Common Market Law Review **50**: 965–1006, 2013.

PROVING PUBLIC INTEREST: THE GROWING IMPACT OF EVIDENCE IN FREE MOVEMENT CASE LAW

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1. Introduction

When national measures restrict the free movement rights conferred by EU law, Member States have the opportunity to argue that their actions are, nevertheless, justifiable and proportionate. But how do they actually demonstrate this? This article explores the standard that States must satisfy to *prove* their public interest claims successfully. It will be argued that a critical information gap on what the Court of Justice expects defendant States to establish has been narrowed through a more concerted focus on proof in recent case law; but that significant issues still demand further attention. The incomplete articulation or inconsistent application of evidence standards can generate a suspicion of instrumental application, a risk compounded by the fact that, as an element of procedural law, a State's approach to standard of proof issues is profoundly shaped by national practices: and therefore by national differences.[1] The way in which Member State arguments are scrutinized thus raises sharp rule of law concerns, one of the Union's foundational values according to Article 2 TEU, if a clear and systematic approach to the required standard of proof is lacking. The impact of procedural gaps on the substantive development of free movement law is another concern here: this has been touched upon in commentary on the

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1. E.g. on common law and civil law procedures for expert evidence and fact-finding, see Edward, "Evidence, proof, fact-finding and the expert witness", 7th Sir Michael Davies Lecture 2004, Expert Witness Institute, available at <www.law.du.edu/documents/judge-david-edward-oral-history/2004-proof-fact-finding.pdf>. Although addressing the distinct field of evidence in criminal matters, see also the general discussion on different national approaches to proof by the European Commission in its Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, COM(2003)688 final.

European Court of Human Rights,[2] but has not yet been addressed comprehensively for the justification and proportionality framework applied by the Court of Justice.

The argument developed in the article has three linked aspects. First, at the level of procedural law, there has been a basic absence of detailed guidance on the applicable standard of proof in free movement law. A framework can be pieced together by extracting key principles from relevant – and especially more recent – case law, but it is questionable whether this is sufficient to assist national judges and national lawyers with understanding how the Court of Justice works, especially since most practitioners will only very rarely encounter a dispute with an EU free movement angle. Second, it is difficult to establish the role that evidence *should* play in the justification and proportionality stages of free movement analysis. There are complex considerations and sensitivities involved in making these kinds of determinations, raising fundamental questions about whether public interest can be neatly "proven" anyway; and whether courts should – whether for reasons of expertise or deference to more democratic interest-determining processes – make these kinds of decisions at all. However, third, it is clear that much more attention *has* been placed on proof and evidence in recent case law. This in turn raises questions about the value of applying a language of empiricism to public interest claims; and whether there are implicit case law patterns suggesting a latent hierarchy of public interest values, or of different kinds of restrictions, or both.

In section 2, we first establish why more sustained reflection on evidence and proof actually matters, noting the limited extent to which these questions have been pulled together for free movement law to date. Following a brief exposition of the justification and proportionality framework applied by the Court (s. 3), we then outline the sparse standard of proof directions that appear in official documentary guidance such as the Court's Rules of Procedure (s. 4) and the more detailed framework that can be constructed from free movement case law (s. 5). We demonstrate that there has been a distinct shift from negative to positive guidance in recent years. However, as a case study, we then discuss the difficulty of unpicking economic arguments from public interest claims to illustrate a series of remaining proof problems (s. 6). We suggest, overall, that knowing an appropriate standard of proof *has* to be reached is one thing; but knowing *what* it is and *how* to reach it is something else entirely.

2. Erdal, "Burden and standard of proof in proceedings under the European Convention", 26 Supp (2001) (Human rights survey 2001), 68. On evidence rules in the ECHR context, see Reid, *A practitioner's Guide to the European Convention on Human Rights*, 4th Ed. (Sweet & Maxwell, 2012).

2. Why does proof matter?

Most discourse on evidence and proof in EU law concentrates on competition law.[3] More generally, discussion of evidence issues tends to be confined to either a specific type of evidence (especially expert[4] and scientific[5] evidence) or a specialized subject area (especially environmental law,[6] and discrimination and equality issues[7]). Additionally, analysis of evidence and proof questions normally focuses on the scope of judicial review *vis-à-vis* the breadth of the discretion enjoyed by the EU legislature,[8] or on the development of detailed frameworks of guidance for national courts constructed over time through composite case law building blocks (e.g. the Court's profile of the "average consumer"[9]). Notwithstanding the specific contexts in which that work considers questions of proof, however, the general themes that emerge

3. E.g. Joao Melicias, "'Did they do it?' The interplay between the standard of proof and the presumption of innocence in EU cartel investigations", 35 World Comp. (2012), 471; Ehlermann and Marquis (Eds.), *European Competition Law Annual 2009 The evaluation of evidence and its judicial review in competition cases* (Hart Publishing, 2011); Bailey, "Presumptions in EU competition law", 31 ECLR (2010), 362; Gippini-Fournier, "The elusive standard of proof in EU competition cases", 33 World Comp. (2010), 187; Lenaerts "Some thoughts on evidence and procedure in European Community competition law", 30 *Fordham International Law Journal* (2006), 1463; Pera and Auricchio, "Consumer welfare, standard of proof and the objectives of competition policy", 1 *European Competition Journal* (2005), 153.

4. E.g. De la Serre and Sibony, "Expert evidence before the EC Courts", 45 CML Rev. (2008), 941; MacLennan, "Evidence, standard and burden of proof and the use of experts in procedure before the Luxembourg Courts" in Weiss (Ed.), *Improving WTO Dispute Settlement Procedures*: *Issues and Lessons from the Practice of other International Courts and Tribunals* (Cameron May, 2000), 265.

5. For an example of how the Court engages with scientific evidence to establish the veracity of a justification claim in free movement law, see e.g. Case C-67/97, *Criminal proceedings against Bluhme*, [1998] ECR I-8033, paras. 33–38.

6. E.g. McEldowney and McEldowney, "Science and environmental law: Collaboration across the double helix", 13 *Environmental Law Review* (2011), 169; Biondi, Cecchetti, Grassi and Lee (Eds.), *Scientific Evidence in European Environmental Rule-Making: The Case of the Landfill and of End-of-Life Vehicles Directives* (Kluwer, 2003).

7. E.g. Havelkova, "Burden of proof and positive action in the Czech and Slovak constitutional courts: Milestones or millstones in implementing EC equality law?", 32 EL Rev. (2007), 686; Beck, "The state of EC anti-sex discrimination law and the judgment in *Cadman*, or how the legal can become the political", 32 EL Rev. (2007), 549; Barbera, "Not the same? The judicial role in the new Community anti-discrimination law context", 31 *Industrial Law Journal* (ILJ) (2002), 82.

8. E.g. Case C-425/08, *Enviro Tech (Europe) Ltd* v. *Belgian State*, [2009] ECR I-10035, esp. paras. 47 and 62. Again, this issue is more developed in the field of competition law; see e.g. Case C-525/04 P, *Spain* v. *Lenzing*, [2007] ECR I-9947, para 57 (with extensive case law citations).

9. E.g. Case C-446/07, *Severi* v. *Regione Emilia-Romagna*, [2009] ECR I-8041, paras. 61–62; Case C-356/04, *Lidl Belgium GmbH & Co. KG* v. *Etablissementen Franz Colruyt NV*, [2006] ECR I-8501, paras. 77–84.

below for free movement law can also be seen here. For example, in their discussion of expert evidence, de la Serre and Sibony highlight the striking scarcity of rules on the admissibility of evidence in EU law.[10] They also show that the Court of Justice is influenced primarily by what the parties involved in the dispute submit: it does not tend to introduce new arguments or dimensions even though, as will be seen below (s. 4), its Statute provides the Court with the necessary inquisitorial powers should it decide to seek evidence on its own initiative.

More specifically for free movement law, general currents in the literature argue against a shift towards more competition-like analysis of complex economic evidence. But these debates are normally about the scope of *restrictions* on free movement rights – addressing, for example, the inaptness of a *de minimis* threshold for evidence-connected reasons.[11] Work that focuses on justification and proportionality more distinctly deals primarily with questions connected to *burden* of proof.[12] There are examples of more extended analyses of *standard* of proof issues in sectoral legal development reviews in particular.[13] But there is limited discussion of standard of proof in a more cross-cutting sense, or of how the management of evidence and proof traverses procedural law and manifests as part of the material development of free movement law too.

Rules on evidence and proof are, at their core, a matter of procedural law. As a preliminary objective, this article thus seeks to elucidate the applicable rules, drawn from relevant official documents and guidance scattered across the case law. But we also explore how that limited baseline of procedural guidance traverses more substantive questions of EU law. First, there is a basic but fundamental rule of law question. It will be shown in section 5 that the adequacy of the evidence submitted has become an increasingly critical factor

10. De la Serre and Sibony, op. cit. *supra* note 4, 958.

11. For an overview of the approach of the Court to these kinds of threshold questions, see A.G. Bot in Case C-110/05, *Commission* v. *Italy (Trailers)*, [2009] ECR I-519, from para 116 of the Opinion; and see generally, Davies, "The Court's jurisprudence on free movement of goods: Pragmatic presumptions, not philosophical principles", 25 *European Journal of Consumer Law* (2012).

12. E.g. Kilpatrick, "The Court of Justice and labour law in 2010: A new EU discrimination law architecture", 40 ILJ (2011), 280; Mathisen, "Consistency and coherence as conditions for justification of Member State measures restricting free movement", 47 CML Rev. (2010), 1021; Barnard, "Restricting restrictions: Lessons for the EU from the US?", 68 CLJ (2009), 575; Barnard, "Derogations, justifications and the four freedoms: Is State interest really protected?" in Barnard and Odudu (Eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), p. 273.

13. E.g. on the free movement of services, see Hatzopoulos, "The Court's approach to services (2006–2012): From case law to case load?", 50 CML Rev. (2013), 459; and Enchelmaier, "Always at your service (within limits): The ECJ's case law on Article 56 TFEU (2006/11)", 36 EL Rev (2011), 615.

in the assessment and determination of State public interest arguments. But can it be said, in turn, that the relevant standard of proof is sufficiently clear, properly articulated, and coherently applied? Second, we have to recall the role of the Court as a steering judicial institution with respect to both the Member States generally and national courts more specifically. Approaches to evidence differ across national legal traditions, and will thus necessarily shape both how States (and lawyers) frame their public interest arguments and how national courts respond to them. The inevitability of this local rootedness reinforces the need for systematic guidance at the central level, yet this seems to be an overlooked dimension of the Court's conventional emphasis on the uniformity of EU law and associated remedies.

Third, questions of proof bring an additional layer to a crucial constitutional question: whether the line between free movement rights and national policy concerns is correctly drawn – especially since States *can* successfully evidence public interest arguments, but mostly do not. This point is attenuated by a perception among scholars that the balance between internal market uniformity and local regulatory diversity is improperly calibrated at present. National policy choices are often diverse; and they are often entrenched at constitutional level in national legal orders. They can also reflect conscious expressions of national or more local identity, which the EU is required to respect in accordance with Article 4(2) TEU. Free movement rights, on the other hand, are depicted as the beating heart of the integration project, pitching the internal market as the antithesis of the kind of national protectionism that has no place in a frontier-free transnational polity. In free movement case law, a balance must somehow be struck to deliver both the proper functioning of the market and due recognition and protection of national autonomy. In a general sense, "the EU courts have been criticized for following a pro-integration agenda and augmenting the competences of the [Union] at the expense of national sovereignty".[14] More specifically, on the intersection of internal market law and fundamental rights, Weatherill writes that

> "[t]he Court's practice makes plain that a *wider* scope for EU free movement law means a correspondingly *wider* scope for affording individuals the protection of fundamental rights recognized by the EU legal order. It widens the scope of its own adjudicative function too. But it also means a correspondingly *narrower* scope for national rule-making…

14. Tridmias and Gari, "Winners and losers in Luxembourg: A statistical analysis of judicial review before the European Court of Justice and the Court of First Instance: 2001–2005", 35 EL Rev. (2010), 135.

