Minimum Harmonisation and the Role of the Principle of Proportionality

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Summary

I. Introduction

In a Festschrift for *Eckard Rehbinder*, a contribution dealing with minimum harmonisation is certainly not out of place.[1] In this contribution, I would like to examine minimum harmonisation in relation to the principle of proportionality.[2]

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1 Cf. *E. Rehbinder, R. Stewart*, Environmental Protection Policy, in: M. Cappelletti, M. Seccombe, J. Weiler (eds.), Integration Through Law. Europe and the American Federal Experience., Vol. 2. Berlin, New York 1985, p. 210-213.

2 Article 5 (3) of the EC Treaty provides that "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." One of the Protocols attached to the Treaty of Amsterdam contains a number of guidelines which work this formulation out further. In light of the rather uncertain situation surrounding the "constitutional treaty" (in full and officially "Treaty establishing a Constitution for Europe"; OJ 2004 C 310/1) I will not here further expand on the provisions *cum annexis* of the constitutional treaty. Readers will be aware that the principle of proportionality can be found in European law in many different guises. In the first place, the principle of proportionality has an important constitutional function in regulating relations between the Union and its Member States. Furthermore, the principle of proportionality is one of the grounds in reviewing the legality of acts of the institutions (cf. Case 331/88, *Fedesa*, ECR 1990, I-4023). Secondly, the principle

(Fortsetzung der Fußnote siehe Seite 2)

In a number of areas of policy, including environmental law, consumer protection, social policy and public health, the EC Treaty provides that the Member States may lay down rules which are "more stringent" than those laid down by the European legislator. Furthermore, on the basis of the Protocol on the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam, the European legislator should make as much use as possible of *minimum rules*. European minimum rules thus form an expression of the principle of proportionality.[3]

This article will not contain yet another general overview of the role and function of the principle of proportionality in European law, of which there are already so many. In the present article, I examine whether the principle of proportionality still has a role to play when the Member States make use of their powers to adopt more stringent rules, and if so, what the role is.[4] The reason for choosing precisely this topic relates to a recent decision of the Court of Justice in the *Deponiezweckverband Eiterköpfe* case, in which the Court decided that national measures that exceed the minimum level of protection need not be reviewed in light of the principle of proportionality.[5]

II. The Remarkable Judgment in *Deponiezweckverband Eiterköpfe*

Deponiezweckverband Eiterköpfe concerned the compatibility with Community law of German legislation on waste. The Deponiezweckverband is an association of administrative districts, for the purpose of waste disposal, in the region of Koblenz, and operates the central landfill site "Eiterköpfe". This association sought a permit from the *Land* Rheinland-Pfalz to fill, after 31 May 2005, two landfill cells site with waste that had been treated by mechanical processes only. The *Land* Rheinland-Pfalz argued that the *Verordnung über die umweltverträgliche Ablagerung von Siedlungsabfällen* (Regulation on the Environmentally Sound Deposit of Municipal Waste) does not allow this. This Regulation was adopted for the purpose of transposing the Directive on the landfill of waste[6] into domestic German law.

of proportionality plays an important part in reviewing the legality under Community law of certain acts of the *Member States*. In this context, it should also be noted that the legal basis the Court of Justice took for applying the principle of proportionality within the context of the free movement of goods was not Article 5 EC, but "the last sentence of article 30 of the Treaty"; cf. paragraph 34 of Case C-400/96, *Harpegnies*, ECR 1998, I-5121.

3 See for one of the most recent contributions on the principle of proportionality: *T. Tridimas*, "The Rule of Reason and its Relation to Proportionality and Subsidiarity", in: Rule of Reason; Rethinking another Classic of European Legal Doctrine, *A. Schrauwen* (ed.), Groningen 2005, p. 123-142.

4 Cf. also *F. De Cecco*, Room to Move? "Minimum Harmonization and Fundamental Rights", *CMLRev.* 2006, p. 9–30.

5 Case C-6/03, *Deponiezweckverband Eiterköpfe*, ECR 2005, I-2753. Also published in DVBl. 2005, p. 697–699 and Europäische Zeitschrift für Wirtschaftsrecht 2005, p. 413–414.

