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The Principle of Proportionality as a Legal Tool for Balancing Economic and Non-Economic Interests? A Comparative and EU Law Perspective(*)

Abstract: While in German Law the principle of proportionality is mainly used as a tool for judicial review of legislative or administrative limitations on basic rights and/or individual freedoms, in the context of the European Union the principle of proportionality is used also in order to check the compatibility of Member States' measures that restrict trade within the European internal market with the aim of protecting relevant non-economic (national) interests. So, it is used as a very useful (and interesting) tool for balancing economic and non-economic interest.

I. Judicial review in complex decision-making contexts: introductory remarks

The tension between judicial control and legislative and administrative discretion is an ever-contested issue in all legal orders. Whether approached from the perspective of common law ultra vires doctrine or from that of the continental 'rule of law' doctrine, it remains a very complex issue as, unfortunately, there is no easy one-fits-all answer available for lawyers to deal with this problem[1].

Moreover, this paper focuses on a very a complex decision-making context, as the question I am supposed to give an answer to, is how judicial review can help finding a proper balance between economic and non-economic interests: trade and limitations to trade within the WTO Framework, in order to protect human health and the environment.

Nevertheless – and this is my thesis of departure – there are tools available, which can help the judge better performing judicial control in complex decision-making contexts. This means, in such a way that it allows Courts (and the like) to identify critical issues in the use of discretionary power (be it legislative or administrative discretion), while not stepping into the decision-maker's shoes.

The principle of proportionality is certainly one of those tools. I will eventually try to explain how it works in the European Union framework, for cases where there is the same problem of balancing between economic and non-economic interests.

I will nonetheless start by explaining what the principle of proportionality is, and where it comes from. How it was discovered (and developed) by the EU Court of Justice and then spread into the legal orders of Member States who previously did not use this principle as such.

I will then deal with a couple of interesting case-law from the Court of Justice of the European Union and reach my conclusion.

II. The principle of proportionality as a tool for well-structured judicial review and its continental European origin

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[1] See for example, most recently, Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press 2018).

The doctrine of proportionality was born between the end of the 18th and the beginning of the 19th century in German Police Law (*Polizeirecht*). In fact, in its embryonic form it was used already by the Prussian State Administrative Courts as a check on the discretionary powers of police authorities[2].
More than a century later came the well-known formula coined by *Fritz Fleiner* - a pupil of *Otto Mayer*, and in turn himself one of the founding fathers of German administrative law - who explained that the principle of proportionality implies that "The police must not shoot sparrows with cannons"[3]. What he basically meant with this formula is that the (albeit essential) limitations on basic rights and individual freedom imposed by the protection of public interest (and which the public authorities are responsible for) must never exceed what is absolutely necessary to achieve the goal of public interest aimed-at by the public authority [4].
This evaluation usually takes place in the domain of single-case-decision-making (and so, of Administrative Law). But in German law the principle of proportionality has been used from the very beginning to balance the extension of public intervention into the private sphere also by legislative means.

III. The principle of proportionality and its structured three-steps-test

Since a landmark decision of 1958 (the pharmacies judgment of the German Federal Constitutional Court - *Apothekenurteil*)[5], in German law judicial review of proportionality is carried out by using a very structured three-steps-test, composed of the elements of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*), and proportionality in the strict sense (*Verhältnismäßigkeit im engeren Sinne*)[6].

1. Suitability

The first step is the suitability test.
According to German case-law, a means used by the public authority is suitable to achieve the targeted goal "If with its help the desired goal can be promoted"[7].
The prediction made by the decision-maker must be justified and reasonable; but an abstract possibility that the target is met is already sufficient.
The prediction is obviously made on the basis of an ex-ante judgment: so that the possibility of an error in the assessment of the possible future development of events is contemplated.
So, even according to the German principle of proportionality, it is not for the judge to set aside a decision taken by the legislator or by the Public Administration only because he imagines that another means would have been better suited to achieve the goal the decision-maker aimed at.

