

THE NEED FOR PROPORTIONALITY: ASSESSING THE CLASH BETWEEN NATIONAL CRIMINAL PROVISIONS AND THE FOUR FUNDAMENTAL FREEDOMS IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

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1. Introduction

In the European Union legal framework, proportionality is a general principle which regulates the exercise of powers by the EU. It was developed by the European Court of Justice (ECJ)¹ in order to limit institutional discretion and was also applied with reference to national legislation as far as the interference of national regulations on obligations under Community law was concerned².

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¹ It is thanks to the ECJ that that principle has been progressively constitutionalised and normativised. See *Roquette Frères*, Case no 138/79, Judgment of 29.10.1980, ECR 1980, 3333, *Hauer*, Case no 44/79, Judgment of 13.12.1979, ECR 1979, 3727, *Internationale Handelsgesellschaft*, Case no 11/70, Judgment of 17.12.1970, ECR 1970, 1125, *Mannesmann AG v. High Authority*, Case no 19/61, Judgment of 13.7.1962, ECR 1962, 655, and *8/55 Fédération Charbonnière de Belgique v. High Authority*, Case no 8/55, Judgment of 29.11.1956, ECR 1956, 291.

² See H. Tor Inge, *The Function of the Proportionality Principle in EU Law*, 'European Law Journal' 2010, vol. 16, no 2, p. 158, T. Tridimas, *The General Principles of EU Law*, 2nd

From a general point of view, after the Lisbon Treaty one must consider Article 5(4) TEU:

under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The Protocol no 2 provides for the obligation to justify draft legislative acts which should contain a detailed statement making it possible to appraise compliance with the principle. Furthermore, pursuant to Article 52(1), second line of the EU Charter of Fundamental Rights, subject to the principle of proportionality, limitations on the rights and freedoms recognised by the Charter may be made only if they are necessary and if they genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others³.

Over time, issues concerning the proportionality of criminal offences have emerged in ECJ case law in the framework of cases concerning clashes between national regulations and the four fundamental freedoms. The Court was asked whether and under what circumstances national laws may sacrifice one of those freedoms. The answers have underlined the centrality of the principle of proportionality and it is not by chance that a specific declination of that principle concerning criminal offences and penalties⁴

ed., Oxford University Press, Oxford, 2007, E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale*, Giuffrè editore, Milano, 2000, E. Ellyis (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, Oxford – Portland, 1999 and N. Emiliou, *The Principle of Proportionality in European Law. A Comparative Analysis*, Kluwer Law International, London, 1996. On the principle of proportionality in the case law of the European Court of Human Rights, see S. Van Drooghenbroeck, *La proportionnalité dans le droit de la convention européenne des droits de l'homme*, Bruylant, Bruxelles, 2001.

³ On Article 52 of the Charter see K. Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 'European Constitutional Law Review' 2012, vol. 8, no 3, p. 375. On the EU Charter of Fundamental Rights in general, see S. de Vries, U. Bernitz, S. Weatherill (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing*, Hart Publishing, Oxford – Portland, 2015, G. Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instruments*, Brill Nijhoff, Leiden – Boston, 2014 and S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford – Portland, 2014.

⁴ In this paper, I do not deal with the interesting issues concerning the assessment of the criminal nature of offences and penalties. One may wish to reference Åkerberg

may be found under Article 49(3) of the EU Charter of Fundamental Rights, under which “the severity of penalties must not be disproportionate to the criminal offence”⁵. As a matter of fact, the Court has constantly looked for a balance between protected interests, sacrificed interests and means that protect the former and sacrifice the latter. This subject will be tackled in the following article⁶.

2. The principle of proportionality and free movement of persons

In relation to the free movement of persons, the starting point in ECJ case law may be found in a 1975 judgment. One particular case concerned

Fransson, Case no C-617/10, Judgment of 26.2.2013, published in the electronic Report of Cases and Bonda, Case no C-489/10, Judgment of 5.6.2012, published in the electronic Report of Cases. For a review, see M. Szwarc, *Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on Fransson Case*, ‘European Public Law’ 2014, vol. 20, no 2, pp. 229-245, A. Andreangeli, *Ne bis in idem and Administrative Sanctions: Bonda*, ‘Common Market Law Review’ 2013, vol. 50, no 6, p. 1827 and B. Van Bockel, *Sanctions for EU Agricultural Subsidies Fraud in the Light of the Charter of Fundamental Rights of the EU*, ‘European State Aid Law Quarterly’ 2013, vol. 12, no 2, p. 392.

⁵ In relation to administrative sanctions, see Council Regulation (EC, Euratom) no 2988/95 of 18.12.1995 on the protection of the European Communities financial interests, OJ 23.12.1995, L-312, p.1. Pursuant to Article 2(1) and (3), administrative sanctions shall be “proportionate” and “Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility”.

⁶ See also E. Xanthopoulou, *The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment*, ‘New Journal of European Criminal Law’ 2015, vol. 6, no 1, p. 32, T. Ostropolski, *The Principle of Proportionality under the European Arrest Warrant – with an Excursus on Poland*, ‘New Journal of European Criminal Law’ 2014, vol. 5, no 2, p. 167, E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, Hart Publishing, Oxford – Portland, 2012, pp. 110-131, M. Böse, *The Principle of Proportionality and the Protection of Legal Interest*, ‘European Criminal Law Review’ 2011, vol. 1, no 1, p. 34, and A.M. Maugeri, *Il principio di proporzione nelle scelte punitive del legislatore europeo: l’alternativa delle sanzioni amministrative*, [in:] G. Grasso, R. Sicurella (eds.), *L’evoluzione del diritto penale nei settori d’interesse europeo alla luce del Trattato di Lisbona*, Giuffrè editore, Milano, 2011, p. 67.

a reference to the Court by Pretore di Milano for a preliminary ruling in a criminal proceedings against British and Italian nationals who did not comply with some public security regulations.

