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THE PRINCIPLE OF PROPORTIONALITY AS JUSTIFICATION TEST ON THE GROUNDS OF ART. 52 I CFR

Abstract

In different jurisdictions the principle of proportionality is newly invented or its application intensified through constitutionalization, jurisdiction and legal methodology. Its impact on judgments on fundamental rights has revealed remarkable judgments since the Treaty of Lisbon entered into force. The variety of views and approaches has evoked enthusiastic and sceptical views on the broader application of this principle with regard to balancing colliding rights. Through Lisbon the EU has made a rather clear statement. Due to art. 52 I CFR (Charter of Fundamental Rights) proportionality may be deemed as backbone of justification, as heart of the whole charta.¹ It is qualified as one of the guiding horizontal principles, the major legal figure or essence of examination of

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¹ Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 1.

justification.² No other rule of the charter was such intensively amended by the European Constitutional Convention.³

Proportionality as general principle of law is an integral part of the EU as legal community. But as expression of justification the requirements are specifically directed to fundamental rights. What is the logic of proportionality? How should essential elements of proportionality be applied? Which scrutiny of judicial application may be caused thereby? Answers may differ due to the understanding of each legal system or culture on international level, the level of the EU as well as in the member states. But art. 52 III, IV CFR requires a coherence among the ECHR, EU primary law and member state laws.⁴ The application of proportionality on fundamental rights will show its practical significance, convergencies and divergencies. Hence, proportionality is of impact on legal discipline, confidence and justice. Moreover, the change of scrutiny of judicial application determines the correlations among state powers. As far as courts intensify the application of proportionality this may influence, limit or govern legislation and execution. Due to its history and constitutional development over the second half of the last century and from the beginning of this century in the coherent, cooperative context of art. 52 CFR the jurisdiction and legal literature in Germany may be of epistemological value.

Keywords: Art. 52 CFR, general principles of law, proportionality logic, justification test, fundamental rights, legal positivism, constitutionalization, law, legitimate objective, appropriateness, proportionality in a narrow sense, proper

² Th. von Danwitz in P. J. Tettinger/K. Stern, *Kölner Kommentar zur Europäischen Grundrechtecharta*, 2006 München, Art. 52 para 1; V. Trestnjak/E. Beysen, *EuR* 2012, 265, Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung; M. Borowsky in J. Meyer, *Charta der Grundrechte der Europäischen Union*, 2014 Baden-Baden, 786; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 570.

³ Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 1.

⁴ K. Stern/D. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 30, 38ff.; S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.100ff., 52.150ff.; Z. Meskic/D. Samardzic in South East European Law School, *Promotion of Scientific Research and Education in European Integration and Policy*, 2014 Skopje, 59ff., From unrelated to cooperative triple protection of human rights in the EU.

balancing, scrutiny of judicial application, prerogative, discretion, legal discipline, confidence, methodology, dogmatic.

A. Legal Character of Proportionality

I. General Principle of Law as Ground of the Justification Test

The intense discourse on proportionality illustrates the increasing importance, the need to cope with this principle and apply it.⁵ General principles of law are by their nature of constituting significance and challenging.⁶ The practical significance of the proportionality test for justification may hardly be overestimated.⁷ As part of justification it is a real hurdle of legality, more as restriction on interference to fundamental rights, than a general principle to balance interests somehow.⁸ As justification test proportionality is a manifestation of proportionality as general principle and an autonomous obligation of this principle.⁹ Therefore, it is of crucial importance to capture the spirit and functions of fundamental rights and proportionality and the correlations among these principles which are naturally linked and dependent on each other. This understanding is supportive for the interpretation of proportionality when applied on fundamental rights.

Fundamental rights are recognised as general principles of law supported by the idea of universality as well as normative approaches to such rights.¹⁰ Before the

⁵ Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, München 2016, Art 52. GRCh, para 71; M. Klatt/M. Meister, *JuS 2014*, 194, Der Grundsatz der Verhältnismäßigkeit; D. Grimm, *University of Toronto Law Journal 2007*, 383ff., Proportionality in Canadian and German Constitutional Jurisprudence.

⁶ Z. Meskic/D. Samardzic, *Pravo Evropske Unije I*, 2012 Sarajevo, 39ff., 226ff.

⁷ M. Klatt/M. Meister, *JuS 2014*, 193, Der Grundsatz der Verhältnismäßigkeit.

⁸ R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1; J. Saurer, *Der Staat 2010*, 4ff., Die Globalisierung des Verhältnismäßigkeitsgrundsatzes.

⁹ H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 35; D. Edward/R. Lane, *European Union Law*, 2016 Cheltenham, 6.101ff.

¹⁰ U. Haltern, *EU II*, 2017 Tübingen, 585ff.; M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Art. 1 para 2, 6; D. Edward/R. Lane, *European Union Law*, 2016 Cheltenham, 6.105ff.; K. Stern in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 184.

CFR entered into force their qualification as general principles was a driver of their effects in primary law.¹¹ Independent of positive law there is a conviction of fundamental rights constituting an *acqui communautaire*.¹² The CJEU early started to interpret fundamental rights as general principles of law.¹³ As reference the Court initially used the traditions of the member states. A mile stone was the case *Stauder*¹⁴ in which the court by one sentence clarified that the state cannot act against general principles of law to which fundamental rights belong. Means of state authorities restricting fundamental rights have to conform to written and unwritten primary law.

Proportionality is also a general principle of law, both in EU and member state law.¹⁵ The broad acceptance shows the correlations of primary and member state law.¹⁶ Often it is derived from the principle of rule of law or fundamental rights.¹⁷ Due to its practical significance and intense impact proportionality is described as ubiquitous or general scale of values.¹⁸ As justification test proportionality in

¹¹ M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 2.

¹² H.-J. Cremer in Ch. Grabenwarter, *Enzyklopädie Europarecht II*, 2014 Baden-Baden, § 1 para 20; P. Häberle, *IEV (Institut für Europäische Verfassungswissenschaften) Online Nr. 3/2009*, "Verfassungskultur" als Kategorie und Forschungsfeld der Verfassungswissenschaften, 3; D. Samardžić/Z. Meskić in South East European Law School, *Rule of Law, Human Rights and European Union*, 2012 Skopje, 11f., Principle "Rule of Law" Or "Rechtsstaatlichkeit" as Basis for Human Rights Protection in European Union Law.

¹³ S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.15ff.; H.-J. Cremer in Ch. Grabenwarter, *Enzyklopädie Europarecht II*, 2014 Baden-Baden, § 1 para 9ff.

¹⁴ CJEU, 29/69, *Stauder*, 1969, 419; H.-J. Blanke in H.-J. Blanke/S. Mangiameli, *TEU*, 289f., 2013 Heidelberg, The Protection of Fundamental Rights in Europe.

¹⁵ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 4ff., 120; H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 35; Z. Meskić/D. Samardžić, *Pravo Evropske Unije I*, 2012 Sarajevo, 74.

¹⁶ I. Pernice in Ch. Calliess, *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, 2007 Tübingen, 69, Theorie und Praxis des Europäischen Verfassungsverbundes; S. Schmahl in R. Schulze/M. Zuleeg/S. Kadelbach, *Europarecht*, 2014 Baden-Baden, § 6 para 2ff.

¹⁷ A. von Arnould, *JZ* 2000, 276ff., Die normtheoretische Begründung des Verhältnismäßigkeitsgrundsatzes; P. Häberle/M. Kotzur, *Europäische Verfassungslehre*, 2016 Baden-Baden, 674ff.

