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# Reasonableness and Law

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# Part IId
# Reasonableness in EU and International Law

# The Principle of Reasonableness in European Union Law

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## 1 The Multiple Facets and Roles of Reasonableness in EU Law

The concept of reasonableness seems to play a number of different roles in the EU legal system, and it takes meanings and purposes that may considerably vary according to the contexts in which it is invoked. Thus, one cannot find a single, comprehensive paradigm within which the concept may be construed; rather, it is necessary to identify different features that may be framed within a general understanding of reasonableness. In addition, it is somewhat difficult to track down an explicit reference to reasonableness in the caselaw of the European Court of Justice (hereinafter, "the Court" or "the Court of Justice"), because (as will be discussed in Section 2) this concept overlaps on occasions with other principles, whilst on other occasions it appears to be deeply hidden in the Court's legal reasoning.

Even the nature of reasonableness is not univocal in EU law: it may be used to construe Community law and fill its gaps—and in this role it takes on the guise of an interpretative rule—but it may also be a criterion by which to assess the lawfulness of EC legislation and of the conduct of the EU's political institutions. Reasonableness can thus be said to have the Janus-faced nature of an interpretative criterion and of a general principle of law that legislation should respect. In any event, the boundary between these two natures appears rather vague: suffice it to recall that the Court relies on general principles of law not only as substantive rules but also as interpretative criteria.[1]

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[1] The Court tries to interpret EC legislation in conformity with the general principles of law, and only where this proves to be impossible it declares an act unlawful. See, for instance, Case C-540/03, 30 June 2006, *European Parliament v. Council, ECR*: I-5769ff., where the Court found that the Directive on family reunions "leaves the Member States a margin of appreciation [. . .] sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights" (par. 105). See also Case 5/88, 13 July 1989, *Wachauf, ECR*: 2609ff.

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Reasonableness is also to some extent relevant in the sharing of powers between the Community and its Member States. The Court applies a standard of reasonableness in assessing whether any derogation from market freedoms that Member States apply is justified. According to the Court's jurisprudence, Member States should produce a "reasonable justification" when they have recourse to a derogation on such grounds as public security or public health, or when they invoke "mandatory requirements" to justify national provisions that might be regarded as measures having an effect equivalent to quantitative restrictions.[2]

Finally, one cannot neglect to consider the influence that EC legislative techniques may have on how the Court uses the concept of reasonableness. When legislation refers to a "reasonable solution" to attain a certain policy objective (on which see Section 4.2), this implies a significant discretion in the judicial control, and it requires a sort of "reasonableness test" to assess the compliance of Member States with their EC obligations under the legislation in question.

In this context, the paper aims at exploring the impact that the recourse to the concept of reasonableness has in the excercise of discretionary powers by the European Court of Justice.

## 2 The Disguised Role of Reasonableness in the Caselaw of the European Court of Justice

Although it cannot be denied that reasonableness often guides the Court's legal reasoning, the concept is rarely mentioned in its judgments. This might be explained with the proposition that the concept is often absorbed—and sometimes concealed—into different interpretative criteria (such as the principle of proportionality or the Court's teleological method) sharing many features with the concept of reasonableness.

Such "disguised" recourse to reasonableness mainly appears from the Court's rulings aimed at finding a "reasonable solution" whenever the meaning of EC legislation is unclear on a textual interpretation. One holding, among others, that can illustrate this pattern is that in *Givane*: the Court was asked to clarify the meaning of Article 3(2) of Regulation No. 1251/70 by establishing whether or not a two-year period giving rise to a right of residence for a migrant worker's family member had to immediately precede the worker's death. The Court began with the assumption that the wording of the provision is of little help because it can support opposite conclusions, and it thus found that "it is necessary to place that expression in its context and to interpret it in relation to the spirit and purpose of the provision in question."[3] The Court thus held that a "reasonable solution"[4] consists in finding that the two-year period does have to immediately precede the death: this was based

[2] The Court first adopted a definition of "measures having an equivalent effect to quantitative restrictions" in Case 8/74, 11 July 1974, *Dassonville, ECR*: 837ff. See also Case 104/75, 20 May 1976, *de Peijper, ECR*: 613ff. See Oliver (2003).

[3] Case C-257/00, 9 January 2003, *Givane, ECR*: 345ff.

