

Towards Process-Oriented Proportionality Review In The European Union

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This article provides an analysis of contemporary case law and subsequent academic commentary which suggests that a more process-oriented approach to proportionality review has recently been taken by the Court of Justice of the European Union. It argues that the manner in which process-oriented review has been utilized gives rise to a fundamental reconceptualization of the nature of the proportionality test at the EU level; moving away from a substantive, merits based concept of review towards something more akin to a procedural obligation to state the reasons which underpin a contested measure. The article highlights some of the problems that have arisen from this shift in approach from both a doctrinal and a theoretical perspective, whilst demonstrating the inconsistent way in which the Court has formulated and applied process-oriented proportionality review to date.

1 INTRODUCTION

According to recently elected Court of Justice of the European Union (CJEU) President Koen Lenaerts, recent case-law reveals that the Court now strives to develop guiding principles which aim to improve the way in which the political institutions of the EU adopt their decisions.¹ In so doing, the CJEU decides not to second guess the appropriateness of the policy choices made by the EU legislator and instead opts to examine whether, in reaching a particular outcome when adopting an act of general application, the EU's political institutions have followed the procedural steps mandated by the authors of the Treaties.²

In this way it is argued that judicial deference in relation to 'substantive outcomes' has been counterbalanced by a strict 'process review'.³ In particular, under a more process-oriented approach to proportionality review, the Court now requires that the EU law-maker demonstrate that it has taken into consideration all the relevant interests at stake before enacting laws.⁴ The great

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¹ K. Lenaerts, *The European Court of Justice and Process-Oriented Review*, 31 Y.B. Eur. L. 3 (2012).

² *Ibid.*, at 4, 16.

³ *Ibid.*, at 4.

⁴ *Ibid.*, at 7.

merit in this shift towards a form of ‘process-oriented review’ by the CJEU, according to Lenaerts, is that it increases judicial scrutiny over the decision-making process of the EU whilst preventing the Court from intruding into the realm of politics.⁵

There would appear to be considerable support in the literature for the turn towards process-oriented review. Commenting upon the ‘significant changes’ that have taken place with regards to judicial review of legislation in the EU and many Member States in recent years, Meßerschmidt states that these changes ‘comprise the growing interest in the procedural requirements of legislation on the one hand and evidence-based legislation on the other hand’.⁶ In contrast to traditional jurisprudence which paid little attention to the input and the impact of legislation,⁷ therefore, it is claimed by some that the contemporary practice of various international and national courts demonstrates that courts not only consider the ‘output’ of the political process in the form of enacted legal rules, but also evaluate the ‘input’ of such law making processes.⁸

Groussot and Bogojević recognize a procedural trend in the CJEU’s case law, stating that the Court has applied ‘procedural proportionality’ in certain cases dealing with the vertical allocation of regulatory powers.⁹ Alemanno notes a ‘new judicial trend’ in which ‘courts may examine the legislature’s decision-making process as part of their determination of the substantive constitutionality of legislation’¹⁰ Taking a broader, inter-jurisdictional perspective whilst making direct reference to the jurisprudence of the CJEU, Mak notes that judicial deference to the political process appears to have given way to a stricter review of legislative and administrative decision making.¹¹ Furthermore, and in contrast to the way in which the proportionality principle has traditionally been conceived as a ground of review in the EU context, Hofmann has noted that ‘Increasingly ... in the context of review of legislative acts of the Union, the CJEU does not review the substance of an act but instead checks whether the

⁵ *Ibid.*, at 15.

⁶ Klaus Meßerschmidt, *The Race to Rationality Review and the Score of the German Federal Constitutional Court*, 6 *Legisprudence* 347, 348 (2012).

⁷ *Ibid.*

⁸ Elaine Mak, *Judicial Review of Regulatory Instruments: The Least Imperfect Alternative?* 6 *Legisprudence* 301, 310 (2012).

⁹ Xavier Groussot & Sanja Bogojević, *Subsidiarity as a Procedural Safeguard of Federalism*, in *The Question of Competence in the European Union*, 246 (Azoulai ed., Oxford University Press 2014). For an overview of ‘Proceduralized’ Proportionality in relation to the CJEU’s review of Member State measures in the Internal Market, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* 191–192 (OUP 2013).

¹⁰ Alberto Alemanno, *The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov’s Semiprocedural Review*, 1 *Theory & Prac. Legis.* 327 (2013).

¹¹ Mak, *supra* n. 8, at 313.

institutions can prove that they themselves reviewed the proportionality of a measure before adopting it.’¹²

In light of this emerging procedural trend, the purpose of this article is to examine the extent to which a shift towards a more process-oriented approach to proportionality review may indeed be detected within the case law of the CJEU. It shall be demonstrated that the manner in which the Court has formulated and applied this more process-oriented approach to proportionality review is far from consistent, with it being possible to detect several ambiguities in the reasoning of the Court’s case law. Furthermore, the manner in which process-oriented review has been utilized by the Court gives rise to a fundamental reconceptualization of the nature of the proportionality test at the EU level; moving away from a substantive, merits based concept of review towards something more akin to a procedural obligation to state the reasons which underpin a contested measure.

As a result, the manner in which the Court now applies the proportionality principle is no longer predicated upon how intensively it will review the merits of a contested legal measure; but instead rests upon the level at which it sets the justificatory threshold for the EU law-maker to demonstrate that its measures are lawful. In carrying out this exercise, the Court has to date indicated a willingness to uncritically accept the assertions and evidence adduced by the law-maker at face value, thus arguably setting the justificatory threshold at a very low level.

Section 2 outlines the distinction that exists between process and substance within judicial review proceedings at the EU level. Section 3 discusses the principle of proportionality as traditionally conceived in EU jurisprudence and academic discourse. Section 4 considers recent developments in the case law which suggest a more process-oriented approach being taken by the Court. Sections 5 and 6 analyse the potential implications of these changes. Section 7 is a conclusion.

2 THE PROCESS/SUBSTANCE DISTINCTION IN EU JUDICIAL REVIEW

According to Article 263(2) Treaty on the Functioning of the European Union (TFEU), the CJEU is limited to four grounds when reviewing the legality of measures enacted by the EU’s law-making institutions: lack of competence, infringement of an essential procedural requirement, infringement of the

¹² Herwig C.H. Hofmann, *General Principles of EU Law and EU Administrative Law*, in *European Union Law* 196, 205 (Barnard and Peers eds, OUP 2014).

treaties or any rule of law relating to their application and misuse of powers.¹³ Three of these grounds for review (lack of competence, infringement of an essential procedural requirement and misuse of powers) speak to a ‘procedural’ or ‘formal’ conception of judicial review in which the substance or merits of the measures of law are, for the most part, beyond the review powers of the Court.¹⁴

Of these three, the duty to state reasons upon which legal acts are based (now enshrined in Article 296 TFEU) – which forms an integral part of the infringement of an essential procedural requirement ground of review – has played an important role in the jurisprudence of the Court.¹⁵ The statement of reasons must show clearly and unequivocally the reasoning of the EU authority which adopted the measure so as to enable the persons concerned to ascertain the reasons for the adopted measure and to enable the Court to exercise its power of review. That being said, such a statement is not required to go into every relevant point of fact and law.¹⁶ In this regard, the question whether the obligation to provide a statement of reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question.¹⁷ In terms of how this operates in judicial proceedings, it is clear that a failure to provide an adequate statement of reasons for a decision will prevent the Court from ruling on the arguments relating to the substantive correctness of the contested decision, thus leading the Court to annul the measure on procedural grounds.¹⁸

In contrast, ‘infringement of the treaties or any rule of law relating to their application’ is a residual ground of review that the Court has used to import a number of unwritten general principles of law into the EU legal order.¹⁹ According to Schütze, this development of general principles by the Court has added a substantive dimension to the rule of law, according to which the Court may review the substantive content or merit of a measure of EU law to determine whether, *inter alia*, it is based upon a manifest error of assessment,²⁰ complies with

¹³ Art. 263(2) Consolidated version of the Treaty on the Functioning of the European Union, 13 Dec. 2007, 2008/C 115/01.

¹⁴ Robert Schütze, *European Constitutional Law* 265–266 (Cambridge University Press 2012).

¹⁵ ‘The duty to give reasons is one of the essential procedural requirements within the meaning of the first paragraph of [Art. 263(2) TFEU], breach of which gives rise to a claim.’ [Parenthesis added.] Jürgen Schwarze, *European Administrative Law* 1401 (Sweet and Maxwell 1992).

¹⁶ Case C122/94 *Commission v. Council* [1996] ECR I-881, para. [29]; Joined Cases C154/04 and C155/04 *Alliance for Natural Health and Others* [2005] ECR I6451, para. [133].

¹⁷ Case C- 63/12 *Commission v. Council*, EU:C:2013:752, para. [99] and case law cited therein.

