

Which Proportionality?

Judicial review of proportionality in a changing Banking Union

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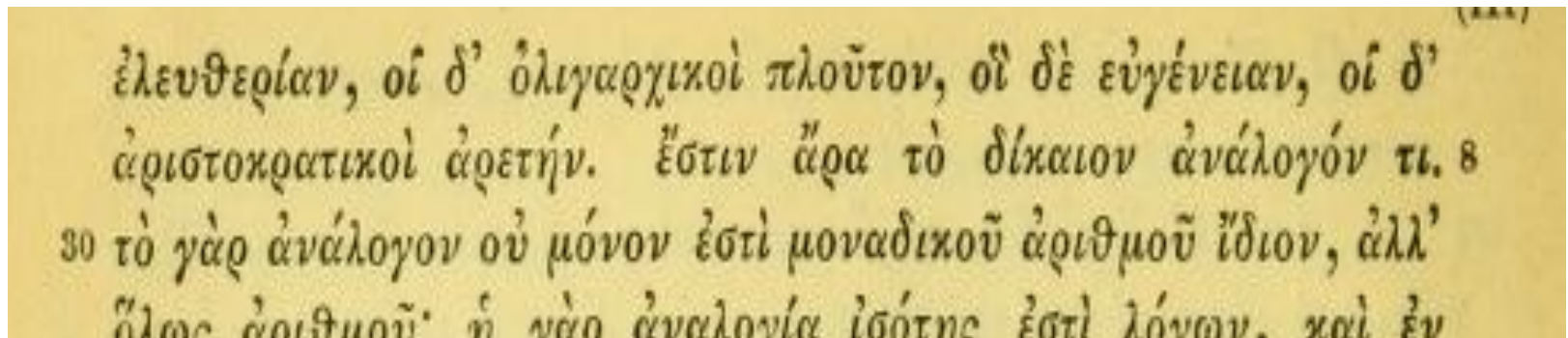
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Proportionality and justice

Ethica Nicomachea, V.iii.8:



Art. 5(4) TEU:

"Σύμφωνα με την αρχή της αναλογικότητας, το περιεχόμενο και η μορφή της δράσης της Ένωσης δεν υπερβαίνουν τα απαιτούμενα για την επίτευξη των στόχων των Συνθηκών."

Principle of proportionality

Ethica Nicomachea, V.iii.8: "Justice is a kind of proportion(ality)"

Article 5(4) TEU: "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."

Ms. D. Nouy: Proportionality is a "core principle in Union law (...) [that] applies to all Union acts as well as the institutions of the EU" (Letter to Mr. S. Giegold of 2/10/2015)

Where will it be tested?

A. Significant Institutions

1. ECB/SRB decision → [Board of Review/Appeal Panel→] ECJ
2. ECB/SRB decision → implementation by NCA/NRA → national judiciary? Board of Review/Appeal Panel? → ECJ

B. Less Significant Institutions

1. NCA/NRA decision → national judiciary → ECJ; or
2. ECB/SRB decision → see above.

→ High complexity

→ Margin of discretion is decisive

Which proportionality?

Proportionality applied by:

1. **Regulator:** policy choices → focus: appropriateness and necessity
 2. **Supervisory/resolution authority:** individual decisions → focus: cost-benefit analysis
- EBA TSs?

(Semi) regulation: *"Draft regulatory technical standards would be subject to amendment if they (...) did not respect the principle of proportionality (...)."*
Recital (23) EBA Reg.

Supervision/resolution: *"When the competent authority requires an institution to take measures (...) its decision on the measures shall be reasoned and proportionate."* Article 6(7) BRRD

→ focus is different (yet both based on Article 5(4) TEU)

Resolvability review - context

Principle: more discretion → less scrutiny

rationale: 1) legitimacy; and 2) expertise

- Policy choices more discretion than individual decisions
- Decisions of technical nature and complex assessment → more discretion → less scrutiny
- Restriction of discretion → closer scrutiny

Resolution: *"Crisis management measures taken by national resolution authorities may require complex economic assessments and a large margin of discretion."* Recital (89) BRRD

Monetary policy: *"(...) since the ESCB is required, (...) to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion."* ECJ, Gauweiler Case, 68.

Review – procedure

Procedural guarantee

- a) reasoning publicly known? (A-G in Gauweiler)

- b) is decision adequately reasoned?
 - all relevant elements taken into account?
 - Sometimes codified. Example: BRRD Annex, Section C - 28 elements to be taken into account in resolvability decision
 - if not codified: no requirement *"to go into every relevant point of fact and law"* (Gauweiler)
 - *"manifest error of assessment"*? (Gauweiler)

Review – substance (i)

1. Suitability or appropriateness test

- *"causal connection between means and objectives"* (A-G in Gauweiler), i.e. does the decision fit the purpose(s) of the instrument in question? Or is it manifestly inappropriate?

2. Necessity test

- no less intrusive measures available? Decision *"manifestly beyond what is necessary to achieve objectives"*? (Gauweiler)

3. Proportionality *stricto sensu*

- cost – benefit analysis, i.e. is the decision manifestly disproportionate?

Review – substance (ii)

1. Objectives broad → pass the test
 - Example: safeguarding critical functions and prevent the use of tax payer money (cf. Recital (1) and (5) BRRD)
 2. Assessment of other options → complex economic assessment → low scrutiny
 3. Cost– benefit analysis → complex economic assessment → low scrutiny
- But: more detailed regulation (Reform Package) → closer scrutiny (legitimacy rationale is absent)

Different views

- What about expertise rationale?

→ different views:

"However, when conducting such a review, the European Union judicature must not substitute its own economic assessment for that of the Commission. The review (...) is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers" (ECJ in ING State Aid)

"the court (...) independently determines the amount of damages, and can ground that decision on all facts and circumstances proven in the proceedings as well as on testimony it has ordered to be given [rather than merely assess the Government's proposal for damages]" (Dutch Supreme Court re. damages SNS REAAL nationalisation)

Conclusions

- Where to be tested?
→ Judicial framework should be clarified
- Which proportionality (framework)?
→ Proportionality is more than cost-benefit analysis
- How to be tested?
→ The more proportionality is codified, the closer scrutiny

A kind of justice!

