Trinity Term
[2015] UKSC 41
On appeal from: [2014] EWCA Civ 1276

JUDGMENT

R (on the application of Lumsdon and others) (Appellants) *v* Legal Services Board (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

24 June 2015

Heard on 16 March 2015

Appellants
Tom de la Mare QC
Mark Trafford QC
Tom Richards
Jana Sadler-Forster
(Instructed by Baker & McKenzie LLP)

Respondent
Nigel Giffin QC
Martin Chamberlain QC

(Instructed by Fieldfisher)

Intervener (Bar Standards Board)
Timothy Dutton QC
Tetyana Nesterchuk
(Instructed by Bevan Brittan LLP)

LORD REED AND LORD TOULSON: (with whom Lord Neuberger, Lady Hale and Lord Clarke agree)

1. The Legal Services Board ("the Board") was established by the Legal Services Act 2007 ("the 2007 Act"). It exercises supervisory functions in relation to approved regulators of persons carrying on legal activities, including the Bar Standards Board ("BSB"), the Solicitors Regulation Authority ("SRA") and the ILEX Professional Standards Board ("IPS").

2. This appeal concerns the lawfulness of the Board's decision on 26 July 2013 to grant a joint application by the BSB, SRA and IPS for approval of alterations to their regulatory arrangements, under Part 3 of Schedule 4 to the 2007 Act. The alterations gave effect to the Quality Assurance Scheme for Advocates ("the scheme"), which provides for the assessment of the performance of criminal advocates in England and Wales by judges.

3. The appellants are barristers practising criminal law. They seek judicial review of the decision on a variety of grounds, all of which were rejected by the Divisional Court and the Court of Appeal: [2014] EWHC 28 (Admin) and [2014] EWCA Civ 1276 respectively. They were given permission to appeal to this court on the single question whether the decision was contrary to regulation 14 of the Provision of Services Regulations 2009 (SI 2009/2999) ("the Regulations").

The Regulations

4. The Regulations were made under section 2(2) of the European Communities Act 1972, in order to implement Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (OJ No L 376, 27.12.2006, p 36) ("the Directive").

5. Regulation 14 provides, so far as material:

> "(1) A competent authority must not make access to, or the exercise of, a service activity subject to an authorisation scheme unless the following conditions are satisfied.
>
> (2) The conditions are that -

(a) the authorisation scheme does not discriminate against a provider of the service,

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest, and

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because inspection after commencement of the service activity would take place too late to be genuinely effective."

6. Regulation 14 implements article 9(1) of the Directive, which is in almost identical terms. In particular, regulation 14(2)(b) reproduces verbatim article 9(1)(b) of the Directive, while regulation 14(2)(c) departs from article 9(1)(c) only by translating the Latin phrase used in the Directive, "an a posteriori inspection", into the less elegant English, "inspection after commencement of the service activity". It will be necessary to return to the Directive.

The 2007 Act

7. Finally, in relation to the domestic legislation, it is necessary to note section 3 of the 2007 Act:

"(1) In discharging its functions the Board must comply with the requirements of this section.

(2) The Board must, so far as is reasonably practicable, act in a way -

(a) which is compatible with the regulatory objectives, and

(b) which the Board considers most appropriate for the purpose of meeting those objectives.

(3) The Board must have regard to -

(a) the principles under which regulatory activities should be transparent, accountable, proportionate,

> consistent and targeted only at cases in which action is needed, and
>
> (b) any other principle appearing to it to represent the best regulatory practice."

The principles set out in section 3(3)(a) are known as the "Better Regulation Principles".

The scheme

8. The details of the scheme are set out in the QASA Handbook and in separate sets of regulatory arrangements for the BSB, IPS and SRA. For barristers the relevant provisions are in the Handbook and the BSB QASA Rules. The object of the scheme is to ensure that those who appear as advocates in criminal courts have the necessary competence. The scheme was devised because of serious concern about the poor quality of some criminal advocacy. There was a general (although not universal) acceptance that there was a need for some form of quality assurance scheme involving assessment by the judiciary. The judgment of the Divisional Court [2014] EWHC 28 (Admin) gives a detailed history of how the scheme came to be developed (at paras 16 to 38) and a detailed description of the nature of the scheme (at paras 39 to 50).

9. In outline, the scheme classifies criminal cases at four levels. Magistrates' Court and Youth Court work is within Level 1. Trials at the Crown Court are at one of the upper levels, which are graded according to the seriousness and complexity of the work. Any advocate wishing to carry out work at one of the upper levels is required to register for provisional accreditation at the appropriate level. He must then be judicially assessed in at least two of his first three effective trials at that level. If he is assessed as "competent", he will be granted full accreditation at that level, which will be valid for five years. The assessment is carried out by the trial judge, against nine standards and a number of performance indicators set out in a Criminal Advocacy Evaluation Form.

10. If an advocate wishes to progress, for example from Level 2 to 3, he must first be judicially assessed as "very competent" at Level 2 in at least two out of three consecutive effective trials over a 12 month period. He must then obtain at least two evaluations as "competent" in his first three consecutive trials at Level 3. If an advocate is refused accreditation at the level for which he has applied, he drops back to his previous level but can seek to work his way up again. There is no right of appeal against an individual assessment by a judge.

The BSB proposal of November 2012

11. Between December 2009 and July 2012 the BSB, SRA and IPS, acting together as a Joint Advocacy Group ("JAG"), issued a series of consultation papers which led to various amendments of the proposed scheme. After the fourth consultation, on 1 November 2012 the BSB proposed an alternative scheme under which advocates would register at the level which they thought appropriate for themselves and would be free to move up a level when they felt competent to do so. They would remain at their chosen level unless judicial concerns were raised about their competence through "monitoring referrals" or evaluations in a rolling programme of judicial assessment. The BSB argued that this would be a more proportionate method of quality assurance than a scheme which required a positive assessment before full accreditation at any of the higher levels, essentially because it would be less burdensome for the many advocates who were competent. In its paper explaining its proposal the BSB said that its approach had the benefit that "regulatory action is targeted at where there is the greatest risk" and that "Those who act within their competence and do not present a risk to the public or the wider regulatory objectives will therefore be subject to minimal oversight and administrative burdens".

12. The BSB's proposal met with opposition from the Board, SRA and IPS. The Board considered that judicial evaluation of all advocates wishing to practise at the upper levels was essential for the effectiveness of the scheme and that the BSB's proposal would add little to the pre-existing arrangements for judges to raise concerns with regulators, which had little impact on the problem. The response of the Board, SRA and IPS placed the BSB in a dilemma whether to continue to participate with the other members of JAG in a joint scheme or to devise a separate accreditation scheme for barristers. It decided for various reasons to continue to participate in a joint scheme involving prior accreditation and to negotiate various amendments on points of detail.

The decision under challenge

13. In the decision under challenge, the Board explicitly proceeded on the basis that the scheme was not an authorisation scheme within the meaning of the Regulations or the Directive. It did not consider how regulation 14, or article 9(1), would apply to the scheme in the event that it was properly classified as an authorisation scheme. The Board did however have regard to the Better Regulation Principles, in accordance with section 3(3)(a) of the 2007 Act.

14. The Board noted that, in developing the scheme, it was the duty of the BSB and other approved regulators to have regard to the Better Regulation Principles. It

was the BSB's duty to undertake the policy development and drafting of the arrangements. It was also their responsibility to provide in their application any relevant material which supported it, including evidence establishing the necessity for regulatory arrangements. The Board had itself undertaken a review of the history and development of the scheme in order to reassure itself that there was a risk which needed to be addressed and that there was a firm rationale for the particular scheme proposed.

