

On Legal Framework in Comparative Administrative Law in Europe

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1 Grounds for Comparing

This article aims to outline a legal framework of comparative administrative law in Europe in a situation where international agreements test the relationships between the parliamentary, judicial and administrative powers.

1.1 *General Preconditions*

Comparative law is often used in a practical way: the aim is to compare legal regulation, especially solving disputes in different countries to discover best ways to prevent and solve conflicting interests while promoting legal rights and aims. Thus comparing legal regulation in countries that don't share the same rights and don't pursue same aims is not producing any practical comparative information, although it may bring information of the foreign legal system. To recognise the aims that are pursued by legal regulation is therefore the foremost issue particularly in administrative law because the regulations are flexible and allow varying degrees of administrative discretion. As important as community aims are also individuals' rights of which international basic rights that concern individuals in Europe are defined in the European Convention on Human Rights¹ and its case-law. The European Social Charter² complements the European Convention on Human Rights in the field of economic and social rights. It seeks to guarantee various fundamental rights and freedoms through a supervisory mechanism based on a system of collective complaints and national reports to ensure that they would be implemented and observed by States. Other international conventions that States have ratified have a varying impact on rights and aims that should be taken into account in public administrative decision making – depending on the monitoring of implementation of the values and aims promoted with these conventions. For example if Free Trade Agreements³ include penalties to states for restricting trade, then free trade is given a high priority in balancing interests in public authorities' decision-making.

Legal comparison carried out as a system-level comparison compares the entire legal system. A comparison on the rule of administrative law includes the system of governance besides the administrative law system in the compared states. Comparative administrative law should include a functional comparison regarding comparing the legally controlled solutions to disputes treating administrative law as an instrument of implementing government policy. Also institutional comparisons which are concerned of comparing the legal status of the various institutions are part of comparing the rule of

1 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECHR, signed in Rome on 4 November 1950.

2 *The European Social Charter*, Council of Europe treaty, signed in 1961 in Turin and revised in 1996.

3 In July 2013, the EU and the US launched negotiations on a Transatlantic Trade and Investment Partnership (TTIP).

administrative law as well as comparing general aspects of administrative law. The main question is, however, to find out how the balance of the interests of the community as a whole, and in relation to interests of individuals has been regulated.

Systemising and abstract rules and principles are the foremost starting point in applying the rule of law, while stressing case-law as source of interpreting law. Both European Union Courts and the European Court of Human Rights stress case-law in the interpretation and promotion of their aims and rights. In accordance with the European Court of Justice's settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also its context and the provisions of EU law as a whole. The origins of a provision of EU law may also provide information relevant to its interpretation.⁴ According to the Grand Chamber of the European Court of Human Rights the Court reiterates that the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory. This concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions; it impacts on the obligations imposed on Governments, but also has effects on the position of applicants.⁵

1.2 Main Factors in Comparative Administrative Law

The European Convention on Human Rights and European Court of Human Rights (ECtHR) produce a legal system which is considered to be the most effective human rights regime in the world. It has created a multi-level, pluralistic system of rights-protection in Europe. The Contracting Parties have an obligation to respect human rights (ECHR Art.1) and to undertake to abide by the final judgement of the Court in any case to which they are parties (ECHR Art.46). Even if the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is pursued is the maintenance and realisation of Human Rights and Fundamental Freedoms (ECHR preamble), neither a national court nor European Court of Human Rights have formal powers to generally impose its interpretation of rights on the other. The Court of Human Rights has, however, been defined by Stone Sweet to be a kind of transnational constitutional court. It adjudicates qualified rights just as constitutional courts do, through proportionality-based balancing. It indicates how a State should reform its law in order to avoid future violations. As Stone Sweet points out even if the "constitutional" label would be rejected, the national courts need a manager.

4 *European Commission v Federal Republic of Germany*, ECLI:EU:C:2014:2202 paragraph 43, judgment of the Court of Justice 11 September 2014. See, also judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, paragraph 50 and the case-law cited.

5 ECtHR [GC] *Case of El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/09, §134 and the case-law cited.

The margin of appreciation of public authorities shrinks as transnational consensus on higher standards of rights protection emerges. It is individuals – not s – who are the major stakeholders. It has been decided that, in Europe, no act of public authority is legally authorized or legitimate if it violates fundamental rights.⁶

The Member States of EU are bound by human rights defined in the European Convention on Human Rights as Contracting Parties and as well by fundamental rights defined in the Charter of Fundamental Rights of the European Union. The ECHR does not constitute, as long as the European Union has not acceded to it,⁷ a legal instrument which has been formally incorporated into European Union law.

Like transnational aims also legal principles provide a common ground for comparative law while limiting the margin of appreciation of public authorities. General principles in administrative law are, inter alia, fairness and equality which are horizontal in nature by stressing consistency, and reasonableness and proportionality that are vertical from the point of view that they are taking into consideration more the context of the case. From administrative law point of view, e.g. in environmental law, precautionary principle, proportionality principle and legal expectations often act to different directions and have to be balanced in the margin of appreciation of public authorities. Measures based on the precautionary principle must not be disproportionate in relation to the desired level of protection and they should not infringe legal expectations. The precautionary principle emphasizes protection issues in the exercise of authority when there is not sufficient evidence on the negative impact of the activity on the interests that must be protected under the law. The proportionality principle acts to the opposite direction, emphasizing the opportunities for development and trade. The potential long-term effects must, however, be taken into account in evaluating the proportionality of measures in the form of rapid action to limit or eliminate a risk whose effects will not surface until ten or twenty years later or will affect future generations.⁸

6 Stone Sweet, Alec, “Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?”, in Dialogue between judges, Proceedings of the Seminar 31 January 2014, Strasbourg, January 2014, p. 22–26.

7 On 5th April 2013, negotiators of the 47 Council of Europe parties and of the European Union finalised the draft instruments for the Accession of the EU to the European Convention on Human Rights, see *Fifth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, final report to the CDDH Council of Europe, Strasbourg 10 June 2013. The Commission requested for an Opinion of the ECJ ECLI:EU:C:2014:2475 *Opinion 2/13 of the Court (Full Court) on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 18 December 2014. According to the Court Opinion 2/13, paragraph 258, the agreement envisaged is not compatible with Art.6(2) TEU or with Protocol No 8 EU.

8 *Communication from the Commission on the precautionary principle* COM(2000) 1 final p. 17–18.

The transatlantic trade agreement is suggested to promote more compatible approaches to current and future regulation and standard-setting and other means of reducing non-tariff barriers to trade. E.g. World Trade Organization (WTO) SPS Agreement on food safety and animal and plant health,⁹ which requests that each side's SPS measures are based on science and on international standards or scientific risk assessments, and that they are applied only to the extent necessary to protect human, animal, or plant life or health,¹⁰ requires that the principle of precautionary has to be balanced with the principle of proportionality. The United States-European Union High Level Working Group (HLWG) recommends that the two sides explore opportunities to address these important issues, taking into account work done in the Sustainable Development Chapter of EU trade agreements and the Environment and Labour Chapters of U.S. trade agreements.¹¹ EU Member States provided the European Commission with a mandate for negotiating the Transatlantic Trade and Investment Partnership Agreement (TTIP), stating that it should include investment protection and investor-to-State dispute settlement (ISDS),¹² which would limit the courts power. The biggest issue in the negotiations and the focus of the growing opposition to the pact is this investor protection dispute settlement, which allows companies to bypass national courts and sue governments for damages on lost investments in extra-territorial arbitration panels. A consultation organised by the Commission has outlined a possible EU approach,¹³ which is regarded to be substantially different from other agreements containing traditional investment protection and ISDS clauses. The proposed EU approach is argued to achieve the right balance between protecting investors and safeguarding the EU's and Member States' right and ability to regulate in the public interest. The Commission recalls, however, that the Member States have unanimously entrusted the Commission to negotiate investment protection and ISDS within TTIP, provided that the final outcome corresponds to the EU interests. The negotiating directives therefore include an element of conditionality and make clear that a decision on whether or not to include ISDS is to be taken during the final phase of the negotiations.

9 *The Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement) entered into force with the establishment of the World Trade Organization on 1 January 1995. It concerns the application of food safety and animal and plant health regulations.

