principle of proportionality. The Court admitted that that prohibition constitutes an interference with a business's freedom of expression and information. It nevertheless regarded that interference as justified by the need to protect human health. In its examination of proportionality, the Court observed that 'discretion enjoyed by the EU legislature, in determining the balance to be struck [between various fundamental rights and legitimate general interest objectives], varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question'.<sup>54</sup> Considering scientific evidence of the harmful effects of tobacco consumption and exposure to tobacco smoke, the degree of human health protection sought by the provision at issue 'outweighed' the commercial interests put forward by the tobacco producers.<sup>55</sup> Referring to the high level of human health protection which not only the Treaties but also the Charter itself require in the definition and implementation of all EU policies and activities, the Court expressly rejected the applicants' claim that the objectives pursued by the provision at issue could be achieved by less restrictive measures, such as adding supplementary health warnings. The Court therefore concluded that the provision at issue did not breach Article 11 of the Charter nor the principle of proportionality.

The *second illustration* concerns decisions which the Commission adopts to sanction undertakings that infringe EU competition rules contained in Articles

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<sup>52</sup> Judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325.

<sup>53</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (*OJ* 2014 L 127, p. 1).

<sup>54</sup> Judgment in *Philip Morris Brands and Others*, para. 155.

<sup>55</sup> *Ibid.*, para. 156.

101 and 102 TFEU.<sup>56</sup> For a long time, some judgments of the General Court referred to the Commission's 'wide margin of assessment' when reviewing the legality of such decisions, even when they did not involve complex assessments of a technical or economic nature. Those judgments therefore suggested that only manifest errors of fact committed by the Commission should justify annulling the decision at issue. In the famous *KME* and *Chalkor* cases,<sup>57</sup> the Court of Justice, on appeal, unambiguously 'invalidated' such limited judicial review, at least in so far as it applied outside complex economic assessments made by the Commission. Inspired by the *Menarini* judgment of the ECtHR,<sup>58</sup> the Court decided that the right which undertakings have to seek annulment of Commission decisions adversely affecting them should satisfy the requirements of an effective remedy before an independent and impartial tribunal within the meaning of Article 47 of the Charter. In principle, therefore, judicial review exercised in that context should allow the General Court to identify – within the limits of the action brought before it – all errors of law or of fact in the Commission's decision, and to review the appropriateness and proportionality of the fine which the Commission has imposed when requested to do so.<sup>59</sup>

### 2.3. 'Process-oriented' review as a counterpart to limited review of substantive choices

The picture would not be complete without emphasising that limited review of proportionality is counterbalanced in the case-law by a 'process-oriented review'.<sup>60</sup> The Court has made clear on numerous occasions that the EU legislature must take into consideration 'all the relevant factors and circumstances of the situation [which its] act was intended to regulate'.<sup>61</sup> Therefore, it must 'at the very least be able to produce and set out clearly and

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<sup>56</sup> Such decisions are adopted on the basis of Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (*OJ* 2003 L 1, p. 1).

<sup>57</sup> Judgments of 8 December 2011, *KME Germany and Others v Commission*, C-389/10 P, EU:C:2011:816, and judgment of 8 December 2011, *Chalkor v Commission*, C-386/10 P, EU:C:2011:815.

<sup>58</sup> ECtHR in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.

<sup>59</sup> Article 31 of Regulation 1/2003 provides: 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'.

<sup>60</sup> K. LENAERTS, 'The European Court of Justice and Process-Oriented Review', *Yearbook of European Law*, Vol. 31, No. 1 (2012), pp. 3-16, p. 4.

<sup>61</sup> *Poland v Parliament and Council*, C-626/18, above at n. 9, para. 99 and judgment of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, para. 116.

unequivocally the basic facts which had to be taken into account as the basis of the contested measures [...] and on which the exercise of [its] discretion depended'.<sup>62</sup> That is what I described as 'procedural proportionality'.<sup>63</sup>

In some instances, that 'process-oriented review' has led the Court to conclude that an EU measure was vitiated by a manifest error of assessment.<sup>64</sup> An illustration is the *Spain v. Council* case, in which that Member State challenged the reform of a 'support scheme for cotton' in the common agricultural policy. In its examination of the plea taken from a breach of the proportionality principle, the Court observed 'that certain labour costs were not included and were thus not taken into consideration in the comparative study of the foreseeable profitability of cotton growing under the new support scheme which was used as the basis of the determination of the amount of the specific aid for cotton'. The fact that those costs could be calculated and were likely to have an impact on the profitability of cotton production in the Spanish regions concerned, contributed to the Court's conclusion that the principle of proportionality had been infringed.<sup>65</sup>

However, once all the scientific studies and other relevant data have been sufficiently taken into account, the likelihood of finding that the measure is manifestly inappropriate is small. In the *Vodafone case*,<sup>66</sup> for example, the Court had to rule on the validity of an EU Regulation on roaming on public mobile telephone networks within the EU.<sup>67</sup> One of the issues raised by the referring court concerned the fact that the Regulation, which aimed to reduce roaming costs for consumers, imposed not only a ceiling for wholesale charges per minute, but also for retail charges. That Court observed that the Commission had carried out a comprehensive impact assessment, including alternatives and their economic impact, and took that in-depth market analysis into account to

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<sup>62</sup> See, for example, *Spain v Council*, above at n. 36, para. 123.