15. In that regard, the Board noted that concerns had been expressed over a long period of time about standards of criminal advocacy. A range of evidence pointed towards a risk, and in some places a pattern, of advocacy not being of the required standard. This included some senior judicial comments, the findings of a study conducted by Cardiff University, and reports by Her Majesty's Crown Prosecution Service Inspectorate. The Board noted that poor advocacy could have a detrimental impact on victims, witnesses and defendants, and on public confidence in the rule of law and the administration of justice, and could also result in increased costs.

16. The Board stated that it had taken into account views disputing the need for a scheme, and opposing the details of the scheme proposed. It observed that much of the disagreement about the extent of low standards of criminal advocacy and the risks that this posed stemmed from the lack of consistent and measurable evidence available under the current arrangements. It recognised that, without a quality assurance framework in place, it would be very difficult to find conclusive evidence of quality problems across criminal advocacy. It observed that it was important that those practising criminal advocacy were operating at least to a minimum imposed standard and that the risks associated with poor quality were addressed by means of a proportionate regulatory response.

17. The Board concluded that there was sufficient consistency of evidence and concern to warrant a scheme such as that proposed by the application. The concerns and limited evidence suggested a real risk, and a pattern, of actual problems in standards across a wide range of criminal advocates, and almost nothing by way of evidence that quality was consistently good enough.

18. In relation to the principle that regulatory activities should be proportionate, the Board stated:

> "28. The Board considers that the proposed scheme has the potential to provide reliable and sustained evidence for approved regulators to measure and improve the quality of criminal advocacy over time. The Board further considers that it is important that where there is opportunity, through a proportionate and targeted mechanism of

> accreditation, for relevant approved regulators to measure and enhance the quality of criminal advocacy, they should do so. In that regard, the Board concludes that the scheme is proportionate because it addresses the risk in a structured way that allows the scheme to be adjusted on the basis of evidence gained from its actual implementation. This is consistent with the Better Regulation Principles enabling a consistent, proportionate and targeted approach to regulation.
>
> 29. The Board is further assured by the commitment from the applicants to review the scheme after two years. The Board understands from the application that this review will 'provide a comprehensive analysis of the scheme including the assessment of the performance of key processes'. The review will also assess whether the scheme promotes the regulatory objectives and improves criminal advocacy standards. With the experience and lessons gained from the operation of the scheme, the Board considers it should be possible to further calibrate it so that there continues to be a proportionate regulatory response to the risk posed from poor criminal advocacy. The Board will actively engage with the review in its oversight role."

19. The Board also noted that the JAG had consulted four times on the details of the scheme, and that aspects of it had been adjusted as a result of representations made during the consultation process. The Board stated:

> "The Board considers that, on balance, the applicants have responded to issues raised during consultation and have adjusted the scheme to make it proportionate and targeted without undermining its potential effectiveness."

The ground of challenge

20. As we have explained, the only question in this appeal is whether the decision was contrary to regulation 14 of the Regulations. The appellants argue that the scheme fails to meet the conditions set out in regulation 14(2)(b) and (c), namely that "the need for an authorisation scheme is justified by an overriding reason relating to the public interest" and that "the objective pursued cannot be attained by means of a less restrictive measure". Since those provisions are derived from article 9(1)(b) and (c) of the Directive, and must be interpreted so as to give effect to the Directive, it is common ground that the argument is in substance a submission that the scheme falls within the ambit of the Directive and fails to comply with article 9(1)(b) and (c). We shall address the argument on that basis.

21. In response, the Board submits that the scheme does not fall within the ambit of the Directive (or, therefore, the ambit of the Regulations), and that in any event it complies with article 9(1)(b) and (c). It is convenient to begin by considering the second of these submissions, on the hypothesis that the Directive is applicable to the scheme.

22. Before turning to that matter, however, it is desirable to consider more widely the EU principle of proportionality, to which article 9(1)(c) gives effect.

Proportionality in EU law

23. It appears from the present case, and some other cases, that it might be helpful to lower courts if this court were to attempt to clarify the principle of proportionality as it applies in EU law. That is the aim of the following summary. It should however be said at the outset that the only authoritative interpreter of that principle is the Court of Justice. A detailed analysis of its case law on the subject can be found in texts such as *Craig, EU Administrative Law* (2006) and *Tridimas, The General Principles of EU Law*, 2nd ed (2006). It has also to be said that any attempt to identify general principles risks conveying the impression that the court's approach is less nuanced and fact-sensitive than is actually the case. As in the case of other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context. This summary will range beyond the type of case with which this appeal is concerned, in order to demonstrate the different ways in which the principle of proportionality is applied in different contexts. It will provide a number of examples from the case law of the court, in order to illustrate how the principle is applied in practice.

24. Proportionality is a general principle of EU law. It is enshrined in article 5(4) of the Treaty on European Union ("TEU"):

> "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

It is also reflected elsewhere in the EU treaties, for example in article 3(6) TEU:

> "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties."

The principle has however been primarily and most fully developed by the Court of Justice in its jurisprudence, drawing upon the administrative law of a number of member states.

25. The principle applies generally to legislative and administrative measures adopted by EU institutions. It also applies to national measures falling within the scope of EU law, as explained by Advocate-General Sharpston in her opinion in *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (Case C-427/06) [2008] ECR I-7245, para 69:

> "For that to be the case, the provision of national law at issue must in general fall into one of three categories. It must implement EC law (irrespective of the degree of the discretion the member state enjoys and whether the national measure goes beyond what is strictly necessary for implementation). It must invoke some permitted derogation under EC law. Or it must otherwise fall within the scope of Community law because some specific substantive rule of EC law is applicable to the situation."

The principle only applies to measures interfering with protected interests: *R (British Sugar plc) v Intervention Board for Agricultural Produce* (Case C-329/01) [2004] ECR I-1899, paras 59-60. Such interests include the fundamental freedoms guaranteed by the EU Treaties.

26. It is also important to appreciate, at the outset, that the principle of proportionality in EU law is neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights. Although there is some common ground, the four-stage analysis of proportionality which was explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, paras 20 and 72-76, in relation to the justification under domestic law (in particular, under the Human Rights Act 1998) of interferences with fundamental rights, is not applicable to proportionality in EU law.

The division of responsibility between the Court of Justice and national courts

27. Issues of proportionality may arise directly before the Court of Justice and be decided by that court, as for example when the legality of an EU measure is challenged in direct proceedings, or when enforcement proceedings are brought by the Commission against a member state in relation to a national measure. Issues of proportionality may also arise before national courts, as occurred in the present case.

28. According to the jurisprudence of the court, a national court may not declare an EU measure to be illegal. When, therefore, the validity of an EU measure is indirectly challenged before a national court on the ground of proportionality, the national court can refer the issue to the court for determination, and should do so if it considers the argument to be well-founded (*R (International Air Transport Association) v Department for Transport* (Case C-344/04) [2006] ECR I-403, para 32) or, in the case of a final court, if the issue is other than acte clair.

29. On the other hand, when the validity of a national measure is challenged before a national court on the ground that it infringes the EU principle of proportionality, it is in principle for the national court to reach its own conclusion. It may refer a question of interpretation of EU law to the Court of Justice, but it is then for the national court to apply the Court's ruling to the facts of the case before it. The court has repeatedly accepted that it does not have jurisdiction under the preliminary reference procedure to rule on the compatibility of a national measure with EU law: see, for example, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (Case C-55/94) [1995] ECR I-4165, para 19. It has explained its role under that procedure as being to provide the national court "with all criteria for the interpretation of Community law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it" (*Gebhard*, para 19).

