The EU law principle of proportionality and judicial review: its origin, development, dissemination and the lessons to be learnt from the Court of Justice of the European Union

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The development of general principles of European Union law and its consequences: introductory remarks

If it is questionable that the reference to "any rule of law" contained in the second paragraph of Article 263 of the Treaty on the Functioning of the European Union (TFEU)[114] can be taken as one of the bases for the development of the general principles of European Union (EU) law, there can on the contrary be no doubt that the second paragraph of Article 340 TFEU, which mentions "the general principles common to the laws of the Member States", is an essential point of reference in this respect. The latter provision has remained essentially unchanged since the Treaty of Rome[115], and has been recently restated in Article 41(3) of the Charter of Fundamental Rights of the European Union in the context of the right to good administration. The well-known 1957 judgment in *Algera* is indeed clear evidence that the CJEU has followed from the outset the approach described in Article 340 TFEU far beyond the specific hypothesis referred to therein (the non-contractual liability of the EU).[116]

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114 The Court of Justice of the European Union (CJEU) shall have jurisdiction "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application", Article 263 TFEU, second paragraph.

115 See Article 215(2) of the 1958 Treaty establishing the European Economic Community (EEC).

116 Joined Cases 7/56, 3/57-7/57, *Algera and Others* v *Assemblée commune*, EU:C:1957:7. See more extensively in the Opinion of Advocate General Lagrange, EU:C:1957:6.

According to the doctrinal opinion I agree with, only the CJEU is entitled to declare the existence of a principle as a general principle of EU law.[117] This fact has relevant implications as to the respective ranks held by these principles within the system of sources of EU law. To cut a long story short[118], the Treaties do not yet contain a provision similar to that set out in Article 38 of the Statute of the International Court of Justice (according to which case-law is one of the sources of international law, albeit of a secondary rank). In order to clarify the position of case-law in the hierarchy of sources of EU law, one has to take into account the ways in which case-law can be overridden. As only the Member States can in fact, in their capacity as “Lords of the Treaties”, amend primary law in order to counter the case-law of the CJEU, the obvious consequence is that the CJEU’s case-law is ranked below primary law.

The ranking of the general principles of EU law above EU secondary law has two important practical consequences. First, the non-compliance of a provision of EU secondary law with a general principle of EU law is one of the most important reasons for the annulment of EU secondary law by the CJEU. Second, such principles are binding on Member States in the same way as primary law, as they are used by the CJEU to interpret the provisions of primary law. The CJEU has, in fact, repeatedly stated that the general principles of EU law must also be applied by Member State authorities when they implement EU law in their own national legal orders.[119]

As a consequence of all of the above, over time the CJEU has become a very powerful vehicle of diffusion of general law principles across the Member States[120], and the principle of proportionality is one of the most peculiar and interesting examples of this phenomenon.[121]

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117 See, for a detailed explanation, Ziller (2014), p. 334.

118 See further in Galetta (2018), para 4.

119 The Court of Justice expressly made it clear as early as in C-230/78 *Eridania*, EU:C:1979:216, that “general principles of Community law… are binding on all authorities entrusted with the implementation of Community provisions”. See also C-258/78, *Nungesser*, EU:C:1982:211.

120 See Schwarze (2010), passim; Schwarze (2012), p. 117.

121 See 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 Blanke, H.-J., Cruz Villalón, P., Klein, T., Ziller, J. (eds.), *Common European Legal Thinking: Essays in Honour of Albrecht Weber*, Springer, pp. 221-242.

1 Origins and development of the principle of proportionality in EU law

1.1 Its origins: the German principle of proportionality and its three-step review

Turning to the specific analysis of the principle of proportionality in EU law, I would like to begin by pointing out that the CJEU, in its earliest references to this principle in its case-law of the 1950s and 1960s, clearly borrowed it from German law[122]: judgments like *Fédération Charbonnière* of 1956, *Società acciaierie San Michele* of 1962 and *Schmitz* of 1964 are, to me, clear indications of that![123]

It is therefore useful to briefly refer, first of all, to the German principle of proportionality, which, as a *terminus tecnicus* of legal language, was used for the first time as early as 1802.[124] And the famous descriptive formula offered by Fritz Fleiner[125], according to which the police should not shoot sparrows with cannons[126], dates back more than a century.[127]

To this day, in German law the principle of proportionality is still closely linked to fundamental rights[128], given its genesis in the context of police law (Polizeirecht).[129] The famous 1882 Kreuzberg judgment of the Prussian Higher Administrative Court (preußisches Oberverwaltungsgerichts) was a milestone in its development, making it clear that the pursuit of the common good cannot imply the total sacrifice of the individual and of his legal position (in this case the right to private property).[130] This judgment was

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[122] There is no contradiction, though, with the position of Craig (2017), p. 145 et seq., who simply contests the idea that proportionality in law is a modern creation, originating in German jurisprudence, by trying to cast historical light on the role played by the concept of proportionality in UK law (dating back to the 16th century doctrine on the legal control of discretion).

[123] C-8/55, Fédération *Charbonnière*, EU:C:1956:11; Joined Cases 5-11, 13-15/62, *Società acciaierie San Michele*, EU:C:1962:46; C-18/63, Schmitz, EU:C:1964:15.

[124] See von Berg (1802), p. 67.

[125] A pupil of Otto Mayer and himself one of the founding fathers of German administrative law. See Giacometti (1938), p. 462.