¹⁸ E.g. *Joined Cases T-228/99 and T-233/99, Westdeutsche Landesbank Girozentrale et al. v. Commission*, 2003, ECR II-435, paras [419–420].

¹⁹ Schütze, *supra* n. 14, at 266.

²⁰ Case C-77/09 *Gowan Comércio Internacional e Serviços Lda v. Ministero della Salute*. [2010] ECR I-13533, para. [57].

fundamental rights,²¹ contradicts the principle of legitimate expectations,²² or complies with the principle of proportionality.²³

There is therefore a distinction between procedural and substantive legality in the EU legal order – a distinction which has been said to constitute one of the cornerstones, not to say the central pillar, of judicial review doctrine in the EU.²⁴ Whilst it has been noted that the two are closely linked – with indications of a defect in the substance of a contested measure possibly being revealed in the statement of reasons, thus making the statement of reasons an authoritative source of information²⁵ – it has been stressed that within the EU legal order:

it is important to adhere to the principle of the distinction between the infringement of the duty to state reasons, as an essential procedural requirement, on the one hand, and its function as an indicator of substantive defects in the decision to be examined, on the other hand.²⁶

It is ‘consistent with this distinction’ for the EU law-maker to be able to satisfy the procedural duty to state reasons by setting out the ‘conceptions on which the decision is based without regard to the substantive correctness of the reasons given’.²⁷ This is clearly illustrated in *Commission v. Parliament and Council* where it is noted that:

it must be remembered that absence of reasons or inadequacy of the reasons stated goes to an issue of infringement of essential procedural requirements within the meaning of [Article 263(2) TFEU], and constitutes a plea distinct from a plea relating to the substantive legality of the contested measure, which goes to infringement of a rule of law relating to the application of the Treaty within the meaning of that article.²⁸

This is further demonstrated by the way in which the Court routinely deals with substantive grounds of review such as proportionality independently of any consideration of whether the procedural duty to provide reasons under Article 296 TFEU.²⁹

²¹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

²² Case C-265/85 *Van den Bergh en Jurgens BV v. Commission* [1987] ECR, 1155; See generally E. Sharpston, *Legitimate Expectations and Economic Reality*, 15 Eur. L. Rev. 103, 108–115 (1990).

²³ Schütze, *supra* n. 14, at 267.

²⁴ Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* 145 (Bloomsbury 1999).

²⁵ Schwarze, *supra* n. 15, at 1402–1403; See also Paul Craig, *EU Administrative Law* 353 (OUP 2012).

²⁶ Schwarze, *supra* n. 15, at 1403; See also Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* 252 (OUP 2011).

²⁷ Schwarze, *supra* n. 15, at 1403.

²⁸ Case C-378/00 *Commission v. Parliament and Council* [2003] ECR I-937 para. [34].

²⁹ E.g. Case C- 508/13 *Estonia v. Parliament and Council* [2015] not yet reported, where the principle of proportionality was examined first at para. [28], followed by the duty to provide a statement of reasons at para. [57]. Given that the duty to provide reasons is said to help facilitate substantive review, it is somewhat puzzling that the Court considers whether this procedural obligation has been complied with after it has conducted its proportionality assessment. Not only would a failure to provide adequate reasons lead to the measure’s annulment without having to enquire into its substantive content, one

Moreover, the consequences of annulment on procedural or substantive grounds differ considerably.³⁰ Annulment under the former leaves the EU law-maker in a position to remedy the procedural defect e.g. provide a statement of reasons and issue the same decision without having to alter the substantive content of the contested measure at all.³¹ In contrast, annulment under the latter results in the EU law-maker being required to re-open the law-making process so as to revise the measure and bring its substantive contents into compliance with the operative part of the Court's judgement. The result, in most cases, will be that the new measure will differ substantially in content from the previous measure that was annulled.³²

In light of this brief overview, it falls to consider the claims that contemporary CJEU jurisprudence demonstrates a more process-oriented approach to the principle of proportionality being taken by the Court.

3 THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality as applied by the CJEU when reviewing the legality of measures of EU law may be said to consist of three sub-principles. The first, suitability stage, requires that the measure under review is suitable or appropriate to achieve the objectives it pursues.³³ The second, necessity stage, involves an assessment of whether less restrictive means could have been used to achieve the aim pursued. Finally, the third stage in the proportionality analysis – which is often either treated without distinction from the second stage in the Court's case law,³⁴ or simply left out entirely – enquires into whether the measure under review was excessive, meaning whether the means employed went beyond the aim pursued.³⁵

According to Craig, one may distinguish between three different types of cases in which the Court applies the principle of proportionality: cases involving discretionary policy choices; cases concerning the infringement of a right

wonders whether these reasons really do have much impact upon the Court's prior in time proportionality assessment.

³⁰ Nehl, *supra* n. 24, at 146.

³¹ *Ibid.*, at 147 at fn. 210.

³² *Ibid.*, at 146; Hans Peter Nehl, *Good Administration as Procedural Right and/or General Principle?*, in *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* 335 (Hofmann and Turk eds, Edward Elgar 2009).

³³ Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 Eur. L.J. 158, 165 (2010).

³⁴ Takis Tridimas, *Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny*, in *The Principle of Proportionality in the Laws of Europe* 65 (Ellis ed., Hart Publishing 1999).

³⁵ Herwig C.H. Hofmann, Gerard C. Rowe & Alexander H. Türk, *Administrative Law and Policy of the European Union* 130 (OUP 2011); Craig notes that the Court will tend not to raise the third limb of the proportionality test of its own volition. See Craig, *supra* n. 25, at 601–604.

recognized by EU law; and cases involving a disproportionate penalty or financial burden. Whilst cognizant of the fact that a clear-cut distinction is not always easy to draw between these categories, the present article shall deal primarily with the first of these; that is, discretionary policy choices which, for the most part, do not entail a fundamental rights dimension.³⁶

In general, the CJEU operates a two-step proportionality test when reviewing discretionary policy choices of the EU institutions, ensuring that measures are suitable for attaining the objective pursued and do not go beyond what is necessary to achieve that purpose.³⁷ According to Tridimas, the tests of suitability and necessity enable the CJEU to review not only the legality, but also to some extent the merits of legislative and administrative action at the EU level.³⁸ It is for this reason that proportionality is perceived as ‘the most far reaching ground of review, the most potent weapon in the arsenal of the public law judge’.³⁹ This is echoed by Shapiro: ‘Proportionality ... is obviously the strongest form of substantive review. In effect, courts are saying ‘We invalidate the law you have made because we can think of a better law –one that achieves your goals at less cost to competing interests.’⁴⁰

The extent to which the proportionality principle will be effective in judicial review cases depends, however, on how strictly the Court applies the suitability and necessity tests and how far it is willing to defer to the choices made by the authority that issued the measure under review.⁴¹ In other words, the interrelation between legislative discretion and judicial scrutiny i.e. the balance to be struck between judicial control and discretion attributed to the EU law-maker – which has been said to be an ‘eternal’ question of any system of constitutional justice⁴² – is of central importance to the operability of the proportionality test in the EU legal order.⁴³

³⁶ Craig, *supra* n. 25, at 590.

³⁷ Joined Cases C-453/03, C-11, 12 & 194/04, ABNA and others, [2005] ECR I-10423, para. [68], Case C-535/03, Unitymark, [2006] ECR I-2689.

³⁸ Takis Tridimas, *The General Principles of EU Law* 140 (OUP 2006).

³⁹ *Ibid.*, at 139. Indeed, the fact that proportionality involves a judicial assessment of the merits of contested measures is what raises the prospect of a substitution of judgment by courts for that of the primary decision-maker, thus rendering it controversial in some circles. Instructive here is the debate within common law legal scholarship. See generally Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (CUP 2012), Ch. 5.

⁴⁰ Martin Shapiro, *The Giving Reasons Requirement* 179, 217 (University of Chicago Legal Forum 1992).

⁴¹ Schutze notes that a court’s capacity to review the exercise of legislative or executive power ranges from classifying it as a non-justiciable political question to fully substituting a political compromise with a judicial solution. In between these two extremes lies various different standards of review of which the CJEU applies a ‘manifestly inappropriate’ test. Robert Schutze, *EU Competences: Existence and Exercise*, in *The Oxford Handbook of EU Law* 100 (Arnull and Chalmers eds, OUP 2015).

⁴² Thomas Von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 37 *Fordham Intl. L.J.* 1311, 1328 (2013).

⁴³ Craig, *supra* n. 25, at 592.