30. Nevertheless, where a preliminary reference is made, the court often effectively determines the proportionality of the national measure in issue, by reformulating the question referred so as to ask whether the relevant provision of EU legislation, or general principles of EU law, preclude a measure of that kind, or alternatively whether the measure in question is compatible with the relevant provision of EU legislation or general principles. That practice reflects the fact that it can be difficult to draw a clear dividing line between the interpretation of the law and its application in concrete circumstances, and an answer which explains how the law applies in the circumstances of the case before the referring court is likely to be helpful to it. The practice also avoids the risk that member states may apply EU law differently in similar situations, or may be insufficiently stringent in their scrutiny of national measures. It may however give rise to difficulties if the court's understanding of the national measure, or of the relevant facts, is different from that of the referring court (as occurred, in a different context, in *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15; [2013] STC 784).

31. Where the proportionality principle is applied by a national court, it must, as a principle of EU law, be applied in a manner which is consistent with the jurisprudence of the court: as is sometimes said, the national judge is also a European judge.

32. The jurisprudence in relation to the principle of proportionality is however not without complexity. As will be explained, the principle has been expressed and applied by the court in different ways in different contexts. In order for national judges to know how the principle should be applied in the cases before them, it is necessary for them to understand the nature and rationale of these differences, and to identify the body of case law which is truly relevant.

The nature of the test of proportionality

33. Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023.

34. Apart from the questions which need to be addressed, the other critical aspect of the principle of proportionality is the intensity with which it is applied. In that regard, the court has been influenced by a wide range of factors, and the intensity with which the principle has been applied has varied accordingly. It is possible to distinguish certain broad categories of case. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application. The court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle will be applied in another context: it is necessary to examine how in practice the court has applied the principle in the particular context in question.

35. Subject to that caveat, however, it may be helpful to describe the court's general approach in relation to three types of case: the review of EU measures, the review of national measures relying upon derogations from general EU rights, and the review of national measures implementing EU law.

36. As a generalisation, proportionality as a ground of review of EU measures is concerned with the balancing of private interests adversely affected by such measures against the public interests which the measures are intended to promote. Proportionality functions in that context as a check on the exercise of public power of a kind traditionally found in public law. The court's application of the principle

in that context is influenced by the nature and limits of its legitimate function under the separation of powers established by the Treaties. In the nature of things, cases in which measures adopted by the EU legislator or administration in the public interest are held by the EU judicature to be disproportionate interferences with private interests are likely to be relatively infrequent.

37. Proportionality as a ground of review of national measures, on the other hand, has been applied most frequently to measures interfering with the fundamental freedoms guaranteed by the EU Treaties. Although private interests may be engaged, the court is there concerned first and foremost with the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU project. In circumstances of that kind, the principle of proportionality generally functions as a means of preventing disguised discrimination and unnecessary barriers to market integration. In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the internal market, for example because the subject-matter lies within an area of national rather than EU competence, a less strict approach is generally adopted. That also tends to be the case in contexts where an unregulated economic activity would be harmful to consumers, particularly where national regulatory measures are influenced by national traditions and culture. An example is the regulation of gambling, discussed in *R (Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media and Sport)* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 751.

38. Where member states adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, therefore, proportionality functions in that context as a conventional public law principle. On the other hand, where member states rely on reservations or derogations in EU legislation in order to introduce measures restricting fundamental freedoms, proportionality is generally applied more strictly, subject to the qualifications which we have mentioned.

39. Having provided that broad summary, it may be helpful to consider in greater detail the application of the principle of proportionality to EU and national measures in turn.

Measures of EU institutions

40. Where EU legislative or administrative institutions exercise a discretion involving political, economic or social choices, especially where a complex

assessment is required, the court will usually intervene only if it considers that the measure is manifestly inappropriate. The general approach in such cases is illustrated by the judgment in *R v Secretary of State for Health, Ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01) [2002] ECR I-11453, concerned with Community legislation harmonising national measures concerning the marketing of tobacco products:

> "122. As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it ...
>
> 123. With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."

41. A further example of this approach is the judgment in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*. The case concerned Community legislation which prohibited the use of certain hormones in livestock farming, so as to address barriers to trade and distortions of competition arising from differences in the relevant national legislation of the member states: differences which reflected differing national assessments of the effects of the hormones on public health, and differing levels of consumer anxiety. The court stated:

> "13. The court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

> 14. However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."

42. As the court said in another similar case, "the criterion to be applied is not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate": *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-189/01) [2001] ECR I-5689, para 83. The court has not explained how it determines whether the inappropriateness of a measure is or is not manifest. Its practice in some cases suggests that it is sufficient to establish that there is a clear and material error, in law, or in reasoning, or in the assessment of the facts, which goes to the heart of the measure. In other cases, the word "manifestly" appears to describe the degree of obviousness with which the impugned measure fails the proportionality test. In such cases, the adverb serves, like comparable expressions in our domestic law, to emphasise that the court will only interfere when it considers that the primary decision-maker has exceeded the generous ambit within which a choice of measures might reasonably have been made.

43. In this context, therefore, the court does not in practice apply the "least onerous alternative" test in any literal sense, but instead considers whether the measure chosen is manifestly inappropriate. The court also made it clear in *Jippes* that the legality of an EU measure cannot depend on a retrospective check on a predictive assessment:

> "Where the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question." (para 84)

44. It would however be a mistake to suppose that the "manifestly inappropriate" test means that the court's scrutiny of the justification for the measure is cursory or perfunctory. While the court will be slow to substitute its own evaluative judgment for that of the primary decision-maker, and will not intervene merely because it would have struck a different balance between countervailing considerations, it will consider in some depth the factual foundation and reasoning underlying that judgment.

45. The point can be illustrated by the *Fedesa* case. The proportionality of a blanket prohibition was challenged on the basis that the legislation was unsuitable to attain its objectives, since it was impossible to apply in practice and would lead to the creation of a black market in the prohibited hormones. It was also argued to be unnecessary, since the objective could be achieved by the dissemination of information. It was in addition argued to be disproportionate stricto sensu, since the financial losses imposed on the applicants would be disproportionate to the public benefit.

46. In relation to the first point, the court noted that, even if the presence of natural hormones in meat prevented the detection of prohibited hormones by tests on animals or on meat, other control methods could be used and had indeed been imposed by a supplementary measure. It was not obvious that the authorisation of hormones described as "natural" would be likely to prevent the emergence of a black market for dangerous but less expensive substances. Moreover, it was not disputed that any system of partial authorization would require costly control measures whose effectiveness could not be guaranteed. It followed that the prohibition could not be regarded as a manifestly inappropriate measure. As to whether it was unnecessary, the applicants' argument was based on the false premise that the only objective of the measure was to allay consumer anxieties. Having regard to the requirements of public health, the removal of barriers to trade and distortions of competition could not be achieved merely by the dissemination of information. As to proportionality stricto sensu, the importance of the objectives pursued was such as to justify substantial negative financial consequences for certain traders.

47. In cases concerned with EU measures establishing authorisation procedures, for example for the use of particular substances, the court will also require that the procedures reflect principles of sound administration and legal certainty. For example, in *R (Alliance for Natural Health) v Secretary of State for Health* (Joined Cases C-154 and C-155/04) [2005] ECR I-6451, the court said at para 73:

> "Such a procedure must be accessible in the sense that it must be expressly mentioned in a measure of general application which is binding on the authorities concerned. It must be capable of being completed within a reasonable time. An application to have a substance included on a list of authorised substances may be refused by the competent authorities only on the basis of a full assessment of the risk posed to public health by the substance, established on the basis of the most reliable scientific data available and the most recent results of international research. If the procedure results in a refusal, the refusal must be open to challenge before the courts."

48. Where a measure is challenged on the ground that it interferes with fundamental rights, article 52(1) of the EU Charter of Fundamental Rights is relevant:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

Where a fundamental right is not absolute, the court has said that it must be viewed in relation to its social purpose:

> "Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed" (*British American Tobacco,* para 149).