[126] More precisely, Fleiner (1912), p. 354 stated that "The office of the police is to adopt the 'necessary institutions' to maintain public security and order. The limitation of individual freedom must never exceed what is absolutely necessary. The police should not shoot at sparrows with cannons".

[127] Otto Mayer himself expressed this same view: Mayer (1924), p. 223. Many other German-speaking authors have also done so. For a detailed discussion of the meaning of the principle of proportionality in German academic literature, see D'Avoine (1994), p. 48.

[128] As to the scope of application of the principle of proportionality, see the fundamental study of Von Krauss (1955), p. 94.

[129] See, most recently, Brenz (2018).

[130] Judgment of 14 June1882, in *Entscheidungen des preußisches Oberverwaltungsgerichts* (PrOVG), no. 9, p. 353.

followed, shortly afterwards, by two subsequent judgments[131], on the basis of which the reasoning on proportionality became settled case-law.[132] The case-law since then has led to a progressive clarification of concepts and the principle has meanwhile become an essential point of reference not only in the context of police law but for the entirety of German public law.[133]

As to its concrete content, the German principle of proportionality results from the combination of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*) and proportionality in the strict sense (*Verhältnismäßigkeit im engeren Sinne*)[134] which, since the well-known *Apothekenurteil* of 1958[135], have been brought together into the principle of proportionality in the broad sense.

According to settled case-law, a means is considered as suitable to attain the goal "if with its help the desired result can be achieved".[136] The prediction must be justified and reasonable but the ex ante assessment implies the possibility of an error. As a rule, it is not even expected that the objective will be fully achieved.[137]

As to the necessity, this parameter is often summarised by the expression "imposition of milder means".[138] That is to say, among several means, all of which are theoretically suitable for achieving the objective, the means chosen must be that which implies the least negative consequences for other rights/interests.[139] The clarification must, however, be made that a means can be considered to have the same effectiveness as another only if it allows the achievement of the objective with the same "intensity" as

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131 See the judgments of 10 April 1886 and 3 July 1886, in PrOVG 13, p. 424 and p. 426. In both cases, the Prussian High Court had to assess whether the measures taken by the police did not exceed the intensity required by the objective pursued.

132 See, inter alia, the judgments of 4 November 1889, in PrOVG 18, p. 336; 18 December 1896, in PrOVG 31, p. 409; 2 July 1990, in PrOVG 37, p. 401; 20 September 1900, in PrOVG 38, p. 291; 21 September 1903, in PrOVG 44, p. 342; 13 May 1904, in PrOVG 45, p. 416; 19 December 1907, in PrOVG 51, p. 248; 24 May 1912, in PrOVG 61, p. 255; 15 March 1923, in PrOVG, 78, p. 431; 10 September 1924, in PrOVG 79, p. 297; 23 March 1933, in PrOVG, 90, p. 293.

133 See, inter alia, Stern (1993), p. 165; Ress (1985), p. 11.

134 See, inter alia, von Krauss (1955); Hirschberg (1981); Dechsling (1989).

135 BVerfG, judgment of 11 June 1958, in BVerfGE 7, p. 377.

136 "Wenn mit seiner Hilfe der gewünschte Erfolg gefördert werden kann". BVerfG judgment of 16 March 1971, in BVerfGE 30, p. 292, para. 70. The translation is mine. See also BVerfG judgment of 24 February 1971, BVerfGE 30, p. 173; BVerfG judgment of 2 October 1973, BVerfGE 36, p. 47; BVerfG judgment of 20 June 1984, BVerfGE 67, p. 157. Among the most recent ones, see BVerfG (VI Senat) of 16 December 2016, in BVerwG 8 C 6.15, para. 43, available at https://dejure.org

137 See BVerfG judgment of 22 May 1963, in BVerfGE 16, p. 147.

138 "Gebot des mildesten Mittels". Synonyms for "Erforderlichkeit" in German literature include: Notwendigkeit; Grundsatz des schonendsten Mittels; Grundsatz des geringstmöglichen Eingriffs; Grundsatz des geringsten Mittels. See on this point Jakobs (1985), p. 102.

139 As is an ongoing element of the case-law of the German Federal Constitutional Court. See, inter alia, the BVerfG judgment of 9 March 1971, in BVerfGE 30, p. 250; the BVerfG judgment of 18 December 1968, in BVerfGE 25, p. 1.; the BVerfG judgment of 10 May 1972, in BVerfGE 33, p. 171; and, most recently, the BVerwG, judgment of 6 February 2019, DE:BVerwG:2019:060219U1A3.18.0, para. 88.

would that other, and this question can obviously be answered only with regard to the specific case at hand.[140] German case-law also denies that the necessity requirement is fulfilled if an ex post examination shows that the chosen means appears to be too restrictive in comparison with others which were already available ex ante.[141]

Finally, proportionality in the strict sense is about comparing the goal and the means and weighing them to ascertain their respective importance. This evaluation is quite complex and is strictly connected with the idea of always having to preserve the essential core of fundamental rights (das *Wesen der Grundrechte* - Article 19 *Grundgesetz*) and, as to its judicial review, has raised debate among German scholars ever since.[142]

1.2 The development of the principle of proportionality in EU law

As noted above, the CJEU has referred to the principle of proportionality already from the outset and has gradually established it as an essential tool for judicial review, applied to almost all areas of EU law[143]. This is the case to the point that it is, at present, the general principle "most frequently invoked before and examined by the Court".[144]

As for its development, the principle of proportionality, even if only insofar as the requirement of necessity is concerned, was directly included in the Maastricht Treaty of 1992, in Article 3b (later to become Article 5 of the Treaty establishing the European Community), which referred, however, to the sole activity of the Community institutions.