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[2] See Günther Heinrich von Berg, *Handbuch des Teutschen Policeyrechts* (Hahn 1802) 67.
[3] Fleiner underlined that '*Des Amtes der Polizei ist es, die 'nötigen Anstalten' zu treffen zur Erhaltung der öffentlichen Sicherheit und Ordnung. Die Beschränkung der individuellen Freiheit darf nie das absolut erforderliche Maß überschreiten. Die Polizei soll nicht mit Kanonen auf Spatzen schießen*' (It is up to the police to take the 'necessary steps' to maintain public security and order. The restriction of individual freedom must never exceed the absolutely necessary level. The police should not shoot sparrows with cannons). Fritz Fleiner, *Institutionen des Deutschen Verwaltungsrechts* (3rd edn, Mohr 1913) 376.
[4] This is how Otto Mayer himself expressed the idea: Otto Mayer, *Deutsches Verwaltungsrecht*, vol. 1 (3rd edn, Duncker und Humblot 1924) 223.
[5] German Federal Constitutional Court, 11 June 1958, BVerfGE 7, 377.
[6] See among others Rupprecht von Krauss, *Der Grundsatz der Verhältnismäßigkeit in seiner Bedeutung für die Notwendigkeit des Mittels im Verwaltungsrecht* (L. Appel 1955); Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Schwartz 1981); Rainer Dechsling, *Das Verhältnismäßigkeitsgebot. Eine Bestandsaufnahme der Literatur zur Verhältnismäßigkeit staatlichen Handelns*, (F. Vahlen1989).
[7] 'Wenn mit seiner Hilfe der gewünschte Erfolg gefördert werden kann'. German Federal Constitutional Court, 16 March 1971, BVerfGE 30, 292, par. 70. See also German Federal Constitutional Court, 24 February 1971, BVerfGE 30, 173; German Federal Constitutional Court, 2 October 1973, BVerfGE 36, 47; German Federal Constitutional Court, 20 June 1984, BVerfGE 67, 157. Among the most recent, see e.g. German Federal Constitutional Court (VI Senat), 16 December 2016, BVerwG 8 C 6.15, par. 43.

The basic assumption, even in the German judicial review system, is that Legislator and Public Administration possess a specific expertise allowing them to make complex evaluations and assessments that, at least as a matter of principle, need to be respected in the context of the ex-post evaluation made by a judge.

2. Necessity

The second step is the necessity test, which is the most important part of the structured proportionality assessment.
It deals with the question if (or not) there was an alternative means of achieving the same goal, which would have had a less restrictive effect/impact on the freedom/right/opposing interest at stake.
The underlying idea is well described with the expression "imposition of the milder means", which means that, if there is a choice among various means, all abstractly suitable for achieving the set objective, the one must be chosen that involves the least negative consequences for the freedom/right/opposing interest at stake[8].
Non-compliance with the necessity parameter is considered by the German judges to occur only when it would have been possible to assess, through an ex-ante examination, that another equally effective but less incisive means was available. Or when it clearly appears - via an ex-post examination - that the chosen means is clearly too strongly impacting on the opposing freedom/right/interest when compared to others.
Also, according to established German case-law, a means can be regarded as having the same effect as another only if it achieves the goal with the same "intensity"; and this latter aspect is assessed by the Courts only in concrete terms, and not in the abstract[9].

3. Proportionality in the narrow sense

The third and most contested part of the proportionality test is the “Proportionality in the narrow sense” test, which established itself as a criterion of evaluation only after 1945: following the very negative experience of the totalitarian Nazi State[10].
This part of the test consists of a comparison between the means used and its burdening effect on the freedom/right/interest opposing to it, on the one side, and the objective aimed-at, on the other. The real problem, though, is how to weigh and compare them in their respective importance.
Certainly, the more important the burdening-effect for the freedom/right/or opposing interest at stake, the more significant needs to be the goal (of general interest) aimed-at.
Nonetheless, in German legal doctrine this always was and still remains the most contest part of the proportionality test: as it is quite easy, here, to slip into a control on the merits of the decision to be reviewed[11].
As for its scope of application, in German law the principle of proportionality remains in close connection with fundamental rights: as its origin goes back to Police Law[12].