49. In the *British American Tobacco* case, one of the grounds of challenge to the legislation was that it interfered with the fundamental right to property because of its impact on trademark rights. Having applied the "manifestly inappropriate test" to grounds of challenge directed at the suitability and necessity of the legislation, the court then turned to the rights-based argument, which it approached in the manner described. One of the contested aspects of the legislation was to require large health warnings on packets. Although the amount of space available for the display of trademarks was consequently reduced, this did not prejudice the substance of the trademark rights, and was intended to ensure a high level of health protection. It was a proportionate restriction. The other contested aspect was the prohibition of certain descriptions (and hence of trademarks incorporating those descriptions) on the packaging, in order to protect public health. It remained possible for manufacturers to distinguish their products by using other distinctive signs. In addition, the measure provided for a sufficient period of time between its adoption and the entry into force of the prohibition to enable the affected manufacturers to adapt. It was therefore proportionate.

National measures derogating from fundamental freedoms

50. It is necessary to turn next to measures adopted by the member states within the sphere of application of EU law. In that context, issues of proportionality have

arisen most often in relation to national measures taken in reliance upon provisions in the Treaties or other EU legislation recognising permissible limitations to the "fundamental freedoms": the free movement of goods, the free movement of workers, freedom of establishment, freedom to provide services, and the free movement of capital. Compliance with the principle of proportionality is also a requirement of the justification of other national measures falling within the scope of EU law, including those which derogate from other rights protected by the Treaties, such as the right to equal treatment or non-discrimination, or fundamental rights such as the right to family life.

51. The case law concerned with restrictions on the right of establishment and the provision of services is particularly relevant to the present case. The Treaty on the Functioning of the European Union ("TFEU") recognises permissible limitations to those rights which are justified upon grounds of public policy, public security or public health (articles 52(1) and 62). Those concepts have undergone considerable analysis in the case law of the court.

52. The court's general approach in this context was explained in the case of *Gebhard*, concerned with the provision of legal services:

> "National measures liable to make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it." (para 37)

53. The last two of these requirements correspond to the two limbs of the proportionality principle. In some more recent cases, the court has also emphasised other general principles of EU law, by requiring that procedures under the national measure should be compatible with principles of sound administration, such as being completed within a reasonable time and without undue cost, and also compatible with legal certainty, including the right to judicial protection.

54. The first of the conditions listed in *Gebhard* is relatively straightforward. In relation to the second condition, the court must identify the objective of the measure in question and determine whether it is a lawful objective which is capable of justifying a restriction upon the exercise of a fundamental freedom. The Court of Justice has recognised a wide range of public interest grounds capable of justifying restrictions on the exercise of fundamental freedoms. Specifically in relation to legal services, the court has accepted that restrictions on freedom of establishment or the

provision of services can be justified by the need to protect the interests of the recipients of those services, and by the public interest in the administration of justice. For example, in *Reisebüro Broede v Sandker* (Case C-3/95) [1996] ECR I-6511, para 38, the court stated that "the application of professional rules to lawyers, in particular those relating to organization, qualifications, professional ethics, supervision and liability, ensures that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience".

55. In relation to the third and fourth conditions, the court must determine whether the measure is suitable to achieve the legitimate aim in question, and must then determine whether it is no more onerous than is required to achieve that aim, if there is a choice of equally effective measures. The position was summarised by Advocate-General Sharpston at para 89 of her opinion in *Commission of the European Communities v Kingdom of Spain* (Case C-400/08) [2011] ECR I-1915, a case concerned with the right of establishment:

> "Whilst it is true that a member state seeking to justify a restriction on a fundamental Treaty freedom must establish both its appropriateness and its proportionality, that cannot mean, as regards appropriateness, that the member state must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose. As regards proportionality, however, it is necessary to establish that no other measures could have been equally effective but less restrictive of the freedom in question."

56. The justification for the restriction tends to be examined in detail, although much may depend upon the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may well be expected to be supported by evidence. The point is illustrated by *Commission of the European Communities v Grand Duchy Luxembourg* (Case C-319/06) [2008] ECR I-4323, concerned with legislation which imposed on providers of services in Luxembourg, who were based in other member states, the mandatory requirements of Luxembourg's employment law. In addressing an argument that the measure ensured good labour relations in Luxembourg, the court stated:

> "51. It has to be remembered that the reasons which may be invoked by a member state in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate

> evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated ...
>
> 52. Therefore, in order to enable the court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, the Grand Duchy of Luxembourg should have submitted evidence to establish whether and to what extent the [contested measure] is capable of contributing to the achievement of that objective."

57. Where goods or services present known and serious risks to the public, the precautionary principle permits member states to forestall anticipated harm, without having to wait until actual harm is demonstrated. The point is illustrated by the case of *Commission of the European Communities v Kingdom of the Netherlands* (Case C-41/02) [2004] ECR I-11375, which concerned a prohibition on the sale of foodstuffs fortified with additives, the justification being the protection of public health. The court held that the existence of risks to health had to be established on the basis of the latest scientific data available at the date of the adoption of the decision. Although, in accordance with the precautionary principle, a member state could take protective measures without having to wait until the existence and gravity of the risks became fully apparent, the risk assessment could not be based on purely hypothetical considerations.

58. In a case concerned with an authorisation scheme designed to protect public health, the court required it to ensure that authorisation could be refused only if a genuine risk to public health was demonstrated by a detailed assessment using the most reliable scientific data available and the most recent results of international research: *Criminal Proceedings against Greenham and Abel* (Case C-95/01) [2004] ECR I-1333, paras 40-42. As in *Commission of the European Communities v Kingdom of the Netherlands*, the Court acknowledged that such an assessment could reveal uncertainty as to the existence or extent of real risks, and that in such circumstances a member state could take protective measures without having to wait until the existence and gravity of those risks were fully demonstrated. The risk assessment could not however be based on purely hypothetical considerations. The approach adopted in these cases is analogous to that adopted in relation to EU measures establishing authorisation schemes designed to protect public health, as for example in the *Alliance for Natural Health* case, discussed earlier.

59. It is not, however, necessary to establish that the measure was adopted on the basis of studies which justified its adoption: see, for example, *Stoß v Wetteraukreis* (Case C-316/07) [2010] ECR I-8069, para 72.

60. Particularly in situations where a measure is introduced on a precautionary basis, with correspondingly less by way of an evidential base to support the particular restrictions imposed, it may well be relevant to its proportionality to consider whether it is subject to review in the light of experience.

61. The court has tended to examine closely (again, depending to some extent on the context) the question whether other measures could have been equally effective but less restrictive of the freedom in question. The point is illustrated by the case of *Criminal Proceedings against Bordessa* (Joined Cases C-358/93 and C-416/93) [1995] ECR I-361, which concerned a Spanish law requiring that exports of coins, banknotes or bearer cheques should be the subject of a prior declaration if the amount was below a specified limit, and of prior authorisation if the amount was above that limit. This interference with the free movement of capital was argued to be necessary in order to prevent tax evasion, money laundering and other offences. The court noted that the requirement of a prior declaration was less restrictive than that of prior authorisation, since it did not entail suspension of the transaction in question. It nevertheless enabled the national authorities to exercise effective supervision. The Spanish Government contended that it was only by means of a system of prior authorisation that non-compliance could be classified as criminal and hence criminal penalties imposed. That contention was however rejected by the court, on the basis that the Spanish Government had failed to provide sufficient proof that it was impossible to attach criminal penalties to the failure to make a prior declaration. It was therefore held that EU law precluded rules which made exports of coins, banknotes or bearer cheques conditional on prior authorisation, but not rules which made such exports conditional on a prior declaration.

