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De Criminali Proportione: On Proportionality Standing Between National Criminal Laws and the E.U. Fundamental Freedoms

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TABLE OF CONTENTS: 1. Introduction; 2. The principle of proportionality and free movement of persons; 3. The principle of proportionality and free movement of goods; 4. The principle of proportionality and free movement of services; 5. The principle of proportionality and free movement of capitals; 6. Conclusion.

ABSTRACT: Over time, the European Court of Justice has had to clarify whether and under what circumstances national laws may put one of the four fundamental freedoms of the internal market aside in cases concerning clashes between national regulations and said freedoms. The answers provided by the E.C.J. have always focused on the centrality of the principle of proportionality, expressing the idea that a balance between conflicting interests and means to protect those interests must be reached. An a priori protection of the fundamental freedoms has been refused in favor of a more concrete kind of approach. This article deals with this topic, assessing the relationship between proportionality and free movement of persons, goods, and services. Also, it is checked whether, thanks to the principle of proportionality, the E.C.J. may achieve the role of a European Constitutional Court that can protect the E.U. interests without putting national interests aside.

KEYWORDS: *Principle of Proportionality; European Court of Justice; Free Movement of Persons; Free Movement of Goods; Free Movement of Services*

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1. INTRODUCTION

It is a notable aspect of the European Union ("EU") legal framework that the general principle of proportionality regulates the exercise of powers by the Union. Although it has been developed by the European Court of Justice (hereinafter E.C.J.)[1] in order to limit the institutions' discretion, it has also been applied to national legislation, as far as the interference of national regulations on obligations under E.U. law has been concerned.[2]

From a general point of view and in light of what the Lisbon Treaty provides with regard to said principle, one must consider art. 5(4) of the Treaty on the European Union (hereinafter T.E.U.):

> 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 principle of subsidiarity and proportionality.[3]

Protocol No. 2 requires draft legislation to be justified with regard to the principles of subsidiarity and proportionality, adding that any draft legislative

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[1] It is thank to the ECJ if that principle has progressively been constitutionalised and normativised. *See* Case 138/79, SA Roquette Frères v Council, 1980 E.C.R. 03333; Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, 1979 E.C.R. 03727; Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 01125; Case 19/61, Mannesmann AG v High Authority, 1962 English special edition 00357 and Case 8-55, Fédération Charbonnière de Belgique v High Authority, 1956 English special edition 1954-56 00245.

[2] *See* Harbo Tor Inge, *The Function of the Proportionality Principle in EU Law*, 16 EUROPEAN L. J. 158, 158-185 (2010); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW (Oxford EU Law Library, 3rd ed. 2018); ENZO CANNIZZARO, IL PRINCIPIO DELLA PROPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE [THE PRINCIPLE IN INTERNATIONAL LAW] (2000); THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed., 1999); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW, A COMPARATIVE STUDY (1996). On the principle of proportionality in the case law of the European Court of Human Rights, see SÉBASTIEN VAN DROOGHENBROECK, LA PROPORTIONNALITE DANS LE DROIT DE LA CONVENTION EUROPÉENE DES DROITS DE L'HOMME [THE PROPORTIONALITY IN THE EUROPEAN CONVENTION OF HUMAN RIGHTS] (2001).

[3] *See* Consolidated version of the Treaty on the Functioning of the European Union [hereinafter TFEU] Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, art 5, Dec. 17, 2007, 2008 O.J. (C 115) 206.

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act shall contain a detailed statement making it possible to appraise compliance with said principles. Furthermore, pursuant to art. 52(1), second line of the Charter of Fundamental Rights of the European Union (hereinafter the Charter), subject to the principle of proportionality, limitations on the rights and freedoms recognized by the Charter may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of other.[4]

Over time, issues concerning proportionality of criminal offenses have been brought to the E.C.J.'s attention. As a matter of fact, the Court has been asked whether and under what circumstances national laws may put one of the four fundamental freedoms of the internal market aside in cases concerning clashes between national regulations and said freedoms. The answers provided by the E.C.J. have constantly underlined the centrality of the principle of proportionality. Additionally, it is not by chance that a specific declination of that principle regarding criminal offenses and penalties may be now found under art. 49(3) of the European Charter of Fundamental Rights, under which "the severity of penalties must not be disproportionate to the criminal offense".[5] In fact, the Court has always looked for a balance between conflicting interests and means to protect those interests.