¹⁸ M. Klatt/M. Meister, *JuS* 2014, 193, Der Grundsatz der Verhältnismäßigkeit; M. Klatt/M. Meister, *Der Staat* 2015, 159, Verhältnismäßigkeit als universelles Verfassungsprinzip.

the spirit of art. 52 I CFR constitutes a hurdle for interferences to fundamental rights. It is seen as the main mechanism for controlling the limitation of charter rights.¹⁹ It has to be examined as restriction on limitations.²⁰ In this understanding proportionality has to be seen from a technical point of view as justification test.²¹ Due to this picture of justification as *limitation on limitation* the terminology of *Schranken-Schranke-Rechtfertigung* (Germ.) was invented in Germany.²²

Maybe the CFR was partially underestimated, but its effects are enormous.²³ The application through the CJEU has noticeably changed since the CFR entered into force by the Lisbon treaty.²⁴ It is not by chance that in the meanwhile we see a globalization of the principle of proportionality through constitutionalization and judicial application.²⁵ Proportionality is deemed as structural element of global

¹⁹ S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.50.

²⁰ R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1.

²¹ S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.65ff.; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 51ff.

²² H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 30ff., 64ff.; R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 46, 111ff.; U. Haltern, *EU II*, 2017 Tübingen, 599ff., 616; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201.

²³ U. Haltern, *EU II*, 2017 Tübingen, 618ff.; H.-J. Blanke in H.-J. Blanke/S. Mangiameli, *The European Union after Lisbon*, 159ff., The Protection of Fundamental Rights in Europe.

²⁴ W. Schroeder, *EuZW* 2011, 462ff., Neues zur Grundrechtskontrolle in der Europäischen Union; W. Weiß, *EuZW* 2013, 287ff., Grundrechtsschutz durch den EuGH: Tendenzen seit Lissabon; D. Sarmiento, *CMLR* 2013, 1267ff., Who is afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe.

²⁵ M. Klatt, *Die praktische Konkordanz von Kompetenzen*, 2014 Tübingen, 26ff.; P. Häberle, *IEV (Institut für Europäische Verfassungswissenschaften) Online Nr. 3/2009*, "Verfassungskultur" als Kategorie und Forschungsfeld der Verfassungswissenschaften; J. Saurer, *Der Staat* 2010, 3ff., Die Globalisierung des Verhältnismäßigkeitsgrundsatzes; B. Schneiders, *Die Grundrechte der EU und die EMRK*, 2010 Baden-Baden, 203ff.; M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 6ff.; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 9ff.; D. Grimm, *University of Toronto Law Journal* 2007, 383ff., Proportionality in Canadian and German Constitutional Jurisprudence.

constitutionalization.²⁶ Although we may see an international reception of proportionality, this does not mean that a universal legal dogmatic is established.²⁷ Codification and jurisdiction do not automatically accept or design one dogmatic, but it is hardly possible to assure a justification logic without any dogmatic.²⁸ Different views exist on how to apply such a test.²⁹ Hence, proportionality is a rather challenging general principle of law.³⁰

II. Multidimensional Development and Enhancement of Proportionality

Legal Positivism and Constitutionalization

Before Lisbon proportionality from the perspective of positive law was very much associated with questions on competencies among the EU and its member states. Proportionality was in focus as general principle of law to govern vertical questions among the EU and its member states.³¹ In the context of vertical competencies or political interests its effects are different from a justification logic on fundamental rights. Besides its economic goals an ever closer Union had to answer related questions. It is difficult to imagine such an Union without being a legal community. On the contrary, a legal system state of the art is a precondition and framework for the other activities of the EU. Hence, also before the codification of the CFR the EU was deemed as community of fundamental rights, but with other priorities from the beginning of its integration on.³² The economic normativity in primary law was used as supportive way. Fundamental freedoms partially were deemed as fundamental rights functionally providing a

²⁶ M. Klatt/M. Meister, *JuS* 2014, 193, Der Grundsatz der Verhältnismäßigkeit.

²⁷ Ph. Reimer, *Der Staat* 2013, 53ff., "... UND MACHET ZU JÜNGERN ALLE VÖLKER?"; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

²⁸ U. Haltern, *EU I*, 2017 Tübingen, 11ff.

²⁹ J. Saurer, *Der Staat* 2010, 13ff., Die Globalisierung des Verhältnismäßigkeitsgrundsatzes.

³⁰ F. Becker, *NVwZ* 2015, 1336, Grundrechtliche Grenzen staatlicher Überwachung zur Gefahrenabwehr.

³¹ Z. Meskic/D. Samardzic, *Pravo Evropske Unije I*, 2012 Sarajevo, 61, 62ff.

³² M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 1; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 1ff.; D. Samardzic/Z. Meskic in South East European Law School, *Rule of Law, Human Rights and European Union*, 2012 Skopje, 14f., Principle "Rule of Law" Or "Rechtsstaatlichkeit" as Basis for Human Rights Protection in European Union Law.

compensatory protection.³³ But this could not have been a substitute for a codified catalogue of fundamental rights. During that time the integrative capacity of the CJEU could not have been overstated. Its proceeding on the grounds of art. 19 TEU may be in this respect characterized as constitutional design competency.³⁴ This has evoked the characterization of the court as driver of integration.

Germany with its history may serve as example of change.³⁵ The acceptance of proportionality has not arisen by chance. Proportionality is closely linked to the fundamental rights and the work of the constitutional courts.³⁶ After the Second World War fundamental rights constituted the first chapter of the German Basic Law. Human dignity was put as untouchable right into art. 1 of this law and art. 1 III obliges all state powers by fundamental rights. Procedurally justiciability by courts is the expression of protecting general principles of law effectively under the independence of courts. These guarantees are strongly represented by the German Constitutional Court, which has enhanced the understanding of fundamental rights in the light of proportionality. Additionally functions of fundamental rights were extended from traditional rights of defense against policy actions to positive obligations or guarantees. These obligations reflect the current understanding of functions of fundamental rights and are at the same time a way to cope with profound dogmatic challenges such as horizontal effects. Altogether this shows that the significance and development of proportionality is very much linked to the change of society and technology to be captured by the scope of fundamental rights.³⁷ In this context the new power of fundamental rights is described as normativity of such rights requiring a balance of colliding rights of the highest, equal ranking. This is critical as far as the logic is not

³³ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 2.

³⁴ M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 2.

³⁵ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 17f.; K. Stern in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 185; D. Grimm, *University of Toronto Law Journal* 2007, 384f., Proportionality in Canadian and German Constitutional Jurisprudence.

³⁶ J. Saurer, *Der Staat* 2010, 5ff., Die Globalisierung des Verhältnismäßigkeitsgrundsatzes.

³⁷ M. Klatt/M. Meister, *Der Staat* 2015, 162ff., Verhältnismäßigkeit als universelles Verfassungsprinzip.

consistent and coherent or even not applied. One of the critical aspects of balancing is to overload single elements of proportionality with normative assessments not reflecting the different characters and purposes of proportionality.³⁸

III. EU Since Lisbon

a) *Legal Ground of Proportionality for Fundamental Rights*

The CFR entered into force 2009 by the Lisbon Treaty. The charter expresses the identity of the Union as a European community of fundamental rights.³⁹ At this stage of integration the CFR may be seen as further enhancement of the EU as legal community. After the genuine idea of a constitutional treaty was refused in two of the member states of the EU, the CFR was codified separately, but of equal primary ranking as the TEU and TFEU (art. 6 I TEU).⁴⁰ Regarding proportionality art. 52 I CFR as general provision for fundamental rights is of superior guidance.⁴¹ The wording of sections I-IV of art. 52 CFR is as follows:

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

³⁸ D. Grimm, *University of Toronto Law Journal* 2007, 393ff., Proportionality in Canadian and German Constitutional Jurisprudence.

³⁹ M. Kotzur, *EuGRZ* 2011, 105ff., Der Schutz personenbezogener Daten in der europäischen Grundrechtsgemeinschaft; U. Haltern, *EU II*, 2017 Tübingen, 3ff.