62. In a different context, the point is also illustrated by the case of *Germany v Deutsches Milch-Kontor GmbH* (Case C-426/92) [1994] ECR I-2757, where the systematic inspection of the composition and quality of skimmed milk powder intended for use as animal feed, in order to combat fraud, was held to be disproportionate on the basis that random checks would have sufficed.

63. The "less restrictive alternative" test is not however applied mechanically. In the first place, the court has made it clear that the burden of proof placed upon the member state to establish that a measure is necessary does not require it to exclude hypothetical alternatives. In *Commission of the European Communities v Italian Republic* (Case C-518/06) [2009] ECR I-3491, a case concerned with an obligation imposed on insurers, it stated at para 84:

> "Whilst it is true that it is for a member state which relies on an imperative requirement to justify a restriction within the meaning of the EC Treaty to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that 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."

64. The court has also accepted that, where a relevant public interest is engaged in an area where EU law has not imposed complete harmonisation, the member state possesses "discretion" (or, as it has sometimes said, a "margin of appreciation") not only in choosing an appropriate measure but also in deciding on the level of protection to be given to the public interest in question. This can be seen, for example, in cases where the public interest relied on is the protection of human life and health, such as *Apothekerkammer des Saarlandes v Saarland and Ministerium für Justiz, Gesundheit und Soziales* (Joined Cases C-171/07 and C-172/07) [2009] ECR I-4171, which concerned a rule restricting the ownership of pharmacies. The court stated:

> "... 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." (para 19)

65. The court is therefore unimpressed, in areas of activity where member states enjoy this kind of discretion, by arguments to the effect that one member state's regulatory scheme is disproportionate because another's is less restrictive. Its focus is upon the objectives pursued by the competent authorities of the member state concerned and the level of protection which they seek to ensure. This is illustrated by the case of *Commission of the European Communities v Italian Republic* (Case C-110/05) [2009] ECR I-519, concerned with a ban on a type of trailer, on the ground of road safety, where the court said:

> "61. In the absence of fully harmonising provisions at Community level, it is for the member states to decide upon the level at which they wish to ensure road safety in their territory, whilst taking account of the requirements of the free movement of goods within the European Community ...
>
> 65. With regard ... to whether the said prohibition is necessary, account must be taken of the fact that, in accordance with the case-law of the court referred to in para 61 of the present judgment, in 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 and, consequently, the fact that one member state imposes less strict rules than another member state does not mean that the latter's rules are disproportionate."

In a context closer to that of the present case, the same approach can also be seen in *Alpine Investments BV v Minister van Financiën* (Case C-384/93) [1995] ECR I-1141, para 51, concerned with the regulation of the provision of financial services.

66. This margin of appreciation applies to the member state's decision as to the level of protection of the public interest in question which it considers appropriate, and to its selection of an appropriate means by which that protection can be provided. Having exercised its discretion, however, the member state must act proportionately within the confines of its choice. A national measure will not, therefore, be proportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive of a fundamental freedom: see, for example, *Rosengren v Riksäklagaren* (Case C-170/04) [2007] ECR I-4071, para 43.

67. In applying the "less restrictive alternative" test it is necessary to have regard to all the circumstances bearing on the question whether a less restrictive measure could equally well have been used. These will generally include such matters as the conditions prevailing in the national market, the circumstances which led to the adoption of the measure in question, and the reasons why less restrictive alternatives were rejected. The court will be heavily reliant on the submissions of the parties for an explanation of the factual and policy context.

68. In relation to authorisation schemes, the court has identified a number of considerations, including considerations relating to principles of good administration, which should be taken into account in determining the compliance of the scheme with the principle of proportionality. The following were mentioned in the case of *Canal Satélite Digital SL v Administración General del Estado and Distribuidora de Televisión Digital SA* (Case C-390/99) [2002] ECR I-607:

> "35. First ... if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily ...

> 36. Second, a measure introduced by a member state cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same state or in another member state.
>
> ...
>
> 39. Third, a prior authorisation procedure will be necessary only where a subsequent control is to be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued.
>
> ...
>
> 41. Finally, it should be noted that, for as long as it lasts, a prior authorisation procedure completely prevents traders from marketing the products and services concerned. It follows that, in order to comply with the fundamental principles of the free movement of goods and the freedom to provide services, such a procedure must not, on account of its duration, the amount of costs to which it gives rise, or any ambiguity as to the conditions to be fulfilled, be such as to deter the operators concerned from pursuing their business plan."

69. In other cases concerned with authorisation schemes, the court has also stipulated that the procedure should be easily accessible and capable of ensuring that the application will be dealt with objectively and impartially within a reasonable time, and that refusals to grant authorisation should be capable of being challenged in judicial or quasi-judicial proceedings: see, for example, *Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* (Case C-157/99) [2001] ECR I-5473, para 90. Other conditions have been mentioned in relation to schemes with specific aims, such as the imposition of public service obligations (*Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado* (Case C-205/99) [2001] ECR I-1271).

70. Where the justification for the national measure is the protection of fundamental rights, the court approaches the issue in the manner described earlier in para 48. The case of *Schmidberger Internationale Transporte und Planzuge v Austria* (Case C-112/00) [2003] ECR I-5659, for example, concerned the Austrian government's failure to ban a demonstration on a motorway, on the ground of respect for the rights of freedom of expression and freedom of assembly guaranteed

by the Austrian constitution and the European Convention on Human Rights. The demonstration resulted in the motorway's closure for over a day, restricting the free movement of goods.

71. The court accepted that since fundamental rights were recognised in EU law, "the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods" (para 74). It noted, however, that neither the freedoms nor the rights were absolute. The right to free movement of goods could be subject to restrictions for the reasons laid down in the Treaty or for overriding reasons of public interest. The rights to freedom of expression and freedom of assembly were "also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued" (para 79). The court continued:

> "80. ... Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed ...
>
> 81. In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.
>
> 82. The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights."

Applying that approach, the court accepted that the action in question had been proportionate.

72. A similar approach can also be seen in the case of *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (Case C-36/02) [2004] ECR I-9609, which concerned a German ban on electronic games involving simulated killing, on the ground that they infringed the guarantee of

human dignity in the German Constitution. The ban was upheld by the Court, which accepted that the circumstances which could constitute a justification on grounds of public policy could vary from one member state to another, and that the national authorities must be accorded a margin of discretion.

National measures implementing EU measures

73. Member states must also comply with the requirement of proportionality, and with other aspects of EU law, when applying EU measures such as directives. As when assessing the proportionality of EU measures, to the extent that the directive requires the national authority to exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will in general be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature, the court has applied a "manifestly disproportionate" test: see, for example, *R v Minister of Agriculture, Fisheries and Food, Ex p National Federation of Fishermen's Organisations and Others* (Case C-44/94) [1995] ECR I-3115, para 58. The court may nevertheless examine the underlying facts and reasoning: see, for example, *Upjohn Ltd v Licensing Authority established by the Medicines Act 1968* (Case C-120/97) [1999] ECR I-223, paras 34-35.

74. Where, on the other hand, the member state relies on a reservation or derogation in a directive in order to introduce a measure which is restrictive of one of the fundamental freedoms guaranteed by the Treaties, the measure is likely to be scrutinised in the same way as other national measures which are restrictive of those freedoms. The case of *Commission of the European Communities v Grand Duchy of Luxembourg*, cited earlier, concerned a national measure of that kind.

Sinclair Collis

75. It may be helpful at this point to say a word about the case of *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394, which was followed by the Court of Appeal in the present case.

76. *Sinclair Collis* concerned a national measure restricting the free movement of goods. The justification put forward was the protection of public health. The issue was whether the measure was necessary, or whether the objective might have been achieved by a less restrictive measure. The relevant area of EU jurisprudence was therefore the body of case law concerning the proportionality of national measures restricting the free movement of goods in the interests of public health. As we have explained, that case law indicates that a measure of discretion is allowed to member

states as to the level of protection of public health which they consider appropriate and as to the selection of an appropriate means of protection.

