



- 
- 
- 

## Related concepts

### Aristotelian equity

Justice in the narrow sense as equal application of a 'fair mean', incorporated into a definite rule v equity as the just result, which cannot be determined in the abstract or in advance  
Modification-rectification of general norms in recognition of a particular case's specific circumstances

### Subsidiarity

#### Better regulation

Simplification  
Better fit: differentiation / calibration  
Impact assessment of policy options  
Cost-benefit analysis  
Cf 'Better Regulation Guidelines', COM(2015)111

#### Individual rights

Both fundamental rights and Treaty freedoms!

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## Proportionality in the caselaw: alternative tests

Canonical tests in ECJ's jurisprudence rest on overlapping criteria of

- suitability (fitting means for achieving legitimate objective),
- necessity (in the sense of lack of a less intrusive alternative), and
- *stricto sensu* proportionality (balancing of aims and disadvantages)

Case 120/78, *Rewe-Zentral (Cassis de Dijon)*

Case C-331/48, *Fedesa*

### Proportionality as the 'rule of reason' in *Cassis*

Emphasis on legitimate objective, factual suitability of the measure and choice of least-restrictive/onerous means (suitability and necessity)

### Proportionality as absence of 'manifest inappropriateness'

Negative-minimalist approach to *stricto sensu* proportionality:  
costs of measure must not be manifestly disproportionate to the benefits  
Judicial deference ; resemblance to *Wednesbury* unreasonableness?

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## Variation depending on decision-makers & areas

### Lack of consistency in the application of proportionality tests

Pro-integration bias: national measures standing in the way of the single market are often deemed to fail the test!

More lenient review of Union measures: manifest inappropriateness test!

Variation depending on the nature of the issue: increasingly strict scrutiny, as we move from discretionary regulatory choices, through measures affecting rights of individuals, to the enforcement of competition rules

Occasional conflation with procedural considerations : procedural safeguards (openness, transparency, stakeholder participation, gathering of evidence) as substitute for proportionality?

### Generally, no recourse to fully-fledged balancing of interests

But see Case C-62/14, *Gauweiler*, para 67:

*“proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives”*

### No attempt to turn proportionality into hard-look judicial review

– much less into a principle of overall economic efficiency!

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## Standard of review or organizing principle?

### Proportionality as a Treaty-enshrined constitutional value

Not merely a judicial standard of review, confined to boundary, *ex post* questions relating to legality and competence

Has a programmatic dimension, not merely a principle for the implementation or review of existing law

Should inform the wider discussion on the merits of the regulatory framework

### Should serve *ex ante* as an organizing principle in the field of banking regulation, as elsewhere

Calibration of norms (scope of application, substantive content) to the regulatory objectives: suitability!

Avoidance of unnecessary burdens (but even at the cost of simplicity & uniformity?)

Balancing of interests: cost-benefit analysis?

Coherence across policy regimes (capital & liquidity framework, reporting and accounting, supervisory review, resolution, securities regulation)

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## Limits & drawbacks of proportionality

Especially if applied *ex post* (as part of the concrete application of general rules to individual cases), proportionality threatens certainty & predictability

### Equal treatment?

Competitive implications and possibility of regulatory arbitrage

### Potential impact on regulatory effectiveness & efficiency

Increased administrative costs

Impediments to streamlined information collection & administration

Potential risks to systemic stability

### Simplicity is frequently conflated with proportionality

– but resorting to simple, flat rules is not always possible or desirable

Simplicity should not go far too far: complex problems, complex industry

Regulatory complexity v differentiation? Complexity and high administrative & compliance costs of 'one-size-fit-all' regulatory regime v more effective supervision and enforcement / calibration of norms in terms of scope & content / targeted attainment of regulatory objectives through differentiation!

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## Proportionality as a function of banking diversity

### Compliance with Single Rulebook: highly complex & costly

European application of Basel standards to all and sundry: disproportionate *per se*?

Cf US approach!

High costs for institutions that do not pose significant risks: unjustified burden

Cost of compliance (as a percentage of revenue, per employee, etc) *inversely proportional* to banks' size; benefits of the regulatory regime, ditto!

### Regulatory significance of banking diversity:

#### bank-level characteristics – as well as overall financial sector structure!

Group size and complexity: large, TBTF banks v small & medium-sized banks

Business model: basic credit provision v trading activities

Range of activities and risk profile: systemic risk / interconnectedness (significance for macroprudential & risk-based microprudential supervision)

Ownership structure

Legal form: corporations v cooperative & savings banks

Potential impact of industrial structure of national banking/financial sector (including concentration, market conditions)

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## Lack of proportionality of the Single Rulebook?