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[8] „*Gebot des mildesten Mittels*’. See Michael Ch. Jakobs, *Der Grundsatz der Verhältnismäßigkeit* (Carl Heymanns 1985) 102. See most recently German Federal Constitutional Court, 6 February 2019, ECLI:DE:BVerwG:2019:060219U1A3.18.0, par. 88.
[9] To clarify the point see the judgment of the Administrative Tribunal of München (BayVBl 1984, 432), which states that the assessment whether the mere imposition of ‘operating conditions’ can to be considered as an equally suitable alternative means with respect to the prohibition of the exercise of an activity (*Auflagen statt Verbot*) is a question that cannot be resolved in the abstract, but that must instead be assessed, from time to time, with reference to the specific case in question.
[10] In the postwar legal literature there are numerous references to the principle of proportionality in the strict sense, despite the linguistic variety of the expressions used (very often it is referred to as ‘*Angemessenheit*’. See Helmut Coing, *Die obersten Grundsätze des Rechts. Ein Versuch zur Neugründung des Naturrechts* (Lambert Schneider 1947) 47.
[11] See for all Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Europa Law Publishing 2013) passim.
[12] Most recently Jan Brenz, *Das Polizeirecht als ein durch den Verhältnismäßigkeitsgrundsatz bestimmtes System von Abwägungsentscheidungen*

It is applied also in criminal law (there is an extensive jurisprudence to this regard). But not, vice-versa, in the field of private law: except as concerns the so-called "third-party effect" (*Drittwirkung*) of Basic Rights: which occurs when fundamental rights apply not only in the relationship between citizens and the State, but influence also the legal relations between citizens[13].

IV. The principle of Proportionality in EU Law: about its origin and spilling over into the national legal orders of the Member States

The Court of Justice of the European Union (CJEU) picked up the principle of proportionality from the German legal order and referred to it already in its case-law of the Fifties and Sixties[14]. It then gradually established it as an essential tool for judicial review, which is applied to almost all areas of EU law[15].
In fact, nowadays it is the general principle most frequently invoked before and examined by the CJEU[16].
At the same time, the Court of Justice has repeatedly stated that this principle is to be applied also as a criterion of interpretation by the authorities of the Member States, when they implement EU law in their own national legal orders[17]. Which in turn has produced a so-called "spill-over effect" of the proportionality principle: namely, its use as a tool for judicial review also for cases without any direct relevance to EU law[18].
This has been the case for Italy, for example, where it has widely replaced the very vague and unpredictable reasonability test (*controllo di ragionevolezza*) used by constitutional as well as by administrative law judges[19].
But the same has happened also in France: where the principle of proportionality has partially replaced the national cost-benefit test ("bilan avantages-coûts" test)[20].
Even in the British legal order the principle of proportionality has gradually made its own way in the case-law of domestic Courts, overcoming the initial resistance and winning the favour for the national Wednesbury-test[21].
Moreover, in the context of EU law with the Maastricht Treaty of 1992 the principle of proportionality (as for the necessity test) has been placed directly inside the EC Treaty. Subsequently, with the Amsterdam Treaty of 1997, a special protocol was dedicated to the principles of subsidiarity and proportionality, the first provision of which essentially follows that of art. 3 B. With the addition, however, of the explicit clarification