In this regard the CJEU generally grants a wide margin of discretion to the EU law-maker whenever discretionary policy choices are involved, typically stating that: ‘in the exercise of the powers conferred on it the [Union] legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations.’⁴⁴ Within the context of the proportionality test, this granting of broad discretion results in the Court adopting a very low-intensity standard of review: ‘Consequently, 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.’⁴⁵

The outcome of formulating discretion in such broad terms so as to cover almost any field of Union action is that the low intensity, ‘manifestly inappropriate’ standard of proportionality review is the norm.⁴⁶ Nevertheless – and it is important to stress this point at this juncture in light of the argument which follows – the prevalent view in both academia and the judiciary is that this low-intensity approach to proportionality review does not call into question the fundamental characteristic of such review; namely, an examination of the merits of a contested measure.⁴⁷

For example, in *ABNA* the CJEU found that a provision in a Directive aimed at protecting public health by requiring manufacturers, on request by a customer, to notify the latter in writing of the exact percentages by weight of the feed materials used in feedstuffs contravened the principle of proportionality. In the Court’s view, having examined the arguments of the parties, an obligation of that nature could not be justified by the objective of protecting public health and, in its view, manifestly went beyond what was necessary to attain that objective.⁴⁸

Likewise, in *IATA* the claimants argued, inter alia, that the obligations to assist, care for and compensate passengers contained in an EU Regulation in the event of cancellation of, or a long delay to, a flight were by reason of the considerable financial charges which they will impose on European air carriers totally disproportionate to the objective pursued. In deciding the case the CJEU first set down its classic two-step proportionality test before stipulating that it was

⁴⁴ *Case C-491/01 British American Tobacco [2002] I-11453, para. [123]; Case C-380/03 Germany v. Parliament and Council [2006] ECR I-11573, para. [145]; Case C-284/95 Safety Hi-Tech [1998] ECR I-4301, para. [37].*

⁴⁵ *Case C-491/01 British American Tobacco [2002] I-11453, para. [123].*

⁴⁶ Harbo notes that the manifestly inappropriate test has been utilized by the CJEU in cases involving economic policy, public health, common agricultural policy, fisheries, transport and social policy. See Harbo, *supra* n. 33, at 178–179.

⁴⁷ Craig, *supra* n. 25, at 595. For a particularly clear judicial statement of the substantive, merits based nature of proportionality review see Advocate General Kokott opinion in *Case C-558/07 SPCM and others [2009] ECR I-5783, paras 73–77.*

⁴⁸ *Joined Cases C-453/03, C-11, 12 & 194/04, ABNA and others, [2005] ECR I-10423, para. [83].*

for the Court to first assess whether the measures adopted were manifestly inappropriate in the light of the regulation's explicit objective.⁴⁹ In so doing, the Court quite clearly gave its own substantive evaluation of the merits of the contested measure, noting that the obligations 'do not appear to be manifestly inappropriate merely because carriers cannot rely on the extraordinary circumstances defence.'⁵⁰ It also did not 'appear unreasonable for those obligations initially to be borne, subject to the abovementioned right to compensation, by the air carriers with which the passengers concerned have a contract of carriage that entitles them to a flight that should be neither cancelled nor delayed.'⁵¹ Furthermore, 'the obligation does not appear manifestly inappropriate to the objective pursued' and 'the amount of the compensation, set at EUR 250, EUR 400 or EUR 600 depending on the distance of the flights concerned, likewise does not appear excessive'.⁵²

4 PROCESS-ORIENTED PROPORTIONALITY REVIEW: A SHIFT IN APPROACH?

In more recent times, however, it has been asserted that CJEU jurisprudence has indicated a shift towards a process-oriented conception of proportionality review in which judicial deference in relation to 'substantive outcomes' has been counter-balanced by a strict 'process review'.⁵³ It has been said that under this more procedural conception of proportionality, the CJEU now requires the EU lawmaker to present and explain material relied upon during the law-making process in order to justify its actions.⁵⁴ This has led to the Court now viewing its main task as being one of 'imposing a duty on the legislature to give careful prior consideration and to conduct an assessment of all relevant economic and scientific data justifying the adoption of a measure'.⁵⁵ According to Keyaerts, the principle of proportionality has thus recently 'contributed to a rationalization in lawmaking', with the CJEU using the principle to focus upon 'justification, procedural, or care,

⁴⁹ *Case C- 344/04 IATA [2006] ECR I-403*, paras 79–83.

⁵⁰ *Ibid.*, para. 86.

⁵¹ *Ibid.*, para. 90.

⁵² *Ibid.*, para. 91.

⁵³ Lenaerts, *supra* n. 1, at 4.

⁵⁴ David Keyaerts, *Courts as Regulatory Watchdogs : Does the European Court of Justice Bark or Bite?*, in *The Role of Constitutional Courts in Multilevel Governance* 269, 280 (Mazmanyan & Vandebrouwaene eds, Intersentia 2013); Popelier & Verlinden, *The Context of the Rise of Ex Ante Evaluation*, in *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation* 13, 31 (Verschuuren ed., Martinus Nijhoff Publishers 2009).

⁵⁵ Loic Azoulai, *The Complex Weave of Harmonization*, in *The Oxford Handbook of European Union Law* 589, 597 (Amull & Chalmers eds, OUP 2015).

standards in lawmaking⁵⁶; whilst cautiously recognizing that the case law of the CJEU seems to have recently shifted towards a more intensive review of procedural requirements, including an interesting role for *ex ante* evaluations including Impact Assessments (IAs).⁵⁷

In this way, ‘the case law of the CJEU has shifted towards a reasonableness test’ in which the EU law-maker must ‘present justification material as proof of reasonable action’⁵⁸ and that ‘actions of the lawmaker are considered reasonable when they are supported by facts and relevant arguments’.⁵⁹

4.1 SPAIN V. COUNCIL

The case of *Spain v. Council* may be cited as a foundational moment by those claiming that there has been a shift towards a more process-oriented proportionality review by the CJEU. In that case, the Court annulled a Council Regulation in the Common Agricultural Policy (CAP) field on the grounds that it infringed the principle of proportionality.⁶⁰

The Court held that acts adopted by EU institutions must not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the law in question; where 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.⁶¹ That being said, where the legislature enjoys broad discretion the legality of the measure can only be affected if it is manifestly inappropriate in terms of the objective pursued.⁶²

From this orthodox starting point the Court seemingly introduced something new into its proportionality assessment. According to the CJEU, even though judicial review is of limited scope in areas where the legislature enjoys broad discretion, it nevertheless requires the EU institutions which have adopted the act in question to show that in adopting that act they ‘actually exercised their discretion’ and that this ‘presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate’.⁶³ ‘It follows that the institutions must at the very least be able to produce

⁵⁶ Keyaerts, *supra* n. 54, at 281.

⁵⁷ David Keyaerts, *Ex Ante Evaluation of EU Legislation Intertwined with Judicial Review?* 35 *Eur. L. Rev.* 869, 882 (2010). Similarly, Von Danwitz, *supra* n. 42, at 1330.

⁵⁸ Keyaerts, *supra* n. 54, at 282.

⁵⁹ *Ibid.*, at 280; see also Popelier & Verlinden, *supra* n. 54.

⁶⁰ *Case C-310/04 Spain v. Council* [2006] *ECR* I-7285.

⁶¹ *Ibid.*, para. [97].

⁶² *Ibid.*, para. [98].

⁶³ *Ibid.*, para. [122].

and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended.⁶⁴

Based on this ‘new test’,⁶⁵ the Court found that there was a breach of the proportionality principle since the EU legislature had failed to sufficiently take account of basic facts in two respects. First, by not taking labour costs into consideration when conducting a preparatory study that formed the basis for the Council’s decision,⁶⁶ and second, by not conducting an assessment of the potential socio-economic effects of the proposed reform in the cotton sector, especially since such studies had been carried out in connection with reforms in other sectors.⁶⁷

In light of this, the Court ultimately found that the Council had not shown that it had actually exercised its discretion in adopting the contested measure – something which would have involved the taking into consideration of basic facts – and consequently it was concluded that the principle of proportionality had been infringed.⁶⁸ In reaching this conclusion, however, the reasoning of the Court was somewhat ambiguous as to the manifestly disproportionate nature of the contested measure. As Groussot has noted, the CJEU ‘merely stated that the Council failed to take account of the basic factors (labour costs and impact study) ... Indeed, there was no explicit mention that the Council committed a manifest error of assessment leading to the resulting measure being manifestly inappropriate and therefore contrary to the general principle of proportionality.’⁶⁹

It is submitted that this can be explained by a shift from a substantive, merits based conception of the proportionality principle to a procedural obligation to state reasons in the case. By phrasing the annulment in terms of a *procedural* failure to demonstrate the exercise of discretion by taking account of relevant facts and circumstances, rather than in terms of the measure being *substantively* manifestly inappropriate (e.g. in ABNA), the Court may indeed be understood to be counterbalancing deference in relation to ‘substantive outcomes’ with a form of ‘process review’.⁷⁰

⁶⁴ *Ibid.*, para. [123].