### Disproportionate/unnecessary burdens on smaller banks

- Compliance and reporting costs
- Adverse competitive implications

### Other relevant issues include

- Reporting requirements: required disclosures, granularity, frequency and time limits
- Alignment of supervisory reporting with accounting standards
- Basel III financial requirements (liquidity rules, risk models)
- Proportionality in the migration to / phasing in of new rules
- Corporate governance & decisions affecting individuals:
  - fitness criteria; mandates and remuneration (incentive structure); BoD composition and functioning, structure of BoD committees, control functions (internal governance); training needs
- Proportionality in enforcement: preserve of national law!

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## Proportionality in banking regulation: levels

### Critical impact of regulation in the form of Level 1 legislation

- Paradigmatic case of the Treaty provisions
- Affects all subsequent levels
- Determines the limits of discretion of subsequent decision-makers

### Proportionality through Level 2 or soft law (guidelines, recommendations)?

- Proportionality of RTSs envisaged in CRDIV, rec 92
- But RTSs must remain within the strict mandates of Level 1 rules: RTSs are of technical nature, may not involve substantial policy choices (TFEU, Art 290; EBA Reg, Art 10)

### Discretionary adaptations of the regulatory framework

- O&Ds for national legislators and NCAs

### Supervision

- Proportionality in Pillar II / SREP (CRDIV, Art 97(4))

### Enforcement / imposition of penalties

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## Initiatives towards greater proportionality

### Debates on regulatory proportionality, simplification and diversification

Industry-based (cooperatives, small banks) and academic concerns and proposals  
 EBA Banking Stakeholder Group report (Oct 2015)  
 Special EBA workshops (Jul 2015, Apr 2016)  
 Commission's Call for Evidence , followed by review of the existing normative framework

### Impact on Banking Reform package of 23 Nov 2016 and the EBA's work

Specific examples of application of proportionality analysis in the context of the review of existing norms:

- CRDIV remuneration provisions
- Supervisory reporting

### Still, the debates remain fussy

Proportionality as a free for all; little progress in practice  
 Absence of structure: lack of clear general criteria, mapping of the technical alternatives and a convergence on priorities

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## How to achieve proportionality?

### Differentiation / simplified approach for which banks?

Criterion: risk-based approach to regulation and supervision and materiality – or simply size?  
 Differentiation between national markets or cross-European differentiation of classes of institutions?

### How should proportionality be factored into the Single Rulebook?

Addressing proportionality at Level 1 (including in the context of CRR review):  
 simplification and/or differentiation of the basic norms

#### Adoption of a Small Banking Box?

Coordination of standard-setting and avoidance of divergent, overlapping or conflicting requirements (e.g., financial requirements in CRR, MREL and TLAC)

Improved standard-setting and proportionality as benchmark for EBA: how effective?

Procedural tools (open consultation, evidence, etc) as means for promoting proportionality?

Tension between simplification and differentiation?

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## Single Rulebook & built-in proportionality

### Differentiated reporting requirements?

Extent/detail of reporting, periodicity, time limits for submission

Countervailing consideration: uniformity necessary for the collection of comprehensive statistical information

### Proportionality of regulatory norms *v* proportionality in compliance & supervisory discretion

Calibration of norms & rule-bound determination of their scope of application, or case-by-case waivers/derogations?

Increased reliance on O&Ds & supervisory waivers? Or centrally defined thresholds & exemptions?

Applying thresholds: open-textured (evaluative) or prescribed (quantitative)?

### Differentiation of the steady-state requirements *v* differentiation of transitional/phase-in arrangements & time-frames

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## O&Ds & the SSM

### CRR: key component of Single Rulebook, directly applicable

Minimization of undue variability of regulatory norms

Greater cross-border transparency, competitive equality

### However, the CRDIV/CRR package contains large number of national ODs

Preservation of some national autonomy

Opportunity for achieving proportionality / better local fit?

Or unwarranted political bargain, diluting the uniformity of the single market?

