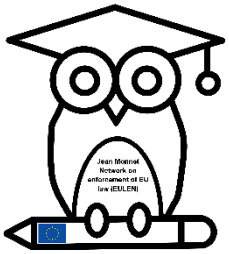

Jean Monnet Network