6 OJ 1999 L 182/1.

The *Verwaltungsgericht* (Administrative Court) Koblenz, before which the Deponiezweckverband had brought the dispute, had doubts as to whether the national legislation was compatible with Article 5(1) and (2) of the Directive. According to Article 5(1) of the Directive, the Member States must develop a national strategy to decrease the amount of biodegradable waste which is transferred to the landfill sites. And according to the same provision this strategy must ensure that the amount of waste which is to be transferred to landfill sites is decreased before specific dates and by specific percentages. The German implementing legislation contains more "stringent" environmental rules than the Directive (tighter time-limits; higher percentages). The legal basis of the Directive is Article 175 EC, which means that Article 176 EC also applies. The latter Article determines that: "The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission."
Nevertheless, the *Verwaltungsgericht* wished to know whether the Directive would preclude the more stringent German implementing legislation, and whether the Community law principle of proportionality has any influence on the assessment of this legislation.
The European Court of Justice began its considerations with the remark that Community environmental law does not aim at complete harmonisation, and referred to its judgment in *Fornasar*.[7] Then the Court analysed the Directive concerned:

"29 The Directive was adopted on the basis of Article 130s(1) of the EC Treaty (now Article 175(1) EC) and, therefore, for the purpose of attaining the objectives set out in Article 174 EC.

30 It is apparent from the ninth recital in the preamble to, and Article 1(1) of, the Directive that the latter is intended to pursue and clarify the objectives of Directive 75/442 by laying down measures to prevent or reduce as far as possible negative effects of landfilling of waste on the environment.

31 Under Article 5(1) of the Directive, the Member States are to set up national strategies in order to reduce the amount of biodegradable waste going to landfills. Under the same provision, those national strategies must include measures to achieve the targets fixed in Article 5(2) of the Directive. The last-mentioned provision states that those national strategies must provide that the amount of waste going to landfill should be reduced by certain percentages before certain fixed dates. The wording and broad logic of those provisions make it clearly apparent that they set a minimum reduction to be achieved by the Member States and they do not preclude the adopting by the latter of more stringent measures.

7 Case C-318/98, *Fornasar e. a.,* ECR 2000, I-4785.

32 It follows that Article 176 EC and the Directive allow the Member States to introduce more stringent protection measures that go beyond the minimum requirements fixed by the Directive (see, to that effect, Fornasar and Others, paragraph 46, concerning Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, OJ 1991 L 377, p. 20)."

The Court thus put an end to an ambiguity concerning the concept "more stringent protective measures" which had been identified in the literature. The question was whether it is at all necessary to rely on Article 176 EC (and thus to have to report the more stringent measures on the basis of Article 176 EC to the Commission) if the Directive itself leaves room, implicitly or explicitly, for more stringent national measures. In other words, does "more stringent protective measures" concern national standards that go beyond what the Directive *allows*, or stricter measures than the Directive *requires* of the Member States? The judgment clarifies that the latter is the case. Whenever the national rules are stricter than those required by the Directive, Article 176 EC is applicable.[8] It must be assumed that the same conclusion should be drawn for the other areas of policy where the EC Treaty requires minimum harmonisation, namely consumer protection,[9] social policy[10] and immigration policy.[11] In my view, the same would apply when the stricter national legislation finds its legal basis in "Article 176-type" provisions in the directives concerned.[12] Finally, there does not appear to be any reason why this conclusion would not apply to those cases where the stricter national measure is not legally based on *explicit* provisions in the Treaty or secondary law, but where the power to take more stringent measures follows *implicitly* from secondary law.[13] These conclusions also apply, in my opinion, in relation to secondary Community law based on Article 95 EC. It appears from the case law of the Court of Justice that when more stringent national measures are still within the range laid down by the internal market directives, they are permitted without there being the necessity to use the procedures provided for in the fourth and fifth paragraphs of Article 95 EC.[14]

Thus far, the judgment might indeed be called noteworthy, but not really astounding. That changes, however, when the Court discusses the potential role of

8 National legislation concerning situations falling outside the scope of the Directive is, of course, not to be considered as "more stringent protective measures".

