

## **Principle of Proportionality in Competition Law of the EU and Uzbekistan**

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**Abstract.** *This article explores the principle of proportionality within EU law and its burgeoning relevance in Uzbekistan's legal framework, particularly in competition law enforcement. Focusing on Uzbekistan, the article highlights recent legal reforms, such as the introduction of fining powers in 2022. Despite these reforms, challenges remain, such as the limited application of proportionality in administrative and judicial proceedings, as evidenced by the infrequent use of this principle in case law. The article underscores the importance of embedding proportionality more deeply within Uzbekistan's legal system to ensure fair and effective competition enforcement.*

**Keywords:** *Proportionality Principle, EU Law, Competition Law, Legal Remedies, Antitrust, Uzbekistan Legal Reforms, Fines, Judicial Review, Regulatory Measures, Market Restoration.*

**The principle of proportionality** means that the courts resolve conflicts between rights and standards by balancing the relative weight of conflicting rights and standards, applying guidelines like the necessity test, and using the least restrictive means test. The concept was developed in German law<sup>1</sup>. Both compared jurisdictions include the principle of proportionality as a fundamental principle of law. All measures of institutions should conform to this principle.

The principle of proportionality in terms of EU law offers a framework for decisions on whether and/or to what extent rights may be limited by governmental action (such as legislation) motivated by public interests. The proportionality criteria must be met by both acts made by Member States and by EU institutions<sup>2</sup>.

The proportionality test includes the following steps:

- the measure under review must be suitable to achieve the legitimate aim that it pursues;
- that aim cannot be achieved by alternative means that are less restrictive than the measure that was adopted;
- whether the effects of the measure adopted are (dis)proportionate in relation to the interests affected by the measure<sup>3</sup>.

**Remedies and principle of proportionality.** Under Regulation 1/2003, the Commission can remedy Articles 101 and 102 TFEU infringements. Remedies may include behavioural or structural measures proportionate to the infringement. Structural remedies are used when behavioural remedies are not

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<sup>1</sup> Sauter, W. (2013). Proportionality in EU Law: A Balancing Act? *Cambridge Yearbook of European Legal Studies*, 15, p. 439

<sup>2</sup> Ibid. p.p.439-440

<sup>3</sup> Gilliams H. (2014) Proportionality of EU Competition Fines: Proposal for a Principled Discussion. Forthcoming in *World Competition* 37, no. 4. p. 6

equally effective or more burdensome for the undertaking<sup>4</sup>.

In EU antitrust cases, there are two scenarios for remedies: the Commission can impose remedies upon finding an infringement or accept commitments proposed by the undertakings after receiving the Commission's preliminary assessment.

Usually, a prohibition decision is accompanied by a fine, serving both as punishment and deterrence. However, in certain cases, the Commission might opt for a prohibition decision without a fine, especially if the infringement is entirely new or if a symbolic fine suffices. Sometimes, merely defining the infringement might not be enough to end it effectively. The Commission can also require the company to restore market conditions without infringement and impose necessary remedies to achieve that<sup>5</sup>.

The principle of proportionality complements the principle of necessity to ensure that the adopted remedy will not result in over-regulation of the market conditions. A proportionate remedy is one that addresses the stated competition problem while not going above and beyond what is required to resolve it. This means that in situations of abuse, proportionate remedies should try to restore the competitive condition that existed previous to the abuse as much as feasible without attempting to strengthen the market structure that existed prior to the abuse<sup>6</sup>.

Case study on proportionality of behavioural remedy (Commercial Solvents Co v. Commission).

*Background.* Commercial Solvents Co. (CSC) is a US, Maryland-based company. CSC produced raw materials needed to create medicine for tuberculosis (ethambutol). The firm Istituto, which purchased raw materials from CSC and sold them to the firm Zoja, who utilised them to produce specific goods, was acquired by CSC for 51% of its share capital. Istituto tried to buy Zoja but failed, and then Istituto increased the prices. Zoja found another source of supplies. However, the alternate source stopped, so Zoja re-ordered materials from CSC. CSC declined Zoja's request to reorder raw materials because it intended to integrate downmarket vertically. The Commission fined undertakings and ordered supplies to Zoja.