Later on, with the Treaty of Amsterdam of 1997, a protocol on the application of the principles of subsidiarity and proportionality was adopted, whose first provision basically restated that of Article 3b, with the addition, however, that "[e]ach institution shall ensure constant respect for the principle(s)".[145]

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140 In order to clarify this point, it suffices to refer, by way of example, to the judgment of the VGH München (in BayVBl, 1984, p. 432), in which it is stated that the assessment of whether the mere imposition of "operating conditions" can be considered as an equally suitable alternative means to the prohibition of the exercise of an activity (Auflagen statt Verbot) is a question that cannot be resolved in the abstract, but must instead be assessed, on a case-by-case basis, with reference to the specific case under consideration.

141 See on this point, 1973, p. 574.

142 In fact, proportionality in the strict sense became a fully established judicial review criterion only as a consequence of the negative experience during the era of the totalitarian National Socialist State. See on this point Coing (1996), p. 65.

143 Most recently Paul Craig expressly underlined that in EU law the principle of proportionality is "a general head of judicial review that applies across the entire EU legal terrain". See Craig (2021), p. 7 (para. 2).

144 Von Danwitz (2012), p. 367.

145 Protocol on the application of the principles of subsidiarity and proportionality, Article 1.

This protocol was later incorporated, with some modifications, into the Treaty of Lisbon (Protocol No 2) and Article 5 of the Treaty establishing the European Community has been replaced by Article 5 of the Treaty on European Union.[146]

Finally, the principle of proportionality has also been included in Article 52(1) of the Charter of Fundamental Rights of the European Union as a reference principle in relation to limitations on the rights and freedoms recognised by the Charter for “purposes of general interest recognised by the Union” or for the “need to protect the rights and freedoms of others”.[147]

It should be noted that the fact that the principle of proportionality is expressly referred to in provisions of secondary EU law does not change its higher ranking, as a general law principle, with respect to the rules of secondary EU law. The moving of general principles from one material source to another, in fact, changes neither their inherent nature as general principles of EU law nor their position of hierarchical superiority with respect to the rules of secondary EU law.

With regard to the case-law on the principle of proportionality, it is applied as a judicial review tool both to the activities of EU institutions, bodies, offices and agencies[148], and of public authorities of Member States when they are fulfilling their obligations under EU law.[149]

As to its application to judicial review of acts/decisions adopted by Member State authorities, the relevant case-law can basically be grouped within three broad categories.

The first of these categories includes judicial review of Member States’ regulatory or administrative measures which have the effect of restricting fundamental freedoms or rights laid down in the Treaties or in EU secondary legislation.[150] This category also includes judgments on the proportionality of measures adopted by Member States in derogation from

[146] Article 5(4) of the Treaty on European Union (TEU) provides as follows: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. It also states: “The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality”.

[147] The analogy with Article 19 of the German *Grundgesetz* on the *Wesensgehaltgarantie* is clear!

[148] “In areas as diverse as the Common Agricultural Policy, Transport Policy, the Area of Freedom, Security and Justice, Structural Funds, Monetary Policy, Economic Policy, Anti-Dumping, and inter-institutional controls”. Craig (2021), p. 7 (para. 2). See further in Craig (2018), Chapters 19-20.

[149] This means, according to the CJEU case-law on Article 51 of the Charter of Fundamental Rights of the European Union, that it applies whenever Member States act within the scope of EU law. Case C-5/88, *Wachauf*, EU:C:1989:32118; Case C-260/89, ERT, EU:C:1991:254; and Case C-309/96, *Annibaldi*, EU:C:1997:631.

[150] In this respect, the CJEU has consistently ruled from the outset that, even when there is a legitimate need to restrict freedoms or rights under the Treaty or secondary legislation in order to achieve goals of public interest, such restrictions must still pass the proportionality test. The first application of the test in this context was in the famous ruling in *Cassis de Dijon*, C-120/78, EU:C:1979:4.

the obligations provided for by individual directives, when the directives themselves provide (for specific reasons expressly mentioned) for the possibility of derogation. In this case, EU judges do not limit themselves to verifying that the derogations are appropriate and necessary; they also check their proportionality in the strict sense, to ensure they are not such as to completely jeopardise the attainment of the objectives laid down by the directive in question.[151]

The second category of judgments is very broad and includes (regulatory or administrative) measures taken by Member States in breach of EU competition rules or the free movement of goods and services, which are again subjected to a thorough proportionality test.[152]

Finally, there are of course all those judgments relating to references for preliminary rulings and in which the application of the principle of proportionality is called into question with regard to national acts implementing EU law.[153] In this regard, the CJEU has repeatedly stated that the principle of proportionality must also be applied as a criterion for the interpretation of national rules by Member State public authorities when they implement EU law in their national legal systems.[154] And it is precisely this case-law that has been at the root of the "spill-over effect" in relation to the principle of proportionality: that is, its use by national courts in cases that have no direct relevance to EU law (see paragraph 3).

1.3 From the German model to a proportionality review characteristic of EU law (and the reasons for that)

Michel Fromont expressed the influential opinion, more than two decades ago, that the most important divergence between the German and EU models of judicial review of proportionality lies in the fact that that the EU courts disregard the rigidly applied three-phase proportionality test proposed and theorised in German legal doctrine.[155]

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[151] See, for example, Case C-76/08, *Commission* v *Republic of Malta*, EU:C:2009:535, para. 57.