9 Cf. Art. 153(5) EC.

10 See Art. 137(4) EC. Cf. also Case C-84/94, *UK v. Council*, ECR 1996, I-5755.

11 Cf. Art. 63(4) EC.

12 Cf. for example Art. 8(2) of Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171/12): "Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection."

13 I. e. directives for which it must be concluded from the wording – with terms such as "at least", "maximum", "at most" – that they aim at minimum harmonisation.

14 Case C-11/92, *Gallaher*, paragraph 43. The paradoxical result is that more stringent measures based on, for example, Art. 176 EC must be reported to the Commission, but more stringent measures that fall within Art. 95 EC do not have to be reported.

the principle of proportionality in relation to such stricter measures by the German legislator. The paragraphs relating to this are quoted here:

61 It is clear from the broad logic of Article 176 EC that, in adopting stricter measures, Member States still exercise powers governed by Community law, given that such measures must in any case be compatible with the Treaty. Nevertheless, it falls to the Member States to define the extent of the protection to be achieved.

62 In that context, in so far as it is a matter of ensuring that the minimum requirements laid down by the Directive are enforced, the Community principle of proportionality demands that measures of domestic law should be appropriate and necessary in relation to the objectives pursued.

63 In contrast, and inasmuch as other provisions of the Treaty are not involved, that principle is no longer applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 EC and going beyond the minimum requirements laid down by the Directive.

64 As a result, the reply to the second question has to be that the Community-law principle of proportionality is not applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 EC and going beyond the minimum requirements laid down by a Community directive in the sphere of the environment, inasmuch as other provisions of the Treaty are not involved. "

The conclusion is clear: more stringent national legislation adopted on the basis of Article 176 EC does not have to be reviewed in the light of the Community principle of proportionality.[15] This conclusion is not only relevant for the interpretation of Article 176 EC, but seems to me also to be significant for all other cases of minimum harmonisation.
The paragraphs quoted above need to be subjected to a detailed analysis in order to see why the judgment of the Court, implying that more stringent national legislation taken on the basis of Article 176 EC does not have to be reviewed in the light of the principle of proportionality, is remarkable.

III. The Role of the Proportionality Principle "Within the Scope of Community Law"

When Member States fulfil *obligations* laid down in minimum directives, there is no doubt that they are obliged to take account of the proportionality principle

15 See also Case C-2/97, *Società italiana petroli*, ECR1998, I-8597, which also demonstrates that the principle of proportionality does not play a role in the review of more stringent national measures if such measures do not form an obstacle to free movement.

when doing so – this is evident from the case law of the Court.[16] But, in that case, why are they not obliged to respect the principle of proportionality when they make use of their *competence* to take stricter national measures?

First of all it must be noted – as appears from paragraph 61 of *Deponiezweckverband* – that when the Member States take more stringent environmental measures, they are exercising a competence which "is governed" by Community law. This observation is not unimportant. After all, in the literature it has been repeatedly stated that it can be inferred from Article 176 EC that the Community competence to take environmental measures is restricted to the adoption of minimum rules.[17] In other words, Article 176 EC is considered to contain an obligation for the Community legislator to adopt minimum rules, and in that case the Community would also have to be considered not to have the competence to restrict the Member States in adopting or maintaining in force stricter environmental rules. Indeed, in that interpretation a review of the more stringent national standards is not obvious. This would mean that all directives based on Article 175 EC would by definition also (have to) be minimum directives, because of Article 176 EC. This interpretation of Article 176 EC would seem no longer tenable in light of the Court's considerations quoted above: How can the competence of the Member States to take more stringent environmental measures be "governed" by Community law, if the Community legislator is not granted such competences?

The term "governed" (paragraph 61) raises the question how this relates to another, but similar, expression in European law. It is stated by the Court of Justice in the *ERT* case that national legislation must be reviewed in the light of the general principles of Community law as far as this national law falls "within the scope of Community law".[18] If the adoption of more stringent measures is "governed" by Community law in the sense of *Deponiezweckverband,* should it then also be assumed that such measures must be considered to fall "within the scope of Community law" as intended in the *ERT* case?[19] If this question should be answered positively – and at first glance, I cannot see why it should be answered negatively – then it is remarkable that in *Deponiezweckverband* the national legislation does *not* have to be reviewed in the light of the principle of proportionality. The principle of proportionality, with its Treaty basis in the third

16 Case C-293/97, *Standley,* ECR 1999, I-2603.

17 See for a discussion of this problem, with references to other literature, more extensively my book *J. H. Jans*, European Environmental Law, Groningen 2000, in particular Chapter III, para. 5.