*Findings of the Court.* CSC decided to appeal the decision of the Commission, and one of its pleas was concerning the proportionality of the ordered supplies. Particularly, CSC "complained that the Commission has misused the powers intended to prevent competition from being distorted within the common market ..." However, the Court stated that "with respect to the question of the proportionality of the injunctions, the Commission states that the issue consists in guaranteeing Zoja's survival as a competitive manufacturer of ethambutol. This competitive position must be evaluated not only in the light of the situations on the market at the moment the Decision was issued, but rather from the point of view that Zoja is the only potential competitor of American Cyanamid Company"<sup>7</sup>.

The question, in this case, was whether the injunctions granted by the Commission were proportionate in light of Zoja's position in the market. The Court decided that the Commission must assess not only the current state of the market at the time the decision is being made but also Zoja's future contribution to the Single Market. Given that Zoja is the sole prospective competitor to American Cyanamid Company, it follows that the Commission must have protected its existence and competitiveness and that the measure taken by the Commission was actually proportionate as it was effective to reach the goal of maintaining undistorted competition and there was an immediate need to take this measure.

*Commentary.* The application of the proportionality principle to this case reveals a balanced approach. The Court's assessment of Zoja's competitive position, recognition of its role in the single market, and emphasis on the urgent need for action all demonstrate a thorough application of the proportionality principle. The Court's decision supports the notion that regulatory measures should

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<sup>4</sup> OECD (2006). Remedies and Sanctions in Abuse of Dominance Cases. DAF/COMP(2006)19. p. 9

<sup>5</sup> OECD (2006). Remedies and Sanctions in Abuse of Dominance Cases. DAF/COMP(2006)19. p. 18

<sup>6</sup> Ibid. p.14

<sup>7</sup> Cases 6/73 and 7/73, Commercial Solvents Co v. Commission [1974] ECR 223, p. 241

be implemented to the unique conditions and goals, without going above and beyond what is necessary to achieve the desired competitive outcome.

Moreover, Regulation 1/2003 explicitly considers structural remedies for cases with a risk of lasting or repeated infringement. It means that if the infringement raised barriers to entry, the Commission's decision should ensure that barriers to entry created by the undertakings under review are effectively removed. Such appreciation can only be made on a case-by-case basis, considering the characteristics of the market's structure and functioning and the infringing undertakings<sup>8</sup>.

Structural remedies include all measures required to compel an undertaking to sever its ongoing businesses, physical assets, or intellectual property, such as sales of activities, division of undertakings, disposal of equity interests in undertakings, or transfer of intellectual property and other rights. The authorities do not commonly use structural remedies, although they may do so if considered necessary and proportional to the violation committed<sup>9</sup>.

Furthermore, the concept of proportionality should be applied as dictating not just the kind of remedy (whether structural or behavioural) but also its duration. The decisional practice of competition authorities demonstrates that length can vary. "The length of the application of remedies should balance potentially opposing effects: it should be long enough to allow intended effects to materialise and short enough to account for the dynamic nature of markets"<sup>10</sup>.

Fines. Under Article 23(2) of Regulation 1/2003, the Commission may, by decision, impose fines on undertakings and associations of undertakings where, either intentionally or negligently: (a) they infringe Article 81 or Article 82 of the Treaty; or (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9. Pursuant to Article 23(3), in calculating the fine amount, the Commission must consider both **the gravity** and **the duration** of the infringement.

In accordance with the 2006 Guidelines on Fines<sup>11</sup>, the starting point for the undertaking's fine is a portion of the business's yearly sales of the item or service in question. The sales of the goods or services that are subject to infringement during the most recent full fiscal year are often considered the relevant sales. According to the seriousness of the violations, this portion of the value of the relevant sales may be up to **30%**. By taking into account the length of the violation and applying a duration multiplier based on the number of days that the violation was committed, the final sum is raised. It is possible for the fine to be raised (for instance, if the corporation is a repeat offender) or lowered (for instance, if the company's involvement was minimal). The maximum penalty is 10% of the enterprise's total yearly revenue in the fiscal year before the decision's approval<sup>12</sup>.