More specifically, when the British national disappeared on a journey to Venice, an Italian national informed the police who found out they had not complied with regulations on the presence of foreigners in Italy⁷. The questions referred to the Court concerned the consistency of those provisions with the free movement of persons and the freedom of establishment.

Speaking of proportionality, Advocate General (AG) Trabucchi noted that such a principle is of general application and obliges both national and supranational authorities to achieve a balance. That is to say public authorities can subject foreigners to greater intrusion into their private lives than that to which national citizens are subject only with an objective justification, taking into account the relation between the obligations imposed on them and the pursued legal purpose⁸.

According to the ECJ, free movement of persons does not exclude the right of Member States to adopt measures aiming at having knowledge of the presence of foreigners. The point is, while deportation would be incompatible with the Treaty, other penalties such as fines and detention may be legitimate if they are not so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons⁹.

In *Calfa*, an Italian national had been caught in possession of drugs while in Greece, sentenced to three months' imprisonment and ordered permanent exclusion from Greek territory. Two questions were brought before the ECJ: the first one concerned the consistency of such a provision with Community law, since permanent exclusion could not apply to Greek

⁷ At that time, pursuant to Article 142 of the Italian Consolidated Public Security Acts (royal decree 18.6.1931 no 773), a foreign national had to report to the public security authority their entry into the national territory within three days. In case of failure to do so, the penalty was a maximum of three month's detention or a maximum fine of 80.000 Lit. Pursuant to Article 2 of the legislative decree 11.2.1948 no 50, Italian nationals were to report the presence of foreign nationals to whom they provided board and lodging within 24 hours. In case of failure to do so, the penalty was detention for up to six months (to which a fine up to 240.000 Lit. could be added). Afterwards, those provisions were repealed.

⁸ Opinion of AG Trabucchi in *Watson and Belmann*.

⁹ *Watson and Belmann*, Case no 118/75, Judgment of 7.7.1976, ECR 1976, 1185. A similar reasoning, concerning German regulations sanctioning foreigners living in Germany without passport or residence permit, may be found in *Sagulo and others*, Case no 8/77, Judgment of 14.7.1977, ECR 1977, 1496.

citizens¹⁰; the second one dealt with the consistency of that regulation with the principle of proportionality.

AG La Pergola noted that the two questions relate to the same issue since proportionality is one of the criteria which must be considered when it comes to assessing the consistency of national provisions with supranational rules. From his point of view, as far as the protection of the fundamental interests of the society against a genuine and sufficiently serious threat, national authorities should adopt measures which, despite the fact they are not identical, are effectively designed to combat such conduct. Thus, Greek legislation introduced a discriminatory action because, when convicted of the same offence, Greek nationals suffered the main penalty, while foreigners are subject to not only the main penalty but an additional one consisting of expulsion. This measure was therefore contrary to Community law¹¹. The ECJ agreed and added, with reference to expulsion:

In this respect, it must be accepted that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, in order to maintain public order. However, as the Court has repeatedly stated, the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively. [...] Previous criminal convictions cannot in themselves constitute grounds for the taking of such measures. It follows that the existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy [...]. It follows that an expulsion order could be made against a Community national such as Ms Calfa only if, besides her having committed an offence under drugs laws, her personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society¹².

Thus, in *Calfa*, the issue at stake regarded a disproportionate legal reaction aimed at protecting a legal interest – public policy – in light of an unjustified differentiation in the applicable sanctions depending on the

¹⁰ Greek nationals cannot be subject to an expulsion order, but may be ordered not to reside in certain parts of the territory in some cases, especially those dealing drugs (the prohibition is discretionary and may not exceed five years).

¹¹ Opinion of AG La Pergola in *Calfa*.

¹² *Calfa*, Case no C-348/96, Judgment of 19.1.1999, ECR 1999, I-21, at paras 22-25.

citizenship of the offender, without taking into account the seriousness of their conduct.

In *Nazli*, a Turkish citizen living in Germany was not able to obtain an extension of his residence permit because he had been implicated in a case of drug trafficking and sentenced to a suspended term of imprisonment. One of the issues brought before the ECJ concerned the possibility of expelling the Turkish citizen, especially if that measure had been ordered out of the will of dissuading other foreigners, and the compatibility of such a measure with Community law¹³.

According to AG Mischo, only general preventive reasons may justify such a measure since the sanction had been suspended, which denies the idea the Turkish citizen could commit this offence again. This would determine incompatibility with Community law¹⁴.

The assessment of the ECJ was a little blurrier. In light of *Calfa*, it must not be considered a criminal conviction, but personal conduct as a present threat to public policy: that is to say, it should be assessed whether personal conduct indicates a specific risk of a new and serious prejudice to the requirements of public policy or not¹⁵.

In *Orfanopoulos and Oliveri*, Greek and Italian nationals, both drug addicts with a number of convictions, were denied an extension to their residence permit by the German authorities.

