



Proportionate reflections

*Unconventional considerations
on an established principle*

Conference *The Principle of
Proportionality & Its Applicability in
EU Banking Regulation,*

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Disclosure and disclaimer

- Alternate Member of the Administrative Board of Review (ABoR), [European Central Bank \(ECB\)](#); Professor of EMU law, [University of Amsterdam](#); Independent Consultant: EMU law, banking regulation, [RS Law & Society Consulting B.V.](#); Assessor, [Belgian Competition Authority](#).
- Nothing that I may say, or omit to say, may be attributed to the ECB, the Single Supervisory Mechanism (SSM), or ABoR, nor may it be considered to have been said, or omitted, with insider knowledge of current developments, which I do not have. I am subject to professional secrecy obligations.

Outline

Proportionality:

1. Monetary policy and economic governance
2. Legal concept
3. Proportionality in favour of banks?
4. Proportionality in the years ahead

Proportionality in primary law

- ❑ Use of EU competences “is governed by the principles of subsidiarity and proportionality” (Article 5(1) TEU)
- ❑ “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties” (Article 5(4) TEU)
- ❑ Protocol No. 2 requires “each institution” to “ensure constant respect for the principles of subsidiarity and proportionality”
- ❑ Burdens imposed on public and private parties, such as economic operators and citizens, should “be minimised and commensurate with the objective to be achieved”.

Deferential review: large margin of discretion

Paragraph 157 of the ECJ's *OLAF* judgment of 10 July 2003 in Case C-11/00 (Commission vs. ECB):

“the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, so that 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”

Economic policy conditionality & monetary policy

- Economic policy conditions attaching to the financing arrangements for Greece, Portugal, Ireland and Cyprus indirectly also affected the monetary policy instruments which the ECB employed to counter the crisis and to stimulate the economy of the Euro Area.
- Even if the precise economic policy measures would be disproportionate or contrary to other provisions of EU, or wider, law, I consider the ECB's competence to refer to these policy conditions unchallengeable.
- I do not question the ECB's exercise of its powers in the recent (and current) crisis situations. It is the legality of economic policy conditions themselves I would like to assess.

Link with economic adjustment programs

- ECB's insistence on an adjustment programme as a condition for the continued (or restored) eligibility of the debt instruments of 'programme States' for monetary policy purposes, is legally valid.
- QE (notably *Public Sector Purchasing Programme*) also hinges on compliance with conditionality: debt instruments issued or guaranteed by States under a financial assistance programme are only eligible if the minimum eligibility criteria have been suspended in respect of these States under ECB Guideline ECB/2014/31
- Lawful on considerations as creditor of strength of its balance sheet
- ELA and economic adjustment programmes

Proportionate economic policies?

1. The inadequate EMU set-up has had disproportional effects on well-being of the people of the States most affected by the crisis: this structural defect in EMU's architecture should be remedied
2. The practical application of conditionality may be disproportional
3. A proportional policy stance requires debt relief

Explaining unconventional considerations

Ad 1: federal fiscal stimulus lacking // State-by-State approach to banks

Ad 2: ‘decisions are taken as closely as possible to the citizens of the Union’

Not questioning validity of budgetary norms

Question is whether, legally and from a humane perspective, it is proportional that small increases in pension payments should be denied to citizens of the debtor nation by its creditors, in view of level of pensions

Review dependent on qualification of the MoU/EU legal acts and procedures

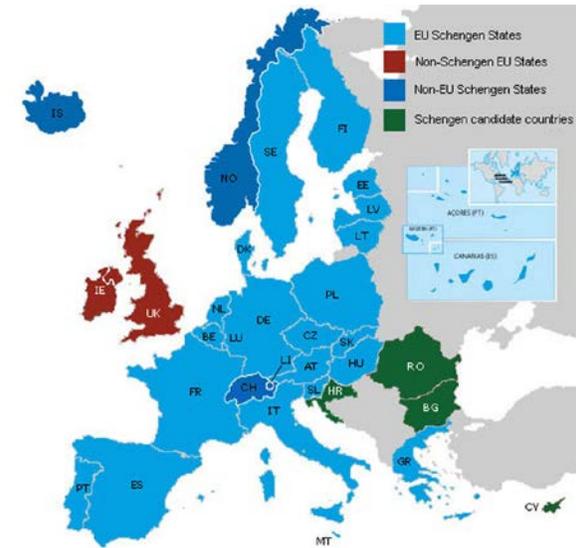
Ad 3: taking no stance on particulars, recognizing debt relief passed, yet:
proportionality requires debt sustainability

Proportionality as a legal concept

1. Whether a measure is suitable (appropriate) to attain the stated objective
2. Whether the measure is necessary for that objective to be reached (this test seeks to establish whether other, less restrictive or intrusive options can be used)
3. Whether the measure's effects are not disproportionate to the objectives pursued (proportionality *stricto sensu*).

Gauweiler Case C-62/14: scrutiny in spite of deference to ECB's "broad discretion" in making "choices of a technical nature" and "undertak[ing] forecasts and complex assessments"

Proportionality at play: Schengen



Proportionality in a completely different area of EU law (Schengen):

Requirement for Member States that temporarily deviate from the rules of the Schengen Area to look for less far-going alternatives that may achieve the same end and to limit border controls to what is necessary

Council Recommendation in last Saturday's Official Journal

Council Implementing Decision (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 36/59, 11 February 2017

Proportionality in favour of banks?

- Single Rulebook (CRR, CRD IV, BRRD, FICOD, SSM & SRM Regulations) mandates proportionality in respect of the “diversity in scale and operations”, “the nature, scale and complexity of [banking risks]” and to protect small institutions from overbearing regulation
- EBA’s Bank Stakeholder Group: ‘materiality’
- Commission’s Better Regulation Guidelines

PROPORTIONALITY IN BANK REGULATION

A Report by the EBA Banking Stakeholder Group

Proportionality: a holistic approach

- ❑ Proportionality: considerations of size and business model
- ❑ Other considerations
 - Role of the banks in providing lending to the real economy
 - Stability of the financial system (Member States, Euro Area, EU)
 - Conditions of competition (the level playing field which demands that regulatory burdens do not squeeze out profitable and sustainable business)
- ❑ Proportionality should work beyond benefitting individual companies: wider stakeholders, including a bank's clients, the economy at large, society and its surroundings: **sustainable** banking
- ❑ Should pressures from less regulated, innovative business that encroaches on traditional banking business be taken into account?

Proportionality in the years ahead

- ❑ Proportionality in context: EMU; holistic approach
- ❑ Banking regulation itself may be at issue (Trump; Brexit)
- ❑ P.R.I.M.E. Finance Conference: a return to principles-based regulation? // Patrick McHenry's letter to Fed Chair Janet Yellen
- ❑ Proper, contextual application of the principle by regulators and supervisors alike is called for. But our attention may be more pressingly needed in another direction: the defence of supervision