[152] In particular, aids (in any form whatsoever) granted to national undertakings are relevant in this context (see, inter alia, Case C-730/79, *Philip Morris*, EU:C:1980:209, para. 17); measures favouring cartels and associations between national undertakings, and abuses of dominant positions (see, inter alia, Case C-258/78, *Nungesser*, EU:C:1982:211, para. 77; Case 61/80, *Coöperatieve Stremsel*, EU:C:1981:75, para. 18); as well as all measures that introduce de facto restrictions with regard to the possibility to participate in tenders in a Member State (see, inter alia, Case C-213/07, *Michaniki*, EU:C:2008:731; Case C-376/08, *Serrantoni*, EU:C:2009:808). See Koch (2003), p. 546.

[153] See, inter alia, Case C-45/08, Spector Photo Group, EU:C:2009:806; Case C-170/08, *Nijemeisland*, EU:C:2009:369.

[154] See, most recently, Case C-627/19 PPU - *Openbaar Ministerie* (Public Prosecutor, Brussels), EU:C:2019:1079. See also the very well-known *Mascolo* judgment: Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Mascolo and Others*, EU:C:2014:2401.

[155] See Fromont (1995), p. 156. See also, in the same vein, Koch (2003), p. 198.

For a while, I had in fact embraced this conclusion.[156] However, after more than three decades of constant monitoring of EU case law in this regard, I have come a different conclusion. As I see things now, the divergence Fromont referred to in 1995 is much more apparent than a real one, as it is basically the consequence of a different style of drafting judgments: while German judges draft extensive and detailed reasoned judgments, EU judges stick to a more bare and essential style, which brings out only the essential points of their legal reasoning. For example, if in a judgment there is no explicit reference to suitability as the first step of the proportionality review, this does not mean that a suitability review was not carried out by the CJEU judges.[157] For the same reason, it may sometimes appear that the proportionality review carried out by the EU courts is performed by altering the sequence of application of the three elements of the proportionality test.[158]

More generally, the CJEU's overly concise manner of presenting its legal reasoning often gives rise to doubts as to the existence of logical leaps in the reasoning concerning the proportionality review. The well-known proverb "brevity is the soul of wit"[159] does not work well when applied to the proportionality review! However, in view of the CJEU's constantly growing backlog of work[160], it is not foreseeable that this aspect can be improved. On the contrary, everything points in the opposite direction: shorter judgments and, therefore, necessarily less reasoned ones.

However, this difference in drafting judgments by EU judges is also a consequence of the great deal of space devoted to explaining the facts and the legal context, as EU courts must necessarily consider the (currently 27) different Member State national legal systems, which have to be combined with the relevant EU law in order to identify the legal background for each case.

Beyond these perhaps only formal differences, there is nonetheless also a more substantial reason, which very much explains the development of what I see as a peculiar judicial review of the form of proportionality that is characteristic of EU law (and which differs from the German one).

This difference concerns the approach to the system of judicial protection. The protection afforded by the German courts is subjectively oriented[161] and takes into account, above all, the intensity with which the measure adopted has affected the legal sphere of the plaintiff. This is obviously linked also to the nature of the judgment and is closely connected to the

[156] See Galetta (2005), p. 541.
[157] See, for example, Case C-126/91, Yves Rocher, EU:C:1993:19. More recently Joined Cases C-96 and 97/03, *Tempelman*, EU:C:2005:145, para. 47.
[158] See Case C-357/88, *Hopermann*, EU:C:1990:172. See on this point Kischel (2000), p. 391.
[159] That is, that a short and concise formulation may ultimately be more comprehensible than a long one.
[160] See in this respect Craig (2018), p. 264.
[161] This has recently been recalled by Kahl (2011), p. 42.

powers conferred on the courts by national procedural law (*Verwaltungsgerichtsordnung* - VwGO).

The EU courts offer, instead, rather an objective type of judicial protection, which essentially takes into account the interests concretely at stake[162], without giving decisive weight to the extent of the harm suffered by the individual. Thus, the EU proportionality test focuses on a comparative assessment of the interests actually at stake, thus bringing the test closer to the "balance of costs and benefits" typical of the principle of proportionality as applied in France in the case-law of the Conseil d'État[163] and the aim of which is essentially to make an overall and comparative assessment of advantages and disadvantages produced by the measure adopted, according to a multi-polar concept of the interests at stake.[164]

This also explains, in my opinion, another issue that is often complained about in legal literature[165]: the difficulty of identifying an a priori and stable rule as to the actual effectiveness of the review carried out by the EU courts through the application of the principle of proportionality. In fact, on the one hand, and despite the incredible amount of case-law in which possible infringement of the principle is invoked, there are few cases in which EU judges have actually declared legislative or administrative measures taken by EU authorities to be unlawful on account of breach of the principle of proportionality.[166] On the other hand, the EU judges seem to take a rather different attitude to the review of acts adopted by Member State authorities, where, as a matter of fact, the proportionality review is usually more intense and strict.[167]

Nevertheless, the differences in intensity in judicial review of proportionality only appear to depend on whether the measure to be reviewed is adopted by an EU or by a Member State authority. This is not, in my opinion, the central issue in EU judges' reasoning when reviewing proportionality.[168] The differences that exist seem to me instead to be related to the different weight placed upon the interests actually at stake. The stance adopted is also influenced by whether an EU judge is being asked to review measures that aim at contributing to "the process of European integration undertaken

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162 See Emiliou (1996), p. 171.