(Duncker & Humblot 2018).
[13] See Albert Bleckmann,' Begründung und Anwendungsbereich des Verhältnismäßigkeitsprinzipes' (1991) Juristische Schlung, 179.
[14] Among others ECJ, 16 July 1956 (case 8/55) *Fédération Charbonnière*, ECLI:EU:C:1956:11; ECJ, 14 December 1962 (joint cases 5-11, 13-15/62) *Società acciaierie San Michele*, ECLI:EU:C:1962:46; ECJ, 19 March 1964 (case 18/63) *Schmitz*, ECLI:EU:C:1964:15.
[15] See the two fundamental judgments of the ECJ of 17 December 1970 (case 11/70) *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114 and of 24 October 1973 (case 5/73) *Balkan-Import-Export*, ECLI:EU:C:1973:109.
[16] See further Diana-Urania Galetta , 'Il principio di proporzionalità' in M.A. Sandulli (ed.), *Codice dell'azione amministrativa* (Giuffrè 2017) 149 (spec. 156 et sqq.).
[17] Most recently in ECJ judgment of 12 December 2019 (case C-627/19 PPU) *ZB*, on the European arrest warrant, ECLI: EU: C: 2019: 1079.
[18] Diana-Urania Galetta, 'Il principio di proporzionalità comunitario e il suo effetto di "spill over" negli ordinamenti nazionali', (2005) Nuove autonomie, 541; Diana-Urania Galetta, 'General Principles of EU Law as Evidence of the Development of a Common European Legal Thinking: the Example of the Proportionality Principle (from the Italian Perspective)' in H-J. Blanke, P. Cruz Villalón, T. Klein, J. Ziller (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber* (Springer 2016), 221.
[19] See Diana-Urania Galetta, 'Il principio di proporzionalità comunitario e il suo effetto di 'spillover' negli ordinamenti nazionali' supra, note 18.
[20] Diana-Urania Galetta, 'Le Principe de proportionnalité' in J.B. Auby, J. Dutheil de la Rochère (eds), *Droit Administratif Européen* (3rd edn, Bruylant 2020).
[21] There is an extensive English-speaking literature on this debated issue: see (also for references) Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective' in S. Vogenauer, S. Weatherill (eds), *General Principles of Law: European and Comparative Perspectives*, (Bloomsbury Publishing 2017) 145.; Paul Craig 'Unreasonableness and Proportionality in UK Law' in E. Ellis (ed), *The principle of proportionality in the Laws of Europe* (OUP, 1999) 85. See also Joffrey Jowell, 'Proportionality and Unreasonableness: Neither Merger nor Takeover' in H. Wilberg, M. Elliott (eds), *The Scope and Intensity of Substantive Review. Traversing Taggart's Rainbow* (Hart Publishing 2015, 41.; Jeff King, 'Proportionality: A Halfway House' (2010) New Zealand Law Review 2, 327.; Yossi Nehushtan, 'The non-identical Twins in UK Public Law: Reasonableness And Proportionality' (2017) Israel Law Review 50/1, 69.

that the obligation to respect the principle is incumbent on "each institution". The protocol in question (now Protocol No. 2) was also taken up, with some modifications, by the Lisbon Treaty, which entered into force on 1 December 2009 and replaced also the old art. 5 EC with art. 5 TEU.
Finally yet importantly, a very relevant, express reference to the proportionality principle is now to be found also in art. 52, para 1, of the Charter of fundamental rights of the European Union.
There can therefore be no doubt that, in European Union Law, the principle of proportionality has always a binding effect. But, depending on the case, it will impose itself either in its capacity as a general principle of EU law, recognized as such by the EU Court of Justice. Or because of its express mention in the Treaty or in the EU Charter (which has now the same legal value as the Treaties). Whereas the difference between the two cases is not that big: as in both cases the principle of proportionality enjoys hierarchical superiority with respect to the rules of secondary EU law[22].

V. From the German to a specific EU Law standard of judicial review of the proportionality

Even if there is no doubt that the EU Court of Justice borrowed it at first from German Public Law, the EU principle of proportionality differs in many ways from the original German one[23].
For our purposes here, the most important difference is that the proportionality-in-the-strict-sense test is never applied in such a way that the EU judge would substitute the decision-makers' evaluation with its own one.
The judicial review of "dis-proportion" falls rather under the necessity-test radar than under the proportionality *stricto sensu* one: as, in the real life of decision-makers, there is almost always an alternative means available which could have been chosen (and which would have been a less burdening one for the opposing right, freedom or interest at stake!).
Moreover, one essential condition which further contributes to reducing the coincidence of the EU principle of proportionality with the German one is their different approaches as to the system of judicial protection. The German one being essentially subjectively oriented (what matters is the intensity with which the measure adopted will affect the legal rights of the appellant)[24]. While, on the contrary, the judicial protection accorded by EU judges takes essentially into account the interests actually at stake[25]: so that it approaches more to the review-scheme which is applied in the WTO context[26].
Moreover, while in German Law the principle of proportionality is mainly used as a tool for judicial review of legislative or administrative limitations on basic rights and/or individual freedoms, in the context of the European Union the principle of proportionality is used in such a way that can give a clear idea of how it could be used also in the context of WTO.
What I mean is that the EU Court of Justice uses it very often as a tool for judicial review of Member States' measures (legislative and or administrative one) that (supposedly) aim at protecting relevant non-economic (national) interests, but have the effect of restricting trade within the European internal market.