⁶⁵ Xavier Groussot, *Case C-310/04, Kingdom of Spain v. Council of the European Union*, 44 Com. Mkt. L. Rev. 761, 777 (2007); Anneli Albi, *Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums*, 15 Eur. L.J. 46, 61 (2009); Werner Vandendruwaene, *Multi-Tiered Political Questions: The ECJ’s Mandate in Enforcing Subsidiarity*, 6 *Legisprudence* 321, 340 (2012).

⁶⁶ *Spain v. Council*, *supra* n. 60, paras 124–127.

⁶⁷ *Ibid.*, paras 103, 128.

⁶⁸ *Ibid.*, para. [133].

⁶⁹ Groussot, *supra* n. 65, at 781.

⁷⁰ Lenaerts, *supra* n. 1, at 4.

When viewed from this perspective, it makes more sense to refer to the Court's decision to annul the measure as being premised upon a breach of a procedural duty to give reasons. Indeed, as Sauter has noted, the manifestly disproportionate standard which has traditionally characterized the low-intensity, merits based approach to proportionality review took on the quality of a failure to state reasons in *Spain v. Council*.⁷¹ This understanding of the decision appears to have been followed by the European General Court (EGC) in *Sungro, S.A.* where it was stated that in *Spain v. Council* 'it was not the contested provisions themselves, but the failure to take account of all the relevant factors and circumstances, in particular by carrying out a study of the reform's impact, before their adoption which was criticized from the point of view of an infringement of the principle of proportionality'.⁷²

In terms of the CJEU's reference to the lack of an IA⁷³ in *Spain v. Council*, it has been noted that whilst it would be unreasonable to interpret the decision as imposing a general obligation on the EU legislature to perform an IA, the outcome of the case could have been different had such an assessment been carried out:

According to the a contrario reasoning of the judgment, it seems that this would have enabled the Court to assess whether the EU institutions 'had exceeded the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question.' In other words, an IA would have facilitated the Court's task of determining whether the challenged measure 'was manifestly appropriate'.⁷⁴

This too implicitly accepts the shift towards a procedural duty to provide reasons conception of review here, since it suggests that the mere production of an IA may be sufficient to convince the Court that various different measures had been considered and thus that the contested measure itself was proportionate. If correct, the question for the Court under such a process-oriented notion of proportionality would no longer be whether the contested measure is itself

⁷¹ Wolf Sauter, *Proportionality in EU Law: A Balancing Act?*, TILEC Discussion Paper No. 2013-003, 1, 14, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208467 (accessed 18 Feb. 2016).

⁷² *Cases T-252/07, T-271/07, and T-272/07, Sungro, SA, Eurosemillas, SA, Surcotton, SA [2010] ECR II-55*, para. [60].

⁷³ Impact Assessments (IA) are non-binding Commission documents compiled during the preparatory stages of EU law-making which are used, inter alia, to help EU institutions design better policies and laws; to facilitate better informed decision-making throughout the legislative process; to take into account input from a wide variety of external stakeholders; to provide transparency on the benefits and costs of different policy alternatives and to ensure that the principles of subsidiarity and proportionality are respected. See Impact Assessment Guidelines SEC (2009) 92 s. 1.3; Most recently see Better Regulation Guidelines COM(2015) 215 final.

⁷⁴ Alberto Alemanno, *A Meeting of Minds on Impact Assessment*, 17 Eur. Pub. L. 485, 501 (2011); Groussot & Bogojević, *supra* n. 9, at 248.

proportionate, but whether the law-maker plausibly considered it to be so as demonstrated by some form of justificatory evidence. (see Section 6 below).⁷⁵

4.2 VODAFONE

Following its decision in *Spain v. Council*, the Court has failed to adopt the ‘actually exercised its discretion’ formulation of the proportionality principle when adopting a more process-oriented approach to judicial review.⁷⁶ Instead, in a number of cases the Court – whilst continuing to grant the EU law-maker broad discretion and repeating the ‘manifestly inappropriate’ standard of review – has introduced a requirement that the EU law-maker demonstrate that it has based measures on ‘objective criteria’.

For example, in *Vodafone*, a case concerning a challenge to a Regulation setting maximum prices for mobile phone roaming charges, the CJEU began by stipulating a two-step proportionality test that measures be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them.⁷⁷

The important point to note here, however, is that the Court then stated that even though the EU legislature had a broad discretion in the area, it nevertheless must base its choice upon objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators.⁷⁸

In conducting such an examination the CJEU found the contested measure to be suitable since the EU legislature had carried out an exhaustive study, summarized in the IA, which showed that the Commission had examined various regulatory options and assessed their economic impact before exercising its discretion in deciding to regulate roaming charges.⁷⁹ The Court also referred to the arguments of the EU law-maker, including references to an IA and the explanatory memorandum to the proposal for a Regulation, and accepted their

⁷⁵ This much is indeed made explicit ‘What better way for the EU legislature to prove “the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate” than by producing an IA before the ECJ?’ Alemanno, *supra* n. 74, at 501.

⁷⁶ The terminology of ‘actually exercised its discretion’ which ‘presupposes the taking into consideration of all the relevant factors’ has come instead to be used by the Court when reviewing whether the EU law-maker has committed a manifest error of assessment – often a distinct ground of substantive judicial review. See *Case T-93/10 Bilbaína de Alquitranes and others v. ECHA* [2013] ECR II-0000, para. [77]; *Case T 689/13 Bilbaína de Alquitranes* [2015], not yet reported, para. [24].

⁷⁷ *Case C-58/08 The Queen, on the application of Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999, para. [51].

⁷⁸ *Ibid.*, para. [53].

⁷⁹ *Ibid.*, para. [55].

findings when concluding at the necessity stage of its proportionality assessment that no less restrictive measures would have been equally effective at achieving the contested measure's aims.⁸⁰ Finally, despite alluding to the third-step of the proportionality test, it is clear that the Court did not engage in an assessment of whether the objectives pursued by the measure were such as to justify even substantial negative economic consequences for certain operators. Instead, without giving weight to the interests of private parties, the CJEU simply held that the Regulation was proportionate due to the importance of the objective of consumer protection and the limited duration of the intervention 'even if it might have negative economic consequences for certain operators, is proportionate to the aim pursued'.⁸¹

Accordingly, in light of the EU legislature's broad discretion, the Court found that it could legitimately take the view that less restrictive measures would not achieve the same result as the regulation under review and that the latter was therefore necessary.⁸² In this way, the CJEU may be said to have deferred to the law-maker's own opinion vis-à-vis compliance with the proportionality principle and thus reduced its role to simply checking whether the EU law-maker had 'provided enough informative input justifying compliance with the principles of proportionality and subsidiarity'.⁸³

4.3 LUXEMBOURG V. PARLIAMENT AND COUNCIL

A similar approach was taken in *Luxembourg v. Parliament and Council*, where the Court once again stipulated that the proportionality principle required the law-maker to base its choices upon objective criteria.⁸⁴ In deciding whether an EU directive seeking to establish a common framework regulating the essential features of airport charges breached the principle of proportionality, the Court, citing *Vodafone* as authority, once again went on to note that the Commission had carried out an IA which considered various different options before adopting the measure currently under review.⁸⁵ This then influenced the Court's reasoning in dismissing Luxembourg's appeal, thus leading to the case being cited as further evidence of the Court operating a more process-oriented approach to proportionality review by primarily focusing not on the substance of the contested measure but on

⁸⁰ *Ibid.*, paras 61–68.

⁸¹ *Ibid.*, para. [69].

⁸² *Ibid.*, para. [68].

⁸³ José A. Gutierrez-Fons, *Transatlantic Adjudication Techniques: The Commerce Clause and the EU's Internal Market Harmonisation Clause in Perspective*, in *A Transatlantic Community of Law Legal Perspectives on the Relationship between the EU and US Legal Orders* 69, 100 (Fahey & Curtin eds, CUP 2014).

⁸⁴ *Case C-176/09 Luxembourg v. Parliament and Council* [2011] ECR I-03727, para. [50].