AG Stix-Hackl referred to *Calfa* and *Nazli* concerning present conduct as a threat, but also considered something else and focused on the European Court of Human Rights (ECtHR) case law concerning Article 8 of the Convention¹⁶, since the expulsion of Mr Orfanopoulos and Mr

¹³ Under Article 6(1) fourth point of the decision no 1/80 of the Association Council of 19.9.1980 on the development of the Association between the European Economic Community and Turkey, a Turkish worker duly registered as belonging to the labour force of a Member State shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment. Thus, one of the questions concerned whether the Turkish worker had lost that right because of his criminal record.

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

¹⁵ *Nazli and others*, Case no C-340/97, Judgment of 10.2.2000, ECR 2000, I-973.

¹⁶ Pursuant to Article 8 (Right to respect for private and family life): “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right

Oliveri could have negatively affected the members of their families who might have had to move to another country¹⁷. So, three aspects should be verified: the personal situation, especially concerning the extent of integration in the State from a social and professional point of view and in terms of family relations; the situation of family members, especially if they should move to another State; and the seriousness and number of offences committed by the individual¹⁸.

The ECJ criticised the idea of automatic expulsion of a foreigner as a consequence of a criminal conviction and ruled:

The necessity of observing the principle of proportionality must be emphasised. To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned¹⁹.

Moving to more recent times, some features of Bulgarian legislation raised some concerns. In *Aladzhov*, a Bulgarian citizen managing a commercial company which had not paid some taxes had an administrative measure imposed on it prohibiting him from leaving the country until payment of, or provision of security for, the State's claim. The preliminary questions concerned the compatibility of the Bulgarian provisions with

except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

¹⁷ *Boultif v. Switzerland*, Application no 54273/00, Judgment of 2.8.2001, ECtHR 2001-IX. For what concerns the ECJ case law, see also *Mary Carpenter v. Secretary of State for Home Department*, Case no C-60/00, Judgment of 11.7.2002, ECR 2002, I-6279.

¹⁸ Opinion of AG Christine Stix-Hackl in *Orfanopoulos and Oliveri*.

¹⁹ *Orfanopoulos and Oliveri*, Joint cases nos C-482/01 and C-493/01, Judgment of 29.4.2004, ECR 2004, I-5295, at para 99. See Article 28 of directive 2004/38 and the explications *infra*.

EU law also in light of the principle of proportionality under Article 27 of the directive 2004/38²⁰.

AG Mengozzi remembered that the measure must pass the test of proportionality and be based on the personal conduct of the individual concerned, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society which the measure aims to protect, pursuant to Article 27(1). In the case of Mr Aladzhov, the personal conduct was not taken into account, since the authorities only considered the factual situation. What is more, other people managing the company were not ordered to leave Bulgaria²¹.

The Court agreed and highlighted the fact that the national judge is supposed to determine whether the measure is appropriate and necessary in order to recover the sums involved and whether there are other measures which would be equally effective in order to obtain recovery but would not affect freedom of movement. More specifically:

European Union law does not preclude a legislative provision of a Member State which permits an administrative authority to prohibit a national of that State from leaving it on the ground that a tax liability of a company of which he is one of the managers has not been settled, subject, however, to the twofold condition that the measure at issue is intended to respond, in certain exceptional circumstances which might arise from, *inter alia*, the nature or amount of the debt, to a genuine, present and sufficiently serious threat affecting one of the

²⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29.4.2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 30.4.2004, L-158, p. 77. Pursuant to Article 27, “1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends. (2) Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted”.

²¹ Opinion of AG Mengozzi in *Aladzhov*.

fundamental interests of society and that the objective thus pursued does not solely serve economic ends. It is for the national court to determine whether that twofold condition is satisfied²².

In *Byankov*, Bulgarian authorities issued an order against a citizen, containing a prohibition on leaving Bulgarian territory and the issuing of passports or replacement documents, because of a debt owed to a private person and his inability to provide adequate security. The questions raised before the Court concerned the compatibility of national legislation with Articles 52(1), second line of the EU Charter of Fundamental Rights and 27(1) of the directive 2004/38.

In AG Mengozzi's view, that legislation is not compatible and he recalled his Opinion in *Aladzhov*²³. The ECJ agreed and recalled ECtHR case law, ruling that these kind of measures should be regularly re-examined. Otherwise, they should be considered disproportionate²⁴.

Thus, assessing the above-mentioned case law and considering all the judgments above dealt with the same issue – free movement of persons – even if from different viewpoints, it can be said that the interpretation given by the ECJ is generally settled, even if some clarifications were made

²² *Aladzhov*, Case no C-434/10, Judgment of 17.11.2011, ECR 2011, I-11659, at para 1 of the ruling.

²³ Opinion of AG Mengozzi in *Byankov*.