⁴⁰ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 9ff.

⁴¹ S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52; A. Dashwood/M. Dougan/B. Rodger/E. Spaventa/D. Wyatt, *European Union Law*, 359ff., 383ff.; P. Häberle/M. Kotzur, *Europäische Verfassungslehre*, 2016 Baden-Baden, 614f.; H.-J. Blanke in H.-J. Blanke/S. Manigiameli, *The European Union after Lisbon*, 2012 Heidelberg, 168ff.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

b) *Legal Ground by Positive Law*

According to art. 52 I 1 CFR limitations must be provided for by law. A law in this spirit has to conform to the rule of law, but is questionable to what degree a democratic legitimation is needed.⁴² This traditionally is given in case of laws passing the parliament as directly democratically legitimated body. In EU terms legal acts in the spirit of art. 289 III TFEU are included. Acts pursuant to art. 290 and 291 TFEU are adopted by the Commission as executive body. In this respect simple acts on the basis of art. 291 TFEU are deemed as insufficient.⁴³ The stronger the interference is, the stricter the criterion of certainty has to be applied.⁴⁴ Finally the question of sufficient democratic legitimation depends on the significance of regulations for fundamental rights. The doctrine of essential content demands that essential legal acts are adopted through the legislative procedure stipulated in the constitution or analogue in primary law.⁴⁵ Grabenwarter/Pabel speak of traceability (Germ. *Rückführbarkeit*).⁴⁶ Accordingly, the interference to a fundamental right must not be directly based on a directly democratically legitimized law, but traceable to a normative basis supported by a parliamentary law. The idea is to achieve an anchoring of essential laws through

⁴² H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 34ff.; Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 61f.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 143.

⁴³ Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 62.

⁴⁴ *Ibid.*

⁴⁵ P. Lerche in D. Merten/H.-J. Papier, *Handbuch der Grundrechte III*, § 62, Vorbehalt des Gesetzes und Wesentlichkeitstheorie; for the overall understanding of democratic legitimation in the EU Ch. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon*, 2010 Tübingen, 163ff., 288ff.

⁴⁶ Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 143.

preferably direct democratic legitimation. The broad scope of interpretation may be illustrated by the example of agreements. Even agreements among member states are deemed as sufficient legal basis for interference to fundamental rights: "In the present case, it is undisputed that the limitation of the *ne bis in idem* principle must be considered as being provided for by law, within the meaning of Article 52(1) of the Charter, since it arises from Article 54 CISA".⁴⁷

Another challenging criterion of art. 52 I CFR is the addition of rights and freedoms of others. Such rights and freedoms have to be of primary ranking related to the understanding of rights and freedoms in the spirit of art. 52 CFR. It is not sufficient to refer to national laws or rights exclusively with no relation to the charter.⁴⁸ Hence, it is a question of the character and quality of a rule. Due to the principle of equality laws cannot be discriminatory. The scope of a law may be narrowed to rather specific addressees, but there is no room to sanction individuals intentionally. From the perspective of the addressees in particular a rule has to be clear and precise as an expression of the principle of legal certainty.⁴⁹ An addressee must be able to foresee or understand what is required and the legal consequences thereof.

c) *New Level of Consistency, Coherence and Cooperation Through the CFR*

Although art. 52 I CFR is deemed as a rather abstract norm, in general, positive law compels jurisdiction to methodologically related interpretation and sharpness.⁵⁰ On the grounds of the essentials and purposes of art. 52 CFR a more consistent and coherent dogmatic may be applied. The multidimensionality of EU law is openly anchored in art. 6 TEU. This article together with art. 52 III, IV CFR requires a coherent application of law through the jurisdictions.⁵¹ These

⁴⁷ CJEU, C-129/14, *Spasic*, 2014, para 57.

⁴⁸ H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 47.

⁴⁹ D. Edward/R. Lane, *European Union Law*, 2016 Cheltenham, 6.134ff.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 144; H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 32.

⁵⁰ M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 3.

⁵¹ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 36; U. Haltern, *EU II*, 2017 Tübingen, 634ff., 705ff.; Z. Mesic/D. Samardzic in South East European Law School, *Promotion of Scientific Research and Education in European Integration and*

provisions support a multidimensional, universal understanding of human rights challenging related laws and jurisdictions.⁵² In this context proportionality as general clause has to be interpreted coherently for all fundamental rights. Member state law is challenging through its differences in 28 jurisdictions. Nevertheless, there is consensus on distinct fundamental principles, rights and methods. The international law perspective is given through the ECHR. The ECHR provides benefits as legal source of interpretation as well as through the case law of the ECtHR. The ECtHR is more experienced in the application of human rights, while the CJEU looks back on a shorter history of codified fundamental rights. According to art. 6 II TEU it is still a mandatory goal to assess the ECHR.⁵³ Currently, the opinion of the CJEU on the accession to the ECtHR has thwarted this process.⁵⁴

B. Logic of Proportionality as Justification Test

I. Four Step Distinction of Proportionality in the Spirit of art. 52 I CFR

Art. 52 I CFR is of rather broad and abstract nature. Only three basic elements of justification are now provided by law: legal basis, the essence of rights and proportionality. Nevertheless, this is an opportunity and obligation to support legal application. Legal methodology may be used to assure the logic and scales of proportionality. Partially, the CFR is deemed as innovative as well as, more enhanced than the ECHR.⁵⁵ In the spirit of its purposes it may be an invitation for

Policy, 2014 Skopje, 59ff., From unrelated to cooperative triple protection of human rights in the EU.

⁵² S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.100ff., 52.150ff.; M. Klatt, *Die praktische Konkordanz von Kompetenzen*, 2014 Tübingen, 2ff., 118ff.; D. Engel, *Der Beitritt der Europäischen Union zur EMRK*, 2015 Tübingen, 15ff.; Z. Meskic/D. Samardzic in South East European Law School, *Promotion of Scientific Research and Education in European Integration and Policy*, 2014 Skopje, 59ff., From unrelated to cooperative triple protection of human rights in the EU.

⁵³ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 154ff.; D. Engel, *Der Beitritt der Europäischen Union zur EMRK*, 2015 Tübingen.

⁵⁴ U. Haltern, *EU II*, 2017 Tübingen, 736ff., 705ff.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 22ff., 29f.; D. Engel, *Der Beitritt der Europäischen Union zur EMRK*, 2015 Tübingen, 313ff.

⁵⁵ M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 6; U. Haltern, *EU I*, 2017 Tübingen, 11ff.

methodological enhancement, state of the art or at least coherent.⁵⁶ A part of this enhancement process is the case law of the CJEU and the jurisdiction of its member states. The CJEU was a promoter of fundamental rights already before Lisbon. It seems as if the CJEU now on the basis of the CFR promotes the dogmatic of fundamental rights, not always consistently, but applying a stricter mean of proportionality and promoting a higher protection level of fundamental rights.⁵⁷ In this context proportionality requires a justification logic, with a coherent structure of elements building a justification test.⁵⁸

There is a consensus on essential elements of proportionality, although terminology is rather differing or even confusing through interchangeable or unclear use.⁵⁹ The ECtHR does not want to confess to one structure, but often reviews the essential elements implicitly *en bloc*.⁶⁰ Nevertheless, in the case law of the CJEU essential elements may be identified. Appropriateness, necessity and proportionality in a narrow sense build a three step test,⁶¹ but through integration of the legitimate objective, the structure converges to a four step test. The legitimate objective serves as reference point for the other elements, as far as the legitimate objective should not be part of the core proportionality test it may be examined as initiator prior to proportionality.

The CJEU prematurely started to clarify the significance of proportionality and a few of its essential elements: In its case *Schröder* the court said: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures

⁵⁶ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 36.