163 See the judgment of the Conseil d'Etat of 2 October 2006, SCI Les Fournels, no. 281506, which expressly states that «une opération ne peut légalement être déclarée d'utilité publique que si les atteintes à la propriété privée, le coût financier et, éventuellement, les inconvénients d'ordre social ou l'atteinte à d'autres intérêts publics qu'elle comporte ne sont pas excessifs eu égard à l'intérêt qu'elle présente».

164 In this sense see, among many others, Case 45/85, *Verband der Sachversicherer*, EU:C:1987:34, para. 61.

165 See for detailed references von Danwitz (2012), op. cit., p. 374.

166 Nevertheless see for example the well-known judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, declaring invalid Directive 2006/24/EC (of 15 March 2006, on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks), on the ground that by adopting Directive 2006/24 the EU legislature "has exceeded the limits imposed by compliance with the principle of proportionality" (para. 69).

167 In this vein, see also von Danwitz (2012), p. 378.

168 See also Zilioli (2019), p. 257 et seq.

with the establishment of the European Communities"[169] regardless of whether these measures are undertaken by an EU or by a Member State authority[170]; or whether, on the contrary, the measure to be reviewed under the principle of proportionality is adopted in derogation from fundamental freedoms or fundamental rights guaranteed by the EU Treaties. In such cases, the principle of proportionality is of course reviewed more rigorously. The CJEU imposes strict requirements in respect of the need for a national measure restricting fundamental freedoms[171], as guaranteeing respect for such fundamental freedoms is the very reason for the existence of the EU itself![172]

Nevertheless, after the entry into force of the Lisbon Treaty, the CJEU imposed similarly strict requirements and applied similar rigour in respect of the proportionality test with regard to measures adopted by EU authorities in derogation from fundamental rights and freedoms recognised by the Charter of Fundamental Rights of the European Union.[173]

Finally, there is another important element which is rarely taken into account by those who criticise the CJEU's jurisprudence but which must be considered when assessing its case-law on the principle of proportionality. This is the procedure in the context of which the review of proportionality is carried out, which differs markedly as between judicial review of proportionality in the context of an infringement procedure under Article 258 TFEU and such review carried out in the context of a preliminary reference procedure under Article 267. According to the "division of labour between the ECJ and National Courts"[174], in respect of a preliminary reference procedure the CJEU will limit itself, in principle, to providing the national court only with the benchmarks for its decision. It is still for the national court to resolve the legal dispute pending before it by assessing the compatibility with the principle of proportionality of the national measures contested by the plaintiffs.[175]

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[169] See the preamble of the TEU.

[170] See Case 29/77, *Roquette*, EU:C:1977:164, para. 19 and 20; Joined Cases C-296/93 and C-307/93, *French Republic and Ireland* v *Commission*, EU:C:1996:65.

[171] See, for example, Case C-65/05, *Commission* v *Hellenic Republic*, EU:C:2006:673. In the same vein, see von Danwitz (2012), p. 378.

[172] See Papadopoulou (1996), p. 252; Von Danwitz (2003), p. 400.

[173] See Joined Cases C-293/12 and C-594/12*, Digital Rights Ireland Ltd*, where the protection of the fundamental rights to privacy and to the protection of personal data were at stake.

[174] See von Danwitz 2012, p. 379.

[175] See, among the most recent cases, Case C-555/19, EU:C:2021:89, where the CJEU reached the conclusion that "Article 56 TFEU must be interpreted as not precluding such national legislation, provided that it is suitable for securing the attainment of the objective of protecting media pluralism at regional and local level which it pursues and does not go beyond what is necessary to attain that objective, which it is for the referring court to ascertain". See also Joined Cases C-34-36/95, *De* Agostini, EU:C:1997:344, para. 52; Joined Cases C-96/03 et C-97/03, *Tempelman*, EU:C:2005:145, para. 49; Case C-182/08, *Glaxo Wellcome*, EU:C:2009:559, para. 102.

So, to conclude, if there can be no doubt that the CJEU drew heavily upon the principle of proportionality under German law[176] at first, it is equally certain, at this point, that its approach to the review of the proportionality has, for various reasons, developed in such a way as to diverge from that carried out by the German courts. Over a timeframe of now more than six decades, the CJEU has in fact developed a form of judicial review of proportionality all of its own, which is specifically adapted to the characteristics of the EU[177] and of EU law.[178]

2 The dissemination of the EU principle of proportionality across (and even beyond) Europe

2.1 The so-called "spill-over effect" and Italian public law

The phenomenon described in academic literature as a "spill-over effect"[179] refers to those Member States that, starting from a situation in which the principle of proportionality was unknown as such in their national legal tradition, have started to refer to the EU principle of proportionality extensively, even in respect of cases without any direct EU law dimension.[180]

A typical example of this phenomenon can be seen in Italian public law, starting from the early 1990s. A test of proportionality was progressively incorporated in the jurisprudence of the Italian administrative courts in the context of domestic cases with no direct EU law dimension[181], alongside the traditional test of reasonableness (*ragionevolezza*).

The test of reasonableness, which is used to the present day both by the Constitutional Court and by the administrative courts, is in fact extremely volatile, thus creating shortfalls in terms of legal protection.[182] For this reason, the EU principle of proportionality was introduced alongside the test of reasonableness. Nonetheless, the overall outcome of over 30 years

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[176] Galetta (1998), p. 6. See also von Danwitz (2012), p. 367.