²⁴ *Byankov*, Case no C-249/11, Judgment of 4.10.2012, published in the electronic Report of Cases. One may also check *ZZ v. Secretary of State for the Home Department*, Case no C-300/11, Judgment of 4.6.2013, published in the electronic Report of Cases. Similar cases were brought before the European Court of Human Rights. See for instance *Ignatov v. Bulgaria*, Application no 50/02, Judgment of 2.7.2010, ECtHR 2010, and *Gochev v. Bulgaria*, Application no 34383/03, Judgment of 26.11.2009, ECtHR 2009. According to the Court, these kind of measures are justified only so long as it furthers the pursued aim of guaranteeing recovery of debt and as long as the authorities regularly re-examine its justification. Otherwise, it is considered a violation of Article 2 of Protocol no 4 to the Convention, under which: "(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own. (3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

in light of the progressive opening to ECtHR case law. The idea expressed by the Court is that, in spite of the importance of the free movement of persons, Member States are allowed to limit such a freedom, but they have to undertake a careful assessment in order to achieve a balance between security reasons and the interest which is sacrificed. One should not forget that the Maastricht Treaty introduced European citizenship by which the relation between the free movement of persons and economic activities has been untied: so, free movement of persons has become an individual right in itself²⁵. Therefore, given the importance of such a freedom and the related qualitative leap, effective since 1992, the Court identified some conditions Member States should comply with if they want to legitimately affect it. The need for a balance is well-expressed by the formula under Article 27(2), second line of the directive 2004/38: a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Its meaning is quite clear inasmuch it conveys the idea of a reasonably substantiated prejudice to the axiological system which belongs to a certain community.

3. The principle of proportionality and free movement of goods

In relation to the principle of proportionality and free movement of goods, one should look at the topic in light of the concept of measures having an effect equivalent to a quantitative restriction. In *Donckerwolcke*, the issue at stake concerned the importation into France of bales of cloth and sacks by two Belgian companies. According to the directors of those companies, the goods originated in Europe but the French customs authorities discovered they came from the Middle East, so the directors were charged with having made false declarations of origin and sentenced to imprisonment and a fine and the goods were confiscated. The questions

²⁵ Apart for the provisions under Article 20 and 21 TFEU, see Article 45(1) of the EU Charter of Fundamental Rights, under which every citizen of the Union has the right to move and reside freely within the territory of the Member States. On that topic, with reference to national criminal regulations, see also *Wijsenbeek*, Case no C-378/97, Judgment of 21.9.1999, ECR 1999, I-6251.

referred to the ECJ concerned the nature of those penalties as measures having an effect equivalent to a quantitative restriction²⁶.

AG Capotorti identified two possible violations of the principle of proportionality: first of all, it is disproportionate to the national provision which obliges importers to make an exact declaration on the origin of the goods, without leaving any ground to stand on if they do not know; secondly, the penalties are excessive in relation to the seriousness of the offence²⁷.

The ECJ ruled that, theoretically, knowledge of origin may be necessary both for Member States, in order to determine their commercial policy, and the Commission, when performing control activities. However, Member States may only require importers to indicate the origin of the goods in so far as they know it or may reasonably be expected to know it. Anyway, a violation of that rule cannot lead to the application of disproportionate sanctions, given the administrative nature of the contravention. So, in light of the principle of proportionality:

Any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty²⁸.

The reasoning was later confirmed in *Cayrol*, which concerned a case of importation into France of prohibited goods by means of a false declaration of origin and on the basis of false or inaccurate documents: the defendants were fined²⁹.

²⁶ See *Dassonville*, Case no 8/74, Judgment of 11.7.1974, ECR 1974, 838.

²⁷ Opinion of AG Capotorti in *Donckerwolcke*.

²⁸ *Donckerwolcke*, Case no 41/76, Judgment of 15.12.1976, ECR 1976, 1922, at para 38.

²⁹ The case was particularly complex: after being ordered to pay a fine by the Montpellier Tribunal de grande instance, one of the parties, Leonce Cayrol, a French national, applied to the Tribunale di Saluzzo for a warrant for attachment against the assets of Rivoira Giovanni e Figli s.n.c. in order to get compensation on the grounds that the penalties imposed by the French authorities were the consequence of the company conduct. As a matter of fact, the company had deceived custom authorities as to the origin of a number of consignments of table grapes using the certificate of the Italian Trade Agency, while the grapes came from Spain. The Tribunale di Saluzzo referred the question to the ECJ when *Donckerwolcke* had already been passed.

AG Warner referred to *Donckerwolcke* and agreed with the solution³⁰ and the same was done by the ECJ, which ruled that:

Seizure of the goods or any pecuniary penalty fixed according to the value of the goods would certainly be incompatible with the provisions of the Treaty as being equivalent to an obstacle to the free movement of goods. In general terms, any administrative or penal measure which goes beyond what is strictly necessary for the purpose of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty³¹.

Another case concerned the limitation of free movement of goods on the ground of public morality. In 1977, two British citizens were convicted of a number of offences relating to the importation and sale of pornographic articles. Under section 42 of the 1876 Customs Consolidation Act and section 304 of the 1952 Customs and Excise Act, these articles could be forfeited and destroyed. One of the issues at stake concerned the notion of public morality under Article 36 TEC³², under which prohibitions or restrictions on import, export or goods in transit may be justified on those grounds. AG Warner stated that it is difficult to provide an uniform definition of public morality and the criterion of reasonableness should be taken into account, meaning that the effects of the prohibition should not be disproportionate in light of the pursued objective³³.

The Court ruled that different regulations are in force in the UK, given the peculiarities of the legal system of that country: however, this does not permit acknowledging the existence of a trade of such articles, so no arbitrary discrimination had been created³⁴.

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

³⁰ Opinion of AG Warner in *Cayrol*.

³¹ *Cayrol*, Case no 52/77, Judgment of 30.11.1977, ECR 1977, 2262, at para 38-39.

³² See Article 36 TFEU.