[4] On art. 52 of the Charter see Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L. REV. 375 (2012). On the EU Charter of Fundamental Rights in general, see THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: FIVE YEARS OLD AND GROWING (Sybe de Vries, Ulf Bernitz & Stephen Weatherill eds., 2015); MAKING THE CHARTER OF FUNDAMENTAL RIGHTS A LIVING INSTRUMENTS (Giuseppe Palmisano ed., 2014); THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Wards eds., 2014).

[5] *See* For what concerns administrative sanctions, Council Regulation (EC, Euratom) 2988/95, of 18 December 1995 on the protection of the European Communities financial interests, 1995, O.J. (L-312) 1. Pursuant to art. 2(1) and (3), administrative sanctions shall be «proportionate» and «Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility».

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So, this search for a balance is the topic this article tackles[6] in order to assess the relationship between proportionality and free movement of persons (Pt. II), goods (Pt. III), and services (Pt. IV).[7] Furthermore, it is checked whether the principle of proportionality may make it possible for the E.C.J. to achieve the role of a European Constitutional Court that can protect the E.U. interests without putting national interests aside.

2. THE PRINCIPLE OF PROPORTIONALITY AND FREE MOVEMENT OF PERSONS

In contemplating the free movement of persons, one may consider some questions referred to the Court for a preliminary ruling by the Pretura di Milano regarding regulations concerning the presence of foreigners in Italy.[8] The questions concerned the regulations' consistency with the free movement of persons and freedom of establishment.

Focusing on proportionality, Advocate General (hereinafter A.G.) Trabucchi noted that this general principle obligates both national and supranational authorities to achieve a balance. Public authorities can only subject foreigners to greater intrusion into their private lives than that national citizens are subjected to only in the presence of an objective

[6] *See also* Ermioni Xanthopoulou, *The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment*, 6 NEW J. EUR. CRIM. L. 32 (2015); Tomasz Ostropolski, *The Principle of Proportionality under the European Arrest Warrant – with an Excursus on Poland*, 5 NEW J. EUR. CRIM. L. 167 (2014); ESTER HERLIN-KARNELL, THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW (2012); Martin Böse, *The Principle of Proportionality and the Protection of Legal Interest*, 1 EU. CRIM. L. REV. 35 (2011); and Anna Maria Maugeri, *Il principio di proporzione nelle scelte punitive del legislatore europeo: l'alternativa delle sanzioni amministrative* [*The Proportionality Principle in the Punitive Choices of the European Legislator: the Administrative Sanctions Alternative*], *in* L'EVOLUZIONE DEL DIRITTO PENALE NEI SETTORI D'INTERESSE EUROPEO ALLA LUCE DEL TRATTATO DI LISBONA [*The Evolution of Criminal Law in the Sectors of European Interest in the light of the Lisbon Treaty*] 67 (Giovanni Grasso & Rosario Sicurella eds., 2011).

[7] *See* Joined cases C-358/93 and C-416/93, Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre, 1995 E.C.R. I-00361 (I could not find precedents concerning the compatibility of national criminal measures with free movement of capitals. For what concerns administrative regulations).

[8] At that time, pursuant to R.D. n. 773/1931, art. 142 (It.), a foreign national had to report to the public security authority their entry into the national territory within three days. In case of failure, the penalty provided for was a maximum of three month's detention or a maximum fine of 80.000 Lit. Pursuant to D.Lgs. n. 50/1948, art. 2 , Italian nationals were to report the presence of foreign nationals to whom they provided board and lodging within 24 hours. In case of failure, the penalty was detention for up to six months (to which a fine up to 240.000 Lit. could be added). Afterwards, those provisions were repealed.

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justification. They must also take into account the relationship between the obligations imposed to them and the pursued legal purpose.[9]

According to the E.C.J., free movement of persons does not exclude the right of Member States to adopt measures whose purpose is to get information about the presence of foreigners. The Treaty prevents deportation in the event that this information is not provided. However, other penalties – such as fines and detention – may be legitimate, provided that they are not so disproportionate to the gravity of the infringement that they become an obstacle to the free movement of persons.[10]

In Calfa, an Italian national had been caught in possession of drugs while in Greece, sentenced to three months' imprisonment, and her permanent exclusion from Greek territory was ordered. Two questions were referred to the E.C.J.: One concerned the consistency of permanent exclusion with Community law, since this measure could not apply to Greek citizens;[11] the other question dealt with the consistency of said measure with the principle of proportionality.