[177] From this point of view, as I have already underlined, it also differs from the one carried out by the Strasbourg Court. See Galetta (1999), p. 743 et seq.

[178] There is, therefore, really no sense in complaining about this! In this regard see my critical remarks as to the attitude of the German Federal Constitutional Court in Weiss, when it preposterously criticised the CJEU for not applying the German principle of proportionality! Galetta and Ziller (2021), p. 633, para. 3.3.

[179] See for example Groussot, X. (2006), *General Principles of Community Law*, Europa Law Publishing.

[180] See Galetta (1998a), *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Giuffrè, Milano, 1998, pp. XVII-273, p. 5.

[181] See Regional Administrative Court of Lombardy (TAR Lombardia), sec. III, 02.04.1997, n. 354; sec. III, 16.04.1998, n. 752. See for further references: Galetta (1998a) *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Giuffrè, Milano, 1998, pp. XVII-273, p. 231; Galetta, (2017), p.165.

[182] See, for details, Galetta (1998b), p. 299.

of making reference to the EU principle of proportionality for domestic judicial review is made up of lights and shadows.[183] There have been some highlights, however, such as the brilliant judgment no. 20/2019[184] of the Italian Constitutional Court, where it was cleverly used to balance competing fundamental principles including transparency and the right to privacy.

2.2 The principle of proportionality in British common law

Another very relevant case of spill-over of the EU principle of proportionality concerns a (now ex) EU Member State: the United Kingdom.

The British case is very interesting, as the EU principle of proportionality made its own way into the case-law of the British domestic courts only very slowly.[185] If, in fact, as early as the beginning of the 1980s Lord Diplock (an authoritative judge of the House of Lords) had underlined all the potential of this principle[186], the British judges have nonetheless refused during decades to refer to it: branding it as useless[187] and/or excessively invasive[188] and sticking to the very national “Wednesbury test”.

However, the situation has radically changed, in particular since the adoption of the Human Rights Act 1998[189], which transposed the European Convention on Human Rights (ECHR) into British national law. Therefore, in more recent years the British courts have often used the principle of proportionality instead of the Wednesbury test also with regard to purely domestic case-law. This represents a conscious decision, made on the assumption that “greater intensity of review is available under the proportionality approach ... than is the case where the review is conducted on the traditional Wednesbury grounds”.[190] The significance of this stance

183 See Galetta, (2017), “Il principio di proporzionalità”, in Sandulli, M.A. (ed.), Codice dell’azione amministrativa, Milano, para 3, p.149.

184 Constitutional Court, judgment 23 January 2019, no. 20, available at https://www.cortecostituzionale.it

185 Birkinshaw (2014), para. 8.02. See also Craig (1999), p. 95; Jowell and Birkinshaw (1996), p. 282; Hoffmann (1999), p. 114.

186 Which he summarised using the following very effective formula: “The principle of proportionality prohibits the use of a steam hammer to crack a nut if a nutcracker would do it”. See the well-known House of Lords judgment *R.* v *Goldsmith* (1983), Weekly Law Reports, p. 155. This was followed by the equally well-known judgment (also of the House of Lords) *Council of Civil Services Unions v Minister for the Civil Service*, ([1985] AC 374, [1985] ICR 14), often cited as the “*GCHQ* Case”, concerning the relationship between the Wednesbury test and the principle of proportionality.

187 Thus, for example, Lord Hoffmann (1999), defined it as “an analytical error” (p. 109) and dismissed it with the lapidary statement: “I see little future for proportionality in this country as a freestanding principle” (p. 114).

188 J. Millet stated that the principle of proportionality was a new and dangerous doctrine in his commentary on the *Allied Dunbar* judgment in *The Times*. *Allied Dunbar (Frank Weisinger) Ltd.* v *Frank Weisinger*, in *The Times* of 17.11.1987, p. 44. In contrast to this, see Jowell and Lester (1988), p. 61; Craig (1999), p. 85.

189 Available at http://www.legislation.gov.uk/ukpga/1998/42/contents

190 Judgment of the House of Lords of 21.03.2002, *Regina* v *Shayler*, para. 75, available at http://www.publications.parliament.uk

is underlined by the fact that on the basis of an analysis of the case-law following the adoption of the Human Rights Act, it was argued that there has been a genuine transformation of British law; and that “proportionality is now a mandatory tool for judicial review when rights are at stake”.[191]

However, the contrast/confrontation between the Wednesbury reasonableness test and the proportionality test as tools of judicial review is far from over.[192] Indeed, it seems to have been reinvigorated by Brexit, which, at least according to some commentators, is considered as an opportunity to undertake what has been identified as a “decontamination of English law”.[193]

2.3 The principle of proportionality beyond the EU’s borders

The principle of proportionality has more recently extended its influence well beyond the borders of the EU. Exportation of the principle of proportionality across the Atlantic has been facilitated by the circumstance that in applying general principles of law the CJEU has followed patterns developed by the Supreme Courts of continental European countries (starting with the French Conseil d’État) over the course of about a century. The principles thus derived resemble, to some extent, the natural justice principles applied by British courts, mainly by the House of Lords, in the same period and which have obviously been imported from common law jurisdictions overseas.