⁵⁷ Recently in particular on the field of data protection for instance CJEU, C-293/12, *Digital Rights Ireland*, 2014; CJEU, C-203/15, *Tele2 Sverige*, 2016.

⁵⁸ S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.65ff.; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen, para 36ff.

⁵⁹ K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen, para 118; U. J. Schröder, *Ad Legendum* 4/2015, 330, Der Verhältnismäßigkeitsgrundsatz; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 145.

⁶⁰ Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 145.

⁶¹ H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 37-42; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen, para 48-54.

are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued".⁶²

Later on the court enhances this understanding by pronouncing the relations of the means used to be proportionate to objectives. The court does not limit proportionality any more only to appropriateness and necessity but speaks of disproportionality and reasonableness: "However, it is well-established in the case-law of the Court that restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights".⁶³

In the meanwhile the CJEU repeats its formulas such as: "As regards the principle of proportionality, it follows from the case-law of the Court that the measures laid down by national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous among them, and the disadvantages caused must not be disproportionate to the aims pursued ...".⁶⁴

II. Scales of Proportionality

a) *Legitimate Objective*

The proportionality test has to be referenced to a legitimate objective.⁶⁵ Pursuant to art. 52 I 2 limitations may only be made if they meet objectives of general interests recognized by the Union or the need to protect the rights and freedoms

⁶² CJEU, 265/87, *Schröder*, 1989 para 21.

⁶³ CJEU, C-292/97, *Karlsson*, 2000 para 45.

⁶⁴ CJEU, C-528/13, *Leger*, 2015 para 58.

⁶⁵ E. Pache, *EuR 2001*, 488, Die Europäische Grundrechtecharta - ein Rückschritt für den Grundrechtsschutz in Europa?; Th. von Danwitz in P. J. Tettinger/K. Stern, *Kölner Kommentar zur Europäischen Grundrechtecharta*, 2006 München, Art. 52 GRC para 24; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 54ff.

of others. Such interests are not limited to art. 3 TEU, although this provision serves as pool of main objectives in the TEU.⁶⁶ Very different objectives and rights may serve as legitimate objective.⁶⁷ It is the reference point for the proportionality test and the counter point to the fundamental rights concerned. Essentially the examination of proportionality is an expression of, on the one hand, the legitimate objective and intensity of limitation and on the other hand the concerned fundamental rights.⁶⁸ Within the test of proportionality in a narrow sense such colliding rights and interests have to be balanced, finally. The wide range of objectives provoked Peers/Prechal to claim "Indeed, it is limitless, particularly as compared to the prohibition on restricting EU market freedoms on economic grounds".⁶⁹

The scrutiny of judicial application on the legitimate objective is not very strict. In its case *Sky Österreich* the court simply stated: "The safeguarding of the freedoms protected under Article 11 of the Charter undoubtedly constitutes a legitimate aim in the general interest".⁷⁰ Art. 11 CFR is of constituting importance for a democracy. Remarkably, it is not only an individual right, but at the same time a general interest representing the cumulation of a right of several people.⁷¹

In its case *Schecke Eifert* the court pointed out the significance of transparency: "... publication of the names of the beneficiaries of aid from ... and of the amounts which they receive from those Funds is intended to [enhance] transparency regarding the use of Community funds ... and [improve] the sound financial management of these funds, in particular by reinforcing public control of the

⁶⁶ R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1.

⁶⁷ S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.46ff.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 145f.; concrete examples Th. Marauhn/J. Thorn in O. Dörr/R. Grote/Th. Marauhn, *EMRK/GG*, 2013 Tübingen, 943ff.

⁶⁸ M. Kenntner, *ZRP 2000*, 424, Die Schrankenbestimmungen der EU-Grundrechtecharta - Grundrechte ohne Schutzwirkung?.

⁶⁹ S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.50.

⁷⁰ CJEU, C-283/11, *Sky Österreich*, 2013 para 52.

⁷¹ About a dichotomy of individual and collective rights H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 47.

money used".⁷² Then the court referred to the legal grounds of transparency: "The principle of transparency is stated in Articles 1 TEU and 10 TEU and in Article 15 TFEU. It enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system".⁷³ Thereby the courts showed that general principles of law may serve as legitimate objectives.

b) *Appropriateness*

Appropriateness may be derived from the wording of art. 52 I 2 CFR "... and genuinely meet objectives ...".⁷⁴ It is enough that a mean is able to promote a legitimate objective or to provide a contribution.⁷⁵ If several objectives are pursued it is sufficient to promote one of the objectives. In order to prove this standard, even a plausible argumentation is sufficient and in line with the precautionary principle known from fundamental freedoms, in case of doubt about the promotional effect, the more conservative assumption has to be chosen.⁷⁶ But such an argumentation has to be in accordance with the current level of scientific knowledge, and has to be coherent and consistent.⁷⁷ This means that state authorities shall avoid opposing, weakening effects or refrain from other promoting means.

The CJEU often demands that the mean is not manifestly inappropriate: "... that the Community legislature must be allowed a broad discretion in an area such as that in issue in the present case, which involves political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking

⁷² CJEU, C-92/09 and C-93/09, *Schecke Eifert*, 2010 para 67.

⁷³ CJEU, C-92/09 and C-93/09, *Schecke Eifert*, 2010 para 68.

⁷⁴ M. Holoubek/G. Lienbacher (ed.) *GRC*, 2014 Wien, Art. 52 para 16; overall Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 60ff.

⁷⁵ H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 37; M. Holoubek/G. Lienbacher (ed.) *GRC*, Wien 2014, Art. 52 para 16, Art. 8 para 33; H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 37f.

⁷⁶ H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 48.

⁷⁷ H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 37f.; H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 48.

to pursue".⁷⁸ Here the court indicated the broad discretion in particular the legislator enjoys. Legislator's discretion may lower the scrutiny of judicial application on proportionality.

In its decision *Schaible* the CJEU detailed (over seven paragraphs) examined the appropriateness. The court analyzed the used mean and its effects in the context of the facts. Two paragraphs out of this decision prove the aforesaid: "*As regards the obligation to keep a register for each holding, it should be pointed out, ..., that the data recorded by the identifier must be entered in a document which can be rapidly updated and, upon request, easily accessed by the competent authorities. Accordingly, that system allows the place of origin of each animal to be established as well as the various places through which an animal has passed. In the event of epizootic disease, that information is fundamental to carry out accurate epidemiological studies, identify dangerous contacts that are liable to spread the disease and, consequently, enable the competent authorities to take the necessary measures to prevent the spread of such contagious disease. ... reinforcement of controls on movements of ovine and caprine animals ..., movements of sheep largely contributed to the spread of foot-and-mouth disease in certain parts of the European Union during the outbreak of foot-and-mouth disease in 2001*".⁷⁹

Nevertheless, it is remarkable that the court mixed up the terminology of appropriateness with suitability. This again shows that in case of doubt the content must be crucial, not the wording. The conclusion of the court in *Schaible* is: "*As regards the allegations concerning the technical flaws of the identification system, even if the percentage of the means of electronic identification attached to animals which are lost or become defective can reach the level indicated by Mr Schaible, such malfunctions cannot, in themselves, demonstrate that the system concerned is, as a whole, unsuitable*".⁸⁰

On the contrary to *Schaible* the CJEU without a detailed analysis in its case *Schecke Eifert* simply stated: "*By reinforcing public control of the use of the money from ..., the publication required by the provisions whose validity is contested contributes to the appropriate use of public funds by the administration*".⁸¹ In the case *Sky Österreich* the CJEU in one paragraph states: "*Similarly, Article 15(6) of Directive 2010/13 is*

⁷⁸ CJEU, C-453/03, *ABNA*, 2005 para 69.

