

EU COURTS' REVIEW OF DECISIONS IMPOSING FINES IN EU STATE AIDS CASES

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Abstract

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The aim of this article is to provide a comprehensive view on the application of the principle of proportionality in the Commission's decisions imposing fines in the area of state aids as well as the EU courts exercise of the jurisdiction over these decisions.

The primary and secondary sources of law and the case law would be investigated in this article. The author would like to briefly describe the historical background of the application of the principle of proportionality and by analysing the case law follow the evolvement of the application of the principle. The study should bring the answer on question whether the rule of law (in this case principle of proportionality) is safeguarded enough by the courts review of the decisions imposing fines.

state aid, court review, principle of proportionality, fines

The principle of proportionality is one of the "constitutional"¹ principles of the European Union. It plays an important role also as a general principle of administrative law, and such it requires each decision and measure to be based on a fair assessment and balancing of interests, as well as on a reasonable choice of means².

This general meaning of the principle is not only valid for national law, but also for European law. Regardless of whether a case concerns agricultural issues, free movement of goods, state aid or citizenship, the Court requires that all administrative acts or decisions and all legislation be in conformity with the general principle of proportionality³.

When assuming illegality of granted state aid both Commission and Court have to do with the

member states' interests. Although the principle of proportionality should be taken into the account, the question is whether it is used and so far, whether it is used properly.

Gerards⁴ see the differences in the application of this principle particularly in relation to penalties or financial burdens and proportionality in relation to discretionary policy choices. According to his point of view *the test applied to penalties or other financial burdens is mainly a test of excessiveness: the essence of the proportionality argument in these cases is mostly that the penalty was too drastic in relation to the aim of the measure in question*.

The article will focus on a standard test of proportionality that is applied by the ECJ on the state aid cases. It will also focus on the review of the Commission decision by the courts.

1 The European Union does not have its own constitution, but according the Treaty on the functioning of European Union there exist a set of principle on which the european lawmaking and application of european law is based.

2 GERARDS, J. H., 2005: Proportionality review in European law.

3 TRIDIMAS, T., 2006: The general principles of EU law; p. 137.

4 GERARDS, J. H., 2005: Proportionality review in European law.

METHODS AND RESOURCES

The aim of this article is to provide a comprehensive view of the application of the principle of proportionality, as one of the two basic principles of legality of European Union law within the rules on state aid. The paper will analyse the provisions of primary law, which set limits on the application of EU competences with the Member States and the relevant secondary and soft law that the rules laid down in primary law has developed in practice. The paper will deal with the concept of proportionality as a limiting factor of the discretionary power of the European institutions.

To achieve the aim of this article an analytical method will be used so as the descriptive and comparative method, which will be used to compare results with findings and allegations of professionals dealing with the topic.

RESULTS

Proportionality can be defined as the use of the most appropriate means in the meaning of a suitable tool that is used and a reasonable strength to achieve the specified targets. Compared to the principle of subsidiarity it is not possible in the case of proportionality to speak of a purely political principle, since it is also an important economic principle of continuous benchmarking of “cost-benefit” in pursuing or achieving a certain goal. This is also followed by the need of proportionality of administrative decisions. The principle of proportionality, according to the Tichý⁵ represents a higher legal force than the “simple” primary law. The principle of proportionality must be applied at both European and national measures and includes not only legislative measures (for example, the rights of European regulations and directives) but also administrative (executive) application of law⁶.

Adhering to the principle of proportionality decisions of the EU is often part of judicial review by the Court of Justice of the European Union. In the case law of the Court it is possible according

to Gerards to identify three levels of review of compliance with the principle of proportionality. The first level of review is to examine the appropriateness and efficiency of the use of a tool with regard to the objective to be achieved⁷. The appropriate tool according to this principle should clearly lead to the goal and not a direct route detour. The second level of review is examining the need for action in relation to other possible measures and the use of such a tool, which is necessary to achieve the objectives and to represent the least burden on the private person concerned⁸. The third level is to review the adequacy of a tool in relation to the costs and benefits analysis. The impact of each action is necessary to weight both in terms of benefits and in terms of negatives⁹. If outweigh the negatives, it is better not to do anything.

The proportionality should be investigated by the court in two areas. First area should be whether the Commission used its discretion power in assessing whether a certain state provision is breaching the prohibition of state aid according to article 107 TFEU properly, that is whether the balancing test and four criteria test were done and all the circumstances played its role and the second would be whether the fines imposed against the state where proportionate in respect to the standings of the involved Member State, the European institution and of the affected companies.