In fact, there happens to be an intense (and very interesting) debate among overseas scholars (in Australia, Canada and New Zealand[194]), on whether the principle of proportionality should become a general principle, to be applied to judicial review of regulatory and administrative decisions taken by public authorities, which would take the place of the largely unsatisfactory Wednesbury test of reasonableness of British tradition[195] and also “curb judicial intrusion into administrative discretion”.[196]

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[191] See Cohn (2010), p. 622.

[192] See Craig (2010), p. 265.; Hickman (2010), p. 303; King (2010), p. 327; Jowell (2015), p. 41. On the concepts of reasonableness and proportionality, see also, more recently, Alexy (2017), p. 13.

[193] See Bathurst (2017), p. 2, who notes that “Speaking in Sydney last year, Lord Goldsmith, former Attorney General of England and Wales, embraced the Brexit result as an opportunity to set about ‘the decontamination of English law’”.

[194] See in particular the articles published in the special issue of the New Zealand Law Review 2010, no. 2 (2010), p. 229.

[195] See Boughey (2015), p. 59.

[196] See Boughey (2017), p. 597. More generally, for a summary of the debate at international level, see Klatt and Meister (2012), p. 159. See also, most recently, Craig (2021), p. 1, who harshly contests a paper published by Endicott in 2020 where he denies that proportionality could ever be a general ground of judicial review.

3 The CJEU and judicial review of proportionality vis-à-vis legislative and administrative discretion: some conclusive remarks (also in the light of the *Weiss* judgment on the “PSPP saga”)

If one accepts the assumption that the functions of making the laws, administering them and adjudicating upon them are (and need to remain) institutionally separated, then the problem affecting the judicial review of proportionality essentially concerns the boundaries to judicial review vis-à-vis legislative and administrative discretion that it may or may not shift.

In this respect, while the judicial review of proportionality in the context of EU law remains the classical three step test borrowed from German law, it is carried out in such a way as not to overstep the boundaries of judicial review and respect legislative and administrative discretion.[197]

From this perspective, when revising the proportionality of legislative and/or administrative choices made in contexts where there is broad legislative and/or administrative discretion – either because it is about making policy choices or because it is about making complex choices of a technical nature (or possibly both!) – the CJEU will check whether the legislator or administrative authorities have done their preparatory work properly[198] by requiring that they explain why the contested measure was introduced and why it was suitable and necessary to attain the stipulated goals. The CJEU will also take into account the impact on opposing interest(s) and check that the measure adopted was not excessive (proportionality in the strict sense), while being mindful of the discretion inherent in the choice made by the decision-maker[199], which can be questioned only in the event of a “manifest error of appreciation”, especially in contexts where the choices to be made required “complex assessments and evaluations”.[200]

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[197] See further in Widdershoven (2019), p. 39. Craig (2021), p. 15, states as follows: “The fact that the review is low intensity ensures that the separation of powers is not transgressed.”

[198] See Lenaerts (2012), p. 13, who identifies such proportionality review as a “Process-oriented Review”.

[199] See Craig (2021), p. 15.

[200] See, for example, Case C-58/08, *Vodafone*, EU:C:2010:321, para. 68 passim.

This appears clearly, for example, in the CJEU's well-known *Weiss* judgment of December 2018[201] concerning the "PSPP saga".[202] This judgment is a perfect example of what I mean when I refer to the type of judicial review of proportionality characteristic of the EU (which diverges from the German approach[203]).

In Weiss, the CJEU had to answer to a request for a preliminary ruling from the German Federal Constitutional Court concerning Decision (EU) 2015/774 of the European Central Bank.[204] In this specific context the CJEU underlined, first of all, that "the ESCB must be allowed a broad discretion since, when it prepares and implements an open market operations programme, it is required to make choices of a technical nature and to undertake complex forecasts and assessments", so that "the Court is required to ascertain, in its review of the proportionality of the measures entailed by such a programme in relation to monetary policy objectives, whether the ESCB made a *manifest error of assessment* in that regard".[205]

This does not mean that the CJEU did not carry out a proper proportionality review![206] As a matter of fact, the CJEU's proportionality review consisted here precisely in verifying that all three steps of the proportionality test were duly carried out by the ESCB, with the following results:

1) as to the suitability test, the CJEU concluded that "in view of the information before the Court, it does not appear that the ESCB's economic analysis - according to which the PSPP was appropriate, in the monetary and financial conditions of the euro area, for contributing to achieving the

201 Case C-493/17, *Weiss*, EU:C:2018:1000.

202 This expression refers to the judgments related to the series of appeals brought in 2015 and 2016 by numerous German savers as well as practising lawyers and Members of Parliament, including the now famous Member of the Federal Parliament [Bundestag] Peter Gauweiler, before the German Federal Constitutional Court (BVerfG). The appellants asked the BVerfG to declare unlawful the decisions of the ECB establishing and implementing, from 2015 onwards, the Public Sector Purchase Programme (PSPP) for the purchase of government bonds on secondary markets by the European System of Central Banks (ESCB) in order to meet the liquidity needs of euro area economies. The appeals concerned "various decisions of the ECB, the participation of the German Central Bank (Bundesbank) in the implementation of those decisions or its alleged failure to act with regard to those decisions and the alleged failure of the Federal Government and the [Bundestag] to act in respect of that participation and those decisions." See the CJEU's summary in *Weiss*, C-493/17, paras. 13-14.

203 See Galetta (2020), para. 2.

204 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (OJ L 121, 14.5.2015, p. 20).