O&Ds allocated variably to Member States as such and/or to their NCAs

### In the BU, O&Ds preserved for the NCAs are exercised, in relation to significant institutions, uniformly by the ECB, stepping into their shoes

ECB Reg (EU) 2016/445

Legal debate on the allocation of competences in Single Rulebook & SRM Reg

Ambiguous justification for allocating discretionary powers along such lines

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## ‘Banking Reform’ package

### Background

Review of existing norms based on

- 2015 public consultation on impact of CRD IV/CRR banking prudential regime on the financing of the EU economy
- ‘Call for Evidence’ on all post-crisis legislation on financial services
- Specific Commission analysis on CRD IV rules on remuneration

Need to implement FSB’s TLAC standard in EU

### 23 Nov 2016: launch of the Banking Reform package

*“Today, we have put forward new risk reduction proposals that build on the agreed global standards while taking into account the specificities of the European banking sector”*

– Commission Vice-President Valdis Dombrovskis

### Five legislative proposals

Amendment of CRD IV/CRR prudential regime of 2013

Amendment of BRRD & SRM Reg resolution regime of 2014

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## Key prudential proposals

### Completion of the Basel III prudential regime

Binding 3% leverage ratio (LR)

Binding detailed net stable funding ratio (NSFR)

More risk-sensitive capital requirements for securities & derivatives trading

No proposed amendments relating to then ongoing discussion in the BCBS (credit and operational risk, including introduction of ‘output floor’)

### Facilitation of lending to SMEs and for infrastructure projects

– but at the cost of significant divergence from Basel standards

### Making supervisory requirements more proportionate & easing burden for smaller and non-complex banks

Differentiated TLAC/MREL implementation (Pillar I MREL only for G-SIIs)

More proportional rules on supervisory reporting

CRR disclosure requirements

Amendment of the remuneration rules

Phasing-in of IFRS9

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## Proportionality in supervisory practices & EBA standards

### Supervisory reporting requirements

Key issues: simplified reporting / lower frequency of reports for small or non-complex banks  
Already, de facto wide differentiation of reporting requirements, depending on size/complexity (including reliance on models)  
Further differentiation through exemptions and additional demands for reports  
Development of tool to monitor reporting obligations

### Proportionality in Pillar 2 and Pillar 3

SREP, stress testing: differentiation based on institutions' classification in four categories  
Disclosures: differentiation based on materiality criteria as well as O-SiIs identification, plus national discretion (EBA Guidelines 2014/14 on materiality, 2016/11 v2 on disclosure requirements)  
Alignment of supervisory reporting requirements and disclosures, including through use of EBA as information hub?

### Eligibility for simplified resolution planning obligations under BRRD

Draft RTS EBA/RTS/2017/11 on simplified obligations (19 Dec 2017)  
Potential alignment with prudential supervisory approach

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

## Proportionality of the division of supervisory tasks!

### Distribution of responsibilities between the ECB & the NCAs

SSMR and Framework Regulation

Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, 16 May 2017

*“The logic of the relationship between [the ECB and the NCAs] consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences . . .*

*Direct prudential supervision by the national authorities under the SSM was envisaged . . . as a mechanism of assistance to the ECB rather than the exercise of autonomous competence . . .*

*The ECB retains important prerogatives even when the national authorities perform the supervisory tasks . . . The existence of such prerogatives is indicative of the subordinate nature of the intervention by the national authorities in the performance of those tasks.”*

### Proportionality and subsidiarity: cannot determine the performance by the ECB of its supervisory tasks and the exercise of its powers

Proportionality: addressed in the context of the SSM's division of supervisory responsibilities, reflected in the overall institutional balance

Subsidiarity: inapplicable within the SSM, since this involves exclusive competencies of the ECB, which are performed in a decentralized manner

- 
- 
- 
- 
- 
- 
- 
-

- 
- 
- 

## Proportionality & the resolution regime

### Proportionality largely embedded in the BRRD regime

Resolution authorities & NCAs must take into consideration bank-level & systemic-risk factors (BRRD, Art 1(1))

### Recovery & resolution planning

Particularly suitable for proportionality-based approach

Possibility of simplified obligations for certain institutions (BRRD, Art 4)

### Implications for resolution tools

Alignment of capital regime & MREL/TLAC (Banking Reform package)

Proportionality in application of bail-in, esp. with regard to scope & exclusions (BRRD, Art 44(3))

### Disproportionate restrictions on public assistance?

BRRD restrictions on precautionary recapitalizations: excessively restrictive?

*Cf* debate on Italian banks

Commission's state-aid conditionality approach potentially too inflexible

- 
- 
- 
- 
- 
- 
- 
- 

- 
- 
- 

**Thank you for your attention**

### **CHRISTOS HADJEMMANUIL**

Professor of Monetary and Financial Institutions, University of Piraeus

Visiting Professor of Law, London School of Economics

Advisor to the Governor, Bank of Greece

Attorney at law, ABLaw, Athens

e-mail: [c.hadjjemmanuil@ablaw.gr](mailto:c.hadjjemmanuil@ablaw.gr)

tel: +30 6936 161770

- 
- 
- 
- 
- 
- 
- 
-