<sup>63</sup> K. LENAERTS, above at n. 60, p. 7.

<sup>64</sup> See, for example, *Spain v Council*, above at n. 36, paras 124 and 126.

<sup>65</sup> *Ibid.*, para. 135.

<sup>66</sup> Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321,

<sup>67</sup> Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (*OJ* 2007 L 171, p. 32).

conclude that the provisions of the Regulation under scrutiny did not infringe the proportionality principle.<sup>68</sup>

Once again, the *Weiss* judgment does not depart from that methodology. In its analysis of proportionality of the PSPP, the Court underlined that, when an EU institution enjoys broad discretion, ‘a review of compliance with certain procedural safeguards [...] is of fundamental importance’.<sup>69</sup> It then observed that the ECB had indeed referred to the practice of other central banks and to various studies to substantiate its view that the massive acquisition of sovereign bonds on secondary markets would contribute to achieving the objective of an inflation rate below, but close to, 2%.<sup>70</sup>

### (3) THE PROPORTIONALITY PRINCIPLE APPLIED TO MEMBER STATES’ MEASURES

As I explained at the beginning of my speech, the Member States are also required to respect proportionality when they act within the scope of EU law. As I will now illustrate, there is no discrepancy in the Court’s case-law on either the scope of that principle or the way in which it is implemented depending on whether EU or Member State action is at issue.

Historically, the first cases in which the Court applied a proportionality test to measures adopted by the Member States concerned restrictions to *fundamental freedoms of the internal market*. It would be illusory of course to examine the abundant case-law on that issue in this keynote speech. I should emphasise nonetheless that many judgments illustrate the Court’s willingness to reconcile judicial review of proportionality – and indeed the effectiveness of the fundamental freedoms guaranteed by the Treaties – with the recognition of a sufficient margin for the Member States to pursue legitimate public interests and thus carry out their own public policies in so far as they do not enter into conflict with EU secondary law.

A clear example is the case *Alpine Investment*,<sup>71</sup> one of the Court’s landmark judgments concerning the freedom to provide services. In that case, a Dutch

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<sup>68</sup> *Vodafone*, above at n. 66. paras 55 to 71.

<sup>69</sup> *Weiss and Others*, above at n. 15, para. 30.

<sup>70</sup> *Ibid.*, para. 77.

<sup>71</sup> Judgment of 10 May 1995, *Alpine Investments*, C-384/93, EU:C:1995:126.

company challenged the prohibition in the Netherlands of a practice known as ‘cold-calling’, consisting of telephone calls to individuals without their prior consent in writing in order to offer them various financial services, including speculation on the commodities future market. That practice had led to numerous ‘unfortunate investments’. To sum up, the Court concluded that that prohibition entailed a restriction on the freedom to provide services outside the Netherlands and accepted that safeguarding the reputation of the Netherlands financial markets and protecting the investing public were imperative reasons of public interest capable of justifying such a restriction. In the last part of its analysis, however, the Court had to address Alpine Investment’s argument that these objectives could equally be achieved by less restrictive measures. Alpine referred, first, to the measure in force in another Member State (the United Kingdom), requiring broking firms to tape-record unsolicited telephone calls made by them which would be sufficient to protect consumers effectively. Second, it argued that the general prohibition of cold-calling imposed an unnecessary burden on broking firms which have never been subject of complaints by consumers, suggesting that consumer protection could be effectively achieved by a prohibition targeting ‘problematic’ broking firms. The Court rejected each of those alternative measures. It put forward a number of characteristics of the prohibition at issue (in particular the fact that it did not apply to customers who have given their written agreement to further calls) and concluded that that prohibition did not appear disproportionate to the objective that it pursued.

The underlying rationale is that proportionality cannot be used, in such context, to substitute autonomous choices of the Member States made in areas in which they retain regulatory competence, in order to achieve a certain level of protection of a legitimate public interest. It only preserves the effectiveness of fundamental freedoms by requiring the Member States, in essence, to ensure that there is a *reasonable correlation* between any restriction placed on those freedoms and that legitimate public interest.

That margin is however without prejudice to other aspects of the principle of proportionality where Member State action entails a limitation of a natural person’s fundamental rights or freedoms guaranteed under EU law.