205 Case C-493/17, *Weiss*, para. 24. The emphasis in italics is mine.

206 As was instead claimed by the German Federal Constitutional Court in a decision (BVerfG, Second Senate of 5 May 2020, 2 BvR 859/15), which I have described as a "clumsy and poorly disguised attempt to lecture the CJEU on what this principle is and how it should be applied". See Galetta and Ziller (2021), p. 85. This decision of the German Federal Constitutional Court is in fact one of the most debated judgments of recent years. See, for example, the papers published in "*Rivista Italiana di Diritto Pubblico Comunitario*", 2020/4, and in "European Public Law", Vol 27/1 (2021), as well as the various contributions published in CERIDAP and available at https://ceridap.eu/?s=weiss&post_type=post

objective of maintaining price stability - is vitiated by a manifest error of assessment”.[207]

2) As to the necessity test (“whether the PSPP does not go manifestly beyond what is necessary to achieve that objective”[208]) the CJEU concluded that “the way that programme is set up also helps to guarantee that its effects are limited to what is necessary to achieve the objective concerned”[209], also because “the PSPP has, from the start, been intended to apply only during the period necessary for attaining the objective sought and is therefore temporary in nature”.[210]

3) As to proportionality in the strict sense, the CJEU underlined that “as the Advocate General has stated in point 148 of his Opinion, the ESCB weighed up the various interests involved so as effectively to prevent disadvantages which are manifestly disproportionate to the PSPP’s objective from arising on implementation of the programme”.[211]

However, verifying that the ESCB had carried out the three step proportionality test properly did not mean that the CJEU substituted its own “I know better”[212] assessments for those of the deciding authority, which (unlike the judge) possessed the specific technical knowledge needed to make the relevant decision! Accordingly, in my opinion, the conclusion reached by the CJEU in the *Weiss* judgment is a sort of perfect synopsis of what (administrative) discretion means in practical terms in cases as complex as the one the PSPP tried to deal with: “the fact that that reasoned analysis is disputed does not, in itself, suffice to establish a manifest error of assessment on the part of the ESCB, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB’s broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy”.[213]

I thus very much agree with those who think that what is really at stake when one deals with the issue of proportionality review is the structure of judicial review itself. The debate about proportionality review, indeed, “touches the very heart of judicial review in terms of the relationship between the courts, the government and the legislature”.[214]

But, as regards the outcomes, I see it rather the other way around. As I see it, the judicial review of proportionality carried out in the CJEU’s own way constitutes a fair judicial review. It makes meaningful review of the use of discretionary powers possible in such a way that, while the principle of

[207] Case C-493/17, *Weiss*, para. 78.
[208] ibid., para. 79.
[209] ibid., para. 82.
[210] ibid., para. 84.
[211] ibid., para. 93.
[212] The peculiar German expression “besser wisserisch“ would perhaps fit best here!
[213] Case C-493/17, para. 91. In the same vein see the very well-known *Gauweiler* judgment of 2015, Case C-62/14, EU:C:2015:400, para. 75.
[214] See Johnston (1996), p. 156.

separation of powers is preserved, the unbearable oscillation of judicial review (from higher intensity to very low intensity), which is typical of reasonableness reviews across the board, is reduced.[215]

To conclude, although the CJEU has certainly been inspired by the German model of judicial review of proportionality, it is equally certain now that, during the last six decades, a form of judicial review of proportionality characteristic of the EU has taken shape in the CJEU's case-law.

As to its specificity, it is rather a point of merit that the CJEU did not give in to the temptation to use the principle of proportionality to overstep its mark and enter territory which, even if not "political" in the strict sense, is characterised by broad legislative and administrative discretion.

In fact, to sum up, the CJEU, when reviewing the proportionality of a decision/act will limit itself to assessing that the choice made was within the range of what could legitimately have been decided, within the margin of assessment reserved for the legislator or public administration, and does not seek to put forward what the judge would have preferred this decision to be.[216] This approach is especially relevant in times of crisis and, more generally, in all contexts where there is uncertainty[217] and unpredictability as to the direction in which matters will develop and where, therefore, finding the appropriate balance is indeed a delicate matter and a moving target[218] for all decision-makers.

So, even if it is certainly true that "across Europe, and no doubt across other jurisdictions beyond Europe, we still have much to learn from one another about the scope, application and value of the principle of proportionality"[219], when we find ourselves within the scope of EU law, we should perhaps stop bothering too much about the origin of the principle of proportionality and start focusing a bit more on its peculiarity and autonomy[220] and on the fact that there are important lessons about proportionality review that all judges should, at this point, learn from the CJEU.

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215 I had already expressed this opinion as to the difference between proportionality review and "controllo di ragionevolezza" in Italian (administrative) law in the conclusions of my 1998 book on the principle of proportionality and judicial review. See Galetta (1998), cit. On this point, see a recent contribution by P. Craig (2021), as to the judicial review of reasonableness by the UK courts.

216 In the same vein Craig (2021), p. 8 underlines that there is no evidence that the judicial review of the proportionality "has caused problems, in the sense of courts interfering too greatly in EU policymaking".

217 This was certainly the case as to the very technical question dealt with in *Weiss*, as economists' opinions on the effects of low interest rates are completely contradictory: see further in Galetta, and Ziller (2021), p. 92.

218 See Zilioli (2019), p. 271.

219 See Young and de Búrca (2017), p. 143.

220 That's why we have harshly criticised the reasoning carried out by the judges of the German "Zweiter Senat" in Weiss, who clearly (and wrongly) referred to their German principle of proportionality in an EU law matter! See Galetta and Ziller, J. (2021), para. 3.3.

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