As the purpose of fines is to sanction undertakings for having infringed competition rules, in order to deter these undertakings, fines of an amount necessary to achieve deterrence by definition are proportionate to the goal of pursuing compliance<sup>13</sup>. Thus, when assessing the proportionality of the fines, the purpose of deterrence plays a significant role.

The Commission takes into account the demand to increase the fine in order to exceed the amount of gains illegally made because of the infringement where it is possible to estimate that amount<sup>14</sup>.

Regarding the judicial review of the fines imposed by the Commission, the Commission shifted from the Guidelines, but also whether the increase is "manifestly disproportionate" or whether the

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<sup>8</sup> OECD (2006). Remedies and Sanctions in Abuse of Dominance Cases. DAF/COMP(2006)19. p. 185

<sup>9</sup> ECN (2013). RECOMMENDATION ON THE POWER TO IMPOSE STRUCTURAL REMEDIES. p.p. 1-2 [https://ec.europa.eu/competition/ecn/structural\\_remedies\\_09122013\\_en.pdf](https://ec.europa.eu/competition/ecn/structural_remedies_09122013_en.pdf) (Accessed on 01.04.2024)

<sup>10</sup> OECD (2006). Remedies and Sanctions in Abuse of Dominance Cases. DAF/COMP(2006)19. p.

<sup>11</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), 1.9.2006 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01))

<sup>12</sup> European Commission (2013). Competition: Antitrust procedures in abuse of dominance. [https://competition-policy.ec.europa.eu/system/files/2021-05/antitrust\\_procedures\\_102\\_en.pdf](https://competition-policy.ec.europa.eu/system/files/2021-05/antitrust_procedures_102_en.pdf) p.2

<sup>13</sup> Gilliams, H. (2014) Proportionality of EU Competition Fines: Proposal for a Principled Discussion (August 8, 2014). Forthcoming in *World Competition* 37, no. 4, p. 4

<sup>14</sup> Paz, José. (2012). Judicial review in European competition law. p. 26 [https://www.law.ox.ac.uk/sites/default/files/migrated/judicial\\_review\\_in\\_european\\_competition\\_law.pdf](https://www.law.ox.ac.uk/sites/default/files/migrated/judicial_review_in_european_competition_law.pdf) (Accessed on 04.04.2024)

Commission is correct in refusing to consider other factors, such as the undertaking's financial losses, which would confer an unfair competitive advantage on undertakings least well adapted to market conditions<sup>15</sup>.

In the *Microsoft Corp. v. Commission* case<sup>16</sup>, Microsoft argued that the Commission's sanctions were excessive. Given the nature of their actions and the exercise of intellectual property rights, they claimed that the fines were disproportionate and unexpected.

The Court deemed the Commission's evaluation of the violation's seriousness and length accurate. It was decided that Microsoft was abusing its dominating position by linking Windows to Windows Media Player, which had a negative impact on competition and online content delivery.

The Commission applied Microsoft's entire EEA revenue on the relevant markets to determine the beginning point of the fine, which was not chosen at random. The Commission relied on the data supplied by Microsoft solely for server OS, contradicting Microsoft's claim that the Commission assessed a larger market for server operating systems.

Given Microsoft's considerable financial resources and the potential for using tactics from other markets, the Court agreed with the Commission's calculation of the fines as an effort to prevent other violations. Therefore, the Court upheld the Commission's decision and dismissed Microsoft's argument that the sanctions were excessive and disproportionate<sup>17</sup>.

This study shows that the Commission considered the gravity and duration of the breach when deciding on the proportionality of the sanction.

Moreover, the Commission increased the initial amount to ensure that the fine was sufficiently deterrent. The proportionality principle states that the punishment must be sufficient to stop the undertaking from committing the same breach again and to ensure that the law is upheld. The seriousness of the offence, the company's financial stability, and the need for deterrence were the main factors taken into account in determining the fines.

Overall, in the above-mentioned case study on the calculation of the fines, the Court focuses on the effectiveness of the measure to reach the aim of the fines or the remedy and other factors such as the gravity, duration of the infringement.