⁷⁹ CJEU, C-101/12, *Schaible*, 2013 para 40.

⁸⁰ *Ibid.*, para 41.

⁸¹ CJEU, C-92/09 and C-93/09, *Schecke Eifert*, 2010 para 69.

*appropriate for the purpose of ensuring that the objective pursued is achieved. That provision puts any broadcaster in a position to be able to make short news reports and thus to inform the general public of events of high interest to it which are marketed on an exclusive basis, by guaranteeing those broadcasters access to those events".*⁸² In contrast to the often more detailed examination of necessity these cases on appropriateness show that appropriateness forms a lower obstacle. The requirements on necessity are more complex and challenging.

c) *Necessity Test*

Necessity broadly is recognized as an integral part of proportionality and has to be examined as next step subsequent to appropriateness and before proportionality in a narrow sense.⁸³ The necessity test requires the search for alternative means.⁸⁴ It can be at large a fact based, empirical or scientific test because it is not a simple weighing. This more technical understanding provoked the thesis that necessity may dogmatically be the most secure part of proportionality.⁸⁵ Actually necessity may be deemed as essentially fact oriented, empirical or scientific examination as far as normative assessments are separated.

However, space for normative assessments is given through the use of criteria such as disproportionate, reasonable, similar or the consideration of effects on other subjects or interests. It is also not deemed as proportional if an alternative mean has stronger impact on third parties or general interests than the mean used.⁸⁶ This second essential part of the necessity formula requires that a milder mean could have been used to achieve the same success but is less invasive for fundamental rights.⁸⁷ This normative formula indicates that it is open to

⁸² CJEU, C-283/11, *Sky Österreich*, 2013 para 52.

⁸³ M. Holoubek/G. Lienbacher (ed.), *GRC*, 2014 Wien, Art. 52 para 16, Art. 8 para 33; Ch. Ladenburger in Calliess/Ruffert, *EUV/AEUV*, München 2016, Art 52. GRC para 49; H. D. Jarass, *EU GRC*, 2016 München, Art. 8 para 14.

⁸⁴ Ch. Ladenburger in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art 52. GRCh para 49; H. D. Jarass, *EU GRC*, 2016 München, Art. 8 para 14.

⁸⁵ Ch. Möllers, *NJW* 2005, 1975, Wandel der Grundrechtsjudikatur, Eine Analyse der Rechtsprechung des Ersten Senats des BVerfG.

⁸⁶ H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 39.

⁸⁷ H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 39; Ph. Reimer, *Der Staat* 2013, 33, "... UND MACHET ZU JÜNGERN ALLE VÖLKER?"; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

normative assessment. There is no exact definition to which degree an alternative mean has to be as successful as the used one and which adverse effects on other subjects an alternative mean may cause. There is no universal dogmatic on necessity. Different views and intensity of examination may lead to gradually or finally different results. A worthwhile case may be the judgment *Spasic* in the legal area of freedom, security and justice: "As regards whether the execution condition is necessary to meet the objective of general interest of preventing, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in one EU Member State, it must be noted that, as the Commission pointed out in its written observations and at the hearing, there are numerous instruments at the EU level intended to facilitate cooperation between the Member States in criminal law matters. ... Where appropriate, such direct consultations may lead, ... However, such instruments of mutual assistance do not lay down an execution condition similar to that of Article 54 CISA and, accordingly, are not capable of fully achieving the objective pursued. ... While it is true that those mechanisms are capable of facilitating the execution of decisions within the European Union, their use is nevertheless subject to various conditions and depends, in the end, on a decision of the Member State in which the court that delivered a decision on a definitive sentence is located, since that Member State is not obliged under EU law to ensure the effective execution of ... It follows that the execution condition laid down in Article 54 CISA does not go beyond what is necessary to prevent, in a cross-border context, the impunity of persons definitively convicted and sentenced in the European Union."⁸⁸

In *Sky Österreich* the CJEU easily tested the first half of the necessity formula. The court identified a milder mean to achieve the legitimate objective. However, the court did not deem this mean as effective as the mean used by the state authorities. Hence, the second part of the formula was not given: "However, it is apparent that less restrictive legislation would not achieve the objective pursued by Article 15(6) of Directive 2010/13 as effectively as the application of that provision".⁸⁹

Necessity makes the logic of proportionality evident. Each element has an own character, more investigative or more determined by normative assessment. Hence, different elements may be treated differently.⁹⁰ But if the more technical

⁸⁸ CJEU, C-129/14, *Spasic*, 2014, para 65-72.

⁸⁹ CJEU, C-283/11, *Sky Österreich*, 2013 para 55.

⁹⁰ Nevertheless regarding for instance the jurisdiction of the ECtHR: Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 147; regarding the CJEU S. Schmahl in R. Schulze/M. Zuleeg/S. Kadelbach, *Europarecht*, 2014 Baden-Baden, § 6 para 43.

and more assessing elements are merged, effects of methodology may be restricted. The boarder towards proportionality in a narrow sense should be clear in the light of the aforesaid because necessity is a rather objective examination such as a technical review. Necessity may be rather difficult to be distinguished from proportionality in a narrow sense if balancing or normative assessment is done within the frame of necessity.⁹¹ Unavoidable normative assessments have to be made, but should be based on comprehensible explanation and transparent evidence.

d) *Proportionality in a Narrow Sense*

aa) Proper Balancing

For the ECtHR proportionality is besides necessity very much a question of fair balance.⁹² *"It is well-established case-law that ... must be construed in the light of the principle laid down in the first sentence of the Article Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights The search for this balance is reflected in the structure of Article ...: there must be a reasonable relationship of proportionality between the means employed and the aim pursued In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question ..."*⁹³

But it is astonishing that this rather important element of proportionality often is examined rather cursory by the ECtHR: *"The Court's task accordingly consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other: With regard to Mr Boujlifa's*

⁹¹ B. Rustenberg, *Der grundrechtliche Gewährleistungsgehalt*, 2009 Tübingen, 223f.; Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEU*, 2016 München, Art 52. GRC para 69; D. Grimm, *University of Toronto Law Journal* 2007, 393ff., Proportionality in Canadian and German Constitutional Jurisprudence.

⁹² Th. Marauhn/K. Mehrhof in O. Dörr/R. Grote/Th. Marauhn, *EMRK GG*, 2013 Tübingen, 405; J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, 2009 Leiden, 31ff.

⁹³ ECtHR, 12033/86, *Fredin/Sweden*, para 51.

ties, the Court observes that he arrived in France at the age of 5 and has lived there since 1967..., when he was serving a prison sentence in Switzerland. He received his education in France, he worked there for a short period and his parents and his eight brothers and sisters live there On the other hand, it seems that he did not show any desire to acquire French nationality at the time when he was entitled to do so. The Court notes that the offences committed (armed robbery and robbery), by their seriousness and the severity of the penalties they attracted, constituted a particularly serious violation of the security of persons and property and of public order. It considers that in the instant case the requirements of public order outweighed the personal considerations which prompted the application. Having regard to the foregoing, the Court considers that the making of the order for the applicant's deportation cannot be regarded as disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."⁹⁴

The CJEU also speaks of fair or appropriate balance.⁹⁵ Often the element of proportionality in a narrow sense is not identifiable due to mutual examination of the elements of necessity and proportionality in a narrow sense.⁹⁶ This is curious due to the impact of proportionality in a narrow sense.⁹⁷ With regard to the fundamental general principles of law and the CFR a more consistent methodology on balancing as well as the scrutiny of judicial application may be supportive.

In its case *Sky Österreich* the CJEU reviews different rights, facts and arguments in proportion: *"In that regard, it should be noted that the European Union legislature was required to strike a balance between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the media, on the other. ... By establishing requirements*

⁹⁴ ECtHR, 25404/94, *Boujlifa/France*, para 43.