18 Case C-260/89, *ERT,* ECR 1991, I-2925. The *ERT* case concerned a situation where a Member State relied on what are now Articles 46 and 55 of the EC Treaty for justification of a possible infringement of the freedom to provide services. In that context, the Court of Justice spoke of a national measure which fell within the scope of Community law, and stated that in this situation courts are obliged to ensure the observance of the general principles of law. Cf. also Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH* v. *Troostwijk GmbH*, ECR 2004, I-3025. The case concerned an Austrian selling arrangement, which was considered to be falling within the field of application of Community law and consequently being reviewed in the light of the principle of freedom of expression as recognised by Article 10 ECHR.

19 Case C-260/89, *ERT,* ECR 1991, I-2925, in particular paragraphs 42–44.

paragraph of Article 5 EC Treaty, seems to me without doubt also to be considered as a general principle of Community law.[20]
In light of the Court's considerations in *ERT* it is surprising that the more stringent German environmental measures in *Deponiezweckverband* do not have to be reviewed in the light of the principle of proportionality.

IV. The Member States Establish the Degree of Protection

One of the main arguments leading to the Court's conclusion that the stricter German standards do not have to be reviewed in the light of the principle of proportionality, is also to be found in paragraph 61 of *Deponiezweckverband*. Here the Court mentions that the extent of the protection to be achieved when adopting more stringent measures on the basis of Article 176 EC is left to the Member States. In itself, this is correct. But I wonder whether this finding of the Court provides a sufficient basis for the final conclusion of the Court, namely that stricter measures pursuant to Article 176 EC do not have to be reviewed in the light of the principle of proportionality. Before I discuss this in more depth, it seems to me important to consider briefly the question of the exact meaning of the principle of proportionality. From the case law on the compatibility of national measures with the so-called internal market freedoms, the following can be concluded. In the first place, the national measure must be suitable: it must be "capable" of actually protecting the interest that needs to be protected. There must in some sense be a causal relationship between the measure and the objective. In the second place, the principle of proportionality implies that the measure is *indispensable* and therefore necessary, which means, among other things, that there is no available alternative which is equally effective for realising the objective to be achieved, but which is less restrictive for the intra-Community trade -in short: the criterion of the "least restrictive alternative". Two or more possible national instruments are first assessed on the basis of the question: Do these protect the interest equally effectively or not? If the answer is yes, then the next thing that must be examined is which of *these* instruments involves the least negative effects for market integration. The third element of the principle of proportionality is generally identified in the literature as the principle of proportionality "*sensu stricto*".[21] This implies that a measure is dispropor-

20 It appears from the Opinion of the Advocate General that one of the arguments which was used in this case to demonstrate that the principle of proportionality would not have to be reviewed, relates to the wording of the third paragraph of Article 5 EC: "Any action by the *Community* shall not go beyond what is necessary to achieve the objectives of this Treaty. " [emphasis added] Since in the case of stricter measures within the meaning of Art. 176 EC it is not conduct of the Community which is concerned, but of the Member States, the argument was that the principle of proportionality could not apply. This fails to take account of the fact that the principle of proportionality must be considered as a general principle of Community law, the scope of which also extends to the Member States.

21 Cf. for example *W. van Gerven*, "The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe". In: The principle of proportionality in the laws of Europe, Evelyn Ellis (Ed.). Oxford 1999, p. 38.

tionate if the restriction of intra-Community trade that it has brought about is not in proportion with the objective pursued or with the result it has caused. One could also say: This concerns the principle of proportionality "as such". To sum up, the principle of proportionality concerns the suitability, the necessity, and the proportionality of the measure.

