

The principle of proportionality in EU law

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Proportionality - a basic concept of “fairness” in EU law

- tells us, as legal “rule-makers”, **when** we may act and **how** we may act, so....
- tells those who are being regulated when they may challenge legal rules.

A short history...

1) judicial origins

Emerged in the case law of the Court of Justice nearly 50 years ago, inspired by German administrative law (Case 11/70 *Internationale Handelsgesellschaft*); proportionality as a “general principle”, “inherent in Community law”.

Subsequently more refined:

“As the Court has consistently held (see, in particular, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 19), the principle of proportionality requires that measures taken by the Community institutions should be appropriate to achieve the objective pursued without going beyond what is necessary to that end.” (Case C-359/92 *Germany v Council*).

2) primary law

Maastricht Treaty (1993) introduced a reference to the principle (indirectly) in the EC Treaty: *"Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty"*.

Today:

Art. 5 TEU:

"1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

[...]

4. 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. 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."

Protocol No. 2 on the application of the principles of subsidiarity and proportionality:

"Article 1

Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union."

The principle applies throughout the legal order of the Union, in particular to:

- measures adopted by Member States;
- acts of the Union institutions (legislation, implementing and delegated acts).

Specific references in Union legislation (e.g. Art. 81 of Directive 2001/83).

What does it mean?

- 1) appropriate to achieve a legitimate objective;
- 2) not going beyond what is necessary to achieve that objective.

This is where law and fact become intertwined.
Application in practice can be challenging....

Legal challenge to Directive 2001/37 on Tobacco Products:

*“... the Community legislature must be allowed a **broad discretion** in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue ...”*

Case C-491/01 *British American Tobacco*, para. 123

Similar approach to national measures,
particularly when public health is being relied on
as a legitimate objective:

Case C-446/08 *Solgar Vitamins France*

A balancing act... but evidence rather than
assertions!

Case C-310/04 *Spain v Council*

Crucial legal role of impact assessments for the purposes of assessing compliance with the principle of proportionality:

- may serve to demonstrate that we have taken into account all relevant circumstances and genuinely exercised our discretion (Case C-58/08 *Vodafone*), **BUT**
- they are not binding on the legislator (which must be able to show compliance through other means – Case C-343/09 *Afton Chemical*)

Conclusions

- application of the principle can lead to annulment of national and EU regulations;
- proper understanding of the principle is the best way of avoiding that outcome.



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