[4] Ibid.

on the argument that the provision in question implies the need for "a significant connection between the host Member State and the worker concerned,"[5] and that such a connection "could not be ensured if the right of residence in the territory of a Member State [. . .] were to be acquired as soon as a worker had resided for at least two years in that State at some stage of his life, even in the distant past" (ibid.).[6]

At first sight, this reasoning could easily be understood in the framework of the Court's teleological method; it may be argued, however, that in fact the Court first sought to find the most appropriate solution from the standpoint of legal reasoning, and then ascribed such a solution to the EC legislator, thereby construing the latter's will as being aimed at establishing a reasonable solution. In carrying out this interpretative operation, the Court took into account the actual outcome of different possible constructions, assessing the reasonableness of possible solutions in light of their application.

A similar pragmatic approach is followed by the Court with respect to the influence of the general principles of EC law. The Court, in its rulings, seems first to identify a reasonable solution, and then to consider whether this solution is required by a general principle of EC law, such as the principle of legal certainty, which plays a crucial role in Court's caselaw; in other words, a general principle of Community law is said to require that a reasonable solution be chosen among different possible interpretations of the same provision.

One may wonder why the Court often prefers to disguise the role of reasonableness by referring to different principles or criteria. A tentative answer is that if the Court frequently referred to reasonableness as the sole foundation of the interpretative solutions it upholds, this could be viewed as an excessively wide or even an arbitrary exercise of its discretionary powers. Indeed, referring to the mere reasonableness of a certain interpretation seems to imply stronger discretionary powers than relying on principles or on interpretative criteria having a specific content: thus, if the Court, having identified a "reasonable solution" to an interpretative problem, ascribes this solution to the legislator's will, or holds that the solution is mandated under a general principle of law, this reasoning seems to imply that the Court is exercising less discretionary power than if it based its rulings on the general (and often questionable) consideration of reasonableness.

## 3 A Tentative Paradigm of Analysis: Different Regulatory Levels in the Application of Reasonableness

An analysis of the Court's caselaw in search of a concept of reasonableness reveals what appears to be, at first sight, a rough distinction between "substantive reasonableness" and "procedural reasonableness."[7] The first kind of reasonableness

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[5] Ibid.

[6] The Court considers that the opposite solution "could create uncertainty as to the legal position of workers and members of their family, whereas that regulation must enable their rights to be clarified and established with certainty" (ibid.).

[7] A similar distinction has been suggested, in the area of international economic law, in Ortino (2005).

refers to principles bearing on the merits of a decision adopted by public authorities (whether European or national), an example being a decision on the scope of EC provisions allowing derogation from the free movement of goods or services. The second kind of reasonableness implies that EC judicial or administrative proceedings should comply with some guarantees aimed at ensuring fairness, and the same applies to national judicial or administrative proceedings where EU legislation is in question.

The Court resorts to the concept in its substantive form as an interpretative criterion or as a general principle of Community law. Thus, reasonableness may be invoked in order to interpret EC legislation or to assess its validity, or to ascertain whether national legislation is in compliance with a given EC obligation.[8]

In its procedural dimension, the principle makes it possible to assess whether national or European judicial or administrative proceedings are fair—that is, whether they comply with basic principles of protection, such as effective judicial protection of rights conferred on citizens by EC law—or else whether proceedings do not exceed a reasonable duration.

Relying, as a general framework, on these two different kinds of reasonableness, one may further argue that reasonableness, as construed by the Court of Justice, comes into play at three regulatory levels.

On the first level, reasonableness comes to bear on the EU's internal organization: it plays a role in regulating the exercise of the different powers the Treaty confers on the EU's political institutions. In the "checks and balances" approach adopted by the Court, reasonableness plays a crucial role in defining the boundaries between the competences of political institutions. On this level, reasonableness may take shape as the principle of "loyal cooperation" or as that of the "rule of law" or of democracy, principles that have to be respected by each European institution in its conduct (Jacqué 2004; Schwarze 2006).

On the second regulatory level, the principle plays a role in the relation between the European Union and its Member States. Here reasonableness serves the different function of supplementing the criteria that regulate the sharing of competences between the EU and its Member States. In particular, the principle is mainly used to construe the Treaty's provisions or secondary legislation allowing Member States to derogate from obligations under EC law.

The third level relates to the protection of citizens' rights. In order to ensure such protection, the Court has derived general principles that are rooted, inter alia, in the concept of reasonableness enshrined in the Member States' legal tradition. On this level, reasonableness is mainly used as a mean by which to protect individual rights from an arbitrary exercise of the powers the Treaty confers on European institutions.