> In this sense a connection may usefully be made with discussion … about the legitimate limits of EU law's review of national regulatory choices".[15]

Finally, the analysis that follows concedes the sheer complexity of public interest arguments, insofar as they represent political, economic, social and ethical choices that must somehow be pushed through the filter of law and legal adjudication. Moreover, when the ECJ reviews State public interest arguments, it engages with a range of very different things, from methodological or technical questions – e.g. evaluating the rationality or consistency of national policy measures – to more obviously substantive questions e.g. the reasonableness or effectiveness of those measure(s). Reflections on evidence and proof thus raise critical questions about the *qualities* that legal decision-making attributes, or strives to attribute, to a framework constructed through empiricism – primarily, questions about relative objectivity and subjectivity; but also about expertise and functional disciplinary boundaries, as well as how and why we might generate (or fail to generate) a wider culture as well as language of proof. Ultimately, in other words, the article questions whether enhancing the relevance of proof in the sphere of public interest claims is a straightforwardly positive step.

3. Justification and proportionality: The basic framework

Article 4(2) TFEU confirms that the internal market is an area where competence is shared between the Union and the Member States. The fact that States can legitimately restrict free movement rights in certain circumstances is one expression of that regulatory balance. In some respects, questions about justification and proportionality are the poor relation of the logically prior issue: whether a national rule or practice constitutes a restriction of free movement rights in the first place. The restriction question is, of course, the critical gateway: if a national measure is not considered to fall within the scope of the Treaty, any discussion of justification and proportionality is irrelevant.

And yet, justification and proportionality mark the point at which most free movement cases are won or lost, because the definition of a restriction on free movement rights is extremely broad. For example, in *CaixaBank*, the Court defined restrictions on freedom of establishment as "[a]ll measures which prohibit, impede or render less attractive the exercise of that freedom".[16]

15. Weatherill, *Cases and Materials on EU Law*, 10th ed. (OUP, 2012), 415–416 (emphasis in original).

16. Case C-442/02, *CaixaBank France* v. *Ministère de l'Économie, des Finances et de l'Industrie*, [2004] ECR I-8961, para 11.

Similar language has been used across free movement law.[17] Discrimination (in law or effect) is not a necessary condition e.g. the Court has also held that Article 45 TFEU catches "national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement".[18] Additionally, as noted above, there is no *de minimis* threshold.[19] It is not difficult to argue, therefore, that a national measure either does or might restrict free movement rights within the meaning of the Treaty – triggering consequential consideration of justification and proportionality in virtually all free movement disputes.

For national measures that are either indirectly discriminatory (i.e. discriminatory in effect) or non-discriminatory, Member States can submit justification arguments on any public interest grounds that they consider to be relevant.[20] The Court has confirmed that such measures may be justified "in order to meet imperative requirements"[21] or by "overriding reasons in the public interest capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty".[22] At one level, the flexibility extended to Member States through the justification framework is extraordinary, since it enables them to raise the most singular, local, or esoteric public interest concerns that might possibly be relevant. However, even if a national measure is considered to be justifiable in principle, a proportionality test then becomes critical since "a restriction on the fundamental freedoms enshrined in the Treaty may be justified only if the relevant measure is *appropriate* to ensuring the attainment of the objective in question and does not go beyond what is *necessary* to attain that objective".[23] The appropriateness of a national measure is often presented as an appraisal of its *suitability.* Assessment of its necessity normally involves consideration of whether alternative measures that can achieve the stated public interest objective but have *less restrictive* effects on intra-EU trade can be conceived, as discussed further below (s. 5.4).

17. E.g. for services, see Case C-76/90, *Säger* v. *Dennemeyer & Co. Ltd*, [1991] ECR I-4221, para 12.

18. Case C-464/02, *Commission* v. *Denmark*, [2005] ECR I-7929, para 45. The absence of discrimination in law or in effect is fatal only for (1) restrictions on the export of goods under Art. 35 TFEU (Case 15/79, *P.B. Groenveld BV* v. *Produktschap voor Vee en Vlees*, [1979] ECR 3409) and (2) selling arrangements for Art. 34 TFEU (Joined Cases C-267 & 268/91, *Criminal Proceedings against Keck and Mithouard*, [1993] ECR I-6097).

19. E.g. Case C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft e.V.* v. *Yves Rocher GmbH*, [1993] ECR 1-2361, para 21.

20. This open-ended justification route was first substantively developed as the doctrine of "mandatory requirements" for Art. 34 TFEU (Case 120/78, *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649, para 8).

21. *Commission* v. *Italy (Trailers)*, cited *supra* note 11, para 59.

22. Case C-384/08, *Attanasio Group Srl* v. *Comune di Carbognano*, [2010] ECR I-2055, para 50.

23. Ibid., para 51 (emphasis added).

Two general framing points should be noted at this stage. First, the function of the Court of Justice is necessarily different in direct actions and indirect actions. To establish an infringement in a direct action against a Member State for failure to fulfil an obligation under EU free movement law (Art. 258 TFEU),[24] the burden of proof falls on the Commission i.e. the Commission must prove that the contested national measure (or the lack of a national measure) restricts free movement rights.[25] At a basic level, the Court outlines the required standard of proof as follows: "[i]t is the Commission's responsibility to place before the Court *all the factual information needed to enable the Court to establish* that the obligation has not been fulfilled and, in so doing, the Commission *may not rely on any presumption*".[26] If a restriction of free movement rights is established, the burden of proof for its justification passes to the Member State.[27] This shift is entirely understandable, since national measures that restrict or potentially restrict free movement are justifiable only as *exceptions* to the rights conferred by EU law. The Court distinguishes the arguments that the Commission can raise to establish the infringement – which are fixed by the scope of the pre-litigation letter of formal notice and reasoned opinion[28] – and the wider range of arguments that a Member State can submit in its defence: "once the subject-matter has been defined, the Member State has the right to raise *all the pleas available to it in order to defend itself*. [T]here is no rule of procedure which requires the Member State concerned to put forward, during the pre-litigation procedure, all the arguments in its defence".[29]

24. For a more general overview of infringement proceedings i.e. beyond the specifics of free movement law, see Prete and Smulders, "The coming of age of infringement proceedings", 47 CML Rev. (2010), 9.

25. Case 96/81, *Commission* v. *Netherlands*, [1982] ECR 1791, para 6; Case C-159/94, *Commission* v. *France*, [1997] ECR I-5815, para 102; Case C-263/99, *Commission* v. *Italy*, [2001] ECR I-4195, para 27; Case C-512/08, *Commission* v. *France*, [2010] ECR I-8833, para 56. The burden of proof can be adjusted by the EU legislator e.g. Regulation 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, O.J. 2008, L 218/21; outwith free movement law, see e.g. Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, O.J. 1998, L 14/6.

26. Case C-400/08, *Commission* v. *Spain (Shopping centres)*, [2011] ECR I-1915, para 58 (emphasis added).

27. If the Commission produces "sufficient evidence" to establish a restriction, "it [is] incumbent on [the Member State] to contest substantively and in detail the information produced and the consequences thereof" (Case 272/86, *Commission* v. *Greece*, [1988] ECR 4875, para 21).

28. Case C-191/95, *Commission* v. *Germany*, [1998] ECR I-5449, para 55; Case C-266/94, *Commission* v. *Spain*, [1995] ECR I-1975, paras. 16–18. See also *Commission* v. *France*, cited *supra* note 25, paras. 101–106.

29. Case C-414/97, *Commission* v. *Spain*, [1999] ECR I-5585, para 19 (emphasis added); however, pleas raised for the first time in the rejoinder will not be admissible because they are

In direct actions, the Court must obviously decide all aspects of the case, including the veracity of relevant justification and proportionality arguments. But for preliminary rulings,

> "[i]t is one of the essential characteristics of the system of judicial cooperation established under Article [267 TFEU] that the Court replies in rather abstract and general terms to a question on the interpretation of [EU] law referred to it, while it is for the referring court to give a ruling in the dispute before it, taking into account the Court's reply".[30]

In broad terms, this means that the ECJ determines the questions of law, but the referring court retains authority over questions of fact. In his Opinion in *Aparape and Tijani*, Advocate General Bot argued that the Court should *not* answer questions "which would require it to depart from the area of law and venture into the area of fact, which is a matter for the national court, *whose freedom in assessing the evidence laid before it cannot and must not be restricted* by the definition of precise criteria".[31] In reality, however, the *extent* of the Court's review tends to vary between being more appropriately hands-off, with reference to the division of functions just outlined, and less appropriately prescriptive i.e. where the Court exceeds the baseline of providing guidance on questions of law and effectively decides the case – including questions of fact – itself.[32]

On one view, more definitive rulings provide a "useful answer"[33] and are likely to appeal to national courts for that reason; they may even be guided by the content and/or degree of information on relevant evidence that has been included in the case file. But not even the acknowledged virtues of procedural economy can displace the fact that the constitutional boundaries written into Article 267 are overridden. Nor do these kinds of responses help to ensure that national courts assume the analysis of cases through an EU legal prism themselves – helping to embed EU law more successfully in national legal

"not based on matters of law or of fact which came to light in the course of the procedure"; Case C-519/03, *Commission* v. *Luxembourg*, [2005] ECR I-3067, para 22.

30. Case C-162/06, *International Mail Spain SL* v. *Administración del Estado and Correos*, [2007] ECR I-9911, para 24.

31. A.G. Bot's Opinion in Case C-529/11, *Alarape and Tijani* v. *Secretary of State for the Home Department*, judgment of 8 May 2013, nyr, para 35 (emphasis added). See similarly, Case C-14/09, *Genc* v. *Land Berlin*, [2010] ECR I-931, para 32: "[t]he national court alone has direct knowledge of the facts giving rise to the dispute and is, consequently, best placed to make the necessary determinations".

32. Even where the role of the national court is expressly acknowledged, the Court can still enter into very detailed discussion of the specifics of proportionality in particular; see e.g. Joined Cases C-570 & 571/07, *Blanco Pérez and Chao Gómez*, [2010] ECR I4629.

33. E.g. Case C-142/05, *Åklagaren* v. *Mickelsson and Roos*, [2009] ECR I-4273, para 41.

orders than seems to have happened to date.[34] For present purposes, the important point is that the vast majority of free movement cases *are* preliminary rulings;[35] it would thus be a significant methodological oversight to focus on questions of evidence and proof in direct actions only.

Second, in a study analysing the Court's judgments in 1984, 1994, and 2004, Barnard established that the case law

> "show[s] a remarkable shift by the Court from considerable deference to Member States' regulatory freedom in 1984 … to a greater willingness to review Member State justifications in 1994 … [to] a more substantial review of the Member States' justifications in 2004, albeit combined with a recognition of a greater of number of justifications".[36]

Case law patterns are best evaluated in the longitudinal view applied in Barnard's study. It is unlikely, for example, that signs of a softening on justification and proportionality in case law on rules regulating the use of goods – in which the Court considered that the contested rules were justified and proportionate, against the views of two Advocates General[37] – will settle more extensively for either Article 34 specifically or free movement law generally. That particular issue is picked up again below (s. 5), but the trajectory observed by Barnard seems the more deeply rooted trend. Critically, she also concluded that "where there is a genuine justification at stake, *which the host state is able to prove and show that the steps taken actually meet the objective*, the Court will accept the derogation/justification … More usually, however, the Court demonstrates its suspicions of the justifications invoked".[38] This finding underscores the growing significance of evidence and proof in free movement law. But has that significance been properly reflected and/or rationalized in the shaping of case law practice?