The Court did not discuss other steps of the proportionality test, as was pointed out by Gilliams H. He recommends that during the assessment of whether there are less restrictive measures, fines imposed for infringements of other areas of law may be relevant if those other areas protect comparable interests. A potentially relevant foundation for comparison may be laws that regulate business practices for the (ultimate) benefit of consumers. He explains this proposal by stating that an assessment that one of two different sanctions is "too high" or "too low" can only be made if we know which sanction is "appropriate" for any given degree of gravity and duration (is it the higher fine, the lower fine, or something in between?)<sup>18</sup>.

However, applying all proportionality tests in such a broad context may be difficult to realise. Nevertheless, it is important to set the criteria of the proportionality test for both remedies and fines based on the deterrence effect, gravity, duration, possibility of less restrictive measures and effectiveness of the chosen measure in each case. The author of the paper also believes that the proportionality test should be applied fully as in other fields of EU law. For example, as in the Internal Market area, it was applied in the *Cassis de Dijon* case<sup>19</sup>.

**Remedies and fines in Uzbekistan.** Under Art 25 of Law on Competition (current edition), in case of violation of competition legislation, entities shall:

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<sup>15</sup> Ibid. p.25

<sup>16</sup> Case T-201/04, Judgment of the court of first instance (Grand Chamber) September 17 2007, *Microsoft Corp. v Commission*

<sup>17</sup> Ibid. paras 1343-1359

<sup>18</sup> Gilliams, H. (2014) Proportionality of EU Competition Fines: Proposal for a Principled Discussion (August 8, 2014). Forthcoming in *World Competition* 37, no. 4, p. 4-16

<sup>19</sup> Case C-120/78, *Cassis de Dijon*, [1970] ECR 649

fulfil the anti-monopoly authority's order to eliminate violations of competition law within the established time limit;

compensate for the damage caused.

This rule reflects the right of the Committee to order remedies for the purpose of the elimination of the violations. As it was mentioned in the previous Paragraph, the Supreme Court confirmed that the Committee possesses discretionary powers in the establishment of the remedies in the case of "Merrymed Farm". However, the chosen measure was only assessed in the context of discretionary powers, not in conformity with the proportionality principle<sup>20</sup>.

Art 178 of the Code on Administrative Liability<sup>21</sup> states that citizens, who abuse the dominant position, shall carry a fine of three to five basic calculation units. Five basic calculations are a very small amount (1 650 000 sums = 129,49 euros) for such infringement as abuse of dominant position.

Until September 2022, the Committee did not have fining powers regarding antitrust cases and could only order remedies and compensation for the damage. Under Uzbek Law, only individuals can be punished with administrative sanctions. So administrative fines are not alternatives to fines, and there was still a need for the introduction of financial sanctions.

First, Presidential Decree N 101 (adopted on April 8, 2022) provides limited fining powers, effective from September 1 2022<sup>22</sup>.

Moreover, the new edition of the Law on Competition introduced an additional duty on the entities which breached competition legislation: returning gained profit and paying fines. Fine for abuse of dominance with amounts of 5% of the same revenues. Fines are doubled in case of repeated infringements<sup>23</sup>. Moreover, the decision on the imposition of the fines is approved in a judicial order. However, the Law on Competition does not mention the aim of the fines.

OECD highlights that "while introducing sanctioning powers is a welcome development, their deterrent effect may prove insufficient, considering the relatively low maximum fine percentages"<sup>24</sup>.

Indeed, this sanctioning system has several flaws:

it does not provide flexibility for the amount of the fines, i.e., there is only one amount of 5 % which is imposed on entities, which does not allow to take into account the gravity of the breach;

the very small percentage, which is not effective for either the deterrence or punishment aim of the sanction;

Administrative liability seems extra when there are already financial sanctions, although their characters are different (administrative liability is applicable only for guilty individuals).

Of course, when there is a fixed amount of the fine, there will be fewer chances of making mistakes in calculating the sanctions. However, it cannot consider the gravity of the conduct. Moreover, Uzbek legislation includes the principle of proportionality similar to EU Law, which will be able to safeguard the possibility of disproportionate fines.