⁸⁵ *Ibid.*, paras 65–67.

whether the institutions showed that they had examined different regulatory options and assessed their impact.⁸⁶

4.4 INUIT TAPIIRIT KANATAMI

Similarly, in *Inuit* the EGC explicitly cited *Vodafone* and the need to base measures on ‘objective criteria’ before continuing the practice of making increased reference to the process that led to the adoption of contested measures of EU law by referring to the preparatory report of the Commission when concluding that the measure was proportionate.⁸⁷

In deciding whether a ban on seal products was proportionate, the CJEU noted that the Commission’s proposal for a Regulation had been watered down in the final Regulation adopted by the Parliament and Council. This ‘demonstrates that the legislature specifically examined the situation in the Union which called for that measure and considerably limited its scope in comparison with the Commission proposal’ and that it must therefore ‘be concluded that the measures provided for were strictly limited to those the legislature considered necessary in order to eliminate the obstacles to free circulation of the products indicated.’⁸⁸

In terms of whether less restrictive measures were available, the Court noted that alternatives such as a labelling requirement were examined and rejected by the legislature.⁸⁹ In support of this finding, the Court simply cited two recitals to the Regulation in which the EU law-maker, relying upon a report by the European Food Safety Authority, asserted that it had examined less restrictive measures and decided that they were unsuitable. It was to be concluded, therefore, that having analysed different alternatives, the legislature took the view that they did not allow the objective pursued to be met and that a general prohibition on the placing on the market of seal products was the best means of guaranteeing the free movement of goods.⁹⁰

Just as in *Vodafone* and *Luxembourg v. Parliament and Council*, therefore, it was law-maker’s own opinion as to the suitability and necessity of the contested measure, as evidenced by the outcome of the law-making process and reliance upon preparatory documents, which was determinative and not the Court’s own assessment of the merits of the contested measure. Finally, the Court did not

⁸⁶ Groussot & Bogojevi!, *supra* n. 9, at 246.

⁸⁷ *Case T-526/10 Inuit Tapiriit Kanatami and Others v. European Commission* [2013] ECLI:EU:T:2013: paras 90–103.

⁸⁸ *Ibid.*, para. [90].

⁸⁹ *Ibid.*, para. [95].

⁹⁰ *Ibid.*, para. [96].

engage in the third step of the proportionality test, citing the applicant's failure to adequately substantiate their position on this point.⁹¹

It is generally accepted that all such cases evidence a general trend towards a more process-oriented approach to judicial review.⁹² The CJEU's insistence upon the need for the EU law-maker to base its measures upon 'objective criteria' and its subsequent citation of IAs and the explanatory memoranda at several different stages of its proportionality reasoning has been hailed as 'revolutionary' in CJEU jurisprudence.⁹³ It has been said that under this more process-oriented approach to proportionality review, the Court now requires the EU law-maker to present and explain material relied upon during the law-making process in order to justify its actions.⁹⁴

Others have proposed that in the above case-law the Court seems to base its conclusion that the contested measure was proportionate, in part at least, upon 'the question of whether the infringing Act was enacted through a process that included procedural requirements such as consultation procedures, appropriate investigations and studies, and sufficient parliamentary debate.'⁹⁵

It has been suggested that this process-oriented approach to proportionality review, particularly in *Vodafone* and *Luxembourg v. Parliament and Council*, continues the line of reasoning established in *Spain v. Council* that the EU institutions must now show that they took all the relevant factors and circumstances of the situation they intended to regulate into account before exercising their discretion to adopt the act in question.⁹⁶

However, this is by no means clear from the explicit wording of the Court's decisions. Indeed, the Court in *Vodafone* and other subsequent cases has neither cited *Spain v. Council* nor the novel proportionality test established therein – instead simply requiring that the measure at issue be based on 'objective criteria'. The only exception to this is the decision in *Afton Chemical* where the Court explicitly repeated verbatim the 'actually exercised its discretion' test and cited *Spain v. Council* as authority for doing so. Rather confusingly, though, it did so

⁹¹ *Ibid.*, para. [98].

⁹² Patricia Popelier, *Preliminary Comments on the Role of Courts as Regulatory Watchdogs*, 6 *Legisprudence*, 257, 262 (2012); Lenaerts, *supra* n. 1.

⁹³ Groussot & Bogojevil, *supra* n. 9, at 246; Isidora Maletil, *The Role of the Principle of Subsidiarity in the EU's Lifestyle Risk Policy*, in *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* 197, 209 (Alberto Alemanno & Amandine Garde eds, CUP 2014).

⁹⁴ Keyaerts, *supra* n. 54, at 280.

⁹⁵ Ittai Bar-Simon-Tov, *Semiprocedural Judicial Review*, 6 *Legisprudence* 271, 274 (2012). According to Bouckaert, under process-oriented review 'the control of the legal validity of an act is not limited to the final regulatory act, but concerns also the process of its legal genesis'. B. Bouckaert, *Law Is Politics and Often Also Policy*, in *Policy Within and Through Law: Proceedings of the 2014 ACCA-conference* 45, 58 (De Bruyne & others eds, Maklu Publishing 2015).

⁹⁶ Lenaerts, *supra* n. 1, at 7; Groussot & Bogojevil, *supra* n. 9, at 246.

when examining whether the law-maker had committed a ‘manifest error of assessment’, which often operates as a substantive ground of review distinct from proportionality.⁹⁷

4.5 GAUWEILER

The recent Grant Chamber decision in *Gauweiler* offers the most compelling example to date that the proportionality principle is now being applied in a procedural fashion by the Court in certain circumstances.

The case concerned the first ever preliminary reference from the German BvG on the question of whether the ECB’s Outright Monetary Transactions programme, as announced in a press release, was legal under EU law. The case raises a number of complex constitutional issues which cannot be addressed here.⁹⁸ Focusing purely on the Court’s approach to proportionality review, it first began by taking a two-step approach in which acts of the EU institutions must be appropriate for attaining the objectives pursued and do not go beyond what is necessary in order to achieve those objectives.⁹⁹ In conducting such an enquiry, the CJEU held that since the ECSB is required to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed a broad discretion.¹⁰⁰

From here, however, the Court introduced yet another (and to date the most process-oriented) formulation of proportionality review, this time explicitly connecting it to the duty to provide reasons as enshrined in Article 296 TFEU:

Nevertheless, where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.¹⁰¹

Accordingly, what was implicit in the Court’s proportionality reasoning in *Spain v. Council* is made explicit in *Gauweiler*: in certain areas where the EU law-maker enjoys broad discretion, merits based proportionality review has been effectively

⁹⁷ Case C 343/09 *Afton Chemical Limited v. Secretary of State for Transport* [2010] ECR I-07027 57. The decision of the CJEU clearly deals with whether a manifest error of assessment had been committed (paras 28–42) independently of whether the contested measure breached the principle of proportionality (paras 43–69). See also fn. 74.

⁹⁸ For an analysis see Alicia Hinarejos, *Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union*, 11 Eur. Const. L. Rev. 563 (2015).

⁹⁹ Case C-62/14 *Gauweiler and Others* [2015] not yet reported, para. [67].

¹⁰⁰ *Ibid.*, para. [68].

¹⁰¹ *Ibid.*, para. [69].

replaced by a procedural obligation to justify measures of EU law by providing a statement of reasons.¹⁰² Interestingly, in formulating this version of the proportionality principle as being inextricably linked with the Article 296 TFEU procedural duty to give reasons, the CJEU, like the Advocate General, did not make any reference to the ‘manifestly inappropriate’ standard of review that has been almost unanimously used in its prior proportionality jurisprudence. Instead, the Court stipulated at the necessity stage of its enquiry that it was restricted to examining whether the measure manifestly goes beyond what is necessary to achieve its objectives.¹⁰³

In conducting the suitability step of the proportionality test, the CJEU simply referred to the press release and the explanations provided by the ECB that the programme is based on an analysis of the economic situation in the Euro Area.¹⁰⁴ It then concluded, once again taking the arguments of the ECB at face value without any scrutiny, that in light of the information placed before the Court in ‘it does not appear that that analysis of the economic situation of the Euro Area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment.’¹⁰⁵

From this, the Court recognized the virtually unlimited discretion of the ESCB in this area, effectively stating that nothing can be done to review the suitability of the disputed measure:

In that regard, the fact, mentioned by the referring court, that that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB’s broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.¹⁰⁶

This leads to a somewhat circular form of reasoning: (i) the applicants are challenging the suitability of the measure; (ii) the Court says that measures must indeed be suitable; (iii) but the Court then grants such a wide margin of discretion to the ESCB that suitability review can only involve an examination of whether the ESCB has used ‘its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy’; (iv) but any challenge to the care and accuracy of such analysis cannot be challenged; (v) because the ESCB has such broad discretion.

¹⁰² Sauter, *supra* n. 71.

¹⁰³ *Gauweiler and Others*, *supra* n. 99, para. [81].

¹⁰⁴ *Ibid.*, paras 72–73.

¹⁰⁵ *Ibid.*, para. [74].

¹⁰⁶ *Ibid.*, para. [75].

That being said, there may of course be good reasons for judicial restraint when scrutinizing policy decisions of the ECB given its nature as an expert body and its independence under the Treaties.¹⁰⁷ It has long been established that the CJEU should not substitute its own preferences for that of the initial decision making body at the Union level just because it would have decided differently had it been entrusted to take such decisions. Nevertheless, for the purpose of analysing process-oriented review, it is clear from the reasoning of the Court here that it is merely concerned with checking that some form of statement of reasons has been given by the law-maker for its actions. The Court is thus not concerned with the accuracy of evidence relied upon by the ECB nor the conclusions drawn from such evidence when formulating monetary policy.