⁹⁵ CJEU, C-92/09 and C-93/09, *Schecke Eifert*, 2010 para 77, 86; CJEU, C-283/11, *Sky Österreich*, 2013 para. 58, 60; CJEU, C-468/10 and C-469/10, *ASNEF*, 2011 para 43, 47f.; S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52, 52.70ff.; H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 41; M. Borowsky in J. Meyer, *Charta der Grundrechte der Europäischen Union*, 2014 Baden-Baden, 786f; Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 para 65.

⁹⁶ Th. Kingreen, in Ch. Calliess/M. Ruffert, *EUV/AEUV*, München 2016, Art 52. GRC para 71; H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 36.

⁹⁷ F. Müller/R. Christensen, *Juristische Methodik*, 2012 Berlin, para 372ff.; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 78ff.; Th. Schwabenbauer, *Heimliche Grundrechtseingriffe*, 2013 Tübingen, 215ff.; G. Britz, *Einzelfallgerechtigkeit versus Generalisierung*, 2008 Tübingen, 164ff.

*relating to the use of extracts from the signal, the European Union legislature has ensured that the extent of the interference with the freedom to conduct a business and the possible economic benefit which broadcasters might draw from making a short news report are confined within precise limits. ... Article 15(5) of Directive 2010/13 provides that short news reports on the event being exclusively retransmitted may not be produced for any kind of television programme, but only for general news programmes. Thus, the use of extracts from the signal in programmes serving entertainment purposes, which have a much greater economic impact than general news programmes, is ruled out, In addition, ..., the Member States are required to define the modalities and conditions regarding the provision of extracts from the signal used by taking due account of exclusive broadcasting rights. In that regard, ... those extracts must, inter alia, be short and that their maximum length should not exceed ninety seconds. Similarly, the Member States are required to define the time limits regarding the transmission of those extracts. Finally, broadcasters producing a brief news report must, ..., identify the source of the short extracts used in their reports, which is likely to have a positive effect in terms of publicity for the holder of the exclusive broadcasting rights at issue. Moreover, ... does not prevent holders of exclusive broadcasting rights from charging for the use of their rights. ... it should be noted that the marketing on an exclusive basis of events of high interest to the public is, ..., increasing and may significantly restrict the access of the general public to information relating to those events. ... In the light, first, of the importance of safeguarding the fundamental freedom to ... the European Union legislature was entitled to adopt rules such as those laid down in Article ..., which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom."*⁹⁸. Here the CJEU started with the main rights concerned weighing business interests vs. rights on information and pluralism of media. The court used different arguments to strengthen its opinion such as duration of broadcast, economical benefits, rights to charge, place of broadcast, duty to reveal the source, public interest, limits, modalities and conditions specified by the legislators of member states. Finally, the CJEU deems it as proportionate that the EU legislator balanced and gave priorities to right of access to information over contractual freedom.

⁹⁸ CJEU, C-283/11, *Sky Österreich*, 2013 para 59, 62-66.

bb) Methods on Proper Balancing

The broad scope of balancing by nature causes insecurities or positively expressed opportunities.⁹⁹ It is not easy or possible to use a standardized set of methods for proper balancing. The case *Sky Österreich* is a more positive example from the case law of the CJEU. Often the CJEU is criticized for its unprecise, inconsistent proceeding, although, much of this criticism comes from the past.¹⁰⁰ But this criticism has to be taken seriously, especially if simple methods such as methodology on finding and explaining judicial results is possible.¹⁰¹ An examination pragmatically or *en bloc* makes it difficult to identify or allocate every fact, argument and proof to a certain legal requirement or element of examination.¹⁰² From the legal point of view the methodology of the court may be qualified as cursory judicial examination and being to inconsistent, incoherent or at least rather liberally applied.¹⁰³ Thereby, the court evokes confusion on legal discipline, confidence or justice.

Balancing is part of the proportionality test, but not everything is balancing. A balancing of everything, inconsistently, incoherently or out of legal methodology

⁹⁹ M. Klatt/J. Schmidt in M. Klatt, *Prinzipientheorie und Theorie der Abwägung*, 2013 Tübingen, 1ff., *Abwägung unter Unsicherheit*; M. Breckwoldt/M. Kleiber in M. Klatt, *Prinzipientheorie und Theorie der Abwägung*, 2013 Tübingen, 1ff., *Grundrechtskombinationen*; H.-J. Koch, *Methoden zum Recht*, 2010 Baden-Baden, 55ff., *Die Begründung von Grundrechtsinterpretationen* (refer also EuGRZ 1986, 345ff.).

¹⁰⁰ U. Kischel, *EuR 2000*, 395ff., *Die Kontrolle der Verhältnismäßigkeit durch den EuGH*; W. Pauly, *EuR 1998*, 242ff., 259f., *Strukturfragen des unionsrechtlichen Grundrechtsschutzes*; K. Ritgen, *ZRP 2000*, 372ff., *Grundrechtsschutz in der Europäischen Union*; E. Pache, *EuR 2001*, 487f., *Die Europäische Grundrechtecharta – ein Rückschritt für den Grundrechtsschutz in Europa?*

¹⁰¹ U. Haltern, *EU II*, 2017 Tübingen, 39; both criticizing and referring to positive approaches of the CJEU F. Müller/R. Christensen, *Juristische Methodik*, 2012 Berlin, para 372ff.

¹⁰² Th. von Danwitz in P. J. Tettinger/K. Stern, *Kölner Kommentar zur Europäischen Grundrechtecharta*, 2016 München, Art. 52 para 17ff.; E. Pache, *EuR 2001*, 487f., *Die Europäische Grundrechtecharta – ein Rückschritt für den Grundrechtsschutz in Europa?*; S. Magiera, *DÖV 2000*, 1022, *Die Grundrechtecharta der Europäischen Union*; R. de Lange/S. Prechal/R. J. G. M. Widdershoven, *Europeanisation of Public Law*, 2007 Amsterdam, 148; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572; F. Müller/R. Christensen, *Juristische Methodik*, 2012 Berlin, para 372ff.

¹⁰³ Th. Oppermann/C. D. Classen/M. Nettesheim, *Europarecht*, 2016 München, 275 para 25; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572; U. Haltern, *EU II*, 2017 Tübingen, 3ff., 27ff.

evokes criticism on proportionality.¹⁰⁴ Proportionality may also be sceptically seen as weighing of subjective views causing lacks of objectivity. But the question is not if courts or other people decide objectively – people are for sure subjects, the question is how is proportionality embedded in primary law and legal logic. For balancing rights it is crucial to understand the underlying legal dogmatic which is not provided by positive law, but indicated in art. 52 I CFR.¹⁰⁵ Rationality is an approach to be more in line with clarity and logic of general principles of law.¹⁰⁶ Proportionality may be interpreted as an expression of the rule of law, of human dignity or the combination of other fundamental rights.¹⁰⁷ In any case, the dogmatic of proportionality may only serve as scales of proportionality if it is formed on legal grounds, on the general principles of law and legal methodology.¹⁰⁸ The CFR as positive law provides a constitutional context for the application of a legal dogmatic on primary law.¹⁰⁹ At least in the spirit of coherence, the common sense in the member states on legal methodology should be assured.¹¹⁰

¹⁰⁴ M. Klatt/M. Meister, *Der Staat 2015*, 169, Verhältnismäßigkeit als universelles Verfassungsprinzip; D. Grimm, *University of Toronto Law Journal 2007*, 393ff., Proportionality in Canadian and German Constitutional Jurisprudence.