The fact that in *Deponiezweckverband* (paragraph 62) the Court of Justice only refers to the first two aspects is not surprising, since the third aspect – which involves an actual balancing of interests – is only used by the Court very exceptionally when assessing national measures on their proportionality.[22] After all, a review of this aspect requires the European Court to decide whether the degree of protection considered necessary by the Member State concerned, is acceptable by the Community legal order. In paragraph 61 of *Deponiezweckverband* the Court of Justice states in many words that it appears from Article 176 EC that the degree of environmental protection is left up to the Member States to decide. That may be so, but at most it can only offer an explanation for not reviewing the third aspect of the principle of proportionality. In reviewing the suitability and the necessity of the measure, the Court of Justice, or any other court, does not have to discuss the question of the desired degree of protection at all. The judgment of the Court of Justice which most clearly illustrates this statement is that in *Läärä*.[23]

Läärä concerned Finnish legislation on the basis of which the operation of slot machines was exclusively reserved to a single public body. Such legislation constitutes a restriction on the free movement of services, according to the Court. The Finnish legislation was intended amongst other things to "limit exploitation of the human passion for gambling" and "to avoid the risk of crime and fraud to which the activities concerned give rise". The Court accepted these interests as "overriding reasons relating to the public interest". Subsequently, a proportionality test was carried out. The measures were assessed as to whether they "guarantee the achievement of the intended aims" and whether they "do not go beyond that which is necessary in order to achieve them". Thus, the first and second aspect of the principle of proportionality were at issue here. In this context the Court noted that "the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment". The Court, understandably, concludes from the national power of assessment that: "the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and, proportionality of, the provisions enacted to that end". However, in this case, that did not mean that no review of proportionality was carried out whatsoever. On the contrary, in *Läärä* there was a review – albeit not in an obtrusive manner – as to whether the Finnish legislation was *suitable*

22 The best known example is Case C-169/91, *Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q Plc*, ECR1992, I-6635.

23 Case C-124/97, *Läärä and others*, ECR1999, I-6067.

for achieving the desired level of protection (whether "it guaranteed the achievement of the intended aims"), and whether this could have been achieved by less restrictive measures ("do not go beyond that which is necessary in order to achieve them").

The lessons learnt from *Läärä* can, in my view, also be applied to more stringent environmental measures based on Article 176 EC and other cases of minimum harmonisation. There is no need to call in question the level of protection as desired by the Member State. Nevertheless, it is incomprehensible why, by taking the level of protection desired by the Member State as a starting point, there cannot be a review as to whether the more stringent standards are in fact suitable for achieving this, and whether this protection could have been achieved by means of less restrictive measures. The reasoning of the Court in *Deponiezweckverband* does not convince me.

In *Deponiezweckverband* the Court carries out a review in the light of the principle of proportionality after all. The "suitability test", as it is carried out by the Court in the context of the free movement provisions, gives the Court a criterion on the basis of which it can deal with national measures that in fact have a protectionist objective, even though they are presented as being necessary for protecting a justified interest. A review of proportionality in the case of minimum harmonisation would have the advantage that the Court then has the possibility of reviewing whether the Member State is trying to avoid its duty to comply with its obligations under the Directive, under the guise of stricter measures.

The Court has stated very clearly in the *Deponiezweckverband* case that stricter environmental measures under Article 176 EC need not be reviewed in light of the principle of proportionality of EC law. However, in my view, one might get the impression that the Court does in fact carry out a review on the basis of the first aspect of the principle of proportionality (suitability) – but then under a different name.

In paragraph 58 the Court of Justice states that:

"In order to answer that question, it is to be recalled that, in connection with the Community's environmental policy, to the extent that a measure of domestic law pursues the same objectives as a directive, Article 176 EC makes provision for and authorises the minimum requirements laid down by that Directive to be exceeded, in the conditions set by that article."

I assume that in this paragraph the Court means to say not only that when national legislation pursues other objectives than those of the Directive, this legislation cannot be considered to be a "more far-reaching measure of protection", but also that such legislation is not allowed.[24] This also makes clear that Article 176 EC does not give the Member States a *carte blanche* to adopt more stringent

24 If not, this would lead to the absurd consequence that stricter measures that do not pursue the same objectives as the directive, would be allowed, but would not need to be reported to the Commission (because they are not stricter measures in the sense of Art. 176 EC).

environmental rules as they please. The more stringent national measures must clearly be an extension of (the objectives of) the Directive. In this way the Court can assure that the stricter national standards are coherent with the Community minimum standards. In its decision, the Court thus does in fact review – and in my view rightly so – whether the more stringent German rules pursue the same objectives as those of the Directive. In essence, this type of test does not differ greatly from the review of "suitability" as the first aspect of the principle of proportionality.