According to Hofmann, the Court's shift towards a procedural conception of proportionality stems from the fact that cases like *Gauweiler* which involve highly technical, information intensive activities are very difficult to monitor via traditional, merits based judicial review.¹⁰⁸ As a result, in situations where such intricacy results in fewer possibilities for the Court to engage in the substance of a contested measure, an enhanced reliance is placed upon procedural requirements, such as demonstrating that all relevant measures were taken into consideration before law-making and that reasons were provided for adopting particular measures.¹⁰⁹ Accordingly, *Gauweiler* is a case which confirms and reinforces the trend towards process-oriented review in the EU legal order in which substantive, merits based proportionality review takes on a form more akin to the procedural duty to state reasons.¹¹⁰

Further support comes from Goldmann who has stated that:

Instead of a full review, the proportionality test bears a largely procedural character. The ECJ establishes that the ECB was under a duty to provide sufficient reasons, which it derives *mutatis mutandis* from Article 296(2) TFEU. What follows is a plausibility test in which the ECJ finds that the reasoning given by the ECB in support of its OMT program is consistent and in line with certain features of the OMT program such as its selective character and conditionality.¹¹¹

¹⁰⁷ Hinarejos, *supra* n. 98, at 575; M. Goldmann, *Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 Ger. L.J. 265, 266 (2014).

¹⁰⁸ Herwig Hofmann, *Gauweiler and OMT: Lessons for EU Public Law and the European Economic and Monetary Union*, Working Paper, 16, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621933 (accessed 22 Jan. 2016); See also Hinarejos 'The Court ... sought to recognise the broad discretion of the European Central Bank to make complex economic assessments and technical choices, while at the same time striving to discharge a meaningful and necessary role ... the Court did not want to be seen to be second-guessing the expert body's policy choices, so it focused on procedural requirements and applied a light-touch review when it came to assessing the proportionality of the scheme.' *supra* n. 98, at 574.

¹⁰⁹ Hofmann, *supra* n. 108, at 16.

¹¹⁰ *Ibid.*

¹¹¹ Matthias Goldmann, *Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB*, 23 Maastricht J. Eur. Comp. L. 119, 124 (2016).

5 COMMENT

Whilst one must be cautious of reading too much into the Court's reasoning in *Gauweiler* given the truly exceptional nature of the case, it is clear from the above jurisprudence and academic commentary as a whole that a fundamental reconceptualization of the nature of the proportionality principle has taken place in recent years. Whereas under its conventional understanding the Court was required to determine whether the merits of a contested measure before it was proportionate (albeit by adopting a very light touch approach), process-oriented review requires the Court to check that adequate reasons have been provided by the law-maker to demonstrate its own belief that it acted in compliance with the proportionality principle.

A number of observations may be made in light of this. First, from a doctrinal perspective one immediately sees considerable overlap between the essential procedural requirement to state reasons in Article 296 TFEU and a novel, process-oriented approach to the proportionality principle that had hitherto been conceived of as a substantive ground of judicial review. As has already been noted, whilst the process/substance distinctions in judicial review at the EU level are closely related, the two are to be kept conceptually distinct. To the extent that the Court now focuses – via its proportionality assessment – upon whether the arguments and justificatory evidence adduced by the law-maker adequately demonstrate that it has taken all relevant facts and considerations into account, however, it is clear that this distinction is becoming increasingly blurred. Indeed, the cases cited above suggest that it was the adequacy of the reasoning provided by the law-maker, and not the substantive content of the contested measure itself (such as in *ABNA*, *IATA* etc.) which was determinative.

Furthermore, in light of the Court's consistent finding that 'in the exercise of the powers conferred on it the [Union] legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations',¹¹² it is possible that process-oriented proportionality review may become the norm outside the fundamental rights context.¹¹³

The point at this stage is not to suggest that in the above cases a more robust scrutiny of complex economic and technical data should have been conducted by the Court. Nor is it to call into question the belief that such issues are best dealt

¹¹² *Supra* n. 44.

¹¹³ In light of the above case law, those types of cases include: The Internal Market (*Vodafone and Inuit*); The Common Agricultural Policy (*Spain v. Council*); Transport (*Luxembourg v. Parliament and Council*); Economic and Monetary Union (*Gauweiler*). For a process-oriented approach to fundamental rights review see *Joined Cases C-92/09 Volker und Markus Schecke GbR and C-93/09 Hartmut Eifert v. Land Hessen* [2010] ECR I-11063.

with by law-maker's and not Courts. It is, rather, that the gradual shift towards process-oriented review in the reasoning of the Court illustrates that it may no longer be correct from a conceptual point of view to understand proportionality in the discretionary policymaking context as involving an examination of the merits of contested measures in certain types of cases. This is aptly demonstrated by Weatherill in his comments on the Vodafone case:

the Commission, having piloted the measure through the EU legislative process, then advises the Court it is constitutionally justified – well, it would, wouldn't it. The Court did not stand outside the legislative choice that had been made. Instead it aligned itself uncritically with the institutions whose choices were being challenged by the applicants.¹¹⁴

This is, of course, central to the perceived advantages of process-oriented review, which is said to be preferable to its traditional, merits based formulation precisely because it prevents the Court from intruding into the discretionary policymaking activities of the law-maker whilst still managing to hold the EU law-maker to account.¹¹⁵ 'Proportionality analysis takes procedural requirements into account, in particular when broad deference hinders a substantive assessment of legislation'¹¹⁶

In this regard, as Dyzenhaus has observed, judges in many legal systems have traditionally felt more comfortable reviewing decisions on procedural than on substantive grounds on the basis that 'procedural review does not interfere with the democratic mandate of the legislature both to make substantive decisions and to delegate authority to make such decisions to administrative officials'¹¹⁷ This is premised upon the belief that judges 'should stay out of the business of reweighing the reasons given by the official – a substantive exercise – and confine themselves to the allegedly procedural exercise of checking that reasons were given.'¹¹⁸ According to this approach, courts should 'defer to administrative interpretations of the law when the reasons of the officials who made the decision provide a reasonable basis for the decision.'¹¹⁹

¹¹⁴ This point is made in relation to the Court's scrutiny of the legislature's justifications for having recourse to Art. 114 TFEU as a legal basis for Union action, but is nevertheless relevant to the closely linked proportionality analysis in that case. Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a 'Drafting Guide'*, 12 German L.J. 827, 842 (2011).

¹¹⁵ 'These standards allow the Court to avoid completing an evaluation of its own, and to invalidate legislation because of a lack of evidence of justification' Meßerschmidt *supra* n. 6, at 356. See also Lenaerts, *supra* n. 1.

¹¹⁶ Popelier, *supra* n. 92, at 257.

¹¹⁷ David Dyzenhaus, *Process and Substance as Aspects of the Public Law Form*, 74 Cambridge L.J. 284, 284–285 (2015).

¹¹⁸ *ibid.* 285.

¹¹⁹ David Dyzenhaus, *Proportionality and Deference in a Culture of Justification*, in *Proportionality and the Rule of Law: Rights, Justification, Reasoning* 243, 239 (Huscroft, Miller & Webber eds, CUP 2014).

Whilst this is not how the proportionality ground of review has traditionally been conceived in the EU legal order,¹²⁰ the above case law and commentary suggests that judicial scrutiny of compliance with the principle has, to some extent at least, shifted towards deferring to the assessment of the legislature itself with respect to its own compliance with the principle provided some form of justificatory evidence is adduced e.g. an IA. This would indeed appear to be confirmed by Hofman's reading of contemporary case law that 'Increasingly ... in the context of review of legislative acts of the Union, the CJEU does not review the substance of an act but instead checks whether the institutions can prove that they themselves reviewed the proportionality of a measure before adopting it.'¹²¹ One sees this clearly in cases like *Vodafone* and *Luxembourg v. Parliament and Council* where the Court noted that the law-maker had examined various different options which were summarized in an IA before taking action and then deferred to the EU law-maker's own opinions and assessments as to why the contested measure complied with the principle of proportionality.