A.G. La Pergola highlighted that the question related to the dame issue since proportionality is one of the criteria that must be taken into account when assessing the consistency of national provisions with supranational rules. From his point of view, as far as the protection of fundamental interests of the society against a genuine and sufficiently serious threat is concerned, national authorities should adopt measures that are effectively designed to combat those conducts, despite the fact that national legislation does not always provide for the same measures. However, regarding the actual case, he came to the conclusion that Greek legislation had introduced a form of discrimination because, when convicted of the same offense, nationals had the

[9] Opinion of AG Trabucchi in *Watson and Belmann*.

[10] Case 118-75,Lynne Watson and Alessandro Belmann, 1976 E.C.R. 01185. A similar reasoning, concerning German regulations sanctioning foreigners living in Germany without passport or residence permit, may be found in Sagulo and others, Case 8/77, Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche, 1977 E.C.R 01495.

[11] Greek nationals cannot be subject to an expulsion order, but may be ordered not to reside in certain parts of the territory in some cases, especially those concerning drug dealing (the prohibition is discretionary and may not exceed five years).

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main penalty applied, while foreigners were subject to that and an additional penalty, the expulsion. So, this measure was contrary to Community law.[12]

The E.C.J. agreed and added something with regard to expulsion:

> In this respect, it must be accepted that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, in order to maintain public order. However, as the Court has repeatedly stated, the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively. [...] Previous criminal convictions cannot in themselves constitute grounds for the taking of such measures. It follows that the existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy [...]. It follows that an expulsion order could be made against a Community national such as Ms Calfa only if, besides her having committed an offence under drugs laws, her personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[13]

Thus, there was a disproportionate legal reaction in Calfa that involved the use of an unjustified differentiation in the applicable sanctions depending on the citizenship of the offender, without taking into account the seriousness of their conduct.[14]

In Nazli, a Turkish citizen living in Germany was not able to obtain an extension of his residence permit because he had been implicated in a case of drug trafficking and sentenced to a suspended term of imprisonment. One of

[12] Opinion of AG La Pergola in *Calfa*.
[13] *See* Case C-348/96, Criminal proceedings against Donatella Calfa, 1999 E.C.R. I-00011, 22-25.
[14] *See also* Case C-441/02, Commission of the European Communities v Federal Republic of Germany, 2006 E.C.R. I-03449, 33, 34, 93. *See also* Case C-50/06, Commission of the European Communities v Kingdom of the Netherlands, 2007 E.C.R. I-04383.

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the issues brought before the E.C.J. concerned the expulsion of a Turkish citizen that had been ordered out of the will of dissuading other foreigners from committing those offenses, and the compatibility of this measure with Community law.[15]

According to A.G. Mischo, only general preventive reasons may justify expulsion. Since the sanction of imprisonment had been suspended, that would deny the idea that the Turkish citizen would commit that offense again, in that the Turkish citizen's criminal behavior had been deemed not so serious. So, expulsion should have been deemed inconsistent with Community law.[16] The E.C.J. ruled that it must be assessed whether the personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy.[17]

In Orfanopoulos and Oliveri, a Greek national and an Italian national, both drug addicts with a number of convictions, were denied the extension of their residences permits by the German authorities. A.G. Stix-Hackl referred to Calfa and Nazli, stating that it should be considered whether the present conduct could be regarded as a threat. Furthermore, she took into account the European Court of Human Rights (hereinafter E.Ct.H.R.) case law concerning art. 8 of the European Convention on Human Rights (hereinafter E.C.H.R.),[18] since the expulsion of Mr. Orfanopoulos and Mr. Oliveri could have negatively affected the members of their families: as a matter of fact, they might have

[15] Under art. 6(1) fourth point of the decision no. 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey, a Turkish worker duly registered as belonging to the labour force of a Member State shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment. Thus, one of the questions concerned whether the Turkish worker had lost that right because of his criminal record.

[16] Opinion of AG Mischo in *Nazli*. The order would have not been consistent with art. 14(1) of the decision no. 1/80 which provides that the provisions concerning employment and free movement of workers shall apply "subject to limitations justified on grounds of public policy, public security or public health", while Mr Nazli had only been involved in a case of drug selling.

[17] *See* Case C-340/97, Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg, 2000 E.C.R. I-00957. The Court dealt with similar cases in Case C-349/06, Murat Polat v Stadt Rüsselsheim, 2007 E.C.R. I-081670, and in Case C-145/09, Land Baden-Württemberg v Panagiotis Tsakouridis, 2010 E.C.R. I-11979.