10 Final Report of United States–European Union High Level Working Group on *Jobs and Growth* February 11, 2013, p. 4.

11 *Ibid.*, p. 5.

12 *Preliminary report on Online public consultation on investment protection and investor-to-dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* July 2014.

13 Report on *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement*. European Commission staff working document SWD(2015) 3 final. Brussels, 13.1.2015.

2 Limits on Discretionary Power

2.1 *Aims in Administrative Law Framework*

Aims might be bypassed in administrative decision making particularly if they are mentioned only in the preamble and are thus not considered to be legally binding. However, aims are the starting point in decision making when balancing different interests. Aims show the direction that the decision should pursue and on the other hand aims not mentioned in applicable legislation should not be decisive when balancing interests.

European Court of Justice took a stand on the significance of prescription of aims as a factor of misuse of powers in the *Fedesa* -case.¹⁴ The Court considered firstly the objectives of common agricultural policy and secondly aims stated in the directive in question. It was alleged that the directive 88/146/EEC prohibiting the use in livestock farming of certain substances having hormonal action, was incompatible with the objectives of the common agricultural policy laid down in Article 39 of the Treaty on the Functioning of the European Union (TFEU). It was further alleged that the directive was in fact intended to reduce beef production, an objective which may be pursued only on the basis of Article 100 of the Treaty establishing the European Community (currently TFEU Art.122).¹⁵ The Court stated that in regulating conditions for the production and marketing of meat with a view to improving its quality, the directive contributed to the achievement of the objectives of the common agricultural policy set out in Article 39 of the TFEU. According to the Article 43(2-3) of the TFEU the Council shall, for implementing the common agricultural policy, establish provisions necessary for the pursuit of the objectives of the common agricultural policy and to adopt measures on quantitative limitation. Therefore the Court held that the Council had the power to adopt the directive on the basis of Article 43 of the TFEU alone.

Furthermore, the Court argued that it had consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. Despite the fact that the possibility of a reduction in surpluses was indeed taken into consideration during the process leading to the adoption of the directive, it does not follow that such a reduction, which is not cited in the preamble to the directive as one of the objectives pursued, was in fact the exclusive or main purpose of the rules adopted. Furthermore, the Court stated that the agricultural policy objectives laid down in Article 39 of the Treaty include in particular the stabilization of markets. Moreover, Article 39(2)(b) and (c) provide that in working out the common agricultural policy

14 *Case Fedesa and others*, ECLI:EU:C:1990:391, 13 November 1990, paragraphs 22–28.

15 According to Art.122 of TFEU (ex Art.100 TEC) the Council may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.

account must be taken of the need to effect the appropriate adjustments by degrees and of the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole. It follows that agricultural policy objectives must be conceived in such a manner as to enable the Community institutions to carry out their duties in the light of developments in agriculture and in the economy as a whole. Accordingly, the Court stated that the reduction of agricultural production surpluses cannot be said to be foreign to the objectives of the common agricultural policy. The Court held that the directive was therefore not vitiated by a misuse of powers.¹⁶ In other words, the fact that one of the aims of the directive was not mentioned in the preamble was excusable, because the Council had the powers to establish provisions necessary for the pursuit of the objectives of the common agricultural policy and therefore to adopt measures on quantitative limitation, and because this aim that was not mentioned in the preamble of that measure was not the exclusive or main purpose of the directive.

The Convention for the Protection of Human Rights and Fundamental Freedoms (Preamble) aims at securing the universal and effective recognition and observance of the rights therein declared. The legal aims allowing possible interference with the rights are mentioned in the second subparagraphs prescribing the rights. E.g. exercise of the freedom of expression (ECHR Art.10(1)), may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. Legal aims which can be balanced against the freedom of expression are prescribed as the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary (ECHR Art.10(2)). In the Case of Pentikäinen¹⁷ the European Court of Human Rights balanced the Article 10 freedom of expression against the aim of maintaining public safety, finding that the police had had the right to ask the applicant, who later proved to be a member of the press, to leave the scene. In exercising its supervisory jurisdiction, the Court stated that it must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it were “relevant and sufficient”. The interference of the police with the applicant’s right to exercise his freedom of expression had been based on law, and it had fulfilled the legitimate aim of preventing disorder. Therefore the interference was assessed to be necessary in a democratic society in order to put an end to a violent situation.

The Helsinki District Court found the applicant guilty of disobeying the police but did not impose any penalty on him. The Court noted that the

16 Op.cit., *Case Fedesa and others*, paragraphs 22–28.

17 ECtHR *Case of Pentikäinen v. Finland*, no. 11882/10, 4 February 2014, §14, §40 and §51–52. The case is also dealt with in chapter 3.1 concerning proportionality. The case was referred to the Grand Chamber 02/06/2014.

applicant was the only journalist claiming that his freedom of expression had been violated in the context of the demonstration. As to the necessity, the Court found that it had been necessary to disperse the crowd because of the riot and the threat to the public safety, and to order people to leave. Thus the restrictions on the applicant's freedom of expression were considered to be justified. The Court found it established that the applicant had been aware of the orders of the police to leave the scene but had decided to ignore them. It appeared from the witness statements given before the Court that the applicant had not told or indicated the arresting police officer that he was a journalist. According to the arresting officer, this fact only became known to him when the relevant magazine appeared. It appeared also from the witness statements that two other photographers, who had been in the sealed-off area, had been able to leave the scene without consequences just before the applicant was arrested. The Court found it further established that the police orders had been clear and that they had clearly concerned everybody. However, no penalty was imposed as the offence was excusable. The Court found that the applicant who, as a journalist, was confronted with contradictory expectations, stemming from obligations imposed on the one hand by the police and on the other by his employer. The ECtHR was however not unanimous in its decision but held by five votes to two that there had been no violation of Article 10 of the Convention.¹⁸ The two judges who disagreed with the majority considered that the order should not have been intended or interpreted as directed against the applicant as a journalist covering the events in question, since his presence was not connected with what needed to be countered and resolved.¹⁹ Aims are especially relevant when the proportionality of the decision is assessed since decisions should not be more restrictive than necessary to achieve the aims.

2.2 *Human Rights/Fundamental Rights*

In interest weighing the counterpart limiting the public authorities' discretion to pursue legal aims is individuals' rights which might of course also contradict each other. Under Article 1 of the ECHR, the Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. In addition to the primarily negative undertaking of a State to abstain from interference in the rights guaranteed by the Convention, "there may be positive obligations inherent" in those rights. The ECtHR has found that positive obligations may arise in respect of Right to life (Art.2), Prohibition of torture (Art.3), Right to respect for private and family life (Art.8), Freedom of expression (Art.10) and Freedom of assembly and association (Art.11). Regarding equally States' positive and negative obligations under the Convention on Human Rights the applicable principles are similar. In both contexts attention must be paid in particular on the fair balance that has to be struck between the competing interests of the individual

¹⁸ *Ibid.*, §14, §40 and §51–52.

¹⁹ *Ibid.*, Dissenting opinion of judge Nicolau joined by judge de Gaetano.

and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State.²⁰ The division of power between States, national courts and the European Court of Human Rights has been stated in ECtHR's case-law. Because of their direct, continuous contact with the realities of the country, a State's courts are considered to be in a better position than an international court to determine how, at a given time, the right balance can be struck. For this reason, the States have a certain margin of appreciation in assessing the necessity and scope of any interference with the rights protected by the ECHR.²¹

As Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law. Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR. The relations between ECHR and the Charter of Fundamental Rights as well as the competence of the European Court of Justice (ECJ) in matters concerning human rights are clarified in the Åkerberg Fransson –case²². According to the Åkerberg Fransson –case European Union law does not govern the relations between the European Convention on Human Rights and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by the convention and a rule of national law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures. Where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights. The level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law should, however, not be compromised.

According to the Charter of Fundamental Rights of the European Union article 51(2) the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power of task for the Union, or modify powers and tasks as defined in the Treaties. The scope of application of Fundamental Rights is limited to situations governed by

20 See ECtHR *Case of Karhuvaara and Iltalehti v. Finland*, no. 53678/00, §38 and §42.

21 ECtHR [GC] *Case of Palomo Sánchez and Others v. Spain*, nos. 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011, §54 and §58. See also *Positive obligations on member States under Art.10 to protect journalists and prevent impunity*. Research report, Council of Europe/European Court of Human Rights, December 2011.

