

The application of the principle of proportionality in the context of Institutional and Regulatory Reforms

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Principle of proportionality

General principle of EU law

- “the Union must always observe the principle of proportionality when exercising its competences deriving from the principle of conferral (Article 5(4) TEU)”: Case C-62/14 *Gauweiler* (OMT), A-G Villalón Opinion [161]
- “the principle of 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”: *Gauweiler*, CJEU [67]

PoP requires that measures:

- do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question
- when there is a choice between several appropriate measures, recourse must be had to the least onerous, and
- The disadvantages caused must not be disproportionate to the aims pursued

In short (*Gauweiler*):

- (i) **Suitability** (objectively, an appropriate measure to achieve the aim)
- (ii) **Necessity** (not excessive compared with other options)
- (iii) **Proportionality *stricto sensu*** (a weighing up measure)

Proportionality and better regulation (1)

Better regulation operationalizes PoP in regulatory decision-making

- "Better Regulation" means designing EU policies and laws so that they achieve their objectives at minimum cost. Better Regulation is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of **subsidiarity** and **proportionality** (COM(2015)111)

Better regulation process itself must be proportionate

- Proportionate IA (ie IA only for initiatives that are likely to have significant economic, environmental or social impacts)

Proportionality and better regulation (2)

IA of policy options (COM(2015)111)

- Whether the option goes beyond what is necessary to achieve the objectives satisfactorily?
- Whether the scope of the option is limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?
- Whether costs for the Union, national governments, regional or local authorities, economic operators or citizens, are minimised in relation to the objective to be achieved?
- Whether the form of action (choice of instrument) is as **simple as possible**, and coherent with satisfactory achievement of the objective and effective enforcement?

Proportionality and cost benefit analysis

Cost benefit analysis

- CBA: specific decision-making tool; narrower than PoP (more than just “strict” proportionality – balancing of competing principles)
- CBA as a particular expression of the PoP in certain situations
 - this third stage calls for a weighing-up exercise which, **in the circumstances of the case**, requires an analysis of whether the ‘benefits’ of the measure at issue outweigh the ‘costs’ (Gauweiler, A-G Opinion [186])
 - ECB exceptional intervention to restore monetary policy instruments v. ECB exposed to financial risk and moral hazard
 - ECB broad margin of assessment (Gauweiler, CJEU [68])

Proportionality and complexity

Complexity

- “The body of EU law is not only necessary, it is our great strength - it makes the EU qualitatively different from any other model of collective governance in the world. That is why it is so important that every single measure in the EU's rulebook is fit for purpose, modern, effective, **proportionate**, operational and **as simple as possible**. Legislation should do what it is intended to do, it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden” ((COM(2015)111)
- Calibration ↗ Proportionality ↘ Simplicity
- Challenge: “simple” rules but not “one size fits all” blunt injunctions

Proportionality and simplicity: reasons why the single rulebook can't be “simple”

Intra-group waivers/derogations

- CRR Arts 7-9 : consolidated/solo capital and liquidity requirements
- CRR Art 113(6) & 400(2)(c): treatment of intra-group large exposures

Options

- CRR Art 107: standardised or IRB approach to credit risk
- CRR Art 355: choice of method for commodities risk (incl. simplified approach)

Exemptions

- CRR Art 400: large exposures limits exemptions
- CRR Arts 48-49 & 470-471: exemptions from deductions from CET1

Thresholds

- Open-textured: “material”
- Prescribed: quantitative boundaries

Proportionality and the calibrated application of the rulebook (1)

CRD: numerous examples

- The provisions of this Directive on remuneration should reflect differences between different types of institutions in a proportionate manner, taking into account their size, internal organisation and the nature, scope and complexity of their activities. **In particular it would not be proportionate to require certain types of investment firms to comply with all of those principles** (rec 66)
- RTS developed by EC and EBA should ensure that those standards can be applied by all institutions concerned in a manner that is proportionate to the nature, scale and complexity of those institutions and their activities (rec 92)
- SREP: Competent authorities to establish the frequency and intensity of the review and evaluation having regard to the size, systemic importance, nature, scale and complexity of the activities of the institution concerned and taking into account the principle of proportionality (Art 97(4))

Proportionality and the calibrated application of the rulebook (2)

Simplified requirements as an instance of proportionality: requirements proportionate to nature, scale and complexity of risks in the business

BRRD Art 4

- Simplified obligations re recovery and resolution plans of institutions
- Impact of institution failure:
 - Nature of business, shareholding structure, legal form, risk profile, size, legal status, interconnectedness, business scope and complexity, membership of IPS/mutual solidarity scheme , and exercise of investment services or activities
- Impact of failure and winding up under normal insolvency proceedings: significant negative effect on:
 - Financial markets, other institutions, funding conditions, or wider economy

BRRD Art 1(1)

- RAs and CAs generally to take account of nature of business etc in applying directive and using tools

Does proportionality permit neutralisation?

Level 1: PoP applies to legislative institutions

- Waivers, exemptions, thresholds etc in Level 1 texts as instances of application of PoP

Level 2

- PoP applies to EC and EBA
- But can only act within scope of mandates in Level 1 text → case by case consideration

MSs/NCAs/Firms

- Compliance with EU law
- Scope of discretion depends, ultimately, on Level 1 text → case by case consideration

Waivers require legal basis

“Cascade” effects of disproportionality at Level 1

Disputed cases

Recovery and resolution planning

- CRDIV, Art 74: proportionality interpreted as permitting complete exemption
- BRRD, Art 4: simplified obligations but not complete exemption; Art 4(8): waiver exhaustive
Literal reading, but ...

Remuneration

- CRDIII & CEBS guidance: neutralization of some requirements (among institutions and/or among categories of staff)
- CRDIV, Arts 92-94: EC and EBA
 - The provisions of this Directive on remuneration should reflect differences between different types of institutions in a proportionate manner, taking into account their size, internal organisation and the nature, scope and complexity of their activities. In particular it would **not** be **proportionate to require certain types of investment firms to comply with all of those principles** (CRDIV, rec 66)
 - Application at group, parent and subsidiary levels but **in a manner and to the extent that** is proportionate to size and internal organization and to nature, scale and complexity of activities (CRDIV, Art 92(2))

Literal reading – implications for smaller and non-complex institutions

Correcting Level 1 disproportionality

“Fast track” amendments to Level 1 measure: must respect constitutional and institutional limits on delegation/conferral of power: TFEU 290/291

TFEU, Article 290

- A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or **amend certain non-essential elements** of the legislative act.
- The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power
- EX: CRR, Art 456(1)(j) (leverage ratio – DA to correct shortcomings)

Note EBA Regulation, Art 10

- RTS shall be technical, shall not imply strategic decisions or policy choices

Delegation to EC in interests of efficiency

- Material limits
- Temporal limits
- Procedure for adoption of DA: Council/EP objections, right of revocation; urgency procedure

Proportionality, institutional balance and single rulebook

Principle of proportionality

- Wide margin of appreciation

Conferral/delegation of power

- Delineation of margin of discretion

Comprehensive single rulebook

- Supervisory judgment

How to square the circle?