¹⁰⁵ Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 1; N. Petersen, *Verhältnismäßigkeit als Rationalitätskontrolle*, 2015 Tübingen, 111ff.; M. Wiebracke, *ZJS 2/2013*, 152, Der Verhältnismäßigkeitsgrundsatz; J. Meyer-Ladewig/M. Nettesheim in J. Meyer-Ladewig/M. Nettesheim/S. von Raumer, *EMRK*, 2017 Baden-Baden, Art. 8 para 113.

¹⁰⁶ M. Breckwoldt/M. Kleiber in M. Klatt, *Prinzipientheorie und Theorie der Abwägung*, 2013 Tübingen, 1ff., Grundrechtskombinationen.

¹⁰⁷ A. von Arnald, *JZ 2000*, 276ff., Die normtheoretische Begründung des Verhältnismäßigkeitsgrundsatzes; P. Häberle/M. Kotzur, *Europäische Verfassungslehre*, 2016 Baden-Baden, 674ff.

¹⁰⁸ Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 para 65.

¹⁰⁹ P. Häberle, *IEV (Institut für Europäische Verfassungswissenschaften) Online Nr. 3/2009*, "Verfassungskultur" als Kategorie und Forschungsfeld der Verfassungswissenschaften, 3.

¹¹⁰ M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 9; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 36.

cc) Proportions of Means Towards Objectives

The proportionality test assures the viability of the principle of rule of law.¹¹¹ *Aristotle* already indicated that every legal issue is a question of proportions.¹¹² Proportionality dogmatically gets its strength from the distinction of its single elements verifying the used means towards legitimate objectives. The legitimate objective as reference point of examination has to be clear and precise. Every element of proportionality has to be examined separately towards this objective.¹¹³ It is not a free balancing of interests. Every single element has its own value. This value is reduced if elements are unnecessarily undistinguished. Sometimes it may be favourable to increase the power of one element by using the support of other elements, principles, rights or arguments. But this endangers principles such as legal certainty, confidence or justice. If proportionality is a simple, free balancing than proportionality would not be needed as independent test. It can be proved that elements such as appropriateness or necessity may be examined on empirical or scientific basis state of the art without overloading these elements with normative assessments.

The legal technique of proportionality is based on its logical sequences of elements within an overall systematic and coherence.¹¹⁴ Rights firstly may be examined generally and secondly each individual case treated individually.¹¹⁵ The abstract testing of rights should be independent and followed by a test in each individual case. Rights may get another weight or intensity in a specific case. At the end balancing it is only a consequence of legal reasoning.¹¹⁶ Often

¹¹¹ V. Trestnjak/E. Beysen, *EuR* 2012, 265ff., Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung.

¹¹² H.-J. Cremer in O. Dörr/R. Grote/T. Marauhn, *EMRK GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, 2013 Tübingen, 217 para 66ff.

¹¹³ Bundesverfassungsgericht, 1 BvR 256/08 of 2 March 2010, para 320.

¹¹⁴ Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, München 2016, Art 52. GRCh, para 68.

¹¹⁵ A. Wehlau/N. Lutzhöft, *EuZW* 2012, 48f., Grundrechte-Charta und Grundrechts-Checkliste – eine dogmatische Selbstverpflichtung der EU-Organe; for instance concretely on the legitimate objective within the frame of proportionality S. Kluckert, *JuS* 2015, 116ff., Die Gewichtung von öffentlichen Interessen im Rahmen der Verhältnismäßigkeitsprüfung; Ch. Bumke/A. Voßkuhle, *Casebook Verfassungsrecht*, 2013 Tübingen, para 148.

¹¹⁶ Ph. Reimer, *Der Staat* 2013, 33, "... UND MACHET ZU JÜNGERN ALLE VÖLKER?"; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

balancing is used to criticize proportionality while proportionality is often used as knockout argument to blur clarity and preciseness.¹¹⁷ An overall logic and a more distinguished clear methodology may help to reveal the power of each element of proportionality, although balancing may be finally needed. The internal structure with its logic has to be distinguished from the external factors with their impact.¹¹⁸

dd) Proportionality Test Embedded In Primary Law, Its General Principles And Recognised Legal Methodology

Balancing by people hardly can be assessed as purely objective. People, including judges, are by nature subjective. But this does not mean to support personal opinions, decisionism or conceptual jurisprudence.¹¹⁹ For example the principle of proportionality is framed and strengthened by the principle of legal certainty.¹²⁰ In its recent cases on data protection the CJEU requires clearly, precisely defined regulations to assure a strict necessity in the spirit of proportionality. Thereby the court links the principle of proportionality with the principles of legal certainty.¹²¹ Balancing is determined by positive law and general principles of law. There is no antagonism between law and methodology. Hence, rationality or logic is needed and neutrality is a virtue.¹²² Facts and arguments have to be foremostly heuristically evaluated and then applied

¹¹⁷ M. Klatt/Moritz M., *JuS* 2014, 195f., Der Grundsatz der Verhältnismäßigkeit; F. Becker, *NVwZ* 2015, 1336f., Grundrechtliche Grenzen staatlicher Überwachung zur Gefahrenabwehr; Ph. Reimer, *Der Staat* 2013, 37, "... UND MACHET ZU JÜNGERN ALLE VÖLKER?"; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

¹¹⁸ M. Klatt/M. Meister, *JuS* 2014, 198, Der Grundsatz der Verhältnismäßigkeit.

¹¹⁹ Ph. Reimer, *Der Staat* 2013, 34ff., "... UND MACHET ZU JÜNGERN ALLE VÖLKER?"; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

¹²⁰ Refer comments on legal certainty on the grounds of art. 52 I CFR H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 27; F. Becker, *NVwZ* 2015, 1336f., Grundrechtliche Grenzen staatlicher Überwachung zur Gefahrenabwehr.

¹²¹ F. Becker, *NVwZ* 2015, 1336f., Grundrechtliche Grenzen staatlicher Überwachung zur Gefahrenabwehr.

¹²² U. J. Schröder, *Ad Legendum* 4/2015, 327, Der Verhältnismäßigkeitsgrundsatz; M. Wiebracke, *ZJS* 2/2013, 149f., Der Verhältnismäßigkeitsgrundsatz; N. Petersen, *Verhältnismäßigkeit als Rationalitätskontrolle*, 2015 Tübingen.

through law and principles.¹²³ The external structure is not congruent with the internal structure of proportionality or a substitute.¹²⁴

ee) Judicial Review Perspective

Depending on the understanding of fundamental rights the review perspective may differ. The ECtHR examines proportionality more focused on the perspective of the subject under the concrete circumstances.¹²⁵ This more subjective approach is rather reminiscent of the individual approach to fundamental rights of the German Constitutional Court. The German court is strongly driven by the idea of subjective rights with human dignity as overall value.¹²⁶ The CJEU examines fundamental rights more abstract from an objective point of view.¹²⁷ To achieve an overall balance the Court focuses on general interests and effects. This may be seen as a more objective than subjective approach, but proportionality in the spirit of art. 52 I CFR has to be interpreted from the individual point of view of fundamental rights, not only as a general principle limiting legislative acts.¹²⁸ This point of view dogmatically makes a difference. Finally, the degree of subjectivity and objectivity depends on the characteristics and functions of rights concerned as well as the facts and circumstances of each single case. A crucial role for finding the right balance takes the legal theory and dogmatic with its methods of interpretation. By

¹²³ Ph. Reimer, *Der Staat* 2013, 48, "... UND MACHET ZU JÜNGERN ALLE VÖLKER?"; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

¹²⁴ M. Klatt/M. Meister, *Der Staat* 2015, 172, 175, 182, Verhältnismäßigkeit als universelles Verfassungsprinzip.

¹²⁵ ECtHR, 5029/71, *Klass/Germany*, para 59.