Of course, there is no clear-cut separation between the different regulatory levels just considered. One may object, among other things, that when a Community act is declared void because it contravenes the principle of reasonableness, this may have an impact both on the sharing of competences between EC institutions and Member States and on the protection of citizens whose interests may have been prejudiced

[8] As mentioned in the main text, this occurs when the Court monitors the Member States' application of Treaty provisions permitting derogation from market freedoms.

by the same act. Furthermore, one might observe that the interpretation of EC law clearly has an influence on the Member States' powers. The recourse to reasonableness as an interpretative criterion of EC law may sometimes lead to the adoption of a certain construction of a provision to avoid imposing an "unreasonable burden" on Member States. For instance, the Court recognises that it may be legitimate for a Member State to grant a benefit only to citizens of other Member States who have demonstrated a certain degree of integration in the State where they have their residence; such a construction is aimed at ensuring that a grant of assistance "does not become an *unreasonable burden* which could have consequences for the overall level of assistance which may be granted by that State."[9] So there appears to be a close interrelation among the different regulatory levels on which reasonableness is applied.

However, for the purposes of this study, a systematic interpretative statement may be useful irrespective of the possible interaction between different levels of analysis; ascertaining the role that reasonableness plays on different levels—pertaining to the EU's internal organisation, to the relation between the EU and its Member States, and to the protection of individual rights—would in any event help to explain the multiple functions the concept serves in the EU system.

Therefore, following the pattern above, I shall review the Court's approach on each of the three levels identified, considering substantial and procedural reasonableness respectively. This will arguably make it possible to describe the different roles and meanings that reasonableness may take on in the EU legal system; this will help not only to assess the concept's actual significance in such a system, but also to highlight, on a more general view, some elements making for a better understanding of the concept. The analysis will also provide a basis on which to discuss, in the final part of the paper, the consequences of a reasonableness principle with respect to the functioning and lawfulness of the EU legal system, and to explore as well the impact of "EC reasonableness" on the Member States' national systems.

## 4 The "Substantive" Notion of Reasonableness

### *4.1 The Significance of Reasonableness in the Functioning of the EU Organization: Reasonableness as a Limitation on the Action of EU Political Institutions*

Considering the significance of reasonableness with respect to the EU's internal organization, it should be ascertained how this concept may limit the legislative powers conferred on political institutions.

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[9] Case C-11/06 and 12/06, 23 October 2007, *Morgan, ECR*: 9161ff., par. 42 (italics added). See also Case C-209/03, 15 March 2005, *Bidar, ECR* I-2119ff., where the Court finds that "in the case of assistance covering the maintenance costs of students, it is [. . .] legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State" (par. 57). See Borgmann-Prebil (2008).

There is no doubt that reasonableness plays a decisive role in defining the principles regulating the exercise of Community competences. It is well known that, although the principle of subsidiarity is aimed at regulating the exercise of the concurrent competences conferred on the Community, it nevertheless implies wide discretionary power for the Community's political institutions. Hence the role of reasonableness is crucial in assessing the conformity of a legislative action with the principle of subsidiarity, insofar as it must be verified, under the "subsidiarity test," whether any EC legislation proposed or adopted in a sphere of concurrent competences is really "necessary." Thus, one may suggest that the principle limits the powers of political institutions, since these are allowed to legislate only if an action is deemed *reasonably* needed (Bast and von Bogdandy 2002; Weatherill 2004; Tridimas 2005).

The role of reasonableness is even more evident when it comes to assessing an action's conformity with the principle of proportionality (de Bùrca 1994; Ellis 1999). The legislator has to choose the least restrictive means, making sure that the proposed measure does not limit rights or interests any more than is necessary to attain the measure's purpose. Here the principle of reasonableness serves to actually mediate between different (and sometimes conflicting) interests in view of the burden a measure may impose to achieve its goals.

The principle of reasonableness may further limit the powers of political institutions by virtue of its serving as a criterion for the validity of EC legislation. The Court has sometimes directly been asked by national courts in preliminary proceedings to assess the validity of a Community act in light of the principle of reasonableness. Thus, for example, the Court was requested by a national court to assess whether the Commission had violated the principle of reasonableness in considering a Member State's national territory as a whole for the purpose of qualifying an area as a wine-growing region, thus disregarding that a national territory "is made up of areas which obviously differ widely both from a geographical and from an oenological point of view."[10] The Court found that "in an entity composed of Member States, such as the European Community, it is clearly reasonable to take the territory of those Member States as a point of reference for administrative purposes," and so Commission's choice seems to be "*prima facie* a reasonable solution," which could therefore be questioned only on the basis of "serious arguments based on specific circumstances" (par. 73). This was a case, then, where the principle of reasonableness was relied on in assessing whether a discretionary power has lawfully been exercised.