77. The judgments in the Court of Appeal, following the arguments of counsel as reported, focused primarily upon the judgments of the Court of Justice in the *Fedesa* case, *British American Tobacco,* and *R v Minister of Agriculture, Fisheries and Food, Ex p National Federation of Fishermen's Organisations and Others.* As has been explained, the first and second of these cases were concerned with the question whether an EU measure was proportionate, while the third case was concerned with a national measure implementing EU requirements.

78. In their judgments, Arden LJ and Lord Neuberger of Abbotsbury MR correctly analysed these cases as yielding a "manifestly inappropriate" test. They then applied that test in the different context of a national measure restricting a fundamental freedom. In a dissenting judgment, Laws LJ correctly attached importance to case law concerned with national measures restricting the free movement of goods, but focused particularly upon a case concerned with the maintenance of a national retail monopoly (*Rosengren v Riksäklagaren*), in which the court found that the monopoly was unsuitable for attaining the ostensible aim of protecting health.

79. Those judgments might be contrasted with that delivered by the Lord Justice-Clerk, Lord Carloway, in the parallel Scottish proceedings: *Sinclair Collis Ltd v Lord Advocate* [2012] CSIH 80; 2013 SC 221. Lord Carloway rejected the submission that the question was whether the legislation was "manifestly inappropriate", stating:

> "... 'manifestly inappropriate' is language used by the ECJ in relation to testing EU institution measures (or national measures implementing EU law) (see eg *R* v *Secretary of State for Health, Ex p British American Tobacco (Investments)* [2002] ECR 1-11453, para 123). There the balance is between private and public interests. It is not applicable when testing the legitimacy of state measures against fundamental principles contained in the EU Treaties where the balance is between EU and state interests." (para 56)

At the same time, Lord Carloway recognised that there was "a margin of appreciation afforded to the state not only in determining the general health objective of reducing smoking but also in selecting the manner in which the reduction in health risk is to be achieved" (para 59). Applying that approach, the Inner House arrived at the same conclusion as the majority of the Court of Appeal.

80. Lord Carloway also questioned the proposition, accepted by the Court of Appeal, that the strictness with which the EU proportionality principle was applied to a national measure restricting a fundamental freedom should depend on the identity of the national decision-maker (whether, for example, it was a minister or Parliament). Lord Carloway commented:

> "... the court has reservations about whether the margin can vary in accordance with the nature of the particular organ of the state which creates or implements the measure. It might appear strange if the manner in which a EU member state elects to organise government within its borders were capable of increasing or decreasing the margin of appreciation available to that state relative to measures challenged as infringing one of the EU Treaties' fundamental principles. The legality of a measure ought not to depend upon whether a measure is passed by a central, national, provincial or local government legislature or determined by an official or subsidiary body under delegated authority from such a legislature." (para 59)

81. There is force in the point made by Lord Carloway; and it is difficult to discern in the court's case law any clear indication that the identity or status of the national authority whose action is under review is a factor which influences the intensity of scrutiny. On the other hand, we would not rule out the possibility that whether, for example, a measure has been taken at the apex of democratic decision-making within a member state might, at least in some contexts, be relevant to an assessment of its proportionality, particularly in relation to the level of protection considered to be appropriate and the choice of method for ensuring it. It is however unnecessary to resolve that question for the purposes of the present appeal.

82. The Court of Appeal based its approach in the present case, and in particular its adoption of a test of whether the scheme was manifestly inappropriate, upon the judgments of the majority of the Court of Appeal in *Sinclair Collis.* For the reasons we have explained, that aspect of the reasoning in those judgments (as distinct from the conclusion reached) is open to criticism.

The Directive

83. The Directive is underpinned by the freedom of establishment, and freedom to provide services, guaranteed by articles 49 and 56 respectively of the TFEU. As explained in recitals 6 and 7 to the Directive, barriers to those freedoms cannot be removed solely by relying on the direct application of the Treaty articles on a case by case basis. The Directive therefore establishes a general legal framework, based on the removal of barriers which can be dismantled quickly, and, for the others, the

launching of a process of evaluation, consultation and harmonisation of specific issues, making possible the coordinated modernisation of national regulatory systems for service activities. As recital 30 to the Directive acknowledges, there existed prior to the Directive a considerable body of EU law on service activities. The recital states that the Directive "builds on, and thus complements, the Community acquis".

84. In particular, recital 54 states that the possibility of gaining access to a service activity should be made subject to authorisation only if that decision satisfies the criteria of non-discrimination, necessity and proportionality:

> "That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection."

85. Turning to the substantive provisions of the Directive, Chapter III is concerned with freedom of establishment for providers of services. It is necessary to consider only Section 1, which is concerned with authorisations, and largely codifies the case law of the court, discussed earlier. The first provision in that section is article 9, para 1 of which provides:

> "Member states shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:
>
> > (a) the authorisation scheme does not discriminate against the provider in question;
> >
> > (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
> >
> > (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective."

86. The expression "authorisation scheme" is defined by article 4(6) as meaning "any procedure under which a provider or recipient is in effect required to take steps

in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof". A fuller description is set out in recital 39, covering "inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession".

87. The conditions set out in subparagraphs (a) to (c) of article 9(1) broadly reflect the Court's case law, as stated for example in *Gebhard.* In relation to (b), "overriding reasons relating to the public interest" are defined by article 4(8) as meaning reasons recognised as such in the case law of the court, including inter alia public policy, the protection of consumers and recipients of services, and social policy objectives. Somewhat confusingly, a different and longer list of "overriding reasons relating to the public interest" is set out in recital 40, and a third list in recital 56. The former list includes safeguarding the sound administration of justice. As we have explained, that is a justification which has been recognised in the case law of the court, and therefore falls within the scope of article 4(8). It is also relevant to note recital 41, which concerns the concept of public policy, and states that, as interpreted by the Court of Justice, it covers protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society, and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults, and animal welfare.

88. In relation to the indication in subparagraph (c) that an authorisation scheme may be proportionate "in particular because an a posteriori inspection would take place too late to be genuinely effective", it is relevant also to note that recital 54, set out above, refers to the need to take account of the risks and dangers which could arise in the absence of a prior inspection.

89. Article 10 goes on to require authorisation schemes to be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner (paragraph 1), and which are non-discriminatory, justified by an overriding reason relating to the public interest, proportionate to that public interest objective, clear and unambiguous, objective, made public in advance, transparent and accessible (paragraph 2). In terms of paragraph 5, the authorisation must also be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

90. Article 11 prohibits an authorisation being for a limited period, except in particular circumstances. One of those circumstances is where a limited authorisation period can be justified by an overriding reason relating to the public

interest. The ability of a member state to revoke authorisations, when the conditions for authorisation are no longer met, is recognised by article 11(4).

91. Article 13 lays down a number of requirements in relation to authorisation procedures. In summary, these include that the procedures are clear, made public in advance, and such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially (paragraph 1); that they are not dissuasive and do not unduly complicate or delay the provision of the service; that they are easily accessible, and that any charges are reasonable and proportionate to the cost of the authorisation procedures and do not exceed the cost of those procedures (paragraph 2); and that applicants are guaranteed to have their application processed as quickly as possible, and in any event within a reasonable period (paragraph 3).

92. The Directive was due to be implemented by 28 December 2009.

The issues arising under the Directive

93. The issues in the present case have been focused by reference to the requirements set out in article 9(1)(b) and (c). It is not contended that the scheme fails to comply with any other provisions of the Directive. The arguments in relation to paras (b) and (c) overlap to the point of being practically indistinguishable.