34. See further, Van Harten, "Proportionality in decentralized action: The Dutch court experience in free movement of services and freedom of establishment cases", 35 LIEI (2008), 217; and Baquero Cruz, "*Francovich* and imperfect law" in Poiares Maduro and Azoulai (Eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010), 418.

35. E.g., in the Court's 2011 Annual Report (available at <curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf>, 76% of the cases classified as free movement proceedings were preliminary rulings (see p. 97 of the Report for the case law table).

36. Barnard, "Derogations ... ", op. cit. *supra* note 12, p. 295.

37. Cf. the decision in *Commission* v. *Italy (Trailers)*, cited *supra* note 11, with the Opinions of A.G. Léger and A.G. Bot.

38. Barnard, "Derogations ... ", op. cit. *supra* note 12, p. 293 (emphasis added).

4. Evidence and proof in EU procedural rules

Lenaerts, Arts and Maselis describe fact-finding as "the outcome of a complex interplay between the parties and between the parties and the Court".[39] But they also point out that "[EU] law does not lay down any specific rules on the use of evidence. *All means of proof are admissible* except for evidence obtained improperly and internal documents, such as an opinion of the legal service of an institution".[40] That statement represents the *Grundnorm* of evidence for EU law. Anderson and Demetriou express it with a more critical edge: "[t]here are no rules of admissibility, and *no effective method of putting such evidence to the test*: the parties and interveners may put in *whatever evidence they please*, and the Court will give it *such weight as it thinks appropriate*".[41] Where EU rights are being claimed in a national court, the Court has stated that "given that there is no legislation at [Union] level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible".[42] Starting from that basis, how can States distil a better understanding of the applicable standard of proof?

Article 24 of the Statute of the Court of Justice provides that the Court "may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal. The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings". Beyond that general statement, more detailed guidance on evidence applies to direct actions only. Article 64 of the Rules of Procedure[43] establishes that the Court may initiate "measures of inquiry" including, according to Article 64(2), requests for information and the production of documents; oral testimony; the commissioning of an expert's report; or an inspection of the place or thing in question. Article 64(3) provides that "[e]vidence may be submitted in rebuttal and previous evidence may be amplified". There are no statistics on the use of measures of inquiry in the Court's annual reports, though it has been noted the General Court makes "avid use" of them – something that makes sense given

39. Lenaerts, Arts and Maselis, *Procedural Law of the European Union*, 2nd Ed. (Sweet & Maxwell, 2006), p. 556.

40. Ibid., 558 (emphasis added); on the latter point, see Case C-445/00, *Commission* v. *Austria* (Order of 23 Oct. 2002), [2002] ECR I-9151, para 12.

41. Anderson and Demetriou, *References to the European Court*, 2nd Ed., (Sweet & Maxwell, 2002), p. 298 (emphasis added).

42. Joined Cases C-310 & 406/98, *Hauptzollamt Neubrandenburg* v. *Leszek Labis and Sagpol SC Transport Miedzynarodowy i Spedycja*, [2000] ECR I-1797, para 29.

43. O.J. 2012, L 265/1.

the nature of the cases within its jurisdiction i.e. "cases requiring a thorough investigation of complex facts".[44]

The defendant in a direct action must submit his defence "within two months after service on him of the application" (Art. 124). A reply from the applicant and rejoinder from the defendant may then be submitted in accordance with time-limits prescribed by the President of the Court (Art. 126), normally within one month.[45] Article 135(2) provides that "a party may supplement his arguments and produce or offer evidence during the oral part of the procedure. The party must, however, give reasons for the delay in producing such further arguments or evidence". Generally, "[e]vidence offered in support by the parties must make out a plausible case for their allegations and so constitute at least *prima facie* evidence".[46] However, the Rules specify only that evidence may be produced or offered "where appropriate"[47] – in other words, there is no explicit *obligation* to submit evidence.

The Court also publishes Notes for the Guidance of Counsel, the current version of which dates from February 2009 i.e. before the current Rules took effect.[48] These Notes are "a working tool intended to enable Counsel to present their written and oral pleadings in the form which the Court of Justice considers most fitting" (p. 3). They reemphasize that "the entire procedure before the Court, in particular the written phase, is governed by the principle whereby new pleas may not be raised in the course of the proceedings, with the sole exception of those based on matters of law and fact which come to light in the course of the procedure" (p. 10). The purpose of the reply and the rejoinder in direct actions is fleshed out (p. 15), but it is also noted that "[w]ith a view to expediting the written procedure, the parties are requested seriously to contemplate the possibility of waiving the right to lodge them". For preliminary rulings, the Notes advise:

44. Lenaerts et al., op. cit. *supra* note 39, 557 (where the authors also note differences between the Rules of Procedure for the Court of Justice and for the General Court respectively for precisely this reason; for the General Court, see the consolidated Rules of Procedure at <curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf>); outlining the different forms of measures of inquiry, see Lenaerts et al., 560–563.

45. Art. 128 outlines whether and when further evidence can be submitted at the reply or rejoinder stages of a direct action. For preliminary rulings, Art. 96 establishes who may submit written observations to the Court, normally within two months (according to Art. 23 of the Statute): primarily, the parties to the national dispute, the Member States and the European Commission.

46. Lenaerts et al., op. cit. *supra* note 39, 557.

47. Arts. 120 and 124 of the Rules of Procedure.

48. Available at <curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf>.

> "It must be emphasized that *none of the parties is entitled to reply in writing to the written observations submitted by the others*. Any response to the written observations of other parties must be made orally at the hearing … *The submission of written observations is strongly recommended since the time allowed for oral argument at the hearing is strictly limited*. However, any party who has not submitted written observations retains the right to present oral argument, in particular his responses to the written arguments, at the hearing, if a hearing is held" (p. 16, emphasis added).

This extract demonstrates that much of the burden of responding to claims made in the course of a preliminary ruling falls on the oral hearing.[49] But it also stresses that the time available for that purpose is strictly limited.[50] The pressures placed on the hearing are compounded by the Court's tendency to reformulate questions sent to it by national courts and tribunals: on which framing of the dispute did the lawyers concentrate their submissions and pleadings (and thus, in turn, their evidence)?[51]

The Court is clearly keen to keep written pleadings brief too. In the "Practice Directions relating to Direct Actions and Appeals" – also published on the Court's website – it is stated that "[i]t is the Court's experience that, save in exceptional circumstances, effective pleadings need not exceed 10 or 15 pages and replies, rejoinders and responses can be limited to 5 to 10 pages".[52] Any additional documents must be submitted as annexes attached to the pleadings.[53] Much of this is driven by the multilingual environment of the

49. This is echoed on p. 23: "In the case of references for a preliminary ruling… the *main purpose* of the hearing is to allow the parties and other interested persons to reply to the arguments put forward by other participants in their written pleadings" (emphasis added).

50. "As a general rule, the period initially allowed to each main party is limited to a maximum of 20 minutes, limited… to a maximum of 15 minutes before Chambers composed of three Judges. The time allowed to interveners is limited to a maximum of 15 minutes… Having regard to the purpose of the hearing, experience shows that the time allowed for oral submissions is generally not fully used by Counsel accustomed to appearing before the Court. A period for oral submissions of less than 20 minutes is usually sufficient" (p. 25).

51. The absence of any reference to the applicant's caring responsibilities in Case C-434/09, *McCarthy* v. *Secretary of State for the Home Department*, [2011] ECR I-3375 is a striking recent example. The questions submitted by the national court concerned the granting of residence permits under Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77; but the Court widened the scope of the case to consider impediments to her movement rights in general – without any reflection on her role as the carer for her disabled son, which would surely affect her capacity to move. See Nic Shuibhne "(Some of) the kids are all right: Comment on *McCarthy* and *Dereci*", 49 CML Rev. (2012), 367–372.

52. Available at <curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/ins_prat2_2009-02-09_16-15-31_502.pdf>; see para 44.

53. Art. 57(4) of the Rules of Procedure.

Court and the translation gymnastics that result in consequence, a theme that threads through the Notes too. Directly addressing "facts and evidence", the Notes state simply that

> "[t]he initial pleadings must indicate all evidence in support of each of the points of fact at issue. However, new evidence may be put forward subsequently (in contrast to the rule excluding new pleas in law), provided that adequate reasons are given to justify the delay. The various forms of evidence upon which parties may rely are set out in Article [64(2)] of the [Rules of Procedure]" (p. 20)

– which is not, as we saw above, the most detailed of provisions to begin with.

This brief overview of the procedural documents published for or by the Court shows that questions relating to evidence and proof are barely addressed. The basic governing principle is openness: in the sense that it is up to the parties to submit any evidence that they consider to be relevant, helpful, or appropriate; and to respond to claims made by other parties involved in the dispute – within the bounds of tightly constrained written and oral submissions. But that tells us very little about how arguments must be proven in more *substantive* terms; for that, the documentary guidance needs to be supplemented with instructions found in case law.

5. Proving public interest: Unravelling the standard

As noted above, free movement discourse normally focuses on the burden of proof i.e. *which party* in a dispute has the responsibility to substantiate (or refute) arguments presented. The *standard* of proof refers to the *level or degree* of evidence that they need to submit for that purpose. In the following paragraphs, we outline four key elements of the required standard of proof for free movement law, drawn from indicators scattered across the case law: (1) the scope of the dispute is framed by the arguments submitted; (2) mere assertions and generalizations are insufficient; (3) the evidence submitted must be "precise"; and (4) for the necessity element of proportionality review, it must be established that less restrictive measures *vis-à-vis* free movement could not sufficiently protect the public interest objective being asserted. Significantly, there has been a marked shift in recent case law towards *positive* expression of and engagement with the standard of proof, which contrasts with the *negative* guidance more prevalent before i.e. it was merely stated that Member States had *no*t reached the required standard without discussion of *how* they might actually do so. We also use this discussion to highlight the problems outlined at the beginning of the article with respect to both the

challenging nature of public interest arguments and the role of evidence – and of courts – in evaluating them.

5.1. *The scope of the discussion is framed by the arguments submitted*

This may seem like an utterly obvious point; but we include it here, first, because States seem still to fail to grasp and act on it. This can be seen most starkly when no justification arguments are submitted at all. Primarily, the responsibility here lies squarely with defendant States – or more specifically, with their lawyers: if they fail to consider whether public interest reasons underpinned a contested measure, then they have no one to blame but themselves. But, second, in preliminary references, there is a potential role for the referring court too. For example, in *Accor*, after a restriction of freedom of establishment was confirmed, the Court stated that "*[n]either the national court* nor the parties which submitted observations have provided evidence to justify that restriction. It must *therefore* be held that Article 49 TFEU precludes legislation such as that at issue".[54] This reference to the national court suggests that the Court considers (expects?) national judges to be actively involved in setting the scope of the dispute *and* steering the submission of relevant evidence. This could be viewed as placing responsibility on the national judge to reflect the parties' representations properly when constructing the preliminary reference; but it may go so far as expecting national judges actively to prompt justification and proportionality angles before sending a reference if the State has not done so itself.