Concerning the principle of proportionality this principle is given in the Law on administrative procedures. It is stated that "measures of influence on individuals or legal persons provided in the course of administrative proceedings must be appropriate and sufficient to achieve the legitimate goal

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<sup>20</sup> DECISION OF THE JUDICIAL COMMITTEE ON ADMINISTRATIVE CASES OF THE SUPREME COURT OF THE REPUBLIC OF UZBEKISTAN, № 5-1001-2201/650, 22.07.2022

<sup>21</sup> Code on Administrative Liability of the Republic of Uzbekistan, 01.04.1995, <https://lex.uz/docs/97664> (accessed on 01.04.2024)

<sup>22</sup> Decree of The President of the Republic of Uzbekistan on next reforms to create conditions for stable economic growth by improving business environment and developing private sector, 08.04.2022, № DP-101 <https://lex.uz/uz/docs/6359076> (Accessed on 04.04.2024)

<sup>23</sup> Law of the Republic of Uzbekistan on Competition, 03.07.2023 № LRU-850 <https://lex.uz/ru/docs/6518383> (Accessed on 04.04.2024)

<sup>24</sup> OECD (2022), An Introduction to Competition Law and Policy in Uzbekistan, OECD Publishing, Paris, [www.oecd.org/daf/competition/an-introduction-to-competition-law-and-policy-inuzbekistan.pdf](http://www.oecd.org/daf/competition/an-introduction-to-competition-law-and-policy-inuzbekistan.pdf) p.45

pursued by the administrative body, and the least burdensome for the persons concerned”<sup>25</sup>.

After the referendum for amendments to the Constitution of Uzbekistan in 2023, Art 20 was amended with the principle of proportionality<sup>26</sup>. Thus, the principle is reflected not only in administrative law but, more importantly it became a constitutional principle. Thus, all measures and sanctions of the government must be proportionate.

However, the government bodies and judiciary still do not apply the principles of administrative procedures actively. Even after five years of adopting the Law, cases related to applying the principle of proportionality in ordering remedies to dominant firms cannot be found<sup>27</sup>.

Uzbek scholar on administrative law Nematov Z. mentions that in the course of questioning employees of relevant ministries and agencies in the framework of scientific work, it was revealed that a lot of the above-mentioned principles are not clear to them. In particular, such principles as proportionality, meaningful absorption, protection of trust, and legitimacy of administrative discretion (discretionary power) cause a lot of questions not only on the meaning of these principles but also related to their implementation<sup>28</sup>.

According to the research conducted in 2021 by the Centre of comparative public law<sup>29</sup>, the main problems of administrative, judicial review are incompleteness of application of legislation and wrong interpretation/ application of the law. From 50 administrative proceedings (in all spheres of law), only one mentioned the principle of proportionality, which shows how this principle is unknown in judicial practice.

As a solution to this challenge, the aim of the remedies and fines should be mentioned in the Law of Competition, and the aim shall be reached by applying the proportionality test by the Committee.

The deterrence purpose of the sanctions, as in the EU, can be taken as the model for Uzbek legislation. Although the proportionality test is not applied in a classical way by CJEU, an above-mentioned case study of the EU law demonstrated that the seriousness of the offence, the company’s financial stability, and the need for deterrence could be taken as indications of developing proportionality test for the fines and remedies determination.

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<sup>25</sup> Art 7 of Law of the Republic of Uzbekistan on Administrative procedures, 08.01.2018. № LRU-457 <https://lex.uz/docs/6114000>

<sup>26</sup> The Constitution of the Republic of Uzbekistan, 30.04.2023. <https://lex.uz/docs/6451070> (accessed on 01.04.2024)

<sup>27</sup> The author of the paper sent a request to the Committee and the Supreme Court, but in materials sent in response, there were no cases concerning the principle of proportionality

<sup>28</sup> Nematov, Zh. Problems of applying the principles of administrative procedures in the Republic of Uzbekistan. Bulletin of the Law Faculty, SFEDU. 2019. Vol. 6, No. 3. P. 71–76 (in Russian). DOI: 10.23683/2313-6138-2019-6- 3-11 p.2

<sup>29</sup> Centre of Comparative Public Law (2021). Analytical report "On problems of judicial practice of consideration of administrative disputes and possibilities of its improvement in the doctrinal line of administrative law reform in Uzbekistan". Archive of the Centre, Tashkent.

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