¹²⁶ Th. von Danwitz, *EWS* 2003, 394, Der Grundsatz der Verhältnismäßigkeit im Gemeinschaftsrecht.

¹²⁷ Th. von Danwitz, *EWS* 2003, 396, 401, Der Grundsatz der Verhältnismäßigkeit im Gemeinschaftsrecht; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572.

¹²⁸ D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572; M. Borowsky in J. Meyer, *Charta der Grundrechte der Europäischen Union*, 2014 Baden-Baden, 786; J. Meyer-Ladewig/M. Nettesheim in J. Meyer-Ladewig/M. Nettesheim/S. von Raumer, *EMRK*, 2017 Baden-Baden, Art. 8 para 113.

general weighing it is difficult to achieve legal expectations, certainty or confidence in line with the rule of law.¹²⁹

ff) Preservation and Promotion of the Optimum Effectiveness of Each Right

Finally balancing in the spirit of practical concordance may lead to more proportionate results.¹³⁰ Balancing in a simple understanding may mean that one right prevails another right. This can lead to a total overweight in a relationship of 51% to 49%. Furthermore this may be interpreted as if the inferior right is not relevant any more. Both interpretations are hardly conform to the principles of the rule of law and democracy with its idea of protection of minorities and respect towards opposition. In case of colliding rights of equal, highest ranking from a constitutional point of view concerned rights must preserve their value. Concerned rights still have to remain their optimal effectivity. This means that the prevailing right has to accept limits of preponderance. As far as this spirit is respected balancing assures respectful correlations among all rights, whether superior or inferior. Thereby the argument of inconsumerability of principles or rights is relativized.

gg) Scrutiny of Judicial Application

The scrutiny of judicial applications depends on the characteristics and functions of fundamental rights as well as on the degree of limitation with its legitimate objectives.¹³¹ These correlations are the proportions captured by proportionality and proportionality is embedded in the frame of the other general principles of law. Separation of powers and democratic legitimation demand respect towards the other state powers. The CJEU in particular towards the legislator admits a

¹²⁹ A. Dashwood/M. Dougan/B. Rodger/E. Spaventa/D. Wyatt, *European Union Law*, 2011 Oxford, 328ff.

¹³⁰ K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 1995 Heidelberg, para 72; M. Klatt/M. Meister, *JuS* 2014, 194, Der Grundsatz der Verhältnismäßigkeit; W. Schroeder, *Das Gemeinschaftsrechtssystem*, 2002 Tübingen, 281ff.; Ph. Reimer, *Der Staat* 2013, 35, "... UND MACHET ZU JÜNGERN ALLE VÖLKER?"; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte; refer on the understanding of practical concordance and its links to fundamental rights M. Klatt, *Die praktische Konkordanz von Kompetenzen*, 2014 Tübingen.

¹³¹ H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 45ff.; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 66ff.

right of prerogation or discretion. The legislator has to foresee rather different circumstances to adopt regulations. This kind of flexibility is needed more than in the area of executive powers. Executive authorities often apply laws in a concrete situation with practical knowledge, higher experience through their profession or more sufficient support. Hence, the court stated: "*It should be pointed out, with regard to judicial review of the validity of the provisions of a regulation, that the Court, when it assesses the proportionality of the measures implemented by those provisions, has accepted that the legislature of the European Union, in the exercise of the powers conferred on it, must be allowed a broad discretion in areas which involve, on its part, political, economic and social choices and in which it is called upon to undertake complex assessments ...*".¹³² Furthermore, the court openly emphasize the political role of the legislator: "*In the area of agriculture, the European Union legislature enjoys, inter alia, such a broad discretion, corresponding to the political responsibilities given to it by Articles 40 TFEU to 43 TFEU. Consequently, review by the Court is limited to verifying whether that legislature has manifestly exceeded the limits of its discretion ...*".¹³³

But it is of great support that the court in the subsequent paragraphs clarified that discretion does not create legal vacuums: "*Indeed, even though it has such a discretion, the European Union legislature must base its choice on objective criteria and, in assessing the burdens associated with various possible measures, it must examine whether the objectives pursued by the measure chosen are such as to justify even substantial negative consequences for certain economic operators ...*".¹³⁴ This understanding is driven by the idea of logic and duty to realization of ideas.¹³⁵ In comparison the ECtHR in the area of fundamental rights uses the term margin of appreciation.¹³⁶ Some people think that such a margin modifies proportionality, while others think that the margin effects the scrutiny of judicial application.¹³⁷ According to the case law of the ECtHR the impression may appear that a judicial review of a margin is excluded. But as shown up by the

¹³² CJEU, C-101/12, *Schaible*, 2013 para 47.

¹³³ *Ibid.*, para 48.

¹³⁴ *Ibid.*, para 49.

¹³⁵ Ch. Bumke/A. Voßkuhle, *Casebook Verfassungsrecht*, 2013 Tübingen, para 155ff.

¹³⁶ J. Meyer-Ladewig/M. Nettesheim in J. Meyer-Ladewig/M. Nettesheim/S. von Raumer, *EMRK*, 2017 Baden-Baden, Einl. para 27.

¹³⁷ Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 149ff.; Th. Marauhn/J. Thorn in O. Dörr/R. Grote/Th. Marauhn, *EMRK/GG*, 2013 Tübingen, 947ff.

CJEU facts and objective criteria may be always reviewed irrespective of legislative freedoms or political assessments.

Regarding the scales of judicial review the CJEU admits that a review cannot be used retrospectively as pointer. Assessment of decisions of state authorities have to be done from their angle in the authentic situation at the respective time: *"However, it should be pointed out that the validity of a European Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted and cannot depend on retrospective assessments of its efficacy. Where the European Union legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question ..."*¹³⁸

C. Resumee

The CFR and its general clause art. 52 I may be deemed as state of the art among fundamental right codifications. It is a clear confession towards the protection of fundamental rights and general principles of law such as proportionality. The legal and methodological needs of application show that it is a challenge among different laws and jurisdictions. As indicated art. 52 I, III, IV form multidimensional challenges, but this is also true for art. 51 or 53 CFR or single fundamental rights such as data protection (art. 8 CFR) which determine all our lives. The practical significance both of the CFR and proportionality may have been partially underestimated, but the huge impact on other laws is given. In the spirit of coherence and the needs caused through the collision of laws jurisdictions are pressured to cooperate and work on legal methodology. The variance of European law cannot be resolved by silo education or views. Constitutionalization and methodology are only expressions of tendencies taking place. It is a huge invitation in times of globalization to use the power of single elements of proportionality and its logic. The opposite, a reactive patchwork, arbitrary or purely pragmatic judgements may have adverse effects on legal discipline, confidence or justice. The origin for examination of interference to fundamental rights now clearly is art. 52 I CFR. Nevertheless, art. 52 I CFR does not determine a certain legal proceeding. Fair or proper balancing is not strongly enough framed by and structured through proportionality. This demands a

¹³⁸ CJEU, C-101/12, *Schaible*, 2013 para 50.

stronger application of the logic of proportionality. Even, if the scales of proportionality may be adapted to different legal systems or cultures, a logic, consistency and coherence cannot be shifted away.

Overall the CJEU has been a promoter of the idea of proportionality to enhance the protection of fundamental rights. The CJEU seems to take the functional role of a European fundamental rights court. Since the CFR has entered into force the CJEU has enhanced the structure of proportionality and intensified the scrutiny of judicial application. The recent judgements on data protection since Lisbon prove the potentials of the CFR as well as the duty to assure a coherence among different laws and jurisdictions. Nevertheless, the newly achieved scrutiny evokes fundamental questions in the correlation among different general principles of law and state powers. The strengthening of fundamental rights and the rule of law naturally leads to a dialectic towards the democratically legitimated legislator and the executive powers.