[22] Further in Diana-Urania Galetta, 'General Principles of EU Law as Evidence of the Development of a Common European Legal Thinking: the Example of the Proportionality Principle' supra, note 18.
[23] This is exactly what has been criticized by the judges of the Second Senate of the German Federal Constitutional Court in the recent (and very upsetting) *Weiss* judgment of 5 May 2020, 2 BvR 859/15. See Diana-Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5May 2020 of the German BVerfG and its consequences' (2020) CERIDAP 2 (https://ceridap.eu/fascicoli/), 52, 54.
[24] Most recently Wolfgang Kahl, 'Die Europäisierung des subjektiven öffentlichen Rechts' (2011) Juristische Arbeitsblätter 1, 41, 42.
[25] So already Nicholas Emiliou, *The principle of Proportionality in European Law A Comparative Study* (Kluwer 1996) 171.
[26] See Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* supra, note 11, 279.

In order to explain this last point, I would like to explain a couple of interesting ruling of the ECJ, whose common denominator is that the principle of proportionality has been used as a way of assessing the balance between economic and non-economic interests.

VI. Proportionality review as a way of assessing the balance between economic and non-economic interests: examples from the case-law of the EU Court of Justice

1. Adrien de Peijper [1976]

In 1975 the Luxembourger European Court of Justice (ECJ) received a reference for preliminary ruling, in a criminal proceedings pending before the Cantonal Court of Rotterdam (Kantongerecht Rotterdam) against *Adrien de Peijper*, managing director of Centrafarm, a pharmaceutical industry based in the Netherlands[27].
He was accused of having engaged in 'parallel importation' of pharmaceutical drugs, without having obtained the consent provided for by the national Dutch legislation (the Decree on Pharmaceutical Preparations of 1970).
The question submitted to the ECJ was if the Dutch provisions were such as to depart further from the principle of free movement of goods than was necessary for the purpose of protecting public health.
The Court of Justice concluded that, in fact, this was the case. As the Dutch provisions in question even if they were suitable to achieve the goal of protecting the health of citizens, were indeed to be considered as beyond what was necessary. So, they were contrary to EU law and constituted an obstacle to imports within the meaning of Article 30 EEC, in as far as the national authorities could have pursued the same objective with the same effect by adopting other means, less restrictive to trade within the Community.

2. The *German beer* case [1987]

Pretty much the same happened in another very relevant case: the so-called *German beer case*[28], where the EU Commission brought an action against Germany for violation of its obligations under Article 30 of the Treaty (the provision about the elimination of quantitative restrictions between Member States in order to achieve the common market).
According to the absolute ban on the marketing of beers containing additives provided for by their national legislation, German's authorities were prohibiting the marketing of beers lawfully manufactured and marketed in another Member State.
After an accurate evaluation also of the scientific findings on the risk additives posed to public health, the Court of justice rejected the argument of the German government, that the ban was justified on public-health grounds.
The German absolute ban was considered as disproportionate to the aim for several reasons: the use of additives was permitted in other Member States and Germany itself allowed it in other drinks; there was no specific procedure laid down in such a way that traders could obtain authorization to use certain additives etc.

[27] Case 104/75 Officier Van Justitie v Adriaan de Peijper [1976] ECR 613, 636. See Derrick Wyatt, 'Article 36 EEC: Scope of the Exception in Favour of Measures Taken to Safeguard Health and Life' (1976) European LawReview , 469et sqq.
[28] Case C-178/84 Commission v Germany [1987] ECR 1227. See Fausto Capelli, 'La liberté de circulation des marchandises dans la Communauté économique européenne et la loi allemande sur la pureté de la bière' (1987) Revue du Marché Commun, 693.

But especially because such rules went beyond what was considered as necessary in order to protect the health of the German consumer, since that could have been done simply by other means, less restrictive on the intracommunity free movement of goods such as labelling or notices.