³³ Opinion of AG Warner in *Henn and Darby*.

³⁴ *Henn and Darby*, Case no 34/79, Judgment of 14.12.1979, ECR 1979, 3797.

For a national rule capable of having a restrictive effect on imports to be justified under Article 36 of the Treaty or on the basis of [...] imperative requirements [...], it must [...] be necessary for the purposes of providing effective protection of the public interest involved and it must not be possible to achieve that objective by measures less restrictive of intra-Community trade. It must therefore be considered whether a national provision such as that concerned in the main proceedings is in accordance with the principle of proportionality thus expressed. [...] In regard in particular to the verification of information supplied to consumers as to the composition of a product when it is released for sale, the importer may not, as a general rule, be required to have the product analysed for the purpose of that verification. Such an obligation would impose on the importer a burden considerably greater than that imposed on a domestic manufacturer, who himself has control of the composition of the product, and it would often be disproportionate to the objective to be achieved, having regard to the existence of other forms of verification equally reliable and less burdensome³⁵.

Therefore, the regulations are compatible with Community law provided that the application to products which were made in another Member State do not determine obligations exceeding what may be deemed necessary in order to achieve the pursued objective.

So, as far as free movement of goods is concerned, the assessment of the ECJ undoubtedly becomes more cryptic. In fact, in the above-mentioned cases³⁶, it cannot be identified a clear and stentorian formula such as one of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society which can be found in the field of free movement of persons. Moreover, a fundamental achievement is the equivalence between proportionality and reasonableness expressed by AG Warner, which means that the capacity of reaching a balance represents the canon since it conforms to reason, that is to say to the capacity of making a correct assessment³⁷.

³⁵ Wurmser and others, Case no 25/88, Judgment of 11.5.1989, ECR 1989, 1124, at para 13, 17.

³⁶ See also Grilli, Case no C-12/02, Judgment of 2.10.2003, ECR 2003, I-11596, Hahn, Case no C-121/00, Judgment of 24.10.2002, ECR 2002, I-9210, Heinonen, Case no C-394/97, Judgment of 15.6.1999, ECR 1999, I-3614, Leifer and others, Case no C-83/94, Judgment of 17.10.1995, ECR, I-3235, and Van der Velt, Case no C-17/93, Judgment of 14.7.1994, ECR 1994, I-3553.

³⁷ See also the Opinion of AG Capotorti in Adoui and Cornauielle v. Belgian State, Case no 115/81, Judgment of 18.5.1982, ECR 1982, 1667, and Commission v. Greece, Case

4. The principle of proportionality and free movement of services

The first judgment which should be taken into consideration in the field of free movement of services concerned criminal proceedings brought in Germany against a Greek woman, who was found driving with a Greek licence but without a German one, and her husband, who was the person in responsible for the vehicle³⁸. The national judge decided to stay the proceedings and refer the question to the ECJ in order to understand if the penalising choice made by the German lawmakers was consistent with the free movement of persons and freedom of establishment³⁹.

The ruling was quite solomonic. The Court, on the one hand, ruled out the prohibition for the Member States to oblige to exchange the licence since, at that time, the Community regulation on the mutual recognition of

no C-65/05, Judgment of 26.10.2006, ECR 2006, I-10344, at para 38-41 in which the ECJ ruled that “even if that case-law may not be applied in the present case, the overriding public interest reasons put forward by the Hellenic Republic may justify the barrier to the free movement of goods. However, it is also necessary for the national legislation at issue to be proportionate to the objectives being pursued. In that regard, the Hellenic Republic has not established that it implemented all the technical and organisational measures likely to have achieved the objective pursued by that Member State using measures which were less restrictive of intra-Community trade. The Greek authorities not only could have had recourse to other measures which were more appropriate and less restrictive of the free movement of goods, as the Commission suggested during the pre-litigation procedure, but also could have ensured that they were correctly and effectively applied and/or executed in order to achieve the objective pursued. It follows that the prohibition laid down by Article 2(1) of Law No 3037/2002 on the installation in Greece of all electrical, electromechanical and electronic games, including all computer games, on all public and private premises apart from casinos, constitutes a measure which is disproportionate in view of the objectives pursued”.

³⁸ Under German regulations, the woman was supposed to exchange her Greek licence with a German one within one year of taking up normal residence in Germany. In case of failure to comply, the German legislation provided for up to one year’s imprisonment or a fine or, if the offence was committed as a result of carelessness, for up to six month’s imprisonment or a fine. Her husband faced the same penalties since, as the person responsible for the vehicle, he allowed his wife to drive it without a licence.

³⁹ As a matter of fact, the driving licence represents the necessary prerequisite for the exercise of a trade or a profession, so the obligation to exchange it could be seen as a discrimination against citizens of other Member States.

driving licences had not yet come into force⁴⁰; on the other hand, it would be disproportionate to treat a person who was found driving with a licence issued by another Member State as if they were driving without a licence. That would be excessive, especially if one considers that the offence is not so serious. Moreover, the Court highlighted the negative consequences arising from the failure to comply with the canon of proportionality by stating that a criminal conviction may have consequences for the exercise of a trade or a profession, as far as the access to certain activities or offices is concerned⁴¹.

The question was also analysed in a case concerning criminal proceedings brought in Italy against more than one hundred people who had allegedly violated the Italian regulation which punishes as a criminal offence the collection and transmission of bets without a licence⁴². The bets were transmitted to an English bookmaker, so freedom of establishment and free movement of services came into consideration.