V. Stricter Proportionality Test After Minimum Harmonisation when Infringements of the Freedom of Movement of Goods are Involved?

In paragraph 63 of *Deponiezweckverband,* the inapplicability of the proportionality principle – by which the more stringent German environmental standards escape review – is made subject to an important condition. More stringent measures are permitted "inasmuch as other provisions of the Treaty are not involved". Should the more stringent measures come into conflict with the Treaty prohibitions regarding the internal market, for instance, then a review of proportionality is in fact carried out; this occurs as part of the examination whether the national measures are justified. An example from the case law is the decision of the Court of Justice in *Aher-Waggon.*[25]

In 1992, *Aher-Waggon* bought a propeller-driven Piper PA 28-140 aircraft in Denmark which had been registered in that State since 1974. Subsequently, it requested the competent German *Bundesamt* to register the aircraft in Germany. This request was refused on the ground that the aircraft exceeded the noise limits permitted in Germany. The aircraft did comply with the relevant Community standard (73 dB(A)),[26] however, with a sound level of 72.2 dB(A), it exceeded the German thresholds (69 dB(A)). Aher-Waggon was unsuccessful in its action before the *Verwaltungsgericht* (Administrative Court) and on appeal. In an application for review on a point of law (*Revision*) before the *Bundesverwaltungsgericht* (Federal Administrative Court), Aher-Waggon held that the refusal to register the aircraft in Germany was a breach of Community law. It based this on the fact that aircraft of the same type and sound level that were already registered in Germany, retained their registration.

The Court first determined that the Directive only laid down minimum requirements, and thus allowed the Member States to adopt stricter noise limits.[27] Here, however, the possibility of applying the principle of proportionality is not

25 Case C-389/96, *Aher-Waggon,* ECR 1998, I-4473. Cf. also Case C-510/99 Criminal proceedings against *Xavier Tridon,* ECR 2001, I-7777, where stricter national rules in the area of endangered species of animals and plants were reviewed in the light of the rules on free movement of goods.

26 Directive 80/51/EEC on the limitation of noise emissions from subsonic aircraft; OJ 1980, L 18/26, as amended by Directive 83/206/EEC; OJ L 117/15.

27 Case C-389/96, *Aher-Waggon,* ECR 1998, I-4437.

excluded – unlike in *Deponiezweckverband*. The reason is that in this case the stricter limits have a negative effect on the free movement of goods, and should in principle be considered "measures having equivalent effect" under Article 28 EC. The Court continued:

"20. It is also settled case law that national legislation which restricts or is liable to restrict intra-Community trade must be proportionate to the objectives pursued and that those objectives must not be attainable by measures which are less restrictive of such trade [...]."

The question that then arises is what influence the minimum level of protection laid down in the Directive has, or should have, on the manner in which the proportionality principle is applied. I would argue that in such cases a stricter review on the basis of the proportionality principle is appropriate. After all, from the moment there is a directive with minimum standards, these standards must be considered to offer an adequate or even "a high level of protection".[28] Otherwise the directive itself might be considered to fail the "suitability" test and infringes the principle of proportionality! But, if the standards of the directive provide an adequate level of protection, how can stricter national measures be *necessary*? Surely it must be assumed that a Member State infringes the principle of proportionality when in fact there is nothing to protect.[29] Member States may in principle be allowed to determine the desired level of protection, but obviously there must be something to protect. This aspect, in particular, could be reviewed more intensively by the Court in cases of European minimum standards.