3. The *Danish Bottles* case [1998]

Again, in the so-called *Danish Bottles* case[29], the EU Commission brought an action, this time against Denmark for violation of its obligations under Article 30 of the Treaty.
The problem here were new Danish rules which, with the aim of protecting the environment, provided that all containers for beer and soft drinks had to be returnable.
While, on the suitability part of the proportionality test, the EU Court of Justice recognized that a recycling system is an effective means of protection of the environment that may justify the restriction of the free movement of goods, nevertheless it held that the restriction on intra-Community trade these new rules would produce was not necessary and therefore disproportionate. And it was so because a foreign producer who wished to sell his products in Denmark would have been obliged, either to manufacture or to purchase containers of a type already approved by the Denmark's authorities. This would have involved substantial additional costs for that producer and therefore make the importation of his products into Denmark very difficult. Or, he could have sold only limited quantities of beverages, according to the Danish system for returning non-approved containers.
Therefore, the ECJ concluded that the aim of protecting the environment might certainly have been achieved by means less restrictive of intra-Community trade.

4. The *Familiapress* case [1997]

The *Familiapress* case of 1997[30] involved, again, free movement of goods. It was the Commercial Court of Vienna which referred to the ECJ for a preliminary ruling, this time.
The question was raised in proceedings brought by a newspaper publisher, established in Germany, who had received an order from the competent Austrian Public Authority to cease to sell in Austria publications offering readers the chance to take part in games for prizes.
The Court of Justice had therefore to determine, whether a national prohibition such as that in issue in the main proceedings, that prevented free trade in Austria of newspapers offering readers the chance to take part in games for prizes, was proportionate to the aim (a non-economic interest) of maintaining press diversity. And whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.
Vey interestingly here, as the answer to this question was very much related to the exact knowledge of the Austrian press market, the European Court of Justice decided that it was for the referring national Court to determine, whether such a prospect of winning constituted an incentive to purchase capable of bringing about a shift in demand, such as to put at risk the legitimate objective of maintaining press diversity.

5. The *Schindler* case [1994]

[29] Case 302/86 Commission of the European Communities v Kingdom of Denmark (Danish Bottles) [1988] ECR-4607, para 6. See Bertold Jadot, 'Mesures nationales de police de l'environnement, libre circulation des marchandises et proportionnalité' (1990) Cahiers de droit européen , 408.
[30] Case C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlage [1997] ECR I-3689, I-3717. See Miguel Poiares Maduro, 'The Saga of Article 30 EC Treaty: To Be Continued' (1998) Maastricht Journal of European and Comparative Law, 298.

The *Schindler* case of 1994[31] is very relevant, too.
It clearly shows, in my opinion, how much the differences in the standard of review of proportionality applied by the EU Court of Justice are related to the different weight of the interests actually at stake.
The European Court of Justice received here a reference for preliminary ruling from the High Court of Justice of England and Wales (Queen's Bench Division).
Under the lens of the ECJ judges came the national legislation prohibiting the holding of lotteries: which totally precluded lottery operators from other Member States from promoting their lotteries and selling their tickets, whether directly or through independent agents.
Though the restriction to the freedom to provide services was in this case more than evident, The ECJ considered nonetheless that, since the national legislation in question involved no discrimination on grounds of nationality, restrictions might be justified in order to assure the protection of consumers and the maintenance of order in society. And reached the conclusion that it was for the national authorities to assess not only whether it was necessary to restrict the activities of lotteries, but also whether they should be prohibited, provided that those restrictions were not discriminatory.
The European Court of Justice gave thereby considerable latitude to the Member State.
In its reasoning it explained that the Member State had do have sufficient room to manoeuvre, in order to determine what was necessary to protect the non-economic interests at stake. And that, the high risk of crime or fraud concretely involved here justified the setting of a high level of protection by the Member State's authorities of the (non-economic) interests opposing to the freedom to provide services (to those wanting to take part in lotteries).