One may gather from this approach that when the use of a discretionary power seems *prima facie* reasonable, strong arguments are needed to challenge a European institution's policy. A policy's reasonableness seems to imply that the discretionary power was correctly used, unless it is shown that particular circumstances would

[10] Case C-375/96, 29 October 1998, *Zaninotto, ECR*: I-6629ff. See also Case C-155/99, 19 October 2000, *Busolin, ECR*: I-9037ff.: the national court asked whether a regulation was "invalid for infringement of the principle of reasonableness, manifest error and inconsistency in relation to the object pursued, in the light of the system of calculation used by the Commission" (par. 7).

have required a different outcome. In a word, if a legislative act is judged by the Court to be at first sight reasonable, the standard is thereby considerably raised against which it can be shown that the act is unlawful.

This hypothesis is borne out by the caselaw relative to the Community's non-contractual liability for legislative acts. Liability in such cases extends to legislative action if there is a "sufficiently flagrant violation of a superior rule of law for the protection of the individual."[11] This entails that, in legislative areas involving policymaking discretion, EC liability arises "only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers."[12] Thus, an act's unlawfulness does not in itself suffice to hold the Community liable, since a Community institution's action must be arbitrary in light of the general principles of EC law.[13] Therefore, where conduct is considered reasonable, it is hard to show that an act is unlawful, and, even if the act *is* shown to be unlawful, it is still difficult to establish that the Community is liable for the damages the act has resulted in.

## *4.2 The Significance of EC "Reasonableness" with Respect to Member States: Sharing of Competences Between the Community and Its Member States, and Fair Application of EC Law in National Legal Systems*

In regard to the role of reasonableness in respect of the conduct of Member States, one may first of all observe that reliance on reasonableness is very extensive in the caselaw aimed at monitoring the Member States' exercise of their power to derogate from Treaty obligations.[14] Thus, on the second level in previously outlined scheme,

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[11] Case 5/71, 2 December 1971, *Schoppenstedt, ECR*: 975ff.: "Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred" (par. 11).

[12] Joined Cases 64, 113/76 et al., 4 October 1979, *Dumortier Frères, ECR*: 3091ff., par. 4. Cf. Grossrieder-Tissot (2001).

[13] Joined Cases 194–206/83, 25 April 1985, *Asteris, ECR*: 2815ff.

[14] Derogation clauses are established by Treaty provisions, and sometimes by legislation. Under certain EC acts, a Member State may refuse to import goods from other Member States if it deems that the product does not meet certain requirements. Thus, for example, Directive 2007/46 provides that a Member State must permit within its territory the sale of a vehicle manufactured according to another Member State's technical requirements, but not so if the former Member State "has reasonable grounds to believe that the technical provisions according to which the vehicle was approved are not equivalent to its own" (Article 23(7)). The same Directive allows a Member State to exempt a particular vehicle from compliance with one or more of the provisions of the Directive itself, provided it imposes alternative requirements; however, an exemption from such provisions is only available "where a Member State has reasonable grounds" for granting the exemption (Article 24(1)).

the principle of reasonableness seems essential as a means with which to specify the scope of the duties the Treaty imposes on Member States.

When employed for this purpose, the principle of reasonableness assumes the form of a means-ends test by which the Court assesses whether there is a "reasonable relationship" between a national measure and its asserted purpose. For example, it may be necessary to examine whether a national measure restricting the free movement of goods is justified by a legitimate aim. Under the scheme usually followed in monitoring the permissibility of a national derogation from a fundamental freedom, the Court considers first whether the aim the measure is alleged to pursue is reasonable.[15] In the Court's caselaw, many policy aims have been so justified, examples being consumer protection, health protection, and environmental protection.