[18] Pursuant to European Convention on Human Rights, art. 8, Nov. 4, 1950, 10 Council of Europe Secretary General 1 (Right to respect for private and family life): "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

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had to move to another country.[19] Therefore, according to the A.G., three aspects should have been verified: the personal situation, especially for what concerns the extent of integration in the State from the social and professional point of view and in terms of family relations; the situation of family members, especially if they should move to another State; and the seriousness and number of the offences committed by the individual.[20]

The E.C.J. criticized automatic expulsions of a foreigner as a consequence of a criminal conviction and ruled:

> The necessity of observing the principle of proportionality must be emphasised. To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned.[21]

Thus, based on the above-mentioned case law, the Court believes that the Member States are allowed to limit free movement of persons, provided that they make a careful assessment to achieve a balance between security reasons and the interest which is put aside – which means, said freedom. In this regard, one should bear in mind that the Maastricht Treaty introduced the European citizenship as a personal status that disconnected the binds between free movement of persons and economic activities: so, free movement of persons

[19] *See* Boultif v Switzerland, App. no. 54273/00, 2001-IX Eur. Ct. H.R. For what concerns the ECJ case law, see also Case C-60/00, Mary Carpenter v Sec'y of State for the Home Department, 2002 E.C.R. I-06279.
[20] Opinion of AG Christine Stix-Hackl in *Orfanopoulos and Oliveri*.
[21] *See* Joined Case C-482/01 and C-493/01, Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg, 2004 E.C.R. I-05257, 99. *See also* Council Directive 2004/38, art. 28, 2004 O.J. (L 158) 77, 115 (EC) and the explications *infra*.

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has become an individual right in itself.[22] Therefore, in light of the relevance of this freedom and the qualitative leap that has occurred since 1992, the Court has identified some conditions Member States should comply with if they want to legitimately affect it and said conditions that have been transposed into E.U. legislation. In fact, the need for a balance is now well-expressed by the formula under art. 27(2), second line of Directive 2004/38:[23] a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Its meaning is quite clear in that it conveys the idea of a reasonably substantial prejudice to the axiological system that defines the identity of a community.[24]

3. THE PRINCIPLE OF PROPORTIONALITY AND FREE MOVEMENT OF GOODS

When evaluating the principle of proportionality and free movement of goods, one should look at that topic in light of the concept of measures having an effect equivalent to a quantitative restriction as defined in Dassonville.[25]

In Donckerwolcke, the issue at stake involved the importation into France of bales of cloth and sacks by two Belgian companies. According to the directors of those companies, the goods originated in Europe but the French

[22] Apart for the provisions under art. 20 and 21 TFEU, see art. 45(1) of the EU Charter of Fundamental Rights that provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States. *See also* Case C-378/97, Criminal proceedings against Florus Ariel Wijsenbeek, 1999 E.C.R. I-6251.

[23] Council Directive 2004/38, 2004 O.J. (L 158) 77, 113 (EC). Pursuant to art. 27 of this Directive, "1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends. (2) Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted".

[24] On the application of art. 27(2), second line of directive 2004/38 to non-criminal cases see Case C-434/10, Petar Aladzhov v Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti, 2011 E.C.R. I-11659. *See also* Case C-249/11, Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti, 2012 published in the electronic Reports of Cases.

[25] *See* Case 8/74, Procureur du Roi v Benoît and Gustave Dassonville, 1974 E.C.R. 00837 where the Court identified "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" as measures having an effect equivalent to quantitative restrictions.

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customs authorities found out that they came from the Middle East, so the directors were charged with having made false declarations of origin and sentenced to imprisonment and fine and the goods were confiscated. The questions referred to the E.C.J. concerned the nature of those penalties as measures having an effect equivalent to a quantitative restriction.

A.G. Capotorti identified two possible violations of the principle of proportionality: first, a national provision that obligates importers to make an exact declaration on the origin of the goods without leaving any ground to stand on if they do not know is disproportionate; secondly, penalties are excessive in that they do not reflect the seriousness of the offense.[26]

The E.C.J. ruled that theoretically, the knowledge of the origin may be necessary both for the Member States to determine their commercial policy and the Commission to perform its control activities. However, the Member States may only require the importers to indicate the origin of the goods when they know it or may reasonably be expected to know it. All things considered, a violation of that rule cannot lead to the application of disproportionate sanctions, given the administrative nature of the contravention. So, in light of the principle of proportionality,

Any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty.[27]

This reasoning was later confirmed in a case involving the importation into France of prohibited goods by means of false declaration of origin and on

[26] Opinion of AG Capotorti in *Donckerwolcke*.
[27] *See* Case 41/76, Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs, 1976 E.C.R. 01921.