94. The objectives identified as the "overriding reason relating to the public interest" justifying the need for the scheme, under article 9(1)(b), are the protection of consumers and other recipients of the services in question, and the sound administration of justice. There is no dispute about the legitimacy and importance of those considerations. The argument is about whether they are sufficient to justify the scheme in the form which has been approved by the Board. That depends essentially on whether the scheme satisfies the condition in article 9(1)(c).

95. The issue arising under article 9(1)(c) in the present case is not a straightforward question whether prior authorisation is necessary, or whether an a posteriori inspection would be adequate. The scheme is not a simple prior authorisation scheme, but involves a combination of provisional accreditation, based on self-certification, and subsequent assessment. The contentious element of the scheme is not the requirement, imposed on advocates wishing to practise at a level higher than level one, to register for provisional accreditation at the level at which they consider themselves to be practising. A requirement to register at a level on the basis of self-assessment is common to both the scheme and the BSB's alternative proposal. It is not argued that it presents any material obstacle to practice. The issue

concerns the particular character and purpose of the judicial assessment which takes place after the advocate has been practising at the level in question on the basis of his or her self-assessment.

96. As was explained earlier, judicial assessment is automatic in relation to all advocates at Level 2 and above, and is carried out in order to decide whether full accreditation should be granted. Such accreditation is then valid for five years, following which its renewal is conditional on a further assessment. Progression to a higher level requires provisional accreditation at that level, on the basis of judicial assessment as "very competent" at the current level, followed by full accreditation at the higher level, based on further assessment. Under the BSB's alternative proposal, on the other hand, judicial assessment would take place only if concerns were raised about a particular advocate through monitoring referrals or evaluations completed in a rolling programme of judicial assessment. Advocates would otherwise remain at their self-assessed level, or move up a level when they felt competent to do so. The point is put in a nutshell in the parties' agreed statement of facts and issues:

> "The BSB proposal was therefore one which involved self-certification at a particular level, with the possibility of judicial assessment at that level to follow subsequently. QASA proposed self-certification for the purposes of initial, provisional accreditation at a particular level, followed by judicial assessment for the purposes of the BSB determining whether the advocate is entitled to maintain full accreditation at the existing level, or to progress to a higher level."

97. The issue under article 9(1)(c), therefore, is whether, in so far as the requirements of the scheme are more stringent than those of the BSB proposal, the objectives pursued cannot be attained by means of a less restrictive measure. As the Commission's *Handbook on Implementation of the Services Directive* (2007) states at para 6.1.1:

> "Member States should keep in mind that, in many situations, authorisation schemes can be ... replaced by less restrictive means, such as monitoring of the activities of the service provider by the competent authorities ..."

In essence, the appellants contend that this is such a situation.

98. It is clear from the case law of the court, summarised in paras 55-67, that consideration of that issue in a context of this kind requires scrutiny of the

justification put forward for rejecting the less stringent alternative. A "manifestly inappropriate" or "manifest error" test is not appropriate in this context; but, as we have explained, that is not to say that no discretion is allowed to the primary decision-maker as to the level of protection which should be afforded to the public interest in question or as to the choice of a suitable measure.

The approach of the courts below

99. In considering the decisions of the courts below, it should be noted at the outset that the EU jurisprudence which we have discussed was not cited to those courts. Nor was it suggested to them that the proportionality principle in EU law differed in any material respect from that applicable under the Human Rights Act.

100. In considering the proportionality of the scheme, the Divisional Court ([2014] EWHC 28 (Admin)) referred at para 130 to the four-stage analysis of proportionality explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, paras 20 and 72-76. That analysis was however concerned with the proportionality under the Human Rights Act of measures which involve the limitation of a fundamental right, rather than with proportionality as a principle of EU law. Attempting nevertheless to apply the *Bank Mellat* approach, the court accepted at stage one of the analysis that the scheme had an important objective, namely to ensure competent advocacy. At stage two, the court accepted that the scheme was a rational method of tackling incompetent advocacy. Stages three and four do not appear to have been explicitly addressed. The court noted that the BSB had considered whether a less intrusive scheme was possible, but had decided that the QASA scheme was the best way forward; that the cost to advocates of participating in the scheme would be very small; that judges would have to be trained before conducting assessments; and that the scheme would be reviewed within a short period. The court then expressed its conclusion that "we cannot regard the balance struck in the light of all these factors as being in any way disproportionate" (para 132). This discussion did not apply the EU principle of proportionality, or address the requirement in article 9(1)(c) of the Directive (or regulation 14(2) of the Regulations) that "the objective pursued cannot be attained by means of a less restrictive measure".

101. The Court of Appeal began its consideration of proportionality by stating (para 102):

> "It is not for the court to decide whether QASA is disproportionate."

We are unable to agree with that statement. It *is* for the court to decide whether the scheme is disproportionate. The court must apply the principle of proportionality and reach its own conclusion.

102. The Court of Appeal continued (para 102):

> "The court is not entitled simply to substitute its own views for those of the LSB: see *R (Sinclair Collis Ltd)* v *Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, at paras 19-23 (per Laws LJ, dissenting), paras 115-155 (per Arden LJ) and paras 192-209 (per Lord Neuberger MR). We remind ourselves that we are *reviewing* the proportionality of the LSB's decision. Even under a proportionality test, the decision-maker retains a margin of discretion, which will vary according to the identity of the decision-maker, and the subject-matter of the decision, as well as the reasons for and effects of the decision. A decision does not become disproportionate merely because some other measure could have been adopted. We accept the submission of [counsel for the Board] that the decision-maker's view of whether some less intrusive option would be appropriate as an alternative is likewise not a question on which the court should substitute its own view, unless the decision-maker's judgment about the relative advantages and disadvantages is manifestly wrong." (emphasis in original)

103. For the reasons we have explained, the judgments of the Court of Appeal in *Sinclair Collis* do not provide reliable guidance as to the test to be applied in a context of the present kind. It is also difficult to see why, in the circumstances of the present case, the identity of the national decision-maker should affect the court's assessment of the compatibility of the scheme with EU law. A test of whether the decision-maker's judgment was "manifestly wrong" has no place in the present context. A decision of the present kind *is* disproportionate if a less restrictive measure could have been adopted, provided that it would have attained the objective pursued.

104. The Court of Appeal considered the scheme in accordance with the approach it had described. It began by emphasising that the Board was the regulator charged by Parliament with the task of making the necessary assessments:

> "Having regard to the identity of the decision-maker and the nature and subject-matter of the decision, we consider that the LSB is entitled to a substantial margin of discretion in relation to the question whether the decision was proportionate." (para 103)

For the reasons we have explained, that was not the correct approach.

105. Addressing the argument that it had not been shown that there was no less intrusive means of achieving the aims pursued by the scheme, the Court of Appeal correctly observed that it was not the law that, unless the least intrusive measure was selected, the decision was necessarily disproportionate. Rather, the question was whether a less intrusive measure could have been used without unacceptably compromising the objective of improving the standards of advocacy in criminal courts (para 105). Addressing the argument that the BSB proposal would have been an equally effective and less onerous alternative to the scheme, the Court of Appeal stated:

> "In our judgment, the LSB was entitled to reject this proposal for the reasons that it gave. It was not 'legally irrelevant' that the LSB considered that, for reasons of consistency and in order to promote competition, it was in the public interest to have one scheme for all advocates. That was not, however, the only reason why the LSB rejected the November alternative. It judged that it was in the public interest that there should be a *comprehensive* assessment scheme and that the evidence indicated that there was a need to make assessments *across the board*. This was a judgment that it reached after considering a massive amount of material on which it brought its expertise as a regulator to bear. In short, the LSB was of the view that a separate 'enhanced quality monitoring' scheme for barristers could not be adopted without unacceptably compromising the objective (in the best interests of the public) of having a single accreditation scheme for all advocates." (para 107)

106. The problem with this reasoning is that, having earlier identified the objective as being to improve the standards of advocacy in the criminal courts, the court here treated the objective as being to have a single accreditation scheme for all advocates. That cannot however be a relevant objective for the purposes of the Directive. Having an authorisation scheme is not an objective in itself: it has to be justified by some (other) overriding reason relating to the public interest. The relevant objectives in the present case could only be the protection of consumers and recipients of services, and safeguarding the sound administration of justice. The application of a scheme on a consistent basis to all criminal advocates might be necessary in order for the scheme to achieve those objectives effectively. It might also be necessary in order for the scheme to comply with the requirement in article 9(1)(a) that it must not discriminate against the provider in question. The court did not however address those issues.