It has been said that '*Ultimately, the extent to which process review is accepted, depends upon the conception of democratic rule or legitimacy dominant within a given legal system.*'¹²²

In light of this, it is important to note that process-oriented review as developed by the CJEU has been claimed to share similarities with procedural theories of democracy and judicial review within the United States literature.¹²³ The locus classicus here is John Hart Ely's *Democracy and Distrust* which promulgates an alternative to substantive judicial review in which courts play a 'representation reinforcing' role by interfering only to the extent that the processes of law-making are deficient.¹²⁴ 'That is the simple, powerful thesis of *Democracy and Distrust*: the courts should be in the business of reinforcing and perfecting, not second-guessing, the work of representative government.'¹²⁵

The central premise of *Democracy and Distrust* is that substantive judicial review is counter-majoritarian and therefore prima facie incompatible with democratic theory.¹²⁶ Based upon this, Ely sought to develop an approach to judicial review

¹²⁰ '[T]aking into account that the main function of [proportionality analysis] is to secure a legal safeguard for the parties affected by the legislative or administrative measures in question, it must imply the judicial review of the merits of the decision' Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* 227 (Hotei Publishing 2015).

¹²¹ Hofmann, *supra* n. 12, at 205.

¹²² Popelier, *supra* n. 92, at 261.

¹²³ Lenaerts, *supra* n. 1; Groussot & Bogojević, *supra* n. 9.

¹²⁴ John H. Ely, *Democracy and Distrust – A Theory of Judicial Review* (Harvard University Press 1980).

¹²⁵ David A Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 *Stan. L. Rev.* 761, 761 (2004).

¹²⁶ Ely, *supra* n. 124, at 4–5, 7–8, 11–12.

that, ‘unlike its rival value protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of ... representative democracy.’¹²⁷ He argued that rather than dictating substantive outcomes or protecting substantive constitutional values, courts should only intervene when the political process malfunctions.¹²⁸ According to Ely, therefore, the basic assumption of the US constitutional system is that legislative majorities are ordinarily entitled to get their own way. As a result, judges should as a default rule defer to the democratically legitimate outcomes of the political process:

[C]ontrary to the standard characterization of the Constitution as ‘an enduring but evolving statement of general values’, ... in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, what might capaciously be designated process writ large – with ensuring broad participation the processes and distributions of government.¹²⁹

For Ely, judicial review that focuses on ensuring that the political process functions correctly, rather than upon the substantive outcomes of those processes, is not only more legitimate from a democratic perspective, but also, ‘again in contradistinction to its rival [substantive judicial review], involves tasks that courts, as experts on process and ... as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.’¹³⁰

The important point to note from this is that Ely and most other process theorists in the United States do not seek to replace substantive judicial review in its entirety. Instead, they use ‘process-based theories to justify some version of substantive judicial review and to delineate the areas in which substantive judicial review is legitimate.’¹³¹

Whilst a full analysis of the normative desirability of procedural theories of judicial review for the EU legal order must be left for another time, the above analysis necessarily poses the question of whether such a procedural approach to judicial review (particularly in those proportionality cases where fundamental rights are not a predominant issue) is well-suited to the EU system of policymaking?

¹²⁷ *Ibid.*, at 88.

¹²⁸ *Ibid.*, at 102–103.

¹²⁹ *Ibid.*, at 87.

¹³⁰ *Ibid.*, at 88. The relative expertise of courts when it comes to matters of procedure as opposed to substantive policy decisions has also been invoked in support of procedural approaches to judicial review in common law legal systems (particularly the United Kingdom). See David Mead, *Outcomes aren't all: defending process-based review of public authority decisions under the Human Rights Act*, Pub. L. 79 (2012).

¹³¹ Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 Boston U. L. Rev. 1959 (2011).

It has been said that the ‘counter-majoritarian’ difficulty is virtually non-existent in the EU context since there is less democracy at the EU level¹³²; thus arguably rendering the central target of Ely and other procedural theorist’s work inapplicable to judicial review in the EU. Essentially this critique rests on the view that it has been the inability to ‘develop structures and processes which adequately replicate or, “translate,”¹³³ at the Union level, even the imperfect habits of governmental control, parliamentary accountability, and administrative responsibility that are practiced with different modalities in the various member states.’¹³⁴

With the coming into force of the Lisbon Treaty, however, the democratic credentials of the Union have been enhanced to a considerable extent. In other words, the functional premise upon which judicial review was based in the early years of European integration has been replaced, or at least complemented to a considerable extent, by considerations of democratic legitimacy. In this regard, [t]he Lisbon Treaty represents a dramatic step towards political Union.¹³⁵ The revised TEU now contains a separate title on ‘democratic principles’¹³⁶ of which Article 10 TEU is the central provision. It provides that the ‘functioning of the Union shall be founded on representative democracy’. This is envisaged as operating in both a direct and an indirect manner: Article 10(2) TEU provides that European citizens are to be represented directly at the Union level by the European Parliament; whereas Article 10(3) states that they are also indirectly represented through their Member States in the Council. ‘This *dual* democratic legitimacy of the Union corresponds to its *federal* nature.’¹³⁷

Furthermore, Article 289(3) TFEU now provides that ‘legal acts adopted by legislative procedure shall constitute legislative acts’, meaning that one may now formally define ‘legislation’ in the EU legal order as an act adopted by the bicameral Union legislator, albeit operating under different procedures depending on the subject matter of the legislation.¹³⁸

The introduction of the term ‘legislative procedure’ is potentially of immense significance here. As Bast notes, the exercise of legislative power means something more than simply producing rules and regulations of any kind or form. Legislation

¹³² M. Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 Intl. J. Const. L. 618, 631 (2006).

¹³³ Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in *European Constitutionalism Beyond the State*, in *European Constitutionalism Beyond the State* (Weiler & Wind eds, CUP 2003) 27, 27–29.

¹³⁴ Joseph Weiler, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12(1) I•CON 94–103, 100

¹³⁵ Robert Schütze, *European Constitutional Law* 43 (Cambridge University Press 2012).

¹³⁶ Title II TEU.

¹³⁷ Schütze, *supra* n. 135, at 44.

¹³⁸ Art. 289 (1) and 289 (2) TFEU. On the difference between the ordinary legislative procedure and the various special legislative procedures *see* Schütze, *supra* n. 135, at Ch. 5.

evokes a mode of law-making by elected representatives and thus a democratic form of coupling the spheres of law and politics.¹³⁹

Accordingly, can one say that the degree of democratic legitimacy now wielded under the ordinary legislative procedure has reached such a stage as to warrant consideration of the counter-majoritarian difficulty at the EU level? And if so, does the Court's more process-oriented approach to reviewing legislative acts in recent years give one cause for contemplating the normative desirability of procedural theories of democracy and judicial review for the EU moving forward?

6 THE QUESTION OF THRESHOLDS

Should process-oriented proportionality become an established practice at the EU level, the central question to be resolved in such cases will be one of thresholds: what will it take to convince the CJEU that all relevant facts and considerations have been taken into account? What precisely is required of the law-maker when demonstrating that it based its measures on 'objective criteria'? In light of the wide discretion afforded to the law-maker, is the Court willing to engage in the substantive contents of such justificatory evidence?

In this regard the Court has yet to definitively pronounce on what constitutes adequate evidence in order to satisfy the 'actually exercised its discretion, which presupposes the taking into consideration all the relevant factors and circumstances of the situation the act was intended to regulate'¹⁴⁰; 'based upon objective criteria'¹⁴¹ or 'examine carefully and impartially all the relevant elements of the situation in question'¹⁴² formulations of the proportionality test. Nor has it indicated where the outer limits of the obligation 'to give an adequate statement of the reasons for its decisions' lies.¹⁴³ What is more, it is unclear whether different legal consequences flow from the differences in formulation here.

Furthermore, in terms of the impact that such an approach to judicial review may have upon the quality of laws passed at the EU level, it has been noted that courts can indeed contribute to enhancing the rationality of law-making by indicating that measures supported by vigorous deliberation and strong evidence will be more likely to survive judicial review.¹⁴⁴ In this regard, 'once the legislator knows that a rational procedure of law-making helps to defend borderline cases,

¹³⁹ Jürgen Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, 49(3) *Com. Mkt. L. Rev.* 885–927, 891 (2012).

¹⁴⁰ *Spain v. Council*, *supra* n. 60, para. [122].

¹⁴¹ *Vodafone*, *supra* n. 77, para. [53]; *Luxembourg*, *supra* n. 84, para. [50]; *Inuit*, *supra* n. 87, para. [89].

¹⁴² *Gauweiler and Others*, *supra* n. 99, para. [69].

¹⁴³ *Ibid.*, para. [69] emphasis added.

¹⁴⁴ Alemanno, *supra* n. 74, at 501.

they will be eager to prove to judicial review that the law under scrutiny resulted from well informed and responsible deliberation.¹⁴⁵

This further highlights the importance of thresholds in process-oriented proportionality review. In this regard, it would appear that the level of justificatory evidence the Court deems must be adduced by the law-maker in order to satisfy proportionality review is rather low. To date, the jurisprudence suggests that absent evidence being lacking entirely (e.g. *Spain v. Council*) all evidence adduced by the law-maker will be accepted at face value, thus leading to the suspicion that scrutiny of contested measures is effectively being operated in a box-ticking fashion.