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the basis of false or inaccurate documents: the defendants were sentenced to pay some fines.[28]

A.G. Warner referred to Donckerwolcke and agreed with the solution provided in that case.[29] The E.C.J. did the same and ruled that in general terms, any administrative or penal measure that goes beyond what is strictly necessary for the purpose of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods must be considered a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty.[30]

Another case concerned the limitation of free movement of goods on the ground of public morality. In 1977, two British citizens were convicted of a number of offenses relating to the importation and sale of pornographic articles. Under sec. 42 of the 1876 Customs Consolidation Act and sec. 304 of the 1952 Customs and Excise Act, those articles could be forfeited and destroyed. One of the points at issue concerned the notion of public morality under art. 36 of the Treaty establishing the European Community,[31] that provided that prohibitions or restrictions on imports, exports or goods in transit could be justified on that ground.

A.G. Warner stated that it is quite difficult to provide a uniform definition of public morality and a criterion of reasonableness should be taken into account, meaning that the effects of the prohibition should not be disproportionate in light of the pursued objective.[32]

The Court ruled that different regulations were into force in the United Kingdom, given the peculiarities of the legal system of that country; Anyway, that did not make it possible to acknowledge the existence of a legal –

[28] The case was particularly complex: after being ordered to pay a fine by the Montpellier *Tribunal de grande instance*, one of the parties - Leonce Cayrol, a French national - applied to the Italian *Tribunale di Saluzzo* for a warrant for attachment against the assets of Rivoira Giovanni e Figli s.n.c. in order to get a compensation on the grounds that the penalties imposed by the French authorities were the consequence of the company conduct. As a matter of fact, the company had deceived custom authorities as to the origin of a number of consignments of table grapes using the certificate of the Italian Trade Agency, while the grapes came from Spain. The Tribunale di Saluzzo referred the question to the CJEU when *Donckerwolcke* had already been passed.

[29] Opinion of AG Warner in *Cayrol*.

[30] *See* Case 52/77, Leonce Cayrol v Giovanni Rivoira & Figli, 1977 E.C.R. 02261.

[31] *See* TFEU art. 36.

[32] Opinion of AG Warner in *Henn and Darby*.

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meaning, permitted – trade of those articles, so no arbitrary discrimination had been created.[33]

Another important ruling may be found in Wurmser, which concerned the compatibility with Community law of a French legislation requiring importers to verify the conformity of imported products with the rules in force and imposing criminal liability in the case of failure. According to the Court,

> For a national rule capable of having a restrictive effect on imports to be justified under art. 36 of the Treaty or on the basis of [...] imperative requirements [...], it must [...] be necessary for the purposes of providing effective protection of the public interest involved and it must not be possible to achieve that objective by measures less restrictive of intra-Community trade. It must therefore be considered whether a national provision such as that concerned in the main proceedings is in accordance with the principle of proportionality thus expressed. [...] In regard in particular to the verification of information supplied to consumers as to the composition of a product when it is released for sale, the importer may not, as a general rule, be required to have the product analysed for the purpose of that verification. Such an obligation would impose on the importer a burden considerably greater than that imposed on a domestic manifacturer, who himself has control of the composition of the product, and it would often be disproportionate to the objective to be achieved, having regard to the existence of other forms of verification equally reliable and less burdensome.[34]

So, as far as the free movement of goods is concerned, the Court's reasoning gets more cryptic than it is in the cases on free movement of persons. In fact,

[33] Case 34/79, Regina v Maurice Donald Henn and John Frederick Ernest Darby, 1979 E.C.R. 03795.
[34] *See* Case 34/79, Regina v Maurice Donald Henn and John Frederick Ernest Darby,1979 E.C.R. 03795.

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based on the above-mentioned cases,[35] it cannot be identified a clear and stentorian formula such as the one of genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society that can be found in the case law concerning free movement of persons. Anyway, one cannot deny the E.C.J. has always tried to strike a balance between national and supranational interests. Furthermore, a fundamental achievement can be found in the equivalence between proportionality and reasonableness established by A.G. Warner.[36]

4. THE PRINCIPLE OF PROPORTIONALITY AND FREE MOVEMENT OF SERVICES

With regard to free movement of services, one may refer to a case regarding criminal proceedings brought in Germany against a Greek woman since she had not complied with the German legislation that provided for the exchange of foreign licenses for a German one within one year of taking up normal residence in Germany. In case of failure to comply, the German legislation provided for up to one year's imprisonment or a fine or, if the offense was committed as a result of carelessness, for up to six month's imprisonment or a fine. The woman was found driving with a Greek license but without a German one after the one-year period had passed. Her husband faced the same

[35] *See also* Case C-12/02, Criminal proceedings against Marco Grilli, 2003 E.C.R. I-11585; Case C-121/00, Criminal proceedings v. Walter Hahn, 2002 E.C.R. I-09193; Case C-394/97, Criminal proceedings against Sami Heinonen, 1999, E.C.R. I-03599; Case C-83/94, Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer, 1995 E.C.R. I-03231; and Case C-17/93, Criminal proceedings against J.J.J. Van der Veldt,1994 E.C.R. I-03537.