107. Treating proportionality as a matter primarily for the Board, the Court of Appeal concluded that the Board "addressed the issue of proportionality and was entitled to conclude that QASA was proportionate" (para 111). Like the Divisional Court, the Court of Appeal made no reference to the specific requirement imposed by article 9(1)(c) of the Directive, or to the corresponding requirement in regulation 14(2)(c) of the Regulations.

108. In the circumstances, it is necessary for the matter to be reconsidered on the proper basis. In particular:

> (1) It is for the court to decide whether the scheme is proportionate, as part of its function in deciding upon its legality.
>
> (2) In so doing it should approach the matter in the same way in which the Court of Justice would approach the issue in enforcement proceedings.
>
> (3) Article 9(1)(c) requires the court to decide, in the present case, whether the Board has established that the objectives pursued by the scheme, namely the protection of recipients of the services in question, and the sound administration of justice, cannot be attained by means of a less restrictive scheme, and in particular by means of the procedure set out in the BSB proposal.
>
> (4) That decision does not involve asking whether the Board's judgment was "manifestly wrong", or whether the scheme is "manifestly inappropriate". The court must decide for itself, on the basis of the material before it, whether the condition set out in article 9(1)(c) is satisfied.
>
> (5) In considering the question of necessity arising under article 9(1)(c), it should be borne in mind that EU law permits member states to exercise a margin of appreciation as to the level of protection which should be afforded to the public interest pursued. It also allows them to exercise discretion as to the choice of the means of protecting such an interest, provided that the means chosen are not inappropriate.

This court's analysis of the proportionality of the Board's decision

109. In their joint application for the Board's approval of the scheme, the BSB, SRA and IPS explained the rationale of the scheme in terms which concentrated on the need to ensure greater protection for the public in relation to criminal advocacy

across the board. To that end they argued that the "systematic assessment and accreditation of the competence of advocates will provide consumers of criminal advocacy with tangible reassurance that their advocate has the necessary competence to handle their case". They described the proposed regulatory changes as a "risk managed" approach: "only those advocates that meet the requirements will be permitted to undertake criminal advocacy and those that are accredited can deal only with cases within their competence." And they argued that the scheme was proportionate to the objective:

> "27. Protecting the public interest and interest of consumers of criminal advocacy has been at the heart of the design and development of the Scheme.
>
> 28. The SRA, BSB and IPS believe that the proposed Scheme and regulatory changes are proportionate to the objective of protecting the interests of consumers of criminal advocacy. The proposed changes will ensure consistent and systematic assessment of competence of advocates and result in advocates taking on only those cases in which they are competent to act."

110. As we have explained at para 14, the Board undertook its own assessment of whether there was a risk which needed to be addressed, and a firm rationale for the particular scheme proposed. The Board's conclusion that there was such a risk was based upon a range of evidence, which we have summarised at para 15. It noted the potentially serious consequences of poor advocacy for those affected and for the administration of justice, as we have explained at para 15. In relation to the particular scheme proposed, the Board considered that a scheme applicable to advocates generally was justified in view of the gravity of the risk and the absence of evidence supporting the adoption of a more selective approach, as we have explained at paras 16-17. The Board also noted that the scheme was to be reviewed after two years, and that it could be adjusted on the basis of evidence gained from its implementation, as we have explained at para 18.

111. The Board did not consider that the scheme was an "authorisation scheme" within the Regulations, but it considered the issue of proportionality in a broad sense and concluded that "there is legitimate and sufficient concern about the quality of criminal advocacy and that the Scheme proposed in the application is both proportionate and targeted". The evidence filed in these proceedings by the Board's chief executive is that the Board did not consider that there were equally effective ways of achieving the scheme's objective without adopting a scheme of that nature.

112. The Court of Appeal considered that the Board was entitled to judge that it was "in the public interest that there should be a *comprehensive* assessment scheme and that the evidence indicated that there was a need to make assessments *across the board*" (original emphasis), and it observed that the Board reached that judgment "after considering a massive amount of material on which it brought its expertise as a regulator to bear" (para 107).

113. The appellants submitted that the reasoning of the Court of Appeal was faulty in that it failed to focus on whether an alternative scheme of the kind previously proposed by the BSB would be any less effective and that it rested on a suppressed, and unestablished, premise that the regulated professions represented by the BSB, SRA and IPS all presented the same risk profile, whereas a scheme of prior authorisation required separate analysis in relation to each category of service provider (barristers, solicitors and legal executives). The appellants further submitted that the BSB's own previous stance was evidence that it could not be demonstrated that the proposed scheme was the least burdensome way of achieving its objective.

114. The core feature of the scheme is that every criminal advocate without exception, who wishes to practise at one of the upper levels, must undertake judicial assessment at the outset. No criminal advocate, competent or incompetent, can slip through that net, and every client has the protection that whoever represents him in a case at an upper level will have been subject to such assessment.

115. A precautionary scheme of this kind provides a high level of public protection, precisely because it involves an individual assessment of each provider wishing to practise at an upper level, and it places a corresponding burden on those affected by it. Whether such a level of protection should be provided is exactly the sort of question about which the national decision maker is allowed to exercise its judgment within a margin of appreciation: see paras 64-65 above.

116. A self-certifying scheme of the kind proposed by the BSB in November 2012 presents a higher level of risk because of the possibility that an advocate may consider himself competent to practise at a level where he does not have the necessary competence, and even if his incompetence is later detected and reported to the regulator (of which there can be no certainty), for those who have had the misfortune of being poorly represented by him it will be a case of shutting the stable door after the horse has bolted. (To illustrate the uncertainty of detection, an advocate who appears infrequently at the upper levels may lack competence, possibly through not keeping up with the law, but will be correspondingly less likely to be assessed under a rolling programme than an advocate who appears more regularly.) It is perfectly true that the evidence did not enable the level of risk to be quantified with any approach to precision, but that did not preclude the Board from

considering that it was unacceptable. We do not regard the judgment made by the Board in that regard as falling outside the appropriate margin of appreciation. Since the only way of reducing the risk, so as to provide the desired level of protection for all members of the public involved in criminal proceedings at an upper level, was to have a scheme of the kind proposed by the JAG, it follows that the scheme was proportionate to the objective, notwithstanding the inconvenience caused to competent members of the profession.

117. Although our reasoning process has been different from the courts below, we therefore agree with the Court of Appeal that a comprehensive assessment scheme was proportionate, and that the Board was entitled to grant the application of the BSB, SRA and IPS.

The scope of the Directive

118. There remains the question whether the scheme is in fact an authorisation scheme falling within the scope of the Directive. The answer to that question does not appear to us to be straightforward, and if it were necessary for this court to reach a decision on the point, we would be inclined to make a reference to the Court of Justice. Given our conclusion, however, that even if the scheme falls within the scope of the Directive, it is compliant with article 9(1)(b) and (c), it is unnecessary for the question to be decided in these proceedings.

Conclusion

119. For these reasons we would dismiss the appeal