Illustrative here is the Court's approach to IAs when considering the proportionality of contested measures. As was noted above, in a series of cases the CJEU has uncritically accepted the findings of ex- ante IAs as evidence that the law-maker had considered various options before enacting the contested measure and thus had complied with the principle of proportionality. This is neatly encapsulated by Brenncke's observation that in *Vodafone* the Court did not actually engage with the substance of the contested measure at all: 'the Court ... referred to the impact assessment and the explanatory memorandum to the proposal for a regulation and adopted the study's findings as expressed in these documents without scrutinizing their merit.'¹⁴⁶

Can we conclude from this that the production of an IA purporting to have considered all relevant facts, circumstances and alternative options before enacting the contested measure is in and of itself sufficient to satisfy the Court that its process-oriented conception of the proportionality principle has been complied with?¹⁴⁷

For an alternative state of affairs to be possible, the Court would have to conduct a review into the substantive accuracy of facts relied on by the EU law-maker and/or the scope of consultation and quality of reasoning of pre-legislative documents such as IAs. The issue would then be whether the Court can second guess the findings or methods deployed in such documents, and whether it is obliged to accept whatever conclusions they make?¹⁴⁸ For example, the Court would have to be willing to decide that a particular IA is so defective that reliance upon it by the law-maker renders the subsequently enacted measure manifestly inappropriate and thus illegal.

¹⁴⁵ Meßerschmidt, *supra* n. 6, at 353.

¹⁴⁶ Martin Brenncke, *Case C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010*, 2010, 47 Com. Mkt. L. Rev. 1793, 1809 (2010).

¹⁴⁷ For a discussion of Impact Assessments and their potential uses in judicial review see Paul Craig, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, 48 Com. Mkt. L. Rev. 395, 411–412 (2011).

¹⁴⁸ Vandenbruwaene, *supra* n. 65, at 342.

Given the degree of discretion afforded to the law-maker in such cases, however, it is questionable whether the Court would wish to interfere in the substantive conclusions drawn from such documents, thus suggesting that the mere production of such preparatory documentation may suffice to ensure compliance with the proportionality principle.¹⁴⁹ On the one hand, it might be the case that ‘the more the Court requires from the Commission in procedural terms, e.g. disclosing its assessment of different possible policy options through an impact study, the more it will alleviate the marginal judicial review of the substantive issues which a “manifestly inappropriate” standard entails.’¹⁵⁰ On the other, it is at least plausible that reliance on such documents does not simply reduce the intensity of substantive review, but effectively replaces it entirely and leads to a mere box ticking exercise by the Court.

In seeking to demonstrate the implications that this may have for applicants seeking to challenge measures of Union law where process-oriented proportionality review is applied, the recent decision in *Estonia v. Parliament and Council* is worthy of note.¹⁵¹ Estonia challenged an EU Directive which sought to simplify the accounting requirements for small companies, arguing that its own national rules were drawn up using a model of international financial reporting standards which required additional information than the contested Directive.¹⁵² According to the applicants, the Commission had committed an error of assessment in the criteria used at the stage of the IA by using as a basis mainly quantitative indicators concerning the number of small undertakings, instead of relying on qualitative indicators such as the market share of sales of those small undertakings in the national economy. In Estonia’s view, small undertakings contribute more strongly than in other Member States to the turnover of undertakings as a whole in their country. Accordingly, certain provisions of the Directive disregarded the obligations imposed upon the EU law-maker in Article 5 of Protocol No 2 annexed to the Treaties in which draft legislative acts should contain, inter alia, some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States.^{153,154}

In contrast, the Commission argued that Estonia’s criticisms of its IA were unproven since that analysis was carried out ‘using the appropriate procedure by an

¹⁴⁹ Support for this comes from the observation that ‘These ... cases thus appear to herald a change in the way that efforts to examine a potential breach of the principle of proportionality ... are carried out using impact assessments. However, as long as these assessments make a favourable finding, it seems that the Court will accept those reasons on their face value.’ Groussot & Bogojevil, *supra* n. 9, at 247.

¹⁵⁰ Brenncke, *supra* n. 146, at 1809–1810.

¹⁵¹ Case C- 508/13 *Estonia v. Parliament and Council* [2015], not yet reported.

¹⁵² *Ibid.*, para. [20].

¹⁵³ *Ibid.*

¹⁵⁴ Art. 5, Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 Dec. 2007.

external contractor, after consulting the relevant committee and taking into account the situation both of the EU and of each Member State.¹⁵⁵

In response, the Court found that the EU legislature must be allowed broad discretion in the area concerned and that accordingly the ‘manifestly inappropriate’ standard applied.¹⁵⁶ There was, however, no need for the EU law-maker to demonstrate that it had ‘actually exercised its discretion’ or based its decisions upon ‘objective criteria’ as in previous case law: thus raising considerable confusion as to when a more process-oriented approach will be adopted by the Court. Ultimately, the CJEU disposed of the case rather swiftly, finding that Estonia had failed to demonstrate why the measure was not necessary and had thus not included in its plea ‘sufficient evidence to demonstrate the manifestly inappropriate nature of the measures adopted by the EU legislature.’¹⁵⁷

In so doing, however, the CJEU avoided the issue of whether it was possible to challenge the substantive quality of IAs before the Court; refusing to address both the applicant’s contention that the IA was based upon incorrect criteria and the Commission’s response.

Whilst one must keep in mind the non-legally binding nature of IAs, a problem potentially presents itself here. As we have seen above, the Court has been willing to accept IAs and other preparatory documents as evidence of the EU law-maker’s compliance with the principle of proportionality. However, given that a more process-oriented approach to proportionality has effectively meant a replacement of low-intensity merits based review with a procedural, reasons giving requirement, the CJEU has to date been willing to accept such evidence at face value.

As a result, a trend is possibly emerging in which the EU institutions are free to rely upon IAs and other preparatory documents to support their assertion that contested measures have been adequately justified in terms of their compliance with the principle of proportionality, and these findings will be accepted by the Court without any degree of scrutiny whatsoever, whereas applicants appear to be precluded from challenging the methodology or findings of such assessments.¹⁵⁸ Furthermore, given that evidence of a more rational, deliberative form of law-making may render contested measures more robust in judicial review proceedings, it is to be anticipated that the Court’s willingness to accept preparatory documents such as IAs as evidence of compliance with the proportionality principle will lead to the Union law-maker routinely turning to such documents to

¹⁵⁵ Estonia, *supra* n. 151, para [26].

¹⁵⁶ *Ibid.*, para. [29].

¹⁵⁷ *Ibid.*, paras 35–37.

¹⁵⁸ This is all the more troubling when one considers that Impact Assessments have been criticized on a number of fronts, including their factual accuracy and scope of consultation. For an early overview of such concerns see Caroline Cecot and others, *An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU*, 2 Reg. & Governance 405 (2008).

defend its decisions. Once again, this raises the question of just how far down this road the Court is willing to go before it would consider evaluating the substantive merits of such preparatory documents or whether, when faced with such justificatory evidence, the Court will in all cases simply accept them at face value less it be accused of overstepping the boundaries of its judicial powers.

7 CONCLUSION

The past decade or so has seen a gradual shift taking place within the case-law of the CJEU away from a low-intensity scrutiny of the merits of contested measures of Union law via the proportionality principle towards a more process-oriented conception of review. In so doing, it has been contended by the Court's recently elected President and other seasoned commentators that such an approach prevents the Court from intruding into the realm of discretionary policy making whilst still being to hold law-maker's at the Union level to account. Whilst there may be much of merit to such an approach – particularly in light of the twin concerns of judicial interference in highly technical areas of law-making and the judiciary substituting its judgment for that of the Union's law-making institutions – the manner in which it has operated to date leaves a number of questions unanswered.

From a doctrinal perspective, the Court has been inconsistent in its formulation of a more process-oriented proportionality principle, using different terminology across different case-law as well as conflating the hitherto substantive ground of review with the procedural duty to state reasons in Article 296 TFEU. Furthermore, in terms of the level of scrutiny actually achieved by process-oriented review, the admittedly limited number of cases to date hint at a willingness by the Court to accept the EU's law-making institutions own views vis-à-vis compliance with the principle of proportionality without engaging in the substantive merits of the contested measures itself. In particular, the Court's acceptance of preparatory documents such as IAs at face value as evidence of compliance with the proportionality principle has led to the suspicion of a box ticking approach being adopted. The potential problems associated with such an approach are highlighted by the Court's reluctance recently in *Estonia v. Parliament and Council* to engage in the applicant's challenge to the accuracy and quality of IAs relied upon by the law-maker when enacting a measure under review. Should such a practice continue, a situation may arise in which the Union's law-making institutions may shield their measures from annulment by relying upon preparatory documents of potentially contestable quality and accuracy which applicants are effectively precluded from challenging.