In some instances, national courts expressly include questions about evidence and proof in their references. In *ATRAL*, for example, one of the questions from the Belgian Conseil d'État sought "to ascertain whether a Member State which claims such justification may merely rely on it in the abstract or must specifically demonstrate its genuineness."[55] The Court responded that "justification can only be specifically demonstrated by reference to the circumstances of the case".[56] Similarly, in *Fachverband der Buch- und Medienwirtschaft*, the referring Austrian court queried whether the national statutory obligation to sell books at a fixed price was justified by reference to Article 36 TFEU,

> "on the basis that its purpose is, *very generally*, *described as* the need to have regard to the status of books as cultural assets, to consumers' interest

54. Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique* v. *Accor SA*, judgment of 15 Sept. 2011, nyr, para 63 (emphasis added).

55. Case C-14/02, *ATRAL SA* v. *Belgian State*, [2003] ECR I-4431, para 66 (emphasis added).

56. Ibid., para 67.

> in reasonable prices for books, and to the commercial characteristics of the book trade … *notwithstanding the lack of empirical data which could prove* that a statutory obligation to sell books at the fixed price is a suitable means for achieving the intended purposes".[57]

However, as noted earlier, national procedures on evidence and proof can differ considerably, which will influence how as well as the extent to which national judges engage with these issues when framing their references. If the Court does envisage a positive obligation on national judges in the way suggested by cases like *Accor*, then this should be confirmed more explicitly.

5.2. *Assertions and generalizations will never satisfy the standard of proof*

Neither *merely asserting* the relevance of a public interest objective nor grounding the argument in *generalizations* will be enough to meet the required standard of proof.[58] For example, in *Commission* v. *Portugal (Golden shares)*, the Government's holding of shares in EDP (the principal licensed distributor of electricity in Portugal), which conferred special rights on it as a shareholder, amounted to a restriction on the free movement of capital. It submitted a justification argument about the risk of serious threats to the security of its energy supply and the Court conceded that

> "[t]hat argument is not entirely without merit. However, since the Portuguese Republic has *done no more than raise that ground* relating to the security of the energy supply, without *stating clearly the exact reasons* why it considers that the special rights at issue… would make it possible to prevent such an interference with a fundamental interest of society, a justification based on public security cannot be upheld".[59]

An extensive reflection on generalizations *vis-à-vis* the "relevant evidentiary burden" can be found in *Commission* v. *Poland*, a case about the compatibility of restrictions in national law on the circulation of genetically modified seed

57. Case C-531/07, *Fachverband der Buch- und Medienwirtschaft* v. *LIBRO Handelsgesellschaft mbH*, [2009] ECR I-3717, para 13 (emphasis added). The Court did not address the evidential issue; it concluded in one line that "the objective of the protection of books as cultural objects can be achieved by measures less restrictive for the importer" (para 35).

58. E.g. Case C-333/08, *Commission* v. *France*, [2010] ECR I-757, para 97: "the generalized presumption of a health risk put forward…is not supported by evidence".

59. Case C-543/08, *Commission* v. *Portugal (Golden shares)*, [2010] ECR I-11241, para 87 (emphasis added). See similarly, Case C-112/05, *Commission* v. *Germany*, [2007] ECR I-8995, esp. paras. 74 and 80; references to the State's failure to "explain" its justification arguments sufficiently contrasts notably with the extensive discussion of evidence at the restriction stage.

varieties with obligations under EU legislation.[60] The case concerned Union harmonization measures, so it is not a classic free movement dispute. However, the Court did consider the scope of the primary Treaty provisions. Outlining the conditions relevant to derogation from Article 34 TFEU, it reasoned:

> "[T]he relevant evidentiary burden is *not discharged by statements as general* as those put forward by that Member State… consisting in references to fears regarding the environment and public health and to the strong opposition to GMOs manifested by the Polish people, or even to the fact that the administrative regional assemblies adopted resolutions declaring that the administrative regions are to be kept free of genetically modified cultures and GMOs … [A]s regards the more specifically religious or ethical arguments put forward … for the first time in the defence and rejoinder … it must be held that that Member State has failed to establish that the contested national provisions *were in fact adopted on the basis of such considerations*. [Poland] essentially referred to *a sort of general presumption* … [S]uch considerations are not sufficient to establish that the adoption of the contested national provisions *was in fact inspired by* the ethical and religious considerations described in the defence and the rejoinder, *especially since* [Poland] had, in the pre-litigation procedure, based its defence mainly on the shortcomings allegedly affecting [the relevant Directive]."[61]

The positive expression of the Court's stance here is that there must be an *established* causal link between the justification submitted and the contested national measure. The Court considers that it is "required to examine a justification… only in so far as it is *common ground or properly established* that the national legislation concerned *does in fact pursue the purposes* that the defendant Member State attributes to it".[62] The reference to "common ground" relates to claims that are not disputed in the course of the proceedings.[63] It is also interesting to note a possible adjustment to a point noted above (s. 3): although a Member State *can* raise defence arguments that were not part of the pre-litigation procedure, does a stronger evidentiary burden attach to such late-stage assertions ("*especially since*")?

If justification arguments are properly demonstrated, and thus accepted in principle, the defendant State must also evidence the proportionality of its actions i.e. it must show that the national measure is both appropriate and

60. Case C-165/08, *Commission* v. *Poland (Genetically modified organisms)*, [2009] ECR I-6843.

61. Ibid., paras. 54–59 (emphasis added).

62. Ibid., para 53 (emphasis added).

63. E.g. Case C-320/03, *Commission* v. *Austria*, [2005] ECR I-9871, para 71; Case C-141/07, *Commission* v. *Germany (Pharmacies)*, [2008] ECR I-6935, para 47.

necessary to attain the public interest pursued.[64] Similarly, where a State does no more than *assert* that the measure is proportionate, the Court concludes that the evidence required to substantiate that position is lacking. In this context, the Court has stated that the burden of proof "cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions".[65] We consider, however, that this guidance connects more appropriately to the *standard* of proof – and, in fact, the Court has since recast the test in that language.[66] These questions are picked up below (5.4) in the discussion on less restrictive measures.

5.3. *The evidence submitted to substantiate argument(s) must be "precise"*

An established but nonspecific requirement that "the reasons which may be invoked by a Member State by way of justification must be accompanied by *an analysis of* the appropriateness and proportionality of the restrictive measure"[67] has been amplified in recent case law through the addition of an obligation to provide "*precise evidence* enabling [the State's] arguments *to be substantiated*".[68] The Court has used different adjectives – e.g. "specific evidence";[69] "appropriate evidence";[70] "conclusive evidence"[71] – but the common thread is that such evidence must *substantiate* the arguments. Where scientific data is relied upon, it must be "the results of international scientific research" and the "latest scientific data available at the date of the adoption of [the national] decision".[72]

64. *Commission* v. *Spain (Shopping centres)*, cited *supra* note 26, para 75; *Commission* v. *Italy (Trailers)*, cited *supra* note 11, para 66.

65. *Commission* v. *Italy (Trailers)*, ibid., para 66. The Court developed this standard by analogy with competition law; see e.g. Case C-157/94, *Commission* v. *Netherlands*, [1997] ECR I-5699, para 58 (cited in *Trailers*).

66. Case C-542/09, *Commission* v. *Netherlands (Access to education)*, judgment of 14 June 2012, nyr, para 85.

67. Case C-42/02, *Lindman*, [2003] ECR I-13519, para 25 (emphasis added).

68. Case C-254/05, *Commission* v. *Belgium*, [2007] ECR I-4269, para 36 (emphasis added); see similarly e.g. Case C-161/07, *Commission* v. *Austria*, [2008] ECR I-10671, paras. 36–37.

69. Case C-147/03, *Commission* v. *Austria (Access to universities*), [2005] ECR I-5969, para 63.

70. Case C-319/06, *Commission* v. *Luxembourg*, [2008] ECR I-4323, para 51.

71. *Commission* v. *Spain (Shopping centres)*, cited *supra* note 26, para 62.

72. Case C-95/01, *Criminal proceedings against Greenham and Abel*, [2004] ECR I-1333, paras. 40 and 42, in the context of an alleged risk to public health. The Court also confirmed that "an assessment of the risk could reveal that scientific uncertainty persists as regards the existence or extent of real risks to human health. In such circumstances…a Member State may, in accordance with the precautionary principle, take protective measures without having to wait

More generally, however, how precise/specific/conclusive does the evidence submitted actually have to be; in other words, what are the criteria of evaluation? Focusing on proportionality review, Advocate General Sharpston has interpreted the required standard as meaning that a State "bears the onus of establishing a prima facie case".[73] She then outlined the Commission's responsibilities in direct actions, which are "to rebut the Member State's analysis by suggesting other less restrictive measures. The Commission *cannot merely propose* an alternative measure. It must *also explain why and how* that measure is appropriate to achieve the stated objective(s) and is, above all, less restrictive… Without such an explanation, the defendant Member State cannot know on what its rebuttal should focus".[74]

Despite the fact that States are (very) frequently told that they have asserted a public interest objective but not actually proven it, it is astonishing to observe how regularly the Court still makes this finding. The judgment in *Commission* v. *Austria (Access to universities)* is one of the most striking and well-known examples in recent years: in fact, the shift from negative findings to more positive engagement with the required standard of proof in the case law can be traced to this significant turning point. To defend differential (more onerous) university entry requirements for holders of qualifications from other Member States, Austria raised arguments about preventing abuse of EU law and obligations under international conventions; however, in particular, it "invoke[d]… safeguarding of the homogeneity of the Austrian education system".[75] The Court responded initially that "excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade"[76] and that "the risks alleged by the Republic of Austria are not exclusive to its higher or university education system but have been and are suffered by other Member States".[77] Then, recalling the obligation on States to provide specific evidence supporting its arguments, the Court continued:

until the existence and gravity of those risks are fully demonstrated…However, the risk assessment cannot be based on purely hypothetical considerations" (para 43).

73. A.G. Sharpston in *Commission* v. *Netherlands (Access to education)*, cited *supra* note 66, para 68 of the Opinion, who had remarked that "I should like to comment on the principles governing the burden of proof and the standard of proof. I do so because neither party in this case has applied those principles properly" (para 67).

74. Ibid., para 70 (emphasis added); less restrictive measures are addressed in subsection (d) below.

75. *Commission* v. *Austria (Access to universities)*, cited *supra* note 69, para 50.

76. Ibid., para 61.

77. Ibid., para 62.

> "In the present case, the Republic of Austria *simply maintained at the hearing* that the number of students registering for courses in medicine could be five times the number of available places, which would pose a risk to the financial equilibrium of the Austrian higher education system and, consequently, to its very existence. It must be pointed out that *no estimates relating to other courses have been submitted to the Court* and that the Republic of Austria has *conceded that it does not have any figures* in that connection. Moreover, the Austrian authorities have accepted that the national legislation in question is *essentially preventive in nature*. Consequently… the Republic of Austria has failed to demonstrate that, in the absence of [the contested measure], the existence of the Austrian education system in general and the safeguarding of the homogeneity of higher education in particular would be jeopardized."[78]

Advocate General Jacobs was similarly "not convinced" by Austria's assertions, but he did not raise the proof angle and had engaged with the merits of the arguments submitted over more than 20 paragraphs in his Opinion.