[36] *See also* the Opinion of AG Capotorti in *Adoui* and *Cornauille* (Joined cases 115 and 116/81, Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State, 1982 E.C.R. 01665, and Case C-65/05, Commission of the European Communities v Hellenic Republic, 2006 E.C.R. I-10341, at paras. 38-41) in which the ECJ ruled that "even if that case-law may not be applied in the present case, the overriding public interest reasons put forward by the Hellenic Republic may justify the barrier to the free movement of goods. However, it is also necessary for the national legislation at issue to be proportionate to the objectives being pursued. In that regard, the Hellenic Republic has not established that it implemented all the technical and organisational measures likely to have achieved the objective pursued by that Member State using measures which were less restrictive of intra-Community trade. The Greek authorities not only could have had recourse to other measures which were more appropriate and less restrictive of the free movement of goods, as the Commission suggested during the pre-litigation procedure, but also could have ensured that they were correctly and effectively applied and/or executed in order to achieve the objective pursued. It follows that the prohibition laid down by art. 2(1) of Law No. 3037/2002 on the installation in Greece of all electrical, electromechanical and electronic games, including all computer games, on all public and private premises apart from casinos, constitutes a measure which is disproportionate in view of the objectives pursued".

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penalties since, as person in charge of the vehicle, he allowed his wife to drive it without a German license. The national judge decided to stay the proceedings and refer a question to the E.C.J. in order to understand whether those provisions were consistent with free movement of persons and freedom of establishment.[37]

The ruling was quite solomonic. In fact, on the one hand, the Court ruled out the prohibition for the Member States to obligate to exchange the license since at that time, the directive on mutual recognition of driving licenses had not come into force yet;[38] on the other hand, the Court acknowledged it would have been disproportionate to treat a person who was found driving with a license issued by another Member State as if they were driving without a license at all. That would be excessive, especially if one considers that the offense is not so serious. Furthermore, the Court underlined the negative consequences arising from the failure to comply with the principle of proportionality, stating that a criminal conviction may have consequences for the exercise of a trade or a profession, as far as the access to certain activities or offices is concerned.[39]

Another case involved criminal proceedings brought in Italy against more than a hundred people who had allegedly violated the Italian regulation which criminalises the collection and transmission of bets without a license.[40] The bets were transmitted to an English bookmaker, so freedom of establishment and freedom to provide services were considered.

According to the E.C.J., national legislation that prohibits on pain of criminal sanctions the collection, acceptance, registration, and transmission of offers to bet, in particular on sporting events, without a license is a restriction

[37] As a matter of fact, the driving licence represents the necessary prerequisite for the exercise of a trade or a profession, so the obligation to exchange it could be seen as a discrimination against the citizens of other Member States.

[38] *See* Council Directive 91/439/ECC of 29 July 1991 on Driving licences, 1991 O.J. (L-237) 1.

[39] *See* Case C-193/94, Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos, 1996 E.C.R. I-00929; Case C-230/97, Criminal proceedings against Ibiyinka Awoyemi, 1998 E.C.R. I-06781.

[40] Pursuant to L. n. 401/1989, art. 4, (It.) fines and imprisonment may apply in that case. *See also* Case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português, 2003 E.C.R. I-08621; Case C-67/98, Questore di Verona v Diego Zenatti, 1999 E.C.R. I-07289; Case C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), 1999 E.C.R. I-06067 and Case C-275/92, Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, 1994 E.C.R. I-01039.

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to those freedoms. The issue at stake regarded the possibility to identify a good reason to justify that restriction. First of all, it had to be justified by imperative requirements in the general interest. Second, it had to be suitable for achieving the pursued objective. Third, it had not to go beyond what is necessary in order to attain it. Therefore, according to the Court, it is up to the national judge to assess it by taking into account some hints given by the Court itself, according to whom consumer protection and the prevention of fraud and incitement to squander on gaming are imperative requirements in the general interest. However, it must be determined whether the restriction aims at achieving that purpose coherently and systematically. Regarding the actual case, the Court held that Italy pursued a policy of expanding betting and gaming. Thus, those reasons could not justify the choice. More, the Court ruled that

> It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate . . . . especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.[41]

In this regard, one may also consider Placanica, where the Court held that a licensing system may be seen as an efficient mechanism to prevent the exploitation of betting and gaming activities for criminal or fraudulent purposes. However, it is up for national courts to determine whether that kind

[41] *See* Case C-243/01, Criminal proceedings against Piergiorgio Gambelli and Others, 2003 E.C.R. I-13031.