According to the ECJ, a national legislation which prohibits on pain of criminal sanctions the collection, acceptance, registration and transmission of offers to bet, in particular on sporting events, without a licence is a restriction to those freedoms. The issue at stake concerned the possibility to identify a good reason to justify such a restriction. First of all, it had to be justified by imperative requirements in the general interest. Second, it had to be suitable for achieving the pursued objective. Third, it could not go beyond what is necessary in order to attain it. Therefore, it rests on the national judge to assess it by taking into account some of the hints given by the Court, according to whom consumer protection and the prevention of fraud and incitement to squander on gaming are imperative requirements in the general interest. However, it should be assessed whether the restriction aims at achieving that purpose coherently and systematically. In the

⁴⁰ See Council Directive 91/439/EEC of 29.7.1991 on driving licences, OJ 24.8.1991, L-237, p. 1.

⁴¹ *Skanavi and Chryssanthakopoulos*, Case no C-193/94, Judgment of 29.2.1996, ECR 1996, I-943. See also *Awoyemi*, Case no C-230/97, Judgment of 29.10.1998, ECR 1998, I-6795.

⁴² Pursuant to Article 4 of law 13.12.1989 no 401, fines and imprisonment may apply in this case. See also *Anomar and others*, Case no C-6/01, Judgment of 11.9.2003, ECR 2003, I-8647, *Zenatti*, Case no C-67/98, Judgment of 21.10.1999, ECR 1999, I-7304, *Läärä and others*, Case no C-124/97, Judgment of 21.9.1999, ECR 1999, I-6104, and *Her Majesty's Customs and Excise v. Schindler*, Case no C-275/92, Judgment of 24.3.1994, ECR 1994, I-1078

case brought to its attention, the Court held that Italy pursued a policy of expanding betting and gaming. Thus, those reasons could not justify the choice. What is more, the Court ruled that:

It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate [...] especially where involvement in betting is encouraged in the context of games organised by licensed national bodies⁴³.

So, we can confirm what has already been written with reference to the free movement of goods: there is not a standard formula but, given the relevance of this freedom, a limitation is justified only when the national measure is proportionate⁴⁴.

5. The principle of proportionality and the free movement of capital

I could not find precedents concerning the compatibility of national criminal measures with the free movement of capital⁴⁵. However, this could be considered a case which relates to economic sanctions imposed at the supranational level against Iran. First of all, some features of the legal framework must be clarified.

On 23.12.2006 the UN Security Council adopted resolution 1737 (2006) in order to apply pressure on Iran to end proliferation-sensitive

⁴³ Gambelli and others, Case no C-243/01, Judgment of 6.11.2003, ECR 2003, I-13076.

⁴⁴ Even if the topic is only implicitly considered, see also Rienks, Case no 5/83, Judgment of 15.12.1983, ECR 1983, 4234 and Auer, Case no 271/82, Judgment of 22.9.1983, ECR 1983, 2729, concerning the improper exercise of the profession of veterinary surgeon.

⁴⁵ For what concerns administrative regulations, see Bodessa and others, Joint cases nos C-358/93 and C-416/93, Judgment 23.2.1995, ECR 1995, I-376.

nuclear activities. In relation to the EU legal framework, that resolution was given effect by Council Common Position 2007/140/CFSP⁴⁶, which prohibits the direct or indirect supply, sale or transfer of items, materials, equipment, goods and technology, including software, to, or for the use in, or benefit of, Iran, by nationals of Member States or through the territories of a Member State. Pursuant to Article 5(1)(b), all funds and economic resources which belong to, are owned, held or controlled, directly or indirectly, by, among others, persons and entities that are engaged in, directly associated with, or providing support for, Iran's proliferation sensitive nuclear activities or for the development of nuclear weapon delivery systems, or persons or entities acting on their behalf or at their direction, or entities owned or controlled by them, including through illicit means, shall be frozen.

What is more, as far as Community competences were affected, Regulation no 423/2007⁴⁷, based on Articles 60 and 301 TEC⁴⁸, was passed. One should consider Article 15(2) of that regulation, under which the Council, acting through a qualified majority, shall establish, review and amend the list of persons, entities and bodies referred to in Article 7(2), that is to say the list of persons, entities and bodies linked to the Iranian nuclear programme and whose funds and economic resources shall be frozen.

Later, the Council adopted decision 2008/475/EC⁴⁹ implementing Article 7(2) of the regulation and Bank Melli, Melli Bank Iran and their

⁴⁶ Council Common Position 2007/140/CFSP of 27.2.2007 concerning restrictive measures against Iran, OJ 28.2.2007, L-61, p. 49.

⁴⁷ Council Regulation (EC) no 423/2007 of 19.4.2007 concerning restrictive measures against Iran, OJ 20.4.2007, L-103, p. 1

⁴⁸ See Articles 75 and 215 TFEU. Under Article 75(1), "where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities". Under Article 215(1), "where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof".

⁴⁹ Council Decision 2008/475/EC of 23.6.2008 implementing Article 7(2) of Regulation (EC) no 423/2007 concerning restrictive measures against Iran, OJ 24.6.2008,

subsidiaries were placed on the list, since they were providing or attempting to provide financial support for companies which were involved in, or procured goods for, Iran's nuclear and missile programmes⁵⁰. Among the subsidiaries, Melli Bank plc of London lodged an application before the Court of First Instance in order to obtain the annulment of a decision inasmuch it failed to comply with the principle of proportionality, since it was not possible to identify a link between the adopted measure and the pursued objective, while the Council could have adopted alternative measures such as the strengthening of controls and obligatory disclosure.