Clearly, a basic point made above applies equally here: States have to take responsibility for making better arguments. At that level, lack of effort on the part of defendant States is purely their own fault. But it has to be acknowledged too that the longstanding absence of more detailed positive guidance, compounded by differing national approaches to evidence and proof, brings another perspective to the problem. It is easier to discern from the case law what kind of "evidence" will *not* meet the required standard of proof than to appreciate what does. In other words, we found abundant examples of the *language* of proof before *Commission* v. *Austria*, but relatively little elaboration of its *substance*. It was often genuinely difficult to decipher the basis for the conclusions drawn by the Court; but it is the Court's judgments that State lawyers will depend on and draw from to prepare their cases, again in the absence of more detailed procedural rules, as shown above (s 4).

In seeking to understand what "precise" evidence means more clearly, consider the following extract from *Gourmet International Products*, a case about Swedish advertising restrictions for alcoholic beverages:

> *"Even without its being necessary to carry out a precise analysis of the facts* characteristic of the Swedish situation, which it is for the national court to do, *the Court is able to conclude that*, in the case of products like alcoholic beverages … a prohibition of all advertising directed at consumers … is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar. *The information*

78. Ibid., paras. 64–66 (emphasis added).

> *provided* by the Consumer Ombudsman and the Swedish Government concerning the relative increase in Sweden in the consumption of wine and whisky, which are mainly imported, in comparison with other products such as vodka, which is mainly of Swedish origin, *does not alter that conclusion*. First, it cannot be precluded that, in the absence of the legislation at issue in the main proceedings, the change indicated would have been greater; second, that information takes into account only some alcoholic beverages and ignores, in particular, beer consumption."[79]

How did the Court assess the precision of the "information provided"? The second reason supporting the fact that the evidence did not "alter the conclusion" made by the Court seems to be empirically based; but how could the first reason (or speculation) be *disproved*? At one level, discussions and analyses of evidence are necessarily case-specific, meaning that more general rules or principles cannot easily be extracted and then transmitted to different circumstances – different in the sense of the kind of national measure involved, or the public interest objective involved, or the kind of evidence that might be relevant in the first place. The purpose of this research was not to second-guess or call into question the substantive conclusions reached by the Court in any given case – something that is, in any event, impossible to do without sight of the case files.

However, what it *is* possible to evaluate is the existence of a broader *culture* of proof, which would be constructed by extensive and transparent flagging of and engagement with the evidence submitted in each case. For example, the Court frequently points to particular pieces of evidence (e.g. expert studies or reports) to rationalize its evaluation of justification arguments,[80] but it does not contextualize that evidence in terms of the overall quantum of material submitted or by providing information about the author (or the institutional purpose or perspectives of the author). How can we gauge why particular weight has been attached to one study that seems to be central to and not just illustrative of the Court's reasoning when it rejects justification arguments?[81] How do we know whether – and when – the Court relies on expert evidence in shaping its conclusions or applies a more intuitive rationale: essentially, common sense?

It might have been assumed that reviewing reports for the hearing in similar past cases was a useful exercise for litigants in this respect. From that

79. Case C-405/98, *Konsumentombudsmannen (KO)* v. *Gourmet International Products AB (GIP)*, [2001] ECR I-1795, paras. 21–22 (emphasis added).

80. E.g. Case C-463/01, *Commission* v. *Germany*, [2004] ECR I-11705, para 60; Case 90/86, *Criminal proceedings against Zoni*, [1988] ECR 4285, para 27.

81. Or indeed, accepts them: e.g. Case C-137/09, *Josemans* v. *Burgemeester van Maastricht*, [2010] ECR I-13019, paras. 80–81.

perspective, the abolition of these reports in 2012 is to be regretted. But there was hardly any discussion of evidence in the reports for the hearing that we reviewed for the purposes of this study (e.g. to compare the report for *Commission* v. *Austria* with the report for *Bressol*, a case returned to below); in sharp contrast to the more detailed and discursive reports still prepared for EFTA Court cases – which are also published online.[82] The relative caseloads of and translation demands on the two Courts must of course be remembered; but logistics did not have to affect the *content* of the reports and the way in which evidence is/was discussed therein.

These points are well illustrated by comparing the Court's approach in *Commission* v. *Austria* with its subsequent preliminary ruling on the Belgian university access restrictions challenged in *Bressol*.[83] The contested rules restricted access to nine medical or paramedical programmes, on the basis of concerns about teaching quality and the sustainability of the affected region's health infrastructure owing to a significant increase in student numbers from other States (especially France). Students who met codified residence criteria had open access to the programmes; all other students were subject to a 30% threshold rule, the places for which were assigned through the drawing of lots. The Court did not hesitate to find that the rules contravened EU discrimination law (applying Arts. 18 and 21 TFEU). But the extensive discussion on justification that then followed was markedly different from the terse judgment in *Commission* v. *Austria*.

It was first stated, without really explaining why, that while

> "it cannot be excluded … that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students … the matters put forward as justification in that regard are the same as those linked to the protection of public health, since all the courses concerned fall within that field. *They must, therefore, be examined only in the light of the justifications relating to the safeguarding of public health*".[84]

It is difficult to know whether this was intended as an equating of public interest objectives, or an instrumentally sympathetic steering of the case

82. E.g. on the free movement of goods, see Case E-16/10, *Philip Morris Norway AS* v. *Norwegian State, represented by the Ministry of Health and Care Services*, [2011] EFTA Court Report 330; the report for the hearing – in which there are substantive references to evidence and the arguments submitted as well as responded to in that respect – is available at <www.eftacourt.int/uploads/tx_nvcases/16_10_RH_Rev_EN.pdf>.

83. Case C-73/08, *Bressol and Others and Céline Chaverot and Others* v. *Gouvernement de la Communauté française*, [2010] ECR I-2735.

84. Ibid., paras. 53–54 (emphasis added).

towards focusing on public health more specifically. The latter is perhaps supported by the Court's citation of *Apothekerkammer des Saarlandes*, in which it made the following statement:

> "When assessing whether that obligation has been complied with, account must be taken of the fact that *the health and life of humans rank foremost among the assets and interests protected by the Treaty* and that it is for the Member States to determine the level of protection *which they wish to afford* to public health *and the way in which* that level is to be achieved. Since the level *may vary from one Member State to another*, Member States *must be allowed discretion*."[85]

This principle can be traced through an established line of public health case law; but as will become even more apparent through the discussion on proportionality below, the affirmation of State discretion here is not something that is protected *uniformly* across the case law. For example, the Court applied more standard reasoning in *Albore* addressing an area of potentially acute national concern:

> "A mere reference to the requirements of *defence of the national territory* cannot suffice to justify discrimination on grounds of nationality… The position would be different *only if it were demonstrated*, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to *real, specific and serious risks which could not be countered by less restrictive procedures*."[86]

The measures challenged in *Albore* were directly discriminatory; and it could be argued that the threshold of justification is rightly higher in such cases – a point underscored by the fact that States are (usually) confined to express Treaty derogations in such cases. But less severe restrictions are considered to be just as problematic in other cases.[87] Also, the use of proportionality as a policy tool to effect a differentiated public interest agenda is clearly apparent in certain sectors of free movement law e.g. to mediate national sensitivities

85. Case C-171/07, *Apothekerkammer des Saarlandes and others*, [2009] ECR I-4171, para 19 (emphasis added).

86. Case C-423/98, *Albore*, [2000] ECR I-5965, paras. 21–22 (emphasis added).

87. See e.g. the Opinion of A.G. Trstenjak in Case C-319/0, *Commission* v. *Germany*, [2007] ECR I-9811, para 79: "[a]gainst the background of *the high justification requirements* … imposed on the Member States, the mere blanket reference by the German Government to possible health risks…cannot be sufficient to justify *such a drastic measure as the refusal of market access*" (emphasis added).

about challenges to gambling restrictions, where a more procedural than substantive proportionality review tends to be applied.[88]

In *Josemans*, the Court conveyed a similar level of trust in the appraisal of the defendant State at the stage of proportionality review; and it is again difficult to avoid concluding that the sensitive subject matter played a part in that deference – a theme already identified above. Addressing whether it was possible to restrict access to coffee-shops in Maastricht in a manner that was less restrictive of cross-border services than the contested residence requirement, the Court noted that

> "according to the case-file … various measures relating to combating drug tourism and the accompanying public nuisance have been implemented … *According to the information provided by the Burgemeester van Maastricht and the Netherlands Government*, those measures have nevertheless proved to be insufficient and ineffective in the light of the objective pursued".[89]

The Court concluded:

> "Member States cannot be denied the possibility of pursuing the objective of combating drug tourism and the accompanying public nuisance by the introduction of general rules which are easily managed and supervised by the national authorities … *[N]othing in the case-file gives grounds to assume* that the objective pursued could be achieved to the extent envisaged by the rules at issue … by granting non-residents access to coffee-shops whilst refusing to sell them cannabis. In such circumstances, *it must be stated that rules such as those at issue in the main proceedings are suitable f*or attaining the objective of combating drug tourism and the accompanying public nuisance and *do not go beyond what is necessary* in order to attain it."[90]

If the Court does conceive of a sliding scale of justification grounds, mapped onto a similarly gradated proportionality scale – if some public interests are more important than others, in other words – it needs to say so and to articulate

88. See e.g. Case C-275/92, *Her Majesty's Customs and Excise* v. *Schindler*, [1994] ECR I-1039, Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd* v. *Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, [2009] ECR I-7633, and Case C-258/08, *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd* v. *Stichting de Nationale Sporttotalisator*, [2010] ECR I-4757; and, for analysis, Planzer, "The ECJ on gambling addiction: Absence of an evidence-oriented approach", 1 *European Journal of Risk Regulation* (2010), 289 and Van den Bogaert and Cuyvers, "Money for nothing: The case law of the EU Court of Justice on the regulation of gambling", 48 CML Rev. (2011), 1206–1210. See generally, Mathisen, op. cit. *supra* note 12, 1021.

89. *Josemans*, cited *supra* note 81, para 80 (emphasis added).

90. Ibid., paras. 82–83 (emphasis added).

the correspondingly variegated adjudicative framework more explicitly. What other "assets and interests" sit alongside public health at the apex of public concern? Do any interests rank even higher? These questions should be reflected on by the Court in a much more systematic way than we have seen to date.[91]

In any event, in *Bressol,* the Court confirmed that "a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of protection of health".[92] It was then emphasized that the determination of proportionality was a matter for the national court, but that the Court of Justice "may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment".[93] The Court then engaged in substantive discussion of the Belgian rules *vis-à-vis* public health as a policy objective, outlining precise "guidance" for the national court about what it should consider when assessing the State's interest in ensuring the quality and sustainability of training for future health professionals, including the specific challenges of undertaking an essentially prospective analysis.[94] It restated the proof threshold of showing "that such risks actually exist" and the standard guidance about precise evidence to substantiate the arguments – but here, critically, in a much more developed form than we saw before: "[s]uch an *objective*, *detailed* analysis, *supported by figures*, must be capable of demonstrating, *with solid and consistent data*, that there are *genuine risks* to public health".[95] The Court then outlined even more precisely what the national court had to examine regarding relevant student numbers:

> "[T]hat analysis *cannot just refer* to the figures concerning one or other group of students and infer, in particular, that at the end of their studies all the non-resident students will establish themselves in the State in which they resided before commencing their studies… [The] analysis must take into account the impact of the group of non-resident students on the

91. For an argument about protecting a specific category of public interest grounds in a distinctive way, see e.g. F. de Witte, "Sex, drugs and EU law: The recognition of moral, ethical and cultural diversity in EU law", 50 CML Rev. (2013), forthcoming.