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of mechanism genuinely contributes to that type of objectives, as well as to ascertain whether it satisfies the condition of proportionality.[42]

Hence, it can be confirmed what has already been written with regard to free movement of goods: There is no standard formula but the Court always tries to strike a balance between conflicting interests.[43]

5. CONCLUSION

The early approach followed by the E.C.J. with regard to the principle of proportionality can be summarized through the well-known cost-benefit formula. In this regard, one should remember the most renowned[44] wording of the principle that can be found in the E.C.J. case law: "The Institutions must ensure that the burdens which commercial operators are required to bear are no greater than is required to achieve the aim which the authorities are to accomplish."[45]

Over time, the E.C.J. has tackled the issue from a different angle, mainly in light of the general provisions that can be found in the Treaties and under art. 52 of the Charter. Most of all, the Court has effectively made it a general tool to achieve a fair balance between fundamental rights and general interests by constantly stressing that the principle of proportionality "requires that acts of the E.U. institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is

[42] *See* Joined Cases C-338/04, C-359/04, C-360/04, Criminal proceedings against Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio, 2007 E.C.R. I-01891; see also Case C-347/09, Criminal proceedings against Jochen Dickinger and Franz Ömer, 2011 E.C.R. I-08185.
[43] Even if the topic is only implicitly considered, see also Case 5/83, Criminal proceedings against H.G. Rienks,1983 E.C.R. 04233 and Case 271/82, Vincent Rodolphe Auer v Ministère public, 1983 E.C.R. 02727, concerning the improper exercise of the profession of veterinary surgeon.
[44] *See* TITO BALLARINO, LINEAMENTI DI DIRITTO COMUNITARIO [PRINCIPLES OF COMMUNITY LAW] 182 (3rd ed. 1990).
[45] Joined Cases 26 and 86/79, Criminal proceeding against Forges de Thy-Marcinelle and Monceau, 1980, E.C.R. *01083* at para. 6 and Case 5/73, Criminal proceeding against Balkan 1973, E.C.R. 1092 at para. 22.

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appropriate and necessary in order to achieve those objectives"[46] and that "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."[47]

Thus, the principle of proportionality surely is the parameter that makes it possible to assess the utility, suitability, and adequacy of draft legislative acts[48] but it has become an instrument of protection of fundamental rights against excessive interference from E.U. acts, first, and Member States acts, then, too.

Therefore, the progressive opening of the European Union to a political dimension – that is to say the progressive opening to the protection of fundamental rights – has brought to light a specific, non-economic declination of the principle of proportionality that concerns the criminal matter too. When it comes to the relationship between E.U. law and criminal law, the E.C.J. seems to focus on the clash between national and supranational legal interests deserving protection in order to avoid that national security policies always prevail and supranational interests are always put aside.

In this regard, one may deem meaningful the equivalence between proportionality and reasonableness drawn by A.G. Warner,[49] since it leads to the consequence that criminal sanctions must be used measurably in order to punish not the violation of a normative precept in itself, but a conduct which effectively harms a legal interest that deserves protection; that is to say, criminal sanctions must be used to punish a genuine, present, and sufficiently

[46] *See, e.g,* Joined Case C-293/12 and Case C-594-12, Digital Rights Ireland Ltd, Seitlinger and Others, 2014, published in the electronic Report of Cases, at para. 46; Case C-101/12, Schaible v Land Baden-Württemberg, 2013, published in the electronic Report of Cases, at para. 29; Case C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk, 2013, published in the electronic Report of Cases, at para. 50 and Case C-558/07, S.P.C.M SA. and Others v Secretary of State for the Environment, Food and Rural Affairs, 2009, E.C.R. I-05783, at. par. 41. On the topic see Georgios Anagnostaras, *Balancing Conflicting Fundamental Rights: The Sky Österreich paradigm*, 39 EUR. L.REV. 111 (2014).