The Court of First Instance dismissed the action and, with regard to the principle of proportionality, ruled:

According to the case-law, by virtue of the principle of proportionality, which is one of the general principles of Community law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures should be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued [...]. When the funds of an entity identified as being engaged in nuclear proliferation are frozen, there is a not insignificant danger that that entity may exert pressure on the entities it owns or controls in order to circumvent the effect of the measures applying to it, by encouraging them either to transfer their funds to it, directly or indirectly, or to carry out transactions which it cannot itself perform by reason of the freezing of its funds. That being so, it must be considered that the freezing of the funds of entities owned or controlled by an entity identified as being engaged in nuclear proliferation is necessary and appropriate in order to ensure the effectiveness of the measures

L-163, p. 29.

⁵⁰ See also Council Common Position 2008/479/CFSP of 23.6.2008 amending Common Position 2007/140/CFSP of 27.2.2007 concerning restrictive measures against Iran, OJ 24.6.2008, L-163, p. 43, and Council Common Position 2008/652/CFSP of 7.8.2008 amending Common Position 2007/140/CFSP of 27.2.2007 concerning restrictive measures against Iran, OJ 8.8.2008, L-213, p. 58. In both cases, Bank Melli, Bank Melli Iran and all the branches and subsidiaries, including Melli Bank plc London, are among the entities whose assets are to be frozen.

Concerning the UN, see Security Council Resolution 1803 (2008). Under para 10, the Security Council "calls upon all States to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad".

adopted vis-à-vis that entity and to ensure that those measures are not circumvented [...]. As regards the existence of other measures, less restrictive than the freezing of funds, that could be applied either separately or cumulatively in order to attain the objective pursued, it has not been established that the supervision and control measures existing at the time the contested decision was adopted are adequate, in relation to the danger described⁵¹.

Melli Bank appealed before the ECJ but, in AG Mengozzi's view⁵², the decision was consistent with the principle of proportionality in light of one of the most renowned precedents of the Court, *Kadi*, in which it is stated that:

The importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights⁵³.

Thus, neither the decision raised any concern under the criterion of proportionality nor did the reasoning of the Court of First Instance: and this is what the ECJ also assessed⁵⁴. So, also in the framework of the free movement of capital, the balance between the pursued objective – international security – and the sacrificed values – the right to property – must be reached.

⁵¹ Melli Bank plc v. Council, Joint cases nos T-246/08 and T-332/08, Judgment of 9.7.2009, ECR 2009, II-2629, at para 100, 103, 107.

⁵² Opinion of AG Mengozzi in *Melli Bank plc*.

⁵³ Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, Joint cases nos C-402/05 P and C-415/05 P, Judgment of 3.9.2008, ECR 2008 I-6351, at para 361. See J. Kokott, C. Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, 'European Journal of International Law' 2012, vol. 23, no 4, p. 1015, G. De Burca, *The EU, the European Court of Justice and the International Legal Order after Kadi*, 'Harvard International Law Journal' 2009, vol. 51, no 1, p. 44, C. Tomuschat, *The Kadi case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?*, 'Yearbook of European Law', vol. 28, no 1, p. 654.

⁵⁴ Melli Bank plc v. Council, Case no C-380/09 P, Judgment of 13.3.2012, published in the electronic Report of Cases.

6. Conclusion

Originally, in the ECJ case law the principle of proportionality was characterized by an approach which can be explained through the well-known formula of cost-benefit analysis. From that point of view, the best-known⁵⁵ wording of the principle in the ECJ case law was the following: “the Institutions must ensure that the burdens which commercial operators are required to bear are no greater than is required to achieve the aim which the authorities are to accomplish”⁵⁶.

Over time, the ECJ has had the chance to tackle the issue from a different angle, mainly in light of the general provisions contained in the Treaties and under Article 52 of the EU Charter of Fundamental Rights. Most of all, the Court has effectively made it a general tool to achieve a fair balance between fundamental rights and general interests by constantly stressing that the principle of proportionality “requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives”⁵⁷ and that “when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”⁵⁸.

Thus, as already noted, the principle of proportionality surely is the parameter by which it is possible to assess the utility, suitability, and

⁵⁵ According to T. Ballarino, *Lineamenti di diritto comunitario*, Cedam, Padova, 1990, p. 182.

⁵⁶ Forges de Thy-Marcinelle and Monceau, Joint cases nos 26 and 86/79, Judgment of 18.3.1980, ECR 1980, at para 6, and Balkan, Case no 5/73, Judgment of 24.3.1973, ECR 1973, 1092, at para 22.

⁵⁷ See for instance Digital Rights Ireland and Seitlinger and Others, Case no C-293/12, Judgment of 8.4.2014, ECLI:EU:C:2014:238, at para 46, Schaible, Case no C-101/12, Judgment of 17.10.2013, published in the electronic Report of Cases, at para 29, Sky Österreich, Case no C-283/11, Judgment of 22.1.2013, published in the electronic Report of Cases, at para 50 and S.P.C.M. and Others, Case no C-558/07, Judgment of 7.7.2009, ECR 2009, at para 41. On the topic see G. Anagnostaras, *Balancing Conflicting Fundamental Rights: The Sky Österreich paradigm*, ‘European Law Review’ 2014, vol. 39, no 1, p. 111.