Margin of discretion is closely connected with the assessment of state aid itself. This is based on the four criteria test. In particular it is¹⁰ the transfer of State resources including national, regional or local authorities, public banks and foundations, etc. The aid can be granted by many means of financial transfer included, tax exemptions, loan guarantees, capital injections, etc; existence of economic advantage that the undertaking would not have received in the normal course of business. The economic advantage is weighted by a private market investor principle¹¹; selectivity of the state aid in the meaning of affecting the natural balance

5 TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T., 2011: *Evropské právo*, p. 94.

6 TRIDIMAS, T., 2006: *The general principles of EU law*; p. 137.

7 Case 116/82 – Judgment of the Court of 18 September 1986 (21 It should be noted that, according to the court's case-law, the principle of proportionality requires the measures imposed by the community institutions to be appropriate to achieve the intended objective and not to exceed the limits of what is necessary to that end.).

8 Case C-535/03 – Judgment of the Court of 23 March 2006 (In accordance with settled case-law, the Community legislature has a wide discretion in this field, corresponding to the political responsibilities given to it by Articles 34 EC to 37 EC. Consequently, judicial review must be limited to verifying that the measure in question is not vitiated by any manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of its discretion).

9 Case C-504/04 – Judgment of the Court of 12 January 2006 (In addition, it should be recalled that the validity of a Community act cannot depend on retrospective assessment of its efficacy. Where the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question).

10 EUROPEAN COMMISSION, 2008: *Vademecum, Community Law on State Aid*, p. 6.

11 RYDELSKI, M. S., 2006: *The EC state aid regime: distortive effects of state aid on competition and trade*. Cameron May, ISBN 1905017340, p. 240.

between companies and their competitors; Effect on competition and trade between Member States.

The proportionality test is needed in assessing of all of these four criteria as the Commission is using its discretionary power in all of them and thus its assessments are subject to court review.

The second level of assessment is the balancing test first introduced in State Aid Action plan in 2005 and then refined in a Staff Working Paper on 'Common Principles for an Economic Assessment of the Compatibility of State Aid under Article 107(3)'.¹²

The balancing test, first, identifies all the possible effects of state aid and, then, compares them in order to determine the overall effect. It consists of the following questions:

1. Is the aid measure aimed at a well-defined objective of common interest? For state aid to be exempted, it must pursue one of the policy objectives that are defined in Article 107(2) or (3).
2. Is the aid well designed to deliver the objective of common interest; that is, does the proposed aid address the market failure or other objective? So as to answer this question it is needed to answer subsidiary questions:
 - a) Is state aid an appropriate policy instrument for the goal that should be achieved? There might exist even better tools how to achieve the desired policy objective than a state aid.
 - b) Does the state aid have any incentive effect; does it change the behaviour of companies?
 - c) Is the aid measure proportional?
3. Are the distortions of competition and their effect on trade limited, so that the overall balance is positive? Even if the aid is appropriate and proportional, it may still generate significant distortions of competition that may harm other competitors¹³.

Concept of state aid under the article 107 TFEU

According to the article 107 (1) any aid granted by the Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertaking or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

Article 107 (2) brings situations in which the state aid is compatible with the common market. These are state aid having a social character, granted to individual consumer, and aid to make good the damage caused by natural disasters; and Article 107 (3) brings up the situations in which the aid is conditionally permitted and compatible with common market and these are aids intended to promote the economic development of underdeveloped areas, promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a member State, facilitate the development of certain activities or areas and promote culture and heritage conservation¹⁴.

As it was said above the margin of discretion used by the Commission is reviewed by the court. The question is, whether the test of proportionality is used in the strict meaning or whether the court is using a deferential approach. It is necessary to mention here that the approach the court holds is affected by many factors.

According to Professor Jean-Marc Thouvenin these factors are connected to the nature and extent of the powers granted to the relevant authorities (both on the national and the Community level). According to him, *If the bounds of a normative or executive power are widely drawn, or if decision-making requires difficult political choices or complex assessments of social and economic factors to be made, the Court usually considers that marginal review is appropriate. The primary reason for this is that the national and Community authorities are generally better placed than the Court to make such choices.*¹⁵ Other factors that have impact on the application of the proportionality test by the court are the nature of the interests concerned in a particular case. If the case would deal with an important Community interest, the Court's review according to prof. Thouvenin is usually very strict. The strict test of proportionality is also connected with those cases where the individual interest harmed by the contested measure or decision is a fundamental right. In the case *Belgium v Commission*¹⁶ the ECJ delimit the margin of discretion of the Commission as it held that the Commission was empowered by the Council to give effect to paragraph 3 of Article 107, but the Council gave no right to Commission to lay down a binding and general definition of the concept of State aid according to article 107 par. 1. And so as to achieve any measure the Commission

12 COMMON PRINCIPLES FOR AN ECONOMIC ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 87.3, cited 21.2.2013, available online http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf.

13 NICOLAIDES P., RUSU I. E., 2010: The 'Binary' Nature of the Economics of State Aid, *Legal Issues of Economic Integration*, 37, 1, p. 29.