92. *Bressol*, cited *supra* note 83, para 62, drawing directly from more proof-primed case law on gender equality (Case C-187/00, *Kutz-Bauer* v. *Freie und Hansestadt Hamburg*, [2003] ECR I-2741, para 52; and Joined Cases C-4 & 5/02, *Schönheit and Becker*, [2003] ECR I-12575, para 83).

93. *Bressol*, cited *supra* note 83, para 65.

94. Ibid., paras. 66–70.

95. Ibid., para 71 (emphasis added). The express requirement of empirical data here seems to contradict softer guidance found elsewhere in the case law for the analysis of proportionality, returned to below.

> pursuit of the objective of ensuring the availability of professionals within the French Community [and] the possibility that resident students may decide to exercise their profession in a State other than the Kingdom of Belgium at the end of their studies. Equally, it must take into account the extent to which persons who have not studied within the French Community may establish themselves there later in order to exercise one of those professions."[96]

The Court also commented on the burden of proof, noting that "[i]t is for the competent authorities to provide the referring court with an analysis which satisfies those requirements".[97]

The Court in *Bressol* provided more than "guidance" for the referring court: it shared comprehensive standard of proof tips with a defendant State. On one view, Belgium's good fortune was to have its university access restrictions assessed through the preliminary rulings procedure rather than in a new direct action – the Commission had already (successfully) challenged Belgian university access restrictions through the infringement route.[98] In that case, the Court noted that Belgium did "not put forward any argument capable of justifying" the "criterion of differentiation" that disadvantaged non-Belgian nationals and confirmed that Belgium had failed to fulfil its obligations under EU law.[99] In *Bressol*, Advocate General Sharpston did not provide the Belgian authorities with an evidentiary second chance, concluding directly that neither the public health nor education policy arguments justified the restrictions placed on the free movement of students and not giving any indications about the nature of the evidence needed to arrive at that finding. Her decisiveness renews questions about the appropriate division of functions between the Court and national courts. Relatedly, it is worth noting that the recurring and constitutionally delicate irony here is that the Court's most extensive discussion of "precise" evidence in the case law up to that point occurred not in a direct action, but in the *Bressol* preliminary ruling. The broader political shading of the Commission's decision not to pursue a second set of infringement proceedings against Belgium before the indirect challenge materialized through *Bressol* – a decision attributed to ensuring smooth passage for the Lisbon Treaty and the stinging public criticism of the Court post *Commission* v. *Austria*[100] – also raises even more difficult questions

96. Ibid., para 73.

97. Ibid., para 74. The Court went on to provide similarly detailed guidance about how the referring court should determine proportionality if it was satisfied that genuine risks to the protection of public health were established.

98. Case C-65/03, *Commission* v. *Belgium*, [2004] ECR I-6427.

99. Ibid., paras. 30–31.

100. See Garben, case comment on *Bressol*, 47 CML Rev. (2010), 1496–1497.

about instrumental use of the standard of proof, something that is wholly objectionable on rule of law grounds and is returned to below.

5.4. *Proportionality and less restrictive measures*

In order to *prove* the proportionality of national measures taken for legitimate public interest reasons, Member States are required "not only to establish that the… measure at issue is proportionate to the objective pursued but also to indicate the evidence capable of substantiating that conclusion".[101] For direct actions, this is a decision that the Court must make itself; but for preliminary rulings, "it is for the referring court to assess whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the stated objective".[102] The Court normally completes that sentence as follows: "that is, whether it could be attained by less restrictive measures". The yardstick of the less restrictive measure is well entrenched in the Court's proportionality framework. What we observed, however, is that guidance about how actually to *discover* or *assess* it varies. For preliminary rulings, the fact that national judges will probably have to undertake a different *character* of proportionality review under EU law than they do in national law underlines the need for clarity and consistency on this point:[103] against the standard grain, national courts and tribunals are consistently directed towards displacing the proportionality assessments made by national legislatures to resolve free movement disputes. More generally, the way in which proportionality analysis blurs the lines between judicial *review* of political choices and judicially *making* fresh or substituted political choices through that process – a distinction that is more sharply preserved in cases assessing *Union* legislative measures[104] – further increases the potential for tension.

Substantive criteria on less restrictive measures can be distilled from patterns that emerge in the case law, e.g. information and labelling rules are

101. *Commission* v. *Netherlands (Access to education)*, cited *supra* note 66, para 82.

102. *Bressol*, cited *supra* note 83, para 77.

103. The judgments in *The Queen on the Application of Sinclair Collis Limited* v. *The Secretary of State for Health* (High Court of Justice Court of Appeal (Civil Division) [2011] EWCA Civ 437) provide apt illustration of the degree to which national judges are relatively more open or closed to both the language and substantive assessments of EU-based proportionality review; it is interesting to observe how the framing and application of proportionality (for a health-grounded restriction of Art. 34 TFEU) frequently returns to national touchstones.

104. See A.G. Kokott in Case C-558/07, *The Queen, on the application of S.P.C.M. SA, C.H. Erbslöh KG, Lake Chemicals and Minerals Ltd and Hercules Inc.* v. *Secretary of State for the Environment, Food and Rural Affairs*, [2009] ECR I-5783, paras. 72–77 of the Opinion.

more salvageable than product requirements;[105] and preventive measures are more salvageable than reparative ones.[106] It is part of the responsibility placed on States to respond to examples of less restrictive measures advanced by the Commission during infringement proceedings. For example, reviewing Portuguese legislation that prohibited fixing tinted film to motor vehicle windows, the Court reiterated that the burden of proof falls first on the Commission; but that "it is incumbent on the defendant Member State to *contest substantively and in detail* the information produced and the consequences thereof".[107] It then found the national measure to be "excessive":

> "[a]s stated by the Commission at the hearing, there is a wide range of tinted film, from transparent film to film which is almost opaque. That information, *which was not challenged by the Portuguese Republic*, means that at least some films, namely those with a sufficient degree of transparency, permit the desired visual inspection of the interior of motor vehicles".[108]

Any acknowledgement by a State of an alternative, less restrictive route to achieving the public interest objective will be fatal to its defence.[109]

But it is harder to get a more precise sense of what States need to demonstrate or how far their diagnoses have to reach. The key concern in this context is the extent to which there is variation in the Court's guidance. As noted earlier, "the burden of proof cannot be so extensive as to require the Member State to prove, positively, that *no other conceivable measure* could enable that objective to be attained under the same conditions".[110] However, in *Stoß and others*, in the context of restrictions on gambling, the Court seemed nonetheless to project a demanding standard. It first noted that "the referring courts are in doubt as to whether, in order to justify restrictive measures… the national authorities *must be able to produce a study* supporting the proportionality of those measures which was prior to their adoption".[111] The Court considered that

105. E.g. Case C-108/09, *Ker-Optika bt* v. *ÀNTSZ Dél-dunántúli Regionális Intézete*, [2010] ECR I-12213, paras. 65–75.

106. E.g. Joined Cases C-515, 527 to 540/99, *Reisch and others*, [2002] ECR I-2157, para 36.

107. Case C-265/06, *Commission* v. *Portugal (Tinted film)*, [2008] ECR I-2245, para 35 (emphasis added).

108. Ibid., para 36 (emphasis added).

109. E.g. Case C-443/10, *Bonnarde* v. *Agence de Services et de Paiement*, judgment of 6 Oct. 2011, nyr, paras. 36–38.

110. *Commission* v. *Italy (Trailers)*, cited *supra* note 11, para 66 (emphasis added).

111. Joined Cases C-316, 358-360, 409 & 410/07, *Stoß and others*, [2010] ECR I-8069, para 70 (emphasis added).

> "if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, *it is under a duty* to supply the court called upon to rule on that question with *all the evidence of such a kind* as to enable the latter to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality".[112]

However, it was conceded that "it cannot… be inferred … that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies those requirements, *solely on the ground that that Member State is not able to produce studies* serving as the basis for [its] adoption".[113]

At a very general level, the Court stipulates that "[i]f a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts [free movement]".[114] Sometimes, it gauges the proportionality of national measures by engaging in a comparative review of solutions adopted in other States.[115] But it has also confirmed that "the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate".[116] In another example of variation, the Court normally uses the requirements of EU law to mark the parameters of proportionality assessment.[117] But, in other cases, it protects a space for State difference by referring to "the circumstances of law and of fact which characterise the situation in the Member State concerned"[118] – with the potential for national discretion augmented when the Court accepts that "the decision as to whether the prohibition … at issue in the main proceedings is proportionate … calls for an analysis of the circumstances of law and of fact which characterise the situation in the

112. Ibid., para 71 (emphasis added), referring to Case C-227/06, *Commission* v. *Belgium*, [2008] ECR I-46, paras. 62 and 63.

113. *Stoß and others*, cited *supra* note 111, para 72 (emphasis added).

114. Case 261/81, *Walter Rau Lebensmittelwerke* v. *De Smedt PVBA*, [1982] ECR 3961, para 12.

115. E.g. *Commission* v. *France*, cited *supra* note 58, para 105.

116. *Commission* v. *Germany (Pharmacies)*, cited *supra* note 63, para 51; Case C-36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609, para 108.

117. E.g. Case C-108/96, *Criminal proceedings against Mac Quen and others*, [2001] ECR I-837, para 37: "[i]t is for the national court to assess, *in the light of the Treaty requirements* relating to freedom of establishment and the demands of legal certainty and the protection of public health, whether the interpretation of domestic law adopted by the competent national authorities in that regard remains a valid basis for the prosecutions brought in the case in the main proceedings" (emphasis added).

118. Case C-434/04, *Criminal proceedings against Ahokainen and Leppik*, [2006] ECR I-9171, para 40.

Member State concerned, *which the national court is in a better position than the Court of Justice to carry out*".[119]

In another access to education case, *Commission* v. *Netherlands*, the defendant State – seeking to rationalize against the free movement of workers a residence requirement attached to eligibility for portable funding of higher education at institutions outside the Netherlands (a student must, among other conditions, have lawfully resided in the Netherlands for at least three of the six years preceding enrolment) –

> "contended that no other rule would *protect as efficiently* the interests which the [contested measure] is intended to protect. A requirement to the effect that the student must know the national language or have a diploma from a Netherlands school would not be an effective means of promoting the objective pursued… [B]esides the fact that such requirements would give rise to discrimination on grounds of nationality, those criteria would make sense only if they related to studies in the Netherlands".[120]

But the Court responded that "it is not sufficient for that Member State *simply to refer to two alternative measures which, in its opinion*, *are even more discriminatory* than the requirement laid down".[121] Then, noting that "[a]dmittedly, the Court has ruled that the standard of proof cannot be so high as to require the Member State to prove, positively, that no other conceivable measure could enable the objective pursued to be attained under the same conditions", the Court affirmed that the Netherlands "would have needed at least to show why it opted for the 'three out of six years' rule, *to the exclusion of all other representative elements*".[122] Those two statements seem to be less far apart than might have been intended in terms of the *standard* of proof being set down.

Recent case law on rules regulating the use of goods exemplifies the problem of variation. In the *Trailers* case – reviewing a prohibition on the towing of trailers by mopeds – Advocate General Bot found it "difficult to accept that the contested measure could meet the requirement of proportionality".[123] Among other arguments, he suggested examples of less restrictive regulatory options to achieve the objective of road safety:

119. *Gourmet International Products*, cited *supra* note 79, para 33 (emphasis added).

120. *Commission* v. *Netherlands (Access to education)*, cited *supra* note 66, para 83 (emphasis added).