⁵⁸ See for instance Nelson and Others, Case no C-581/10, Judgment of 23.10.2012, published in the electronic Reports of Cases, at para 71 and Afton Chemical, Case no C-343/09, Judgment of 8.7.2010, ECR 2010, at para 45.

adequacy of draft legislative acts⁵⁹ but also with time it has become an instrument of protection of fundamental rights against excessive interferences from EU acts, first, and Member States acts, then.

So, it can be said that the progressive opening to a political dimension of the EU – that is to say the progressive opening to the protection of fundamental rights – has brought to a specific non-economic declination of the principle of proportionality, which also concerns criminal matters. Then, when it comes to the relationship between EU law and criminal law, the ECJ seems to focus its attention on the clash between national and supranational legal interests deserving protection in order to avoid national security policies always prevailing and supranational interests always being sacrificed. Thus, one may deem meaningful the equivalence between proportionality and reasonableness drawn by AG Warner, since it leads to the consequence that criminal sanctions must be used *measurably* in order to punish not the violation of a normative precept in itself, but a conduct which effectively harms a legal interest which deserves protection; that is to say, in order to punish a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society while avoiding excesses which are justified by reasons of internal politics only.

That is positive inasmuch it restates the centrality of the principle of proportionality but one may wonder if it really permits avoiding quite a difficult situation. In light of the above-mentioned case law, the ECJ is the only judicial body entitled to assess the balance between national and supranational conflicting legal interests and it appears to be willing to preserve its position as the only judicial body entitled to do so. That may raise a problem – and not a minor one – if one considers the sometimes complicated relationship between the ECJ and national courts, especially some Constitutional Courts⁶⁰.

⁵⁹ F. Pizzetti, G. Tiberi, *Le competenze dell'Unione e il principio di sussidiarietà*, [in:] F. Bassanini, G. Tiberi (eds.), *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, il Mulino, Bologna, 2010, p. 143, at p. 153.

⁶⁰ One may check the *Lisbon* judgment of the German Federal Constitutional Court (BVerfG, 2 BvE 2/08 Gauweiler Die Linke v. Act of Approval of the Lisbon Treaty (Lisbon), Judgment of 30.6.2009) and the academic literature it has given rise to. As a start see A. Steinbach, *The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?*, 'German Law Journal' 2010, vol. 11, no 4, p. 367, J. Ziller, *The German Constitutional Court's Friendliness towards European Law: On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon*, 'European Public Law' 2010, vol. 16, no 1, p. 53 and D. Thym, *In the Name of Sovereign*

The position held by the ECJ is quite balanced since it tries not to convey the idea of *a priori* protection of the four fundamental freedoms when a clash between them and national provisions arises, but one may question that approach when it comes to criminal law. It is well known that the ECJ has ruled out the existence of national safe havens not affected by supranational law⁶¹; at the same time, a peculiar tie between criminal law and national sovereignty does exist and cannot be denied⁶².

So, as far as proportionality is concerned, one may think that the ECJ could avoid new conflicts with national courts only by sticking to its constant interpretation of the principle of proportionality. However, this approach requires the Court to carefully assess the fundamental interests of national societies involved in the proportionality test and that should lead to a more comparative, cross-fertilized approach to proportionality by the ECJ. As a matter of fact, the decisions of national courts should be taken into proper account in order to identify the real scope of national interests. Otherwise, the proportionality test would be based on a one-way interpretation of both national and supranational interests by the Court which could cast some doubts on the effective fairness of the assessment.

Truth be told, the case law mentioned in this article makes it clear that the ECJ does not follow that road and does not seem so willing to follow it for several reasons⁶³, most of all because that may compromise

Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court, 'Common Market Law Review' 2009, vol. 46, no 6, p. 1795. Also, one should consider the Declaration 1/2004 of the Spanish Constitutional Court (European Constitution), Judgment K 18/04 of the Polish Constitutional Court (Accession Treaty) and Decision Pl. ÚS 19/08 of the Czech Constitutional Court (Lisbon).

⁶¹ For instance, in *S.A.I.L.*, Case no 82/71, Judgment of 21.3.1972, ECR 1972, at para 5, the Court ruled that Article 177 of the Treaty on the European Economic Community is worded in general terms and draws no distinction according to the nature, criminal or otherwise, of the national proceedings within the framework of which the preliminary questions have been formulated. In *Cowan*, Case no 186/87, Judgment of 2.2.1989, ECR 1989, at para 19, the Court ruled that although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, Community law sets certain limits to their power.

⁶² See for instance *Achughbadian*, Case no C-329/11, Judgment of 6.12.2011, ECR 2011, at para 32.

⁶³ G. De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 'Maastricht Journal of European and Comparative Law' 2013, vol. 20, no 2, p. 168.

its battle over judicial supremacy in Europe⁶⁴. The careful consideration of national courts decisions may be an interesting way to ascend – once and for all, perhaps – to the role of the European Constitutional Court without sacrificing national identities.

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⁶⁴ The expression “battle over judicial supremacy in Europe” may be found in A. Pliakos, G. Anagnostaras, *Who is the Ultimate Arbiter? The Battle Over Judicial Supremacy in Europe*, 'European Law Review' 2011, vol. 36, no 1, p. 109.

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