Where the Court answers in the affirmative—that is, where the national measure at issue is deemed to be justified by a legitimate aim—it further assesses whether the measure is proportional to its aim. Thus, the Court has held in many cases that "if a Member State has at its disposal less restrictive means of attaining the same goals, it is under an obligation to make use of them."[16] In other words, the Court generally considers whether the interest in question can be protected in a different way, with a lesser impact on a fundamental freedom established in the Treaty.[17] Although the second step in the Court's analysis surely falls within the purview of the principle of proportionality, it is clear that the national measure must in the Court's view be "reasonable" in both respects, meaning that the aim pursued and the means chosen to protect that aim must both be reasonable.[18] When assessing the validity of a national measure in light of the said scheme, the Court enjoys a very wide discretionary power, since it decides which aims may reasonably justify a limitation on market freedoms, and to what extent a derogation is permitted.

Although the "rule of reason" was developed with respect to the free movement of goods, the Court of Justice applies the same rule in the context of other market freedoms, such as the freedom to provide services.[19] The Court thus assesses whether any restriction on a fundamental freedom may be justified by imperative reasons of public interest.

The Court has occasionally reasoned along the same lines in regard to competition law, finding that a public interest justifies a derogation to Article 81.[20] This

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[15] In making such an assessment, however, the Court does not invoke reasonableness but instead uses words such as *suitable* or *appropriate*.

[16] Case 90/86, 14 July 1988, *Zoni ECR*: 4285ff. See Gormley (2005).

[17] The Court does not always use the test in the same way. See de Bùrca (1994).

[18] See Case C-265/88, 12 December 1989, *Messner, ECR*: I-4209ff.: the Court found that an obligation imposed on EC nationals to make a declaration of residence within three days of entering into a State's territory is in breach of EC obligations "when the time allowed for making the declaration of arrival by foreigners is not reasonable" (par. 9).

[19] Case C-384/93, 10 May 1995, *Alpine Investment ECR*: I-1141ff.: "Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services" (par. 44).

[20] As in Case C-309/99, 19 February 2002, *Wouters*, *ECR*: I-1577ff., and Case C-67/96, 21 September 1999, *Albany, ECR*: I-5751ff.

approach clearly extends the Court's judicial discretion in defining the scope of the rule of reason and hence that of competition law. The rule of reason also plays a role in connection with Article 81(3), under which the effects that counteract competition must be balanced against those that promote it; however, the Court's discretion in this context is limited, since the assessment is to be made within the Treaty framework. The Court has held up in this respect a flexible application of the Treaty provisions by establishing that "competition cannot be enforced without account being taken of the economic and legislative context and the effects of the alleged infringements."[21] However, such a flexible approach cannot mean that judicial application of the rule of reason may affect the requirement to comply with EC obligations. As the Court clarified, "even if the rule of reason did have a place in the context of Article 85(1)—now Article 81(1)—of the Treaty, in no event may it exclude application of that provision in the case of a restrictive arrangement involving producers accounting for almost all the Community market and concerning price targets, production limits and sharing out of the market."

Furthermore, reasonableness may also have a crucial role in assessing whether a national measure may be justified on the basis of the precautionary principle; this is well illustrated by the *Monsanto* case,[22] where the Court had to consider the unpredictable effects on human health which may be produced by the insertion of foreign genes in foods. According to the Court, the precautionary principle means that "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" (par. 111). Protective measures thus presuppose that risk assessment provides scientific evidence which "makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary in order to avoid novel foods which pose potential risks to human health being offered on the market" (par. 113). One may argue that, in this case, the principle of reasonableness takes the form of an assessment of how probable a risk is, and thus plays a pivotal role in clarifying the scope of the Member States' power to limit the free movement of goods by asserting a reasonable probability of a health hazard on the basis of scientific evidence.

If the Court makes wide use of the principle of reasonableness—under the previously described scheme—in assessing whether a Member State has correctly used its power to derogate from EC law, the principle has at times been accorded some relevance in the more general context of verifying compliance with Treaty

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[21] Case C-235/92, 8 July 1999, *Montecatini v. Commission ECR*: I-4539, par. 130. See also Case C-552/03 P, 28 September 2006, *Unilever Bestfoods, ECR* I-9091ff., par. 13; Case T-112/99, 18 September 2001, *Métropole télévision, ECR*: II-2459ff.; Case T-328/03, 2 May 2006, *O2, ECR*: II-1231ff. See on the rule of reason in competition law: Odudu (2002), Manzini (2002), Wesseling (2005), Marquis (2007), and Rossi and Curzon (2008).

[22] Case 236/01, 9 September 2003, *ECR*: I-8105ff.