121. Ibid., para 84 (emphasis added).

122. Ibid., paras. 85–86 (emphasis added).

123. A.G. Bot in *Commission* v. *Italy (Trailers)*, cited *supra* note 11, para 167 of the Opinion.

> "It would be appropriate, for example, to define which itineraries in Italy are considered to be fraught with risks – such as mountain crossings, motorways or even particularly heavily used public highways – for the purpose of laying down sectoral prohibitions or limitations. That alternative would reduce the risks arising from the use of trailers and would certainly be less restrictive of trade… [I]t was *incumbent on the Italian authorities to examine closely*, before adopting *as radical a measure as a general and absolute prohibition*, the possibility of resorting to measures less restrictive of freedom of movement and not to reject them unless it was clearly established that they were not consonant with the aim pursued. However, *it does not appear from the case-file* that the national authorities carried out any such examination."[124]

By contrast, the Court first stated, in one line, that "the prohibition in question *is appropriate* for the purpose of ensuring road safety".[125] Then, turning to necessity, the Court was remarkably hands-off:

> "[I]n the field of road safety a Member State may determine the degree of protection *which it wishes to apply* in regard to such safety *and the way in which that degree of protection is to be achieved*. Since that degree of protection may vary from one Member State to the other, *Member States must be allowed a margin of appreciation ... [T]he Italian Republic contends, without being contradicted on this point by the Commission*, that the circulation of a combination composed of a motorcycle and a trailer is a danger to road safety … *Although it is possible*, in the present case, to envisage that *measures other than the prohibition laid down* … could guarantee a certain level of road safety … such as those mentioned in point 170 of the Advocate General's Opinion, the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of *general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities*."[126]

This is an exceptionally benevolent proportionality review – and in a direct action, where the Court had full decisive powers. It uses familiar pieces of the proof puzzle here but connects them to evince a "margin of appreciation" doctrine rarely seen in proportionality analysis more generally. Linking back to the earlier discussion about differentiated review, an argument that the Court was kinder here because the measure was non-discriminatory does not fit with Advocate General Bot's strong condemnation of a "radical" complete

124. Ibid., paras. 170–171 (emphasis added); A.G. Léger has reached the same conclusion in the first Opinion on the case.

125. *Commission* v. *Italy (Trailers)*, cited *supra* note 11, para 64 (emphasis added).

126. Ibid., paras. 65–67 (emphasis added).

ban. Introducing the bigger picture angle, it is again difficult to avoid concluding that the usual standard of proof was side-lined for more instrumental than evidentiary reasons here, given that the judgment effected a significant stretching of *restrictions* of Article 34 TFEU. But the Court's reluctance to engage with the feasibility of less restrictive measures might have left a more general, and dangerous, imprint; a margin of appreciation doctrine is an attractive framework for national judges to adopt, noting once again that national judges (in lower courts especially) will not lightly displace national legislative measures.[127] Did the Court really intend to effect such a significant case law shift in reviewing *exceptions* to free movement rights?

It cannot simply be disregarded that the Court's praise for the "general and simple" nature of the rules effecting the prohibition in *Trailers* is at odds with its approach to national prohibitions in general. In an earlier case concerning Austrian restrictions on road transport for environmental reasons, the Court framed its proportionality review quite differently – and more recognizably:

> "Without the need for the Court itself to give a ruling on the existence of alternative means, by rail or road, of transporting the goods covered by the contested regulation under economically acceptable conditions, or to determine whether other measures … could have been adopted in order to attain the objective of reducing emissions of pollutants in the zone concerned, it suffices to say in this respect that, *before adopting a measure so radical as a total traffic ban* on a section of motorway constituting a vital route of communication between certain Member States, the Austrian authorities were *under a duty to examine carefully* the possibility of using measures less restrictive of freedom of movement, and *discount them only if their inadequacy*, in relation to the objective pursued, *was clearly established*."[128]

The Court went on to find that the rules were a disproportionate way of protecting air quality, noting that

> "it has not been conclusively established in this case that the Austrian authorities … *sufficiently studied the question* whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was *a realistic alternative* for the transportation of the affected goods by other means of transport or via other road routes".[129]

127. See e.g. the recent first instance judgment in *The Scotch Whisky Association and others,* petition for Judicial Review of the Alcohol (Minimum Pricing) (Scotland) Act 2012 and of related decisions [2013] CSOH 70, esp. paras. 48–52.

128. *Commission* v. *Austria*, cited *supra* note 63, paras. 86–87 (emphasis added).

129. Ibid., para 89 (emphasis added), referring to para 113 of A.G. Geelhoed's Opinion.

It is hardly surprising that States remain confused about what is expected of them.

6. Illustrating proof problems: The boundaries of economic arguments

It was shown in section 5 that there has been a discernible shift towards more extensive articulation of and engagement with proof issues in free movement case law. There is also a welcome change of tone, in that the Court has developed more extensive *positiv*e guidance that goes well beyond its former, more abrupt statements that the required standard was *not* reached. But this shift is not enough, on its own, to enable a conclusion that a properly rigorous and systematic framework is in place overall. In particular, multiple instances of *variations* in approach were provided, raising questions about the instrumental adaptation of the standard of proof for various reasons: the sensitivity of the issue under review; broader political concerns; or diluting the impact of legal change. Through discussion of a substantive justification sphere – establishing that economic rationales can legitimately justify free movement restrictions – we demonstrate further here why resolving these questions should attract more attention from the Court – and lawyers involved in free movement disputes – than has yet been the case.

It is, at one level, a standard rule of free movement law that objectives of a purely economic nature cannot justify a restriction of Treaty rights,[130] but a more permissive case law thread accepts that "none the less… interests of an economic nature"[131] can constitute a legitimate defence. This line of reasoning emerged in case law on access to medical services. In *Kohll*, the Court accepted that "the objective of maintaining a balanced medical and hospital service open to all … although *intrinsically linked* to the method of financing the social security system, may also fall within the derogations on grounds of public health… in so far as it contributes to the attainment of a high level of health protection".[132] However, in *Vanbraekel*, the economic premise was extended more autonomously: "it cannot be excluded that the risk of seriously undermining the financial balance of a social security system might constitute an overriding reason in the general interest capable of justifying a barrier to

130. E.g. Case C-35/98, *Staatssecretaris van Financiën* v. *B.G.M. Verkooijen*, [2000] ECR I-4071, para 48: "aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty".

131. *Commission* v. *Germany (Pharmacies)*, cited *supra* note 63, para 60.

132. Case C-158/96, *Kohll* v. *Union des caisses de maladie*, [1998] ECR I-1931, para 50 (emphasis added).

the principle of freedom to provide services".[133] In *Commission* v. *Austria*, Advocate General Jacobs described this as "a departure from the orthodox approach of the Court" and "a double derogation, first from the fundamental principles of free movement and second from the accepted grounds on which those derogations can be justified".[134]

The perforation of the economic objectives exclusion remains a consistent feature of case law on medical services,[135] raising the issue of proof. In other words, States have not failed in their defences because they *argue* economic objectives in the first place, but because they do not argue their claims *properly*.[136] Moreover, the logic of the medical services case law has crept outwards into public spending issues more generally, with accompanying admonitions of the quality of State arguments – for example, in cases on the funding of education[137] and social benefits.[138] In her recent Opinion in *Prinz and Seeberger*, Advocate General Sharpston provides an extended analysis of how evidence can – and should – be used to support State claims based on the extent to which free movement imposes a reasonable or unreasonable burden on their social security systems.[139] The relevance of economic arguments to restrictions on the free movement of EU citizens occupies an especially misty normative space, accentuated by the fact that the circumstances in which those failing to satisfy self-sufficiency conditions can be deported are not

133. Case C-368/98, *Vanbraekel and others* v. *Alliance nationale des mutualités chrétiennes (ANMC)*, [2001] ECR I-5363, para 47.

134. A.G. Jacobs in *Commission* v. *Austria (Access to universities)*, cited *supra* note 69, para 31 of the Opinion.

135. E.g. Case C-372/04, *Watts* v. *Bedford Primary Care Trust and Secretary of State for Health*, [2006] ECR I-4325, paras. 103–104; Case C-173/09, *Elchinov* v. *Natsionalna zdravnoosiguritelna kasa*, [2010] ECR I-8889, para 42.

136. E.g. Case C-490/09, *Commission* v. *Luxembourg*, [2011] ECR I-247, para 44.

137. E.g. Joined Cases C-11 & 12/06, *Morgan and Bucher*, [2007] ECR I-9161, para 36: "[t]here is no doubt that the objective of ensuring that students complete their courses in a short period of time, thus contributing in particular to the financial equilibrium of the education system of the Member State concerned, may constitute a legitimate aim in the context of the organisation of such a system. However, there is nothing before the Court to support the conclusion that the first-stage studies condition is or could be appropriate, in itself, to ensure that the students concerned complete their courses".

138. E.g. Joined Cases C-396, 419 & 450/05, *Habelt, Möser and Wachter* v. *Deutsche Rentenversicherung Bund*, [2007] ECR I-11895, para 83: "although the Court has accepted that the risk of seriously undermining the financial balance of the social security system may justify a barrier of that kind…the German Government has failed to demonstrate how transfers of residence from Germany such as those which took place in the cases in the main proceedings, are liable to impose a heavier financial burden on the German social security scheme".

139. Joined Cases C-523 & 585/11, *Prinz and Seeberger*, pending; Opinion of A.G. Sharpston delivered on 21 Feb. 2013.

clearly worked out.[140] For residence rights in a host State beyond an initial (essentially unregulated) stay of three months, Article 7 of Directive 2004/38 establishes the basic threshold conditions of "sufficient resources… not to become a burden on the social assistance system of the host Member State" and "comprehensive sickness insurance". Recital 16 of the Preamble, reflecting the case law, provides more nuance:

> "[a]s long as the beneficiaries of the right of residence do not become an *unreasonable* burden on the social assistance system of the host Member State they should not be expelled. Therefore, *an expulsion measure should not be the automatic consequence of recourse to the social assistance system*. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an *unreasonable* burden on its social assistance system and to proceed to his expulsion" (emphasis added).[141]

But the inverse of this position is that recourse to the host State's social assistance system *can* be a *legitimate* factor in expulsion decisions in some cases – embedding economically-grounded justification thinking in another strand of free movement law. The paradox stemming from the fact that this exception to the general rule concerns the rights attached to the "fundamental status"[142] of EU nationals is self-evident and is widely acknowledged as one of the starkest disconnects between the legal reality of EU citizenship (and associated movement rights) and the conceptual ambitions that we might want to attach to it.

The preliminary reference in *Prinz and Seeberger* brings many of these questions together. Mirroring *Commission* v. *Netherlands*, discussed above, it concerns a German rule that applicants for funding to attend a higher education institution in another State must demonstrate three years of

140. This derogation question about expulsion should be distinguished from the more general question of restricting access to host State economic benefits; on the latter point, Spaventa notes that "welfare provision can be legitimately reserved to lawfully resident Union citizens, as such a requirement might either not breach the principle of equal treatment at all, since residents and non-residents are not in comparable situations vis-à-vis welfare provision; or it may be justified, in that it is legitimate for the Member States to require that those who claim welfare benefits are lawfully resident in their territory" (Spaventa, "Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects", 45 CML Rev. (2008), 30).

