

PROPORTIONALITY PRINCIPLE AND THE MANAGEMENT OF RISK

HIGHLIGHTS NOTE 12

Proportionality, the idea that the use of the power of the State should be proportionate to the problem to be solved, is one of the core principles of the rule of law and of good regulatory governance. Requirements to respect it form part of most strategies to improve the quality of regulatory decision-making throughout the OECD area. It is, moreover, one of foundations on which high quality risk management rests.

Proportionate decision-making helps legitimate the use of the extensive powers of the State and limits the risk of regulatory failure. Application of a well-designed principle of proportionality by lawmakers and regulators focuses public policy on demonstrably significant problems; targets those problems directly and effectively; ensures interventions are least burdensome; and delivers outcomes where costs are justified by benefits.

Whilst the EU has taken important steps to improve the use of proportionality in the policy cycle, more needs to be done to articulate the best way to apply it to individual decisions - particularly those made by the EU Administrative State to implement complex risk management laws.

This ERF Highlights Note examines the nature and meaning of proportionality as a concept for guiding decision-making. It considers how specific OECD countries have tried to embed this concept into regulatory decision-making, and examines progress made by the European Union to achieve this goal. Using evidence from ERF research, the note highlights the characteristics, and causes, of disproportionate risk management measures introduced by the EU Administrative State to implement risk management laws. It concludes with a brief list of suggested reforms.

PROPORTIONALITY: A PRINCIPLE AND POLICY GUIDE

Proportionality is a general principle of EU law, and is enshrined in the constitutions of most Member States. In general terms, it seeks to ensure that

freedom should not be limited beyond what is necessary for the public interest. This is a means of restraining the exercise of the powers of the State. It provides a basis for judicial review of the actions of governments, as well as managing the expectations of the public.

As a legal principle, proportionality has been subject to three tests that have emerged from case law and academic scholarship. The tests follow a sequence. Specifically the tests require that:

- **Suitability** – actions by governments must be appropriate to achieve their stated aims, and the causal relationship between the envisaged action and its policy objective must be clearly established;
- **Necessity** – governments, when choosing between different possible interventions, must demonstrate that they opt for the least restrictive available alternatives that achieve the agreed objectives;
- **Proportionality** – benefits from realising the policy objectives must justify the harm caused to society by the adopted measure

As a conceptual guide to inform decision-making, proportionality is also used within other domains, such as medicine and healthcare. From this perspective the principle of proportionality is subject to four conditions:

- **Importance of objective** – the intended goal, theoretical or practical, must be important;
- **Relevance of means** – the means, such as treatment or a drug, must bring about or at least help to achieve the goal;
- **Most favourable option** – there is no other less controversial or risky means to achieve the goal;
- **Non-excessiveness** – the means used should not be excessive in relation to the intended goal.

The challenge for governments is how to find ways to ensure that this powerful concept informs the design, assessment, and implementation of specific regulatory interventions. This requires the coherent integration of the principle of proportionality into the policies and guidance that make up Better Regulation strategies. It is, moreover, particularly relevant when governments face systemic crises, such as the COVID-19 pandemic, or when they set ambitious societal goals, such as the EU Green Deal.

REGULATORY GOVERNANCE

In the 1995 Recommendations and Guidelines on Regulatory Policy, the OECD set out the core principles of proportionate action: use of the powers of the state should be justified by evidence of the existence of a problem; alternatives to regulation should be assessed fully; and benefits should justify costs. These principles were expanded in 2005 and 2012 to include recommendations to explore the use of less restrictive means and, for restrictions on competition, to ensure that measures are limited and proportionate to the public interests they serve.

Most OECD member countries have developed these ideas further, including articulating specific requirements to guide the development of individual measures.

In the USA, for example, the guidance for proportionate action is contained within the 1993 Executive Order on Regulatory Planning and Review and the 2003 OMB Circular A-4 on Regulatory Analysis. A number of specific requirements can be identified:

- The regulatory system should achieve its objectives without imposing unacceptable or unreasonable costs on society;
- Interventions should be justified by evidence, focused on risks, and be limited to those required by law or compelling need;
- Net benefits should be maximised, and all costs and benefits, including ancillary impacts, should be considered;
- Regulatory objectives should be achieved in the most cost effective manner, and should impose the least burden on society;
- Alternatives to regulation should be considered fully, including the use of informational measures rather than direct controls; and,
- Regulatory instruments should use performance standards rather than design standards, and, wherever possible, be based on market-orientated approaches rather than direct controls

Similarly, the Federal Government of Canada has considered how to develop operational considerations that embed the principle of proportionality into regulatory decision-making. The 2007 Cabinet Directive on Streamlining Regulation requires regulators to demonstrate that the regulatory response is proportional to the degree and type of risk to be managed. The directive also recommends that mandatory requirements, particularly for technical regulations (such as those that manage risks), should specify performance rather than design or descriptive characteristics. Regulators must also ensure that proposed interventions maximise net benefits and impose the least possible cost on Canadians and business that is necessary to achieve the intended policy objectives.

EU AND PROPORTIONALITY

Proportionality is one of the legal principles on which the actions of the European Union must be based. The Lisbon Treaty states that the use of Union competences is governed by the principles of subsidiarity and proportionality, and that under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty. A Protocol to the Treaty sets out how the legal principle is to be applied. It emphasises the need for wide consultation and the minimisation of burdens commensurate with the objective to be achieved. If challenged, the European Courts determine whether or not specific measures are proportionate.

Since 2003, the Inter-Institutional Agreement on Better Law-making reaffirms the centrality of proportionality to ensuring good regulatory governance and the responsibility of the EU institutions to develop tools and standards for the application of the principle. These commitments were renewed in 2016.