22 *Åkerberg Fransson*, ECLI:EU:C:2013:105, 26 February 2013 (Grand Chamber), paragraphs 19–21, 29, 44, 49 and the case-law cited.

European Union law, but not outside such situations. Therefore the European Court of Justice has no power to examine the compatibility of national legislation with the Charter lying outside scope of European Union law. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it. Any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction.²³ According to the opinion of advocate general Cruz Villalón of the ECJ, the implementation of EU law sets, however, an essentially fluid boundary as far as the distribution of responsibility for guaranteeing fundamental rights is concerned. In certain circumstances, where the exercise of public authority by a Member State involves some degree of autonomy, it must be analysed in the light of the fundamental rights as they govern the Union by the supreme interpreter of those rights, the Court of Justice.²⁴

Whereas the European Court of Human Rights, in accordance with Article 53 of the Convention, sets the minimum level of human rights protection throughout Europe, the ECJ must ensure that the law is observed in the interpretation and application of the EU Treaties (TEU Art.19(1)). The president of Federal Constitutional Court of Germany, Andreas Voßkuhle, emphasizes that as much as a uniformly high human rights standard in Europe is desirable, it is not the task of the European Union Court in Luxembourg, but that of the ECtHR in Strasbourg, to safeguard it internationally.²⁵

2.3 *Legitimate Expectations*

Legitimate expectations are based on individual's trust that is given weight in decision making. Legitimate expectations include both already achieved benefits and future expectations. Barak-Erez points out that the distinction between the reliance and expectations explains differences when interpreting legitimate expectations. Protection of expectations is bound to protection of equality. Appropriate balance should, however, be struck between administrative discretion to solve future challenges and claims relating to substantive protection of legitimate expectations. Authorities should weigh not only potential benefits but also damages inflicted on those who had relied on previous policy or decision. Frustration of this reliance may be entitled to compensation if clear and general advance notice has not been given. Barak-Erez argues that reliance results against changes in administrative decisions. When a remedy is sought only for the protection of expectations without

23 *Ibid.*, paragraphs 19-21 and the case-law cited.

24 *Opinion of advocate general Cruz Villalón* ECLI:EU:C:2012:340, 12 June 2012, paragraph 29.

25 Voßkuhle, Andreas, "Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts", in *Dialogue between judges, proceedings of the Seminar 31 January 2014, Strasbourg, January 2014*, p. 36–40.

involving reliance, the claim is more likely to be successful when affecting a limited group, without restraining administrative discretion in general.²⁶

The European Court of Human Rights found that a company's legitimate expectation, which was linked to property interests such as the operation of an analogue television network by virtue of the licence, had a sufficient basis to constitute a substantive interest and hence a "possession" within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1. According to the Court Article 1 of Protocol No. 1 applies only to a person's existing possessions. Thus, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable. Further, the hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition. However, in certain circumstances, a legitimate expectation of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a legitimate expectation if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence. However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national court.²⁷

In Fedesa –case the principle of legal certainty was connected to the lack of scientific certainty. It was argued that the directive protecting the use of hormones in livestock farming²⁸ lacked any scientific basis justifying the public health considerations and consumer anxieties which underlay its adoption. It was argued that the prohibition of the use of certain hormones frustrated the legitimate expectations of traders, who felt entitled to expect that the substances in question would not be prohibited in the absence of, as they claimed, any objectively based doubt as to their safety, efficacy and quality. The Court held, however, having regard to the discretionary power conferred on the Council in the implementation of the common agricultural policy, that judicial review was limited to examine whether the measure in question was vitiated by a manifest error or misuse of powers, or whether the Council has manifestly exceeded the limits of its discretion. The claim, based on the existence of scientific evidence demonstrating the safety of the five hormones in question, was not upheld. The Court stated that it was not necessary to order any measures of inquiry to verify the accuracy of the allegations, because divergent appraisals by the national authorities reflected in the existing national

26 Barak-Erez, Daphne, *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests*, European Public Law, Volume 11, Issue 4, Kluwer International 2005, p. 583–601.

27 ECtHR [GC] *Case of Centro Europa 7 S.R.L. and di Stefano v. Italy*, no. 38433/09, 7 June 2012, §172–173 and §179 and the case-law cited.

28 *Council directive 88/146/EEC of March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action*.

legislation was sufficient. Therefore the Council had remained within the limits of its discretionary power in deciding to prohibit the hormones in question. As to the frustrate of legitimate expectations of traders, the Court held that in view of divergent appraisals traders were not entitled to expect that prohibition on administering the substances in question to animals could be based on scientific data alone.²⁹ Therefore consistent scientific research, if available, can be a factor in deciding on legal expectations.

3 Balancing Interests

In the fourfold composed of important and less important community values in the form of legal aims and on the other hand fundamental and less fundamental individual rights and legal expectations, varying legal principles have a varying weight. The more important the aims that are pursued by public authorities' decisions are, the less weight proportionality principle that stresses individual rights gets and vice versa. Precautionary principle gives even more weight to community values when there is scientific uncertainty concerning particularly protection of the environment and public health.

3.1 Proportionality Principle

According to the principle of proportionality, public authorities should size their operations to the appropriate level where the objectives can be achieved. The principle emphasizes the setting of objectives in decision-making. The principle of proportionality in Europe has received its content from the European Court of Human Rights case-law. According to the principle of proportionality, fair balance has to be established between promotion of political objectives decided by democratically elected institutions and of interests of individuals.

Robert Alexy determines the principle of proportionality as comprising the rule of suitability, rule of necessity and rule of proportionality.³⁰ Proportionality is applied when it comes to examining the conditions and results of interventions by public authorities in individual rights. First is assessed whether the current means are likely to meet the intended purpose (rule of suitability). Then the necessity of the procedure to achieve the intended purpose is assessed (rule of necessity). If there are less stringent alternatives, they should be used. Finally the public gains are compared to the damage caused by the interference to the individual (rule of proportionality). The principle has been raised not only in connection with decisions of type injunctions and prohibitions, which include a direct and significant power use, but also in connection with authorization decisions, such as exemptions.

29 Op.cit., *Fedesa and others*, paragraphs 7–10.

30 Alexy, Robert, *A Theory of Constitutional Rights*, Oxford University Press 2002, p.66–69.

Significant in applying proportionality is that the measures are proportionate to the objectives which are confirmed in the provisions.

The European Court of Human Rights has ruled on proportionality from the point of whether the decisions of public authorities have been disproportionate. This gives public authorities wider discretion than assessing if decisions are proportionate. The Court has assessed that besides the negative obligations not to interfere with fundamental human rights more than necessary; the States have also positive obligations to promote certain fundamental rights. The principle of proportionality is applicable to assessing equally State's positive and negative obligations under the Convention. Regard must still be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims being of certain relevance. The Court has found, having regard to the diversity of the practices followed and the situations obtaining in the States that the requirements regarding State's positive obligations vary considerably from case to case. Nonetheless, the Court has found that certain factors have been considered relevant for the assessment of the content of positive obligations on States. The factors relate either to the applicant or to the impact on the State concerned. The factors related to the applicant concern the importance of the interest at stake and whether "fundamental values" or "essential aspects" of human rights are in issue. Also the impacts on an applicant of discordance between the social reality and the law as well as the coherence of the administrative and legal practices within the domestic system are being regarded as important factors. Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question is whether the alleged obligation is narrow and precise or broad and indeterminate or about the extent of any burden the obligation would impose on the State. In implementing their positive obligation the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights.³¹

The principle of proportionality in assessing the limits of State's margin of appreciation has been evaluated in an ECtHR's decision on not allowing the marriage to continue between same-sex spouses while providing legal recognition of the new gender after one of the spouses had had a gender reassignment surgery. It was for the Court to determine whether the State's legal system struck a fair balance between the competing interests, namely the applicant's right to respect of her private life and State's interest in maintaining the traditional institution of marriage intact, and that the legal

31 ECtHR [GC] *Case of Hämäläinen v. Finland*, no. 37359/09, 16 July 2014, §65–67 and the case-law cited.

system satisfied the proportionality test. In conclusion, the Chamber considered that the State's legal system as a whole had not been shown to be disproportionate in its effects on the applicant and that a fair balance had been struck between the competing interests in the present case.³²