So, what is the best way of dealing with the review – in light of the principle of proportionality – of "stricter" national measures that involve a breach of one of the free movement provisions of the EC Treaty? As mentioned, in such cases a more intensive review in light of the principle of proportionality seems appropriate, precisely because account must be taken of the level of protection realised by the relevant directive.[30] In order to demonstrate the necessity of the national measures, the Member State will usually have to demonstrate why the protection

28 When the basis for harmonisation is Art. 95 EC, then the third paragraph requires "a high level of protection" in the areas concerning health, safety, environmental protection and consumer protection. See, for a more extensive discussion of this, my book *J. H. Jans*, European Environmental Law, Groningen 2000, p. 125.

29 Thus, a ban on importing a certain product "for the protection of public health" will not be necessary, when scientific research demonstrates that the prohibited product does not constitute a health threat. In fact, it can be argued that this aspect does not fall within a review of proportionality and in fact is a preliminary issue. The Court on the other hand usually deals with this question within the framework of a review of proportionality.

30 See also, but then in the framework of Art. 95 EC (then Art. 100a EC), Advocate General Tesauro: "The control entrusted to the Community institutions by Article 100A(4), on the other hand, seems necessarily to be inspired by more stringent criteria than those underlying the provisions of Article 36, in that there is no possibility of not taking account of the standards of protection already laid down by the harmonization rules"; Case C-41/93, *Commission v. France*, ECR 1994, I-1829, paragraph 6 of his opinion.

offered by the directive does not offer a solution in its specific case. In other words, is there such an exceptional situation that the Member State feels it must disregard the level of protection of the directive, and adopt more stringent measures? In such cases, therefore, I would advocate a similar proportionality review to that laid down by the EC Treaty in the framework of Article 95(5) EC for national measures derogating from Community harmonisation measures.[31] This is notwithstanding the fact that it may be questioned whether the Court actually does carry out a more intensive proportionality review in these kinds of cases.[32]

VI. Conclusions

In an earlier publication on the principle of proportionality of EC law, I came to the conclusion that there is no such thing as *the* application of the principle of proportionality.[33] The principle of proportionality provides the Court of Justice with an instrument for a differentiated assessment of the legality of national measures according to European law.

The case law of the Court of Justice on the role of the proportionality principle in assessing national measures in cases of minimum harmonisation provides strong evidence for this conclusion. Thus, the principle of proportionality requires the European legislator to formulate its standards as much as possible as minimum standards, and thus to leave the Member States the freedom to decide whether they want to raise the level of protection or not. Once the Member States make use of their freedom to adopt stricter standards, a complex situation arises. The general rule seems to be that, insofar as more stringent national standards do not infringe the market freedoms, they need not be reviewed in the light of the principle of proportionality at all. The reasoning that the Court has given for this general rule in *Deponiezweckverband*, is however, in my view, not convincing. It is not evident why restrained judicial review in light of the first (suitability) and possibly even the second aspect (necessity) of the principle of proportionality is not possible. Such a review could prevent Member States from abusing their power to adopt and implement stricter national standards. By categorically ruling out any form of review, the Court ignores the different gradations of the principle of proportionality.

A further analysis of the case law of the Court, furthermore, gives the impression that in fact the Court does carry out a review of the suitability of the stricter measures, but does so "between the lines", by requiring that the national meas-

31 Conflicting national measures are possible "on grounds of a problem specific to that Member State". Here I would like to note that in my opinion this requirement also applies to measures taken under Art. 95(4) EC; see on this subject more extensively *J. H. Jans*, European Environmental Law, Groningen 2000, p. 125.

32 Neither in *Aher-Wagonn*, nor in *Tridon* did the Court clarify whether it carried out a more intensive review of proportionality "than normal"; cases cited supra note 26.

33 J. H. Jans, "Proportionality Revisited", *LIEI* 2000/3, p. 239–265

ures are an extension of the objectives of the European minimum rules. In my view, this is correct.

Once the more stringent norms come into conflict with the market freedoms, the situation becomes completely different. In judging whether the more stringent measures are justified, in my opinion an intensive review of proportionality should be carried out. Nevertheless, it remains up to the Member States to decide what level of protection they consider desirable. It would be possible, however, to require the Member States demonstrate why their situation is so exceptional that stricter measures than those of the directives are necessary. It should be mentioned here that the case law of the Court is not completely clear on this point.

Proportionality is needed, but by who, when and how, remains a complex matter.