The importance of proportionality for the use of the EU's powers is also recognised in the European Commission's Communication on the Precautionary Principle issued in 2000. This requires measures based on the Precautionary Principle to be proportional to the chosen level of protection. In all cases this means tailoring measures to the chosen level of risk and undertaking a review of the measures against emerging scientific evidence.

The European Commission's Better Regulation Principles and Guidelines issued in 2017 set out some additional requirements. They require measures to respect the overarching principles of proportionality and subsidiarity and state that Better Regulation is about regulating only when necessary and in a proportionate manner. Ways of achieving this objective can be found in different parts of the general principles, as well as in Better Regulation Toolkit #5. Taken together, these provide a number of 'tests' of proportionality and include basing actions on evidence; keeping burdens to a minimum; matching the intensity of

the policy approach to the identified problem; leaving scope for national decisions; and, restricting Union actions to what is necessary to achieve the objectives defined in the Treaties.

The continued relevance and value of the limited tests of proportionate action set out in Toolkit #5 was confirmed by Commission Communication 'The Principles of Subsidiarity and Proportionality – Strengthening their role in the EU's policy-making' issued in 2018, reflecting the work of a dedicated Task Force.

Whilst the EU has taken significant steps to improve the use of proportionality throughout the policy cycle, more needs to be done to provide detailed guidance for its application to individual interventions particularly those made by the EU Administrative State to implement complex risk management laws.

APPLICATION OF PROPORTIONALITY: THE EU ADMINISTRATIVE STATE

Detailed research by the ERF suggests that whilst many implementation measures prepared by the EU Administrative State, to manage risks to human health and the environment, are of high quality, too many are disproportionate (see ERF Monograph 'Risk Management and the EU's Administrative State: Implementing Law through Science, Regulation, and Guidance' 2019).

To try and achieve complex risk management goals, the EU has, over the past decades, created an Administrative State, using regulations rather than directives to set out secondary legislation, establishing new centralised risk assessment institutions, and using soft law and comitology to make implementing decisions.

Specifically, disproportionate implementing measures made by the EU Administrative State exhibited some or all of the following weaknesses:

- Failed to address target risks directly or indirectly;
- Failed to demonstrate an adequate assessment of the scale and nature of the risk to be managed and of the regulatory costs of the measure, including benefits foregone, dynamic impacts and risk-risk tradeoffs;
- Did not adequately consider least restrictive options;
- Did not demonstrate a credible cost effectiveness relationship

In turn, disproportionate implementation measures contribute to different forms of regulatory failure including high levels of Defensive R&D, failure to reduce

net risk, loss of access to technologies, and increased development costs (time-to-market).

Poor quality, disproportionate measures have a number of causes. These include a lack of scientific rationale for intervention and restrictions based on real world exposures and practicability; a partial understanding of the dynamics of compliance and enforcement, leading to a failure to ensure that measures are achievable and measurable; and a failure to understand the full range of potential impacts of risk management options, including risk-risk tradeoffs and second-order effects along and across value chains.

Finally, there are weaknesses in the Commission's Better Regulation strategy. Guidance does not provide regulators with clear methodologies and operational standards with which to demonstrate that the proposed measure is least restrictive or that benefits justify costs. And guidance does not specify the type of impacts, positive and negative, that ought to be considered in such tests.

ERF OBSERVATIONS

Good regulatory decision-making depends upon interventions being proportionate. This helps to ensure that the use of the extensive powers of government is both restrained and justified, and that regulatory failure is avoided.

Action is needed by the EU institutions to build on the existing legal and policy requirements for the use of proportionality. The application of proportionality to the design of individual measures should be strengthened, including those used by the EU Administrative State to implement complex risk management laws. Specific improvements could include:

Proportionality Principle – the Council of the EU Ministers should adopt dedicated Conclusions calling for a more robust and systematic application of the principle.

Commission Communication – the European Commission should define the meaning and usage of the Proportionality Principle, possibly in the form of a Communication. The Communication should be informed by legal requirements set out in the treaty and in the jurisprudence of the EU Courts. It should explain how the principle should be used to improve the quality of regulatory decision-making, including implementation measures. It should include **four basic tests**;

- **Measures should only target significant, demonstrable problems** – for measures designed to protect human health or the environment this necessitates the use of risk assessments, and the development of clearly defined “intervention logics”;
- **Measures should demonstrate that the problem is targeted directly and can achieve a**

measurable impact – this requires the use of scientific evidence to demonstrate a causal relationship and measurable outcomes for health and environmental measures;

- **Measures should be least burdensome** – this requires rigorous assessment of non-regulatory alternatives; the use of outcome-based and performance-based rules; and assessments of cost effectiveness;

- **Measures should preferably demonstrate that benefits exceed costs or at least that they justify costs** – this requires all costs and benefits to be considered including second-order and ancillary impacts such as risk-risk tradeoffs

Better Regulation Guidance – a new Toolkit should be developed by the Commission that provides detailed operational guidance for the application of the

Proportionality Principle Communication, including methods of complying with the four core tests of proportionate action.

Regulatory Scrutiny Board – compliance with the four tests of proportionate action should be one of the prominent formal ‘quality’ requirements applied by the RSB to all measures, including those that implement complex risk management laws.

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Richard Meads, Lorenzo Allio, and Max Bentinck the Rapporteur, Senior Policy Analyst, and Programme Manager at the European Risk Forum, wrote this Highlights Note. However, the views and opinions expressed in this paper do not necessarily reflect or state those of the European Risk Forum or its members.