141. Art. 14(3) confirms that "[a]n expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State".

142. E.g. Case C-184/99, *Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I6193.

uninterrupted residence in Germany immediately before studying abroad. Having stated that the rule restricts the rights conferred by Articles 20 and 21 TFEU, Advocate General Sharpston focuses primarily on whether the residence condition can be justified. She accepts that "the objective of avoiding an unreasonable burden which could have consequences for the overall level of assistance" could justify the restriction in principle; but she also stresses that it is not "sufficient for a Member State merely to assert, without more, that such an economic objective exists".[143] She concedes that "[i]t is clearly for each Member State to decide what part of its public budget it is willing to set aside to fund studies at home and abroad and to assess what overall financial burden it considers to be reasonable" – noting that "[w]hilst it is not for the Court to review a Member State's decision as to what is 'reasonable', it may give guidance to national courts regarding their examination of whether, *given that decision* (emphasis in original), covering the maintenance (and possibly other) costs of students from other Member States will create a risk of an unreasonable burden".[144] The Opinion then addresses proof:

> "[T]he German Government relies on data generated by the federal statistical office … showing that in 2008 approximately one million German nationals lived in other Member States, including half a million in neighbouring Member States. [It] submits that, if the residence requirement were to be eliminated, that group, together with certain non-nationals, would qualify for funding for the entire duration of studies outside Germany. Whilst I see *no basis for doubting the accuracy* of those figures, they obviously *say nothing about the existence of an actual or potential risk of an unreasonable financial burden*. It is doubtful whether all Germans residing elsewhere in the EU, from babes in arms to old-age pensioners, intend to pursue further studies (and in particular outside Germany). Nor is it evident that those who do intend to be students will all apply to the German authorities for funding. The German Government confirmed at the hearing that *it did not have further, more detailed material* to put before the Court."[145]

The final sentence should sound a warning note for Germany as it awaits the Court's judgment, following the tenor of and thresholds set in the access to education cases discussed above (s. 5). Advocate General Sharpston suggests that "a more robust assessment of the likely risk of 'an unreasonable financial burden that could have consequences for the overall level of assistance that

143. A.G. Sharpston in *Prinz and Seeberger*, cited *supra* note 139, paras. 55–56 of the Opinion.

144. Ibid., para 59.

145. Ibid., paras. 61–63 (emphasis added).

may be granted' is required in order to establish that a restriction such as the three-year rule is justified *on the basis of the economic objective*".[146] Finally, on proportionality, she notes that "[p]ossible alternative rules might be less restrictive but still effective. A different approach might incorporate more flexibility. I emphasise that I am not recommending any particular rule – *that is the province of the Member State*. I merely observe that it would be possible to construct less rigid, and therefore more proportionate, arrangements".[147] Overall, however, she considered that Articles 20 and 21 TFEU preclude the contested residence rule.

There are vital substantive issues to address in the case law summarized above: on the implications of extending free movement rights into health-care services in the first place;[148] on the organization and funding of education systems;[149] and on the extension of justification arguments into the economic sphere generally.[150] Focusing here on the issue of proof, however, it is imperative to ask how the Court should manage evidence-based State arguments relating to the organization of national budgets – a question that takes on a heightened edge in the current climate of crisis. It is no longer tenable to assert that objectives of an economic nature cannot justify a restriction of free movement rights. Looking at the language of the case law – which already spans citizenship, services, and workers – it is difficult to sustain the argument that even aims of a *purely* economic nature are still proscribed. In any event, few public interest arguments cannot conceivably be linked to the delivery of some public good – and associated public expenditure. Conversely, many public goods are clearly structured as tradable services.[151] The approach of the Court is both more nuanced and more complex now, and the resulting challenge is clear: how can bald protectionism and sound public interest choices, even economically oriented ones, be properly distinguished?

146. Ibid., para 64 (emphasis added), citing Case C-209/03, *Bidar* v. *London Borough of Ealing; Secretary of State for Education and Skills*, [2005] ECR I-2119, para 56.

147. A.G. Sharpston in *Prinz and Seeberger*, cited *supra* note 139, paras. 55–56, (emphasis added).

148. E.g. Davies, "The effect of Mrs Watts' trip to France on the national health service", 18 *King's Law Journal* (2007), 158.

149. E.g. F. de Witte, "Who funds the mobile student? Shedding some light on the normative assumptions underlying EU free movement law: *Commission* v. *Netherlands*", 50 CML Rev. (2013), 203.

150. E.g. Roth, "Economic justifications and the internal market" in Bulterman, Hancher, McDonnell and Sevenster (Eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer, 2009), p. 73.

151. Discussing this issue in the context of education, see Jørgensen, "The right to cross-border education in the European Union", 46 CML Rev. (2009), 1581–1589.

The empirical capital of evidence is increasingly invoked to perform a decisive role in this context. But if a defendant State submits empirically-grounded arguments about why and how it chooses to allocate resources, on what basis should those decisions be assessed, let alone overturned, by any court – EU or national? Three points can be made in this context. First, the Court is, generally speaking, dealing primarily with the claims of individuals in these cases – especially in case law on medical services.[152] Restricting the rights of *one* patient may indeed seem disproportionate in an isolated case; but how can States demonstrate – or more likely, project[153] – to a sufficiently rigorous degree the knock-on, systemic effects for its health service if consequence a, b or c might materialize? How best can the empirical intricacies – and empirical limitations – of economic and political arguments be harnessed (or even appropriately explained) within the parameters of a litigious dispute; and how can courts then extract legal judgments from such evidence? Newdick rightly points out that the Court's recognition of a "financial balance" justification in principle might indicate that it will confine itself to a *procedural* review of national policy choices; but the case law in fact evidences that "[t]he justification it has in mind does not concern the need for balance and the community as a whole, but the *substantive* interests of individual patients".[154] Some of the Court's reasoning in this context could even be described as naïve. For example, addressing an argument that "the Member States would be forced to abandon the principles and system of their sickness insurance scheme and that both their freedom to set up the social security system of their choice and the operation of that system would be adversely affected… the achievement of the fundamental freedoms guaranteed by the [TFEU] inevitably requires Member States to make some adjustments to their systems of social security. It does not follow that this would undermine their sovereign powers in this field"[155] – but of course it does.

There are signs that the Court has become more alert to the national or *internal* solidarity issues to which these types of claims relate, tempering its former focus on the cross-border, *external* understanding of resource-sharing alone. In *Commission* v. *Spain*, a national rule governing the reimbursement of medical expenses, which distinguished between hospital costs incurred in

152. See generally, Newdick, "Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity", 43 CML Rev. (2006), 1645.

153. Ibid., *supra* note 80, where Newdick criticizes the Court in *Watts* (at para 75) for predicting that "the numbers demanding treatment would be small, but its conclusion was reached in the absence of any evidence on the matter" – an ironic observation, given the importance that the Court places on States always to produce appropriate "precise" evidence.

154. Ibid., 1656–1657 (emphasis in original).

155. *Commission* v. *Luxembourg*, cited *supra* note 136, para 45.

Spain and during temporary stay in another State, was challenged. Essentially, costs relating to the latter would be reimbursed in Spain only in the event of life-saving treatment. Advocate General Mengozzi was not convinced that the measure could be justified, dismissing the arguments of the defendant State – and the States that intervened – as relying "on the risk of a resurgence of 'health tourism'".[156] In his view, "it is possible to conceive of measures that are less restrictive than a systematic refusal of reimbursement (except for vital procedures) such as that which essentially derives from application of the Spanish legislation".[157] But the tone of the Court's judgment was strikingly different – "as the Danish and Finnish Governments have pointed out, the ever-increasing mobility of citizens within the European Union, particularly for reasons of tourism or education, is likely to mean an ever greater number of cases of unscheduled hospital treatment… which the Member States can in no way control" – and it held that "the Commission has failed to show that, *viewed globally*, the legislation at issue constitutes a failure by the Kingdom of Spain to fulfil its obligations".[158]

However, second, recalling the point about resource allocation, public spending in one domain cannot be hermetically sealed: pressures to extend public service x have implications for the funding of or further investment in public services y and z. Must States have their *entire* budgets scrutinized so that a court can establish that less restrictive measures for one policy area may be conceived but may nevertheless distort the *balance* of the social security system overall – precisely the benchmark used by the Court in accepting these arguments in the first place. Even if such a level of scrutiny was remotely feasible in practical terms, it is neither in the functions nor the capacity of courts to execute it. The social security "brake" added to Article 48 TFEU post-Lisbon leaves another cautionary imprint in this context. In short, resources are finite, and they are scarce; the Court of Justice has opened a precarious avenue of review in the suggestion that it, or any court, can work out the financial "balance" of an entire national budget by reflecting on whether *one* policy choice could have been implemented less restrictively – a point accented by the impression that empirical evidence can *prove* such a conclusion definitively.

Third, as Advocate General Sharpston has acknowledged,[159] neither the Member States nor the EU have properly grappled with the issue of *uneven* migration – the question at the heart of the Austrian and Belgian responses in

156. A.G. Mengozzi in Case C-211/08, *Commission* v. *Spain (Hospital care)*, [2010] ECR I-5267, para 95 of the Opinion.

157. Ibid., para 97.

158. Ibid., paras. 76–80 (emphasis added).

159. A.G. Sharpston in *Bressol*, cited *supra* note 83, para 143 onwards.

the university access cases. Simply put, some States pay considerably more for the realization of free movement rights than others. In *Bressol*, Advocate General Sharpston argued for a legislative solution. The judgment shows an atypical acceptance in the interim of measures States might lawfully take to dilute the effects of asymmetric free movement situations – but, again, so long as those choices are somehow "precisely" empirically rationalized. This is a positive turn in the case law from the perspective that Member States cannot just assert things and do little more to establish an appropriate degree of persuasiveness than show up. After all, the aims against which these national choices are being evaluated are free movement rights i.e. core EU principles that the Member States have themselves dreamed up and committed to realizing.

7. Conclusion

This article has shown that, first, the framework of evidence and proof applicable in EU free movement law is not yet grounded in detailed procedural rules, even though national approaches to these issues can vary significantly. Moreover, second, proof factors can materially affect the outcome of a case, blurring the line between procedural and material considerations. This is a heady but unstable mix of elements, compounded by the fact that the justification of free movement restrictions is a dynamic constitutional question amid ongoing efforts to understand how competence for realizing the internal market can really be *shared* by the EU and the Member States. Third, the relevance of proof has clearly acquired enhanced significance in more recent free movement case law. At one level, the onus on defendant States to rationalize their public interest choices with appropriate rigour is an entirely welcome and consistently reinforced message. States really do have no one else to blame if they continue merely to "assert" the value of their public interest objectives and/or the suitability or necessity of the national measures chosen to attain them. Fourth, unravelling the applicable standard of proof reveals more substantive but unsettled questions in free movement law: for example, whether or not the Court applies an implicitly variegated understanding of public interest arguments. But it is misleading and somewhat dangerous to attribute to the language of proof a character of certainty that it cannot actually deliver, especially in a system with a still thin culture of proof. Public interest choices are complex, as is the understandable quest to understand how to evidence the dividing line between rightly protecting things and illicit protectionism. But it is also necessary to reflect on – and distinguish between – the palliative and substantive benefits of the

clearly intensifying focus that the case law places on *proving* that dividing line.

We have to acknowledge that there is a difficult set of questions percolating under the surface of public interest arguments: not just the basic, and rightly accepted, contention that sympathy given to States on the basis that compliance with EU law costs money would be the beginning of the end for free movement rights. The justification/proportionality case law increasingly shifts our focus from the conceptual and normative problems inherent in these questions to the more neutral terrain of proof. But the risk is that this approach seeks to attribute qualities of certainty, definitiveness and objectivity to obviously complex, contestable and value-laden concerns – against a backdrop of incremental and often opaque rules on evidence and proof, from the procedural point of view, in the first place.