[47] *See, e.g,* Joined Case C-581/10 and C- 629/10, Nelson and Others, 2012, published in the electronic Reports of Cases, at para. 71 and Case C-343/09, Afton Chemical Limited v Secretary of State for Transport, 2010, E.C.R. I-07027, at para. 45.

[48] *See* Franco Pizzetti & Giulia Tiberi, *Le competenze dell'Unione e il principio di sussidiarietà* [*EU Authority and Subsidiarity Principle*] *in* LE NUOVE ISTITUZIONI EUROPEE. COMMENTO AL TRATTATO DI LISBONA 143-153 (Franco Bassanini & Giulia Tiberi eds., 2nd ed. 2010).

[49] However, it is interesting to notice that the Italian Constitutional Court has come to the same conclusion, too. *See also* Italian Constitutional Court, Judgment of I June 1995, no. 220, at para. 4, where the Court underlined that proportionality is a direct expression of the general canon of reasonableness.

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serious threat affecting one of the fundamental interests of society while avoiding excesses which are justified by reasons of internal politics only.

This is positive in that it restates the centrality of the principle of proportionality but one may wonder if it really makes it possible to avoid a tough situation. In light of the above-mentioned case law, the E.C.J. seems to be the only judicial body entitled to assess the balance between national and supranational conflicting legal interests and it looks like the Court is keen to preserve its position as the only judicial body entitled to do so. This may raise a problem – and not a small one – if one considers the sometimes complicated relationship between the E.C.J. and national courts, especially some Constitutional Courts.[50]

The position held by the E.C.J. is quite balanced indeed, since its purpose is not the a priori protection of the fundamental freedoms when a clash between them and national provisions arises. However, one may question that approach when it comes to criminal law. It is well renowned that the E.C.J. has ruled out the existence of national safe havens not affected by the supranational law;[51] at the same time, a peculiar tie between criminal law and national sovereignty does exist and cannot be denied.[52]

Hence, as far as proportionality is concerned, one may think that the E.C.J. could avoid new conflicts with national courts only by sticking to its constant interpretation of the principle of proportionality. However, this requires the Court to carefully assess the fundamental interests of national

[50] One may want to check the *Lisbon* judgment of the German Federal Constitutional Court (BVerfG, 2 BvE 2/08 *Gauweiler Die Linke v. Act of Approval of the Lisbon Treaty (Lisbon)*, Judgment of 30.6.2009) and the academic literature it has given rise to. *See* Armin Steinbach, *The Lisbon Judgement of the German Federal Constitutional Court - New Guidance on the Limits of European Integration?*, 11 GER. L. J. 367 (2010); Jacques Ziller, *The German Constitutional Court's Friendliness Towards European Law: On the Judgement of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon*, 16 EUR. PUBLIC L. 53 (2010); Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MKT. L. R. 1795 (2009). Also, one should consider the Declaration 1/2004 of the Spanish Constitutional Court (European Constitution), Judgment K 18/04 of the Polish Constitutional Court (Accession Treaty) and Decision Pl. ÚS 19/08 of the Czech Constitutional Court (Lisbon).

[51] *E.g.*, Case 82/71, SAIL v Pubblico Ministero della Repubblica Italiana, 1972, E.C.R. 00119, at para. 5, the Court ruled that art. 177 of the Treaty on the European Economic Community is worded in general terms and draws no distinction according to the nature, criminal or otherwise, of the national proceedings within the framework of which the preliminary questions have been formulated. In Case 186/87, Cowan v Trésor public, 1989, E.C.R. 00195, at para. 19, the Court ruled that although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, Community law sets certain limits to their power.

[52] *See, e.g.*, Case C-329/11, Achughbabian v Préfet du Val-de-Marne, 2011, E.C.R. I-12695, at para. 32.

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societies and that should lead to a more comparative, cross-fertilized approach to proportionality. As a matter of fact, the decisions of national courts should be taken into proper account in order to identify the real scope of national interests. Otherwise, the proportionality test would be based on a one-way interpretation of both national and supranational interests by the Court which could cast some doubts on the effective fairness of the assessment.

Truth be told, the case law mentioned in this article makes it clear that the Court does not follow that interpretative approach and does not seem so willing to follow it for several reasons,[53] most of all because that may compromise its battle over judicial supremacy in Europe.[54] Anyway, the careful consideration of national courts decisions may be an interesting way to ascend – once and for all, maybe? – to the role of European Constitutional Court without disregarding national differences.

[53] *See* Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168 (2013).
[54] The expression "battle over judicial supremacy in Europe" may be found in Asterios Pliakos & Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle Over Judicial Supremacy in Europe*, 36 EUR. L. REV. 109 (2011).