14 BĚHAN, P., 2008: *Komunitární právní úprava zneužití dominance, kartelových dohod a veřejných podpor a její vývoj ve světle rozhodovací praxe*. Ostrava: KEY Publishing, p. 218.

15 Prof. Jean-Marc Thouvenin web pages, cited 15.1.2013, available online at <http://lewebpedagogique.com/jmthouvenin/european-governance-2-program/european-governance-2-the-principle-of-proportionality/>.

16 Case C-110/03 – Judgment of the Court of 14 April 2005.

is obliged not to contravene the principles of legal certainty, subsidiarity and proportionality.

According to prof. Thouvenin the test of proportionality is connected with the powers that the institution holds. In this respect the court is criticized¹⁷ as the full test of proportionality is not used in areas where the Commission is empowered with a discretionary power that is widely described in a legal norm and where a comprehensive approach is needed to make any assessment. This is the case of state aid, where Commission holds a discretionary power over the assessment of the state aid within the paragraph 3. In this respect the court review is minimized to that extend whether the Commission applied the tests properly or not¹⁸. In the case *Corsica Ferries France v Commission*¹⁹ the Court of First Instance held that the Commission had made an erroneous appraisal, that is the Commission did not applied its discretionary power in respect of the two tests and the Court made the assessment itself. But this is rather an exceptional case of a full review where the test of proportionality is applied. The standard approach of the Court to the reviews of the contested measures is mainly connected whether

the tests were applied and the court itself does not fight against the decision of the Commission if the measure taken is not obviously incorrect²⁰.

CONCLUSION

The principle of proportionality is one of the key principles of European Union law. However the assessment of the measures taken by the Commission in state aid cases in respect to this principle is sometimes hard. The answers to the question why it is hard might be that for the courts it is also very important to follow a consistent approach to the approach of the Commission as the Commission should protect the European Union interests. The other possible answer is that courts have to deal with cases where they have not enough information and sources to contest the \commission decision. The other thing is that even if the court would have enough information, it would have lack of people to assess this information. The conclusion of this work is that the proportionality test described above is not applied widely in the state aid cases. This should be noted and criticised.

SUMMARY

The principle of proportionality is one of the “constitutional” principles of the European Union. It plays an important role also as a general principle of administrative law, and such it requires each decision and measure to be based on a fair assessment and balancing of interests, as well as on a reasonable choice of means.

Proportionality can be defined as the use of the most appropriate means in the meaning of a suitable tool that is used and a reasonable strength to achieve the specified targets.

Adhering to the principle of proportionality decisions of the EU is often part of judicial review by the Court of Justice of the European Union. In the case law of the Court it is possible according to Gerards to identify three levels of review of compliance with the principle of proportionality. The first level of review is to examine the appropriateness and efficiency of the use of a tool with regard to the objective to be achieved²¹. The appropriate tool according to this principle should clearly lead to the goal and not a direct route detour. The second level of review is examining the need for action in relation to other possible measures and the use of such a tool, which is necessary to achieve the objectives and to represent the least burden on the private person concerned. The third level is to review the adequacy of a tool in relation to the costs and benefits analysis. The impact of each action is necessary to weight both in terms of benefits and in terms of negatives. If outweigh the negatives, it is better not to do anything.

The margin of discretion used by the Commission to assess whether a measure constitutes state aid or not is reviewed by the court. The question is, whether the test of proportionality is used in the strict meaning or whether the court is using a deferential approach. It is necessary to mention here that the approach the court holds is affected by many factors.

17 See for example VILACA, J. L., 2009: Material and Geographical Selectivity in State Aid – recent Developments. *EstAL*, 1, pp. 443–451. ISSN 1619-5272 or LEGAL, H., 2005: Standards of Proof and Standards of Judicial Review in EU Competition Law [online]. [cit. 20.11.2012]. Available at: https://groupes.renater.fr/sympa/d_read/credaconcurrency/Art/LegalFordham2005.pdf.

18 For example BARAN, M., DONIEC, A., 2010: EU Courts' Jurisdiction Over and Review of Decisions Imposing Fines in EU Competition Law [online]. *Yearbook of Antitrust and Regulatory Studies*, 2010, 3, 3: 235–259, 2010.; CENGİZ, F., 2011: Judicial Review and the Rule of Law in the EU Competition Law Regime after *Alrosa*. *European Competition Journal*, 7, 1: 127–153. ISSN 1757-8396.

19 Case T-349/03 Judgment of the Court of 15 June, 2005.

20 See for example joined cases C-266/04, 276/04 and 321/04 to 325/04 – Judgment of the Court of 27 October, 2005.

21 Case 116/82 – Judgment of the Court of 18 September 1986 (21 It should be noted that, according to the court's case-law, the principle of proportionality requires the measures imposed by the community institutions to be appropriate to achieve the intended objective and not to exceed the limits of what is necessary to that end.).

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