The Chamber approached the case as a right to privacy case and examined it from the point of view of an interference with the applicant's right to respect for her private life since she had not been granted a new female identity number while remaining married. Obtaining it while remaining married would have implied a same-sex marriage between the applicant and her spouse, which was not allowed in the State in question. The Chamber had regard to the absence of a common view in Europe on same-sex marriages when examining the proportionality of this interference. The Grand Chamber decided, however, that the case was also one of positive obligations.³³ The Chamber seems to have approached the question from an equality point of view, while the Grand Chamber stressed the principle of proportionality. The Grand Chamber refrained from assessing whether the aim of the marriage legislation in Finland was equal for its citizens. This interpretation is in line with the separation of powers which reserves the setting of goals to the governmental powers. It is for the judicial powers merely to review whether the goals have been equally applied and whether disadvantages caused have been disproportionate to the aims pursued. The Grand Chamber considered it appropriate to analyse the applicant's complaint also with regard to the positive aspect of the respect for private and family life and found that the applicant and her wife and children would not lose any rights if their marriage were converted into a registered partnership but that the original legal relationship would continue. In the Court's view it was not disproportionate to require, as precondition to the recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage. The Grand Chamber therefore held that the minor differences between these two legal concepts were not capable of rendering the current State's legal system deficient from the point of view of the State's positive obligation.³⁴

The judgement of the Grand Chamber was, however, not unanimous. The three judges of the minority hold that as there was no pressing social need for the interference in question it was therefore accordingly not necessary in a democratic society that the applicant had to suffer a violation of her rights to privacy under Article 8 of the Convention on Human Rights.³⁵ One of the judges who voted with the majority disagreed on the methodology of the Court in so far as the Court has repeatedly stated that, in view of the absence of clear practice in Europe and the ongoing debate in many European societies, it cannot interpret Article 8 as imposing an obligation to grant same-sex marriages. He disagreed with that the Court once again ventured into an

32 *Ibid.*, §36, §39–40 and §64.

33 *Ibid.*, §38 and §64.

34 *Ibid.*, §69–88.

35 *Ibid.*, Joint dissenting opinion of judges Sajó, Keller and Lemmens §21.

examination of the European consensus. According to the opinion of the concurring judge this means that the Court tries to establish what the domestic law and practice is in, if possible, 47 member States and thus attempts to determine whether a subsequent State practice may have emerged leading to a new interpretation, or even an amendment, of a treaty (see Vienna Convention on the Law of Treaties, Art.31), or possibly confirming the existence of *opinio juris*. In his opinion the protection of morals remained, however, a relevant justification for the interference with the applicant's right to privacy.³⁶

In the Case of Pentikäinen when the European Court of Human Rights balanced the Article 10 freedom of expression against the aim of maintaining public safety, the necessity of the interference was a key issue. The Court found that the police had had the right to ask the applicant, who later proved to be a member of the press, to leave the scene. The Court considered that in particular, it must determine whether the interference in issue was proportionate to the legitimate aims pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient. The ECtHR was not unanimous in its decision but held by five votes to two that there had been no violation of Article 10 of the Convention.³⁷ The minority considered that the domestic courts had been unable to adopt an interpretative approach, and therefore they were bound, in applying Article 10 of the Convention, to balance the competing interests involved. They argued that it was incumbent on the national authorities to convincingly establish, by relevant and sufficient reasons, that curtailing press freedom was necessary in the sense that it meets a pressing social need. The minority argued that there was no indication that any such balancing exercise was carried out in the present case. On the contrary, the case revealed, in their opinion, a one-sided attitude on the part of the authorities, one likely to create a "chilling effect" on press freedom. For these reasons the judges considered themselves to be unable to follow the majority.³⁸ The disagreement seems more to be whether it was necessary for the police to ask everybody to leave the scene to prevent disorder, than whether the freedom of press was actually infringed as such. The aim to prevent disorder was legal and the interference with the freedom of expression was assessed to be justified, but neither the majority nor the minority considered directly whether

36 *Ibid.*, Concurring opinion of judge Ziemele §2.

37 *Op.cit.*, *Case of Pentikäinen v. Finland*, paragraphs 14, 40 and 51–52. The case is also dealt with in chapter 2.1 concerning the legal aims. The case was referred to the Grand Chamber 02/06/2014.

38 The minority appealed in its reasoning to cases *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88–91, ECHR 2004-XI; *Goodwin v. the United Kingdom*, 27 March 1996, Reports of Judgments and Decisions 1995-II; *Tillack v. Belgium* (no. 20477/05, 27 November 2007) and *Voskuil v. the Netherlands* (no. 64752/01, 22 November 2007). In the latter case a journalist, who was called as a witness in criminal proceedings, refused to name his source even when the judge ordered him to do so. He was punished by detention for non-compliance. The Court found a violation of Article 10. It held that the judicial order was not justified by an overriding requirement in the public interest and so, in balancing the competing interests, "the interest of a democratic society in securing a free press" had to prevail. *Op.cit.*, *Case of Pentikäinen v. Finland*, Dissenting opinion of judge Nicolau joined by judge de Gaetano.

the actions of the police where disproportional to pursue the legitimate aim. Concerning the legitimate governmental aim, courts are restricted to examine whether disadvantages caused are disproportionate to the aims pursued. This is due to the separation of powers, according to which courts can't interfere with what is considered to belong to the margin of appreciation of governmental powers. This has been particularly brought up in the UK, where there has been announced proposals to repeal the British Human Rights Act (HRA) and to leave the European Convention on Human Rights (ECHR). The proposal has been published as a Private Member's Bill,³⁹ which purposes to repeal the Human Rights Act 1998 and related legislation and to make provision for a bill of rights and responsibilities to apply to the United Kingdom.

The proportionality of the powers of the police were assessed in the European Court of Human Rights when the applicants alleged that the powers of stop and search used against them by the police breached their rights, *inter alia*, under Article 8 of the Convention. National courts argued that the powers of the police remained necessary and proportional to the continuing and serious risk of terrorism, and regarded London as a special case. The Court regarded that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. In this connection, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor. Therefore the Court held that these searches constituted interferences with their right to respect for private life under Article 8. Such interference is justified only if it is in accordance with the law, pursues one or more of the legitimate aims referred to in the paragraph and is necessary in a democratic society in order to achieve the aims ECHR Art.8(2)). There was no requirement at the authorisation stage that the stop and search power of the police be considered necessary and therefore no requirement of any assessment of the proportionality of the measure. In the Court's view, there was thus a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. The Court considered that the powers of authorisation and confirmation as well as those of stop and search were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They were not, therefore, in accordance with the law with the result that there had been a violation of Article 8 of the Convention.⁴⁰ The proportionality test requires that the necessity of actions can be assessed; therefore it should be included in provisions on prescribing the width of discretionary powers when proportionality is a factor in balancing interests. If proportionality is, however, considered to be a general principle applicable to all administrative discretion, specific provisions are needed as to the content of the proportionality test in specific cases and as to exempt certain administrative proceedings from the proportionality test.

According to the Article 5 of the Treaty on European Union, it is clear that the principle of proportionality requires that the measures of the EU institutions

39 Human Rights Act 1998 (Repeal and Substitution) *Bill 2013:31*.

40 ECtHR *Case of Gillan and Quinton v. the United Kingdom*, no. 4158/05, 12 January 2010, §3, §17, §61, §65, §80, §85, §87.

decided on the basis of the principle of subsidiarity, should not go beyond what is required so that the EU's objectives are to be met.⁴¹ Proportionality is therefore applied in administrative proceedings in the EU. The EU Commission has related to proportionality in its Communication on the precautionary principle.⁴² Proportionality is considered to be one of the general principles that apply to all risk management measures. Proportionality is seen as a point of view that makes it possible to achieve the appropriate level of protection in relation to total risk reduction. Especially the potential long-term effects must be taken into account in evaluating the proportionality of measures.