A *first aspect* relates to the requirement of an individual assessment of that person's situation. Thus, in *Tjebbes*, the question referred to the Court concerned the conditions under which a Member State can deprive a person of her citizenship of that Member State, and hence of her EU citizenship rights, when that person is not a national of another Member State, without violating the status of that person as an EU citizen and that person's fundamental right to private and family life (protected by Article 7 of the Charter). In the main proceedings, Ms Tjebbes challenged a ministerial decision rejecting her request for a passport. That decision was based on a provision of the Law on Netherlands nationality, which automatically entailed the loss of Netherlands nationality when certain conditions are met, without an individual assessment of the situation of the person concerned. In its answer, the Court, applying the proportionality principle, required the competent authorities to carry out 'an individual assessment of the situation of the person concerned [...] in order to determine whether the consequences of [...] the loss of his citizenship of the Union might [...] disproportionately affect the normal development of his family and professional life'.<sup>72</sup>

*Another aspect* concerns situations in which an EU legislative or regulatory act does not itself strike a balance between the interests and fundamental right(s) or principle(s) at issue and which calls for implementing measures at Member State level. In such a situation, it is for the latter 'to *reconcile* the requirements of the protection of those various rights and principles at issue, striking a fair balance between them'.<sup>73</sup> That requirement of a 'fair balance' therefore applies in the same way as it does to the EU institutions when they decide to strike themselves that balance<sup>74</sup>.

The Grand Chamber judgment in *Centraal Israëlitisch Consistorie van België and Others*, delivered on 17 December 2020,<sup>75</sup> perfectly illustrates that point. In that case, the Constitutional Court of Belgium raised doubts, in particular, concerning the validity of a provision of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of

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<sup>72</sup> Judgment of 12 March 2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189, para. 44.

<sup>73</sup> Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para. 65.

<sup>74</sup> See, for example, the landmark judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, para. 77.

<sup>75</sup> Above at n. 73.

killing.<sup>76</sup> In principle, that Regulation does not require stunning of animals before their killing for ‘slaughter prescribed by religious rites’, provided that such ritual slaughter takes place in a slaughterhouse. That exception to the principle of prior stunning sought to protect the freedom of religion guaranteed in Article 10 of the Charter. However, a distinct provision of the Regulation allowed the Member States to ‘ensur[e] more extensive protection of animals at the time of killing’. Making use of that possibility, the Flemish Region adopted a decree requiring, in the case of ritual slaughter, stunning which is reversible and cannot cause death. Religious organisations challenged the compatibility of that decree and, by extension, of the flexibility clause in the Regulation on which it was based with, inter alia, freedom of religion. In its answer to the request for a preliminary ruling, the Court made it clear that that flexibility clause had to be interpreted – and applied by Member States – in a manner consistent with that freedom, as guaranteed in Article 10(1) of the Charter. Although the national decree at issue introduced a limitation on that freedom, the Court decided that that limitation did not violate Article 10(1) of the Charter. The Court emphasised in particular, first, that that limitation, which concerned only one aspect of ritual slaughter, did not prohibit ritual slaughter as such and therefore respected the essence of that freedom. Second, it referred to scientific consensus that prior stunning is the optimal means of reducing the animal’s suffering at the time of killing. Those elements led the Court to conclude that the decree at issue in the main proceedings did not exceed the discretion which EU law confers on Member States to reconcile freedom of religion with animal welfare, the latter being a requirement imposed on the EU and its Member States in Article 13 TFEU.

## CONCLUSION

In this keynote speech, I have clarified the scope (and limits) of the proportionality principle in the EU legal order. Its many expressions and functions justify its classification among the *matrix principles* of that legal order.

A first lesson is that proportionality in EU law specifically concerns how a competence is exercised, and has therefore nothing to do with the very existence of that competence. Moreover, it appears from the case-law I have examined

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<sup>76</sup> OJ 2009 L 303, p. 1.

that the ‘burden’ which that principle creates for public bodies does not differ depending on whether the action at issue involves the EU or the Member States acting within the scope of EU law. In essence, proportionality offers in all cases the guarantee of a reasonable correlation between the measures envisaged or adopted and the objectives of the public interest pursued. That *conceptual coherence* is without prejudice to *variations* in the *application* of proportionality as a result of the specific aspects and circumstances of a given case, such as the reliability of the data that were taken into consideration, whether the action at issue entailed a limitation of fundamental rights or freedoms, or the fact that alternative measures offering the same degree of protection of the legitimate public interest pursued were obviously available.

The Court plays an essential role in ensuring that the proportionality principle is upheld across the EU legal order. Judicial review of proportionality cannot be unlimited, in order to maintain institutional balance and preserve the autonomy of the Member States to carry out policies in fields where they retain regulatory competence. A considerable number of the illustrations that I have used however demonstrate that that review is far from being an ‘empty shell’. Judicial review of proportionality contributes not only to the effectiveness of EU law, including fundamental freedoms and fundamental rights, but also to the legitimacy of EU action and thus to the confidence that it must inspire in EU citizens.