6. The *Omega* case [2004]

Last but not least, there is the well-known *Omega* case of 2004[32].
It is a very famous and interesting case concerning, again, the balancing between a non-economic (national) interest and free movement of services (and of goods) within the internal market.
In the background of the present case there is the fact that the German regulatory authority had served a notice on Omega: a German company operating an installation known as a "laserdrome" and used for the practice of "laser sport".
With its notice, the German authority had forbidden Omega from "facilitating or allowing" the so called "playing at killing" games in its premises. The reason given was that, *inter alia*, public order was endangered: because the simulated killing action, and the associated portrayal of violence as inoffensive, offended common fundamental values and was contrary to the principle of protection for human dignity enshrined in the German national Constitution.
The European Court of Justice stated, first, that - as a matter of fact - the contested order, by prohibiting Omega from operating its "laserdrome" did affect the freedom to provide services, which the EC guarantees both to providers and to the persons receiving those services.

[31] Case C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg [1994] ECR I-1039. See Werner Schroeder, 'Kein Glücksspiel ohne Grenzen' (1994) Europäische Grundrechte-Zeitschrift , 373.
[32] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn. See Enza Pellecchia 'Il caso Omega: la dignità umana e il delicato rapporto tra diritti fondamentali e libertà (economiche) fondamentali nel diritto comunitario' (2007) Europa e diritto privato, 181.

Nonetheless, in consideration of the interests (and values) here concretely at stake, the ECJ concluded that the measure adopted by the German authority could not be regarded as imposing an unjustified restriction on the freedom to provide services in the internal market. And that it did not go beyond what was necessary to achieve the objective aimed at.

VII. Conclusive remarks

In academic literature it has often been claimed (and complained about the fact) that, when it comes to verifying compliance with the principle of proportionality, the Court of Justice of the European Union would have a rather different attitude and would apply a different standard of proportionality review, depending if the measure to be reviewed is adopted by an authority of the European Union, or by a Member State authority[33].

I think that this criticism totally misses the point.

A careful analysis of the case-law of the EU Court of Justice shows in fact that, though there are clear differences in the standard of review of proportionality, such differences are rather related to the case-by-case different weight of the interests actually at stake, and are quite independent of who (Member State's or European Union's authority) adopted the measure[34].

The principle of proportionality is in fact reviewed more rigorously when it has the effect of limiting one of the "four basic freedoms" provided for by the EU Treaty (free movement of goods, services, capital or persons). Basic freedoms which, at the end of the day, are essential to the European single market that, again, is the very reason of existence of the European Union itself.

This is the reason why I think that there are a lot of analogies, here, with the WTO context: as the World Trade Organization is an organization for trade opening, whose primary purpose is to open trade for the benefit of all its participants. So, when dealing with balancing issues in disputes between Member States in the WTO framework, we face rather the same "standard of review" scenario as we do in the European Union framework[35].

And in fact - as we have seen - in the contest of EU law, the Court of Justice very often uses the principle of proportionality in order to check the compatibility of Member States' measures restricting trade within the European internal market with the aim of protecting relevant non-economic (national) interests.

As this kind of measures affects the good functioning of the internal market - which is the first *raison d'être* of the European Union - the principle of proportionality is certainly reviewed more rigorously here than in others case-law scenarios. Nonetheless, as we have seen via a couple of examples chosen from the case-law of the EU Court of Justice, this principle has proved to be a very well working and useful tool when used for balancing economic and non-economic interests in the cross-border framework of the European Union.

Moreover, it is certainly not true that it is always the economic interest related to the internal market to win over the non-economic ones: the *Schindler* and *Omega* rulings of the EU Court of Justice clearly show us the contrary! That is why - to conclude - I think that also in the WTO framework the principle of proportionality can serve as a very useful tool of structured judicial-review, which can help to better (and even more

[33] See Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny, in E. Ellis (ed), *The principle of proportionality in the Laws of Europe* supra, note 21, 69.

[34] See Rob Widdershoven, 'The European Court of Justice and the Standard of Judicial Review' in Jurgen de Poorter, Ernst Hirsch Ballin, Saskia Lavrijssen (eds), *Judicial Review of Administrative Discretion in the Administrative State* (Asser Press/Springer 2019), 39.

[35] Mads Andenas and Stefan Zleptnig, 'Proportionality and balancing in WTO law: a comparative perspective' (2007) Cambridge Review of International Affairs, 20:1, 71.

transparently) reconcile economic and non-economic interests in very complex cross-national-borders contexts.