The European Court of Justice stated in the *Fedesa* –case, that it has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibiting measures are 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. However, because the Community legislature has discretionary power, the legality of a measure adopted in that sphere can be reviewed only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.⁴³ In particular, the principle of proportionality requires the Commission to set a fine proportionately to the factors taken into account to assess the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified.⁴⁴

3.2 *Precautionary Principle*

The precautionary principle is not defined in the Treaties of the European Union, which prescribe the principle only once - to protect the environment. Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based, inter alia, on the precautionary principle. But in practice, its scope is much wider, and it should be applied specifically where preliminary objective scientific evaluation indicates that there are reasonable grounds for concern of the potentially dangerous effects on the environment or on human, animal or plant health

41 *Protocol (No 2) on the application of the principles of the subsidiarity and proportionality* (Art. 5). Annex to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

42 *Communication from the Commission on the precautionary principle* COM(2000) 1, p. 17.

43 *Op.cit., Case Fedesa and Others*, paragraph 13–14 and the cases mentioned. See also *Case Esso Société anonyme française and Others v European Commission*, ECLI:EU:T:2014:630, 11 July 2014, paragraph 106.

44 *Op.cit., Case Esso Société anonyme française and Others v European Commission*, paragraph 107.

which may be inconsistent with the high level of protection chosen for the Community.⁴⁵ According to the Treaties aims of the European Union are, inter alia, high level of protection and improvement of the quality of the environment (TEU Art.3(3), CFREU Art.37) and a high level of human health protection (TFEU (Art. 9 ,114(3) and 168(1), CFREU Art.35).

As set out in TFEU Article 191, the Community policy on the environment is to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources, and to be based on the precautionary principle and on the principles that preventive action should be taken, environmental damage should, as a priority, be rectified at source and that the polluter should pay. In accordance with Article 191, in preparing its policy on the environment, the Community is to take account of available scientific and technical data, environmental conditions in the various regions of the Community, and the economic and social development of the Community as a whole and the balanced development of its regions as well as the potential benefits and costs of action or lack of action.

Whilst the European Convention on Human Rights does not guarantee a specific right to a healthy and sound environment, the general standards deriving from it may nonetheless also apply to environmental matters. The European Court of Human Rights examines complaints on alleged breach of a right protected by the Convention, as a result of adverse environmental factors. Conversely, the protection of the environment may also be a legitimate aim for the authorities to justify interference with certain individual rights. The Court has established that the right to peaceful enjoyment of one's possessions may be restricted if it is considered necessary for the protection of the environment. The Court has identified in its case-law how the environment might affect the right to life (Art.2), the right to respect for private and family life as well as the home (Art.8), the right to receive and impart information and ideas (Art.10), the right to an effective remedy (Art.13) and the right to peaceful enjoyment of one's possessions (Art.1 Protocol No.1). The European Committee of Social Rights has interpreted the right to protection of health under the European Social Charter (Art.11) as including a right to a healthy environment.⁴⁶

The European Convention on Human Rights does not include goals to guarantee public health either. Health is mentioned in the Convention only in connection with protection of private and family life. There shall be no interference by a public authority with the exercise of this right except in accordance with the law when it is necessary in a democratic society in the interests of, inter alia, protection of health (Art. 8(2)). The right to protection of health guaranteed in Article 11 of the European Social Charter which complements Articles 2 and 3 of the European Convention on Human Rights, as interpreted by the case-law of the European Court of Human Rights, by

45 Op.cit., COM(2000) 1, p. 2.

46 See *Manual on Human Rights and the Environment*, Council of Europe Publishing 2012, p 8.

imposing positive obligations designed to secure the effective exercise of the right to protection of health (ESC Art.11).

According to the precautionary principle matters should be decided in favor of nature⁴⁷ or in favor of human health where there is reasonable doubt of the substantial negative consequences. The precautionary principle makes it possible to react quickly to avert a possible threat to human or animal health, to plant health, or to protect the environment. If the facts are not sufficient to assess the risk completely, this principle should be used to prohibit activities that may be hazardous to the environment or health. According to the Commission's guidance,⁴⁸ the precautionary principle can be used when a phenomenon, a product or a process can have potentially harmful effects, which have been identified through a scientific and objective evaluation, but this evaluation does not allow the risk to be determined with sufficient certainty.

The use of the principle is included in the overall risk analysis (which in addition to risk assessment consists of risk management and risk communication) and particularly in the context of risk management related to the decision-making phase. The Commission stresses that the precautionary principle can be used only if there is indeed a potential risk and that under no circumstances can arbitrary decisions be justified. The use of the precautionary principle is justified only when the following conditions are met:

- identification of potentially negative effects;
- evaluation of the available scientific evidence;
- the extent of scientific uncertainty.⁴⁹

The authorities responsible for risk management may decide to either take or not take action, depending on the risk level. The use of the principle requires as complete a scientific assessment as possible and determining the degree of scientific uncertainty as well as risks and possible consequences of not taking action. All stakeholders should be involved in the study of precautionary measures as soon as the results of the scientific evaluation and risk assessment are available. The general principles of good risk management are also applicable in the context of the precautionary principle. There are the following five principles:

- the measures taken should be proportionate to the desired level of protection;
- measures should be non-discriminatory;
- measures should be consistent with the measures already adopted in similar circumstances or that have used similar approaches;

47 See, e.g. Trouwborst, Ariel, *International nature conservation law and the adaptation of biodiversity to climate change: a mismatch?*, Journal of Environmental Law 2009 21:3, p. 425, 429.

48 Op.cit., COM(2000) 1.

49 *Ibid.*

- the potential benefits and costs of action or lack of action should be explored;
- measures should be reassessed in light of new scientific evidence.⁵⁰

The Commission regards, concerning the precautionary principle relating to the use of chemicals and other hazardous agents, that a prudential approach is routinely applied at the risk assessment stage under all the REACH⁵¹ procedures in accordance with the Commission's Communication on the Precautionary Principle. The Commission states that it has so far not been necessary to take preventive risk management decisions in accordance with the precautionary principle under the REACH restrictions procedure.⁵² Precautionary principle was not mentioned in the judgment of the Court of Justice on a request for a preliminary ruling to use old telecommunications poles treated with copper-chromium-arsenic –solutions as underlay for duckboards. The Court ruled that as it was about reuse of waste, it ceased to be waste and therefore the REACH Regulation is applicable as it authorizes the use of wood treated with copper-chromium-arsenic –solution. REACH Regulation prohibits the use of wood treated with copper-chromium-arsenic –solution where there is a risk of repeated skin contact. According to the Court the prohibition at issue must apply in any situation which, in all likelihood, will involve repeated skin contact with the treated wood, such likelihood having to be inferred from the specific conditions of normal use of the application to which that wood has been put, this being a matter for the referring court to ascertain.⁵³ In this case the precautionary principle is taken into consideration in the provisions of the REACH Regulation. The risk assessment was prescribed as to prohibit the use where repeated skin contact of wood treated with copper-chromium-arsenic –solution was likely.

The provisions of REACH Regulation are underpinned by the precautionary principle and the manufacturers, importers and downstream users have the burden of proof (Art.1(3)). Article 1(1) of the REACH Regulation defines which interests are to be balanced regarding chemicals. The purpose of the Regulation is to ensure a high level of protection of human health and the environment as well as the free circulation of substances on the internal market. Free circulation on the internal market is ensured in particular by the fact that, under Article 128(1) of the REACH Regulation, the Member States must not interfere with the use of a substance falling within the scope of the regulation and with European Union acts adopted in implementation of the

50 *Ibid.*

51 *Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).*

52 Question for written answer E-001975/14 to the Commission by Hiltrud Breyer (Verts/ALE) 20 February 2014 and Answer given by Mr Poto on behalf of the Commission 28 April 2014.

53 *Request for a preliminary ruling from the Korkein hallinto-oikeus — Finland — Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri –vastuualue, EU:C:2013:142, 7 March 2013.*

regulation. Under Article 128(2) of the REACH Regulation, however, nothing in the regulation is to prevent Member States from maintaining or laying down national rules to protect workers, human health and the environment applying in cases where the regulation does not harmonise the requirements on use. Article 67 of, and Annex XVII to, the REACH Regulation harmonise the requirements concerning the manufacture, placing on the market or use of the mixtures and products listed in that annex, so that more stringent national requirements concerning their use are possible only in accordance with the regulation. According to the proportionality of the Regulation if the socio-economic benefits from the use of the substance outweigh the risks connected with its use and there are no suitable alternative substances or technologies that are economically and technically viable, the uses may be authorised despite the risks (preamble (69)). REACH regulation (Annex XVII) lists the conditions of restriction under which listed substances may be used by way of derogation. It must be interpreted as meaning that the list is exhaustive in character and that, therefore, derogation cannot be applied to cases other than those referred to therein. It is for the referring court to determine whether the use does in fact come within the scope of the substances listed in that provision.⁵⁴

Habitats Directive⁵⁵ integrates the precautionary principle in interest weighing that concerns intended plans and projects affecting special areas of conservation, which makes it possible to prevent adverse effects on the integrity of protected sites when uncertainty remains as to the absence of adverse effects. The aim of Habitats Directive (Art.2(1)) is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory. These special areas of conservation in Europe form a Natura 2000 network. According to the preliminary ruling of the Court of Justice⁵⁶ it is to be noted that the public authority must refuse to authorise a plan or a project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site. The authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question is not considered to ensure as effectively the fulfilment of the objective of site protection intended under that provision.⁵⁷ If there can be no guarantee of success for the replacement of the previous habitat or, thus, of the net benefit, the arrangement to compensate lost sites might not be consistent with the precautionary principle. On the other hand, the fact that approval is not possible in accordance with Article 6(3) does not in itself preclude approval

54 Op.cit., *Request for a preliminary ruling from the Korkein hallinto-oikeus — Finland — Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri –vastuualue.*

55 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

56 *Request for a preliminary ruling from the Supreme Court — Ireland — Peter Sweetman and Others v An Bord Pleanála*, EU:C:2013:220, paragraphs 41 and 48.

57 *Ibid.*, paragraph 41.

in accordance with Article 6(4), whose wording specifically takes account of compensatory measures. The creation of the new area may be regarded as a compensatory measure within the meaning of Article 6(4), provided that it is specifically linked to the project in question and would not otherwise have been implemented in the context of the ordinary management of the site as required by Article 6(1) or (2). Where that is so, the project may be carried out provided that all the conditions and requirements laid down in Article 6(4) are fulfilled or observed. In this case precautionary principle is specifically mentioned in the preliminary ruling regarding assessment of the implications for a Natura site by a bypass road scheme. The Court ruled that precautionary principle should be applied for the purposes of the appraisal on whether the scheme that will adversely affect the integrity of the site is liable to prevent the conservation of the objective justifying the designation of the site.

The application of precautionary principle was thoroughly defined in EU case-law when Pfizer Animal Health SA/NV applied for suspension of withdrawal of the authorisation of certain antibiotics concerning additives in animal feed.⁵⁸ During the court proceedings the precautionary principle was codified as the communication of the commission. Opposing where the use of certain hormones in animal feed to gain higher profits and its impact on public health. The President of the Court of First Instance decided in the Order that the requirements of the protection of public health must take precedence over economic considerations even though there where uncertainty as to the existence or extent of risks to human health. The EU Council and Commission were allowed to take protective measures without having to wait until the reality and seriousness of those risks would become fully apparent. An investigation and a surveillance programme were to be conducted to assess microbial resistance in animals which have received antibiotics. The Court of First Instance found that the applicant's plea alleging that the precautionary principle had been contravened could not be regarded as wholly unfounded and therefore justified balancing of interests. The Court concluded hereafter that the applicant had not succeeded in showing that it would suffer serious and irreparable damage if the contested regulation were not suspended. In any event, the Court held that the balancing of commercial and social interests in the case cannot outweigh the damage to public health, which would be liable to be caused by suspension of the contested regulation, and which could not be remedied if the main action were dismissed.⁵⁹

As to the scope of judicial review in matters concerning the common agricultural policy the Court held that the Community institutions enjoy a broad discretion regarding definition of the objectives to be pursued and choice of the appropriate means of action. In that regard the Court must be confined to

58 Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with certain provisions of the directive by 1 April 1998. *Council Regulation (EC) No 2821/98 of 17 December 1998 amending Directive 70/524/EEC concerning additives in feedingsuffs.*

59 *Case Pfizer Animal Health v Council, Order of the President of the Court of First Instance*, ECLI:EU:T:1999:130, 30 June 1999, paragraphs 133, 165, 169–172 ; *Case Pfizer Animal Health v. Council*, ECLI:EU:T:2002:209, 11 September 2002, paragraphs 135–163.

examining whether there has been a manifest error or a misuse of powers or whether the Community institutions clearly exceeded the bounds of their discretion. In particular, under the precautionary principle the Community institutions are entitled, in the interests of human health to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions, and they enjoy a broad discretion in that regard. The judgement stressed that guarantees in administrative proceedings, like importance of careful examination and impartiality, are fundamental in such cases.⁶⁰

The urgency of preventing or limiting actions that might cause inconveniences depends on the nature of the inconveniences, like hazardousness and extent of the operations. Moreover, the degree of sensitivity of the protected interests and the sensitivity of those exposed to the interference factors have to be considered. The question on applying the precautionary principle was assessed in an order for interim measures by the President of the General Court of the European Union and an order from the Vice-President of the Court of Justice where he dismissed the appeal against the former. The Commission argued that, even if the national provisions ensure a better level of protection on health than those of the new toys directive, it is still necessary that provisions pose a threat of serious and irreparable damage to children's health, to be unlawful. The President of the General Court was considered to be correct to draw attention to the relevance of the precautionary principle in the present context. In accordance with that principle, where there is uncertainty as to the existence or extent of risks to human health, the EU institutions, pursuant to that principle, may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent. Germany presented, both before the General Court and before the Court of Justice in these interim proceedings, the reasons for which it considered that the probable occurrence of serious and irreparable damage is established in the toys directive case, so far as concerns the five substances at issue. Germany submitted, inter alia, that human health, in particular children's health, is, in itself, a particularly important value. Irrespective of the factors and the arguments which the State put forward at the administrative proceedings, it was regarded sufficient to observe that the President of the General Court, in relying inter alia on the precautionary principle, did not commit any error of law in this respect. Subject to the weighing-up of interests, the result of which was regarded as perhaps not the most effective for the purposes of protecting human health was however sufficient to prove, with a sufficient degree of probability, the future occurrence of serious and irreparable damage. Regarding provisions notified by the Germany maintaining national limit values for certain substances in toys and the Commission's decision to refuse to approve those provisions, the Order was in favour of Germany.⁶¹

60 Op.cit., *Case Pfizer Animal Health v. Council*, paragraphs 165–166 and 170–171.

61 *Case Germany v Commission, Order of the president of the General Court*, ECLI:EU:T:2013:245, 15 May 2013, paragraphs 71–74 and *Case Commission v Germany*, ECLI:EU:C:2013:848, 19 December 2013, paragraphs 53–54, 57 and the case-law cited.

Aims that had to be balanced were the State's interest to maintain national provisions on toy safety and the Commission's interest to harmonise those provisions in the European Union. The main objective of the new toys directive was considered to be the harmonisation of the national rules in the field of toy safety, and therefore that was the underlying objective behind the Commission's interest in obtaining the application of that directive without delay. TFEU Article 168(5) excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health. The Court of Justice held that harmonisation measures adopted on the basis of other provisions of primary law can have an effect on the protection of human health. TFEU Article 168(1) provides, *inter alia*, that a high level of human health protection is to be ensured in the definition and implementation of all European Union policies and activities and TFEU Article 114(3) states that the European Parliament and the Council are to seek to achieve this objective in the exercise of their powers relating to the establishment of the internal market. Other provisions of primary law may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation seeking to protect and improve human health laid down in TFEU Article 168(5). After having weighed-up the interests by means of a comparison between Germany's interest in maintaining the national provisions with the aim of the protection of children's health and the Commission's interest in the rejection of the application for interim measures, in order that the harmonised provisions adopted by the EU legislature in the new toys directive might apply from 21 July 2013 throughout the internal market, including in Germany, the Court of Justice concluded that the Commission's interest should give way to the Member State's interest in obtaining the maintenance of the national provisions.⁶²

After allowing Germany to maintain national provisions under the court proceedings, in the ruling on the substance of the action the General Court declared that there was no need to adjudicate on the lawfulness of Commission Decision 2012/160/EU of 1 March 2012 concerning the national provisions notified by the German Federal Government maintaining the limit values for lead, barium, arsenic, antimony, mercury and nitrosamines and nitrosatable substances in toys beyond the entry into application of Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys, in so far as it concerns barium. The General Court held that Germany is not entitled to rely on the bioavailability limits comparison to argue that the notified national regulations provide a higher level of protection of human health than Directive 2009/48. Therefore Germany was not considered to have presented evidence covered by the burden of proof, in other words evidence that the notified national provisions adopted guaranteed higher level of protection of arsenic, antimony and mercury, than the Directive 2009/48. On that account the action was dismissed in so far as it related to the annulment of the Commission's decision to refuse to maintain the notified national provisions which provide for limit values on arsenic, antimony and mercury in bioavailability. There was

62 *Op.cit.*, *Case Commission v Germany*, paragraphs 74–75 and 77 and the case-law cited.

considered to be no need to examine Germany's argument concerning the proportionality of the provisions in question and the alleged fact that national provisions do not constitute a means of arbitrary discrimination or constitute a disguised restriction on trade between Member States or a disproportionate obstacle to the internal market. Since Germany was not considered to have shown that the notified national regulations on arsenic, antimony and mercury, guaranteed the higher level of protection than the Directive 2009/48, the argument was held to be ineffective.⁶³ The assessment of the proportionality of the Commission's interest to harmonize internal market was not considered to be necessary because Germany's request was rejected.

3.3 *Balancing Precautionary Principle and Proportionality Principle*

Decision-makers are faced with the dilemma of balancing the freedom and rights of individuals, economic life and organisations with the need to reduce the risk of adverse effects to the environment, human, animal or plant health. Therefore, finding the correct balance so that the proportionate, non-discriminatory, transparent and coherent actions can be taken requires a structured decision-making process with detailed scientific and other objective information. With regard to the balance of interests ECHR prescribes that interference with freedoms and rights has to be assessed to be necessary which requires the use of proportionality test. Thus balancing precautionary principle and proportionality principle is included in the Convention and its case-law. The Commission⁶⁴ has pursued to build in EU a common understanding of how to assess, appraise, manage and communicate risks that science has not yet been able to evaluate fully, and at the same time avoid unwarranted recourse to the precautionary principle, as a disguised form of protectionism.

In the Pfizer Animal Health –case⁶⁵ regarding withdrawal of the authorisation of certain antibiotics, the Court concluded that adoption of the contested regulation was not a manifestly inappropriate means of achieving the objective pursued. As to the scope of judicial review in matters concerning the common agricultural policy⁶⁶ the Community institutions were considered to enjoy a broad discretion concerning definition of the objectives to be pursued and choice of the appropriate means of action. In that regard the Court interpreted that it must be confined to examining only whether there has been a manifest error or a misuse of powers or whether the Community institutions

63 *Case Germany v Commission*, ECLI:EU:T:2014:251, 14 May 2014, paragraphs 129–132 (translated from the Finnish version). Not available in English 14 January 2015.

64 *Op.cit.*, COM(2001) 1, p. 1.

65 *Op.cit.*, *Case Pfizer Animal Health v. Council*. The case has been dealt with more thoroughly concerning precautionary principle in chapter 3.2.

66 The European Union has shared competence with the Member States in the area of agriculture (TFEU Art.4(2)(d)). The Union has competence to carry out actions to support, coordinate and supplement the actions of the Member States concerning protection and improvement of human health (TFEU Art.6(a)).

clearly exceeded the bounds of their discretion. In particular, under the precautionary principle the Community institutions are entitled, in the interests of human health, to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions, and they enjoy a broad discretion in that regard. Guarantees in administrative proceedings, like careful examination and impartiality, should be of fundamental importance. As to the duty to take other, less onerous measures the Court took into consideration that there had been a considerable increase in the rate of development of antibiotic resistance. Antimicrobial resistance is a virtually irreversible phenomenon. Existence of a link between the use of antibiotics as growth promoters and the development of resistance in humans had not yet been scientifically probed but was nevertheless corroborated by a certain amount of reliable scientific data. It was in harmony with the precautionary principle to prevent the risk from becoming a reality and at the same time to continue with the research that was already under way. According to the proportionality principle, Pfizer had the burden of proof. While Pfizer did not show that other, less onerous measures existed which would have allowed the objective pursued by the contested regulation to be achieved, the Court held that the contested regulation was not a breach of the principle of proportionality.⁶⁷

By its appeal, Acino AG was seeking the setting aside of the judgment *Acino v Commission*,⁶⁸ by which the General Court of the European Union dismissed its action for annulment of the interim decisions of the Commission relating to the suspension of the marketing of certain medicinal products for human use manufactured at a certain site and the withdrawal of those products from the market. In the present case, the appeal sought to call into question the General Court's assessment of the conditions for the application of Articles 116 and 117 of Directive 2001/83⁶⁹ in the light of the precautionary principle, as derived from the Court's case-law. Acino complained that the General Court failed to have regard to the precautionary and proportionality principles in its assessment of the conditions related to marketing authorisation. The Court of Justice dismissed the appeal.⁷⁰

As regards the complaint concerning the General Court's alleged disregard for the precautionary principle, the Court of Justice found that in accordance with that principle, as interpreted by the Court's case-law, where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. The Commission argued that the General Court had in no way concluded that breaches of the rules on good practice

67 *Op.cit.*, *Case Pfizer Animal Health v. Council*, paragraphs 166, 170–171, 440, 442–444.

68 Judgement of the General Court of the European Union of 7 March 2013 in Case T-539/10 EU:T:2013:110.

69 *Directive of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.*

70 *Case Acino AG v Commission*, ECLI:EU:C:2014:255, 10 April 2014, paragraphs 1, 38 and 43.

would automatically lead to impairment of qualitative and quantitative composition of the products, but that the more serious the breach is the greater the risk of impurity is. Although the Court has admittedly already held, that the risk assessment cannot be based on purely hypothetical considerations, it has, however, also added that where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures. The General Court therefore correctly applied the precautionary principle, as interpreted by the Court of Justice, when it stated, that while it is true that all the grounds set out in the first paragraph of Article 116 of Directive 2001/83 aim to prevent certain risks to health, the fact remains that those risks need not be specific, but only potential.⁷¹

The appeal alleged also that the General Court misapplied the principle of proportionality. Acino maintained that, in the light of evidence adduced concerning the quality and safety of the medicinal products at issue, the measures ordered by the Commission were clearly not necessary and were disproportionate on account of the serious economic loss they caused Acino. According to Acino at the time the definitive decisions were adopted, the retroactive withdrawal of the medicinal products at issue should have been cancelled in accordance with the principle of proportionality. With regard to the alleged infringement of the principle of proportionality, the General Court found that the Commission was entitled to consider that varying the marketing authorisations only with respect to the future, as envisaged by Acino as a less restrictive measure, was not a sufficiently appropriate measure, in the light of the aim of protecting human health. According to the General Court, any variation of the marketing authorisations under Article 116 of Directive 2001/83 would not address the risk associated with the actual presence of the medicinal products concerned on the market, which could be overcome only by the actual withdrawal from the market of the medicinal products at issue in accordance with Article 117 of Directive 2001/83. The General Court stated that those considerations were all the more valid in the light of the requirement to comply with the precautionary principle as applied to the sensitive field of the protection of human health. The General Court inferred therefore, that the principle of proportionality was respected, since the measures ordered by the Commission were, moreover, restricted only to the manufacturing site where the health risks in producing medical products had been detected. In so far as the appeal was suggesting, as a less restrictive measure, that the marketing authorisations should affect only the future, without expounding legal arguments, the General Court was unable to conclude that the principle of proportionality had been infringed. The Court of Justice agreed with the General Court.⁷²

⁷¹ *Ibid.*, paragraphs 50, 57–59, 84 and the case-law cited.

⁷² *Ibid.*, paragraphs 89–90 and 93–96.

3.4 *Burden of Proof*

Before the Court of Human Rights as regards prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court states that in proceedings before it there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and the distribution of the burden of proof are considered to be intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation). In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the public authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. If the evidence submitted by the applicant can be regarded as sufficiently reliable and significant to give rise to a strong presumption of breach of Convention rights, the burden of proof is regarded to shift to the Government.⁷³

In certain cases the precautionary principle, and always the proportionality principle, turn the burden of proof which usually falls on the public authority so that the burden of proof falls on those who apply to take the action. This is usually judged on a case by case basis, so that the European community is considered to be able to participate in the investigation of the issues that are considered important to the community.⁷⁴ The provisions of REACH Regulation⁷⁵ are underpinned by the precautionary principle and the manufacturers, importers and downstream users have therefore the burden of proof (Art.1(3)).⁷⁶ As to the burden of proof concerning precautionary principle in the Pfitzer Animal Health case, the Court held that Community institutions must show that the contested regulation was adopted following as thorough a scientific risk assessment as possible, which would take account of the particular circumstances of the case and that they had available, on the basis of that assessment, sufficient scientific indications to conclude, on an objective

73 ECtHR [GC], *Case of D.H. and Others v. the Czech Republic*, no. 57325/00, 13 November 2007, §178–179, and §195 and case-law cited.

74 On the burden of proof, *see*, Zander, Joakim, *The Application of the Precautionary Principle in Practice*, Cambridge University Press 2010, p. 330–332.

75 *Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)*.

76 *Op.cit.*, *Request for a preliminary ruling from the Korkein hallinto-oikeus — Finland — Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri –vastuualue*.

scientific basis, that the use on the growth promoter constituted a risk to human health. Regarding Pfizer's request, which concerned the proportionality principle, that the Community institutions should take other less onerous measures, Pfizer had the burden of proof according to the proportionality principle.⁷⁷ This was also stated in *Acino* –case where the appeal was reversed regarding the suggestion of a less restrictive measure without expounding legal arguments for it.⁷⁸

The Member State has the burden of proof in EU in situations where they seek after adaptation of a harmonisation measure to maintain more strict national provisions. The specific context of the procedure is provided for in Article 114(4) TFEU. The fact that it is for the Member State to prove that the derogation which it requests from the provisions of a harmonisation directive is justified, and the discretion which the Commission has in this respect, are relevant for the purposes of the examination of whether there is a *prima facie* case. However, that relevance means only that the judge hearing the application for interim relief, in ascertaining whether the Member State requesting the adoption of an interim measure has submitted grounds which may, *prima facie*, establish that the Commission acted unlawfully, and consequently, that there is a *prima facie* case, must take account of the fact that it is for the Member State to establish, during the administrative proceedings, that the conditions for the grant of the derogation sought are satisfied. That relevance does not mean, on the other hand, that the Member State is required to establish definitively, at the stage of the interim proceedings, that those conditions are fulfilled. Were the judge hearing the application for interim relief to adopt a position on that latter issue, he would be obliged to rule on an aspect of the merits of the main proceedings brought by the Member State concerned and would thereby exceed the limits of his own powers. It follows that the President of the General Court did not commit any error of law and, in particular, did not reverse the burden of proof by holding in the order under appeal, that the grounds for annulment raised by Germany before the General Court were not, *prima facie*, irrelevant. The Commission argued that the order under appeal will force it to adopt new provisions by relying on information other than the latest scientific knowledge and, thereby, to infringe its obligation under Article 114(3) TFEU, according to which it must take as a base a high level of protection, taking account in particular of any new development based on scientific facts. The President of the General Court held so far as concerns lead, barium, antimony, arsenic and mercury, that Germany had submitted arguments which were capable of demonstrating that its pleas in the main action, seeking to support the opposite line of argument to that adopted by the Commission, were not unfounded. In the context of the present appeal relating to interim proceedings, the judge hearing the application for interim relief could be alleged to have infringed that provision only if it were established by the party making the claim that that finding seemed to be manifestly incorrect. According to Germany, the method adopted by the Commission for the

77 Op.cit., *Case Pfizer Animal Health v. Council*, paragraphs 165 and 450–451.

78 Op.cit., *Case Acino AG v Commission*, paragraphs 95–96.

purposes of its calculations of the limit values was incorrect, which led it to make an inaccurate comparison between the level of health protection ensured by the national provisions and that guaranteed by the new toys directive. The vice-president of the Court of Justice ruled that the arguments of the Member State were not, *prima facie*, irrelevant.⁷⁹

As to the burden of proof on the substance of the action where Germany claimed to maintain national provisions, the General Court claimed that Germany has to provide evidence on the basis of which these data on which it relies can be compared to that of the Commission. Germany recalled in this context that the requesting Member State may, to argue for the maintenance of national laws or regulations, invoke that it has assessed the public health risks differently than the European Union in the harmonization measure. The Court held that even though the risk assessment can legitimately be different without necessarily being based on different or new scientific information, the claim should indicate the manner in which the Commission's assessment of the evidence presented to it has been incorrect, and why the General Court should interpret it differently. The argument on chemical intake is considered to be based on a specific situation, which is formulated in hypothetical terms, without referring to any scientific research. SCHER (Scientific Committee on Health and Environmental Risks) questioned the basis for the claim of Germany, and Germany has not raised objections in that regard. Germany has argued that the values that RIVM's (Dutch National Institute for Public Health and the Environment) report relied on were rough estimates, which require further investigation. The General Court held that bioavailability comparisons of limit values, which Germany appeals to, express the health risk assessment which is opposite to that of the comparison based on the latest scientific knowledge, and the basis of which the chemical characteristics of the specific requirements in Directive 2009/48 have been confirmed. Therefore the argument was held to be ineffective.⁸⁰

4 Further Development

International development on protecting the social aspect of sustainable development in the form of human rights and fundamental rights has caused the other two aspects of sustainable development - environmental aspects and economic aspects - pressure to establish legally binding rules for interest-weighting. So far these aspects have been generally taken into consideration as the precautionary principle in protecting public health and the environment under scientific uncertainty and the principle of proportionality that has regard especially to the economic consequences of legal rulings. Precautionary principle and proportionality principle might be applied in the same case. The burden of proof has an impact on the public authorities' powers to reduce risks for environment and public health. The reversed burden of proof gives public

⁷⁹ Op.cit., *Case Commission v Germany*, paragraphs 43–45, 49 and 50.

⁸⁰ Op.cit., *Case Germany v Commission*, paragraphs 97, 100, 117, 119 and 127.

authorities opportunities to restrict activities on precautionary bases, mainly in environmental and health cases. The proportionality principle which is applicable when the necessity of restrictions has to be weighed reverses the burden of proof. When arguing for less onerous measures to achieve legal aims, the applicant has to provide evidence for the claim.

The separation of powers between governmental powers and judicial powers is clearer concerning European Union and its Courts and Member States than concerning European Court of Justice and the Contracting States. The division of powers is plainly defined in the Treaties of the European Union as exclusive competence and shared competence⁸¹ and the European Court of Justice has no jurisdiction over matters belonging to the competence of Member States. Not even the fundamental rights defined in the Charter of Fundamental Rights of the European Union do extend the competence of the European Court of Justice. The judicial powers of the Court of Human Rights are more obscure. By defining its competence as to examine not only whether human rights have been violated but also to assess whether aims of the Contracting States legal systems fulfil the positive obligations to ensure effective respect for the rights protected, extends its jurisdiction. The question is who gets to determine which community values are given such weight that they take precedence to individual rights and if so what rights can be overruled. So far the Court of Human Rights has mainly refrained from assessing legal aims of the States, but it has showed willingness to evaluate common European values. Even if strengthening the Court's power in this way would give more weight to individuals' rights, it would lessen parliaments' power to decide on community values in their areas. Therefore the question of how the Community is defined when assessing which aims are to be pursued is to be answered specially concerning the European Court of Human Rights.

International trade agreements have caused anxiety as to what extent social aspects and especially health and environmental issues can be taken into consideration regarding limits set for trade. This is a development which has great impact on public authorities' discretion because of their responsibility to implement the common goals in the community. Protection of legal expectations is, however, currently limiting the discretion of public authorities. To extend legal expectations, with trade agreements, to limit also parliaments' power to revise legislation, diminishes fundamentally their democratic powers. The willingness of the parties to take greater risks concerning health and environmental issues can be influenced by the question of who pays for the consequences. A community responsible for a significant part of costs to restore environmental damages or for medical care is more willing to stress precautionary measures restricting activities liable to harm public health or the environment. Administrative law should be able to provide a legal framework that ensures balancing of different interest in the use of discretionary power to promote sustainable development locally as well as globally and not only in the short run but especially in the long-term.

81 *The Treaty on the Functioning of the European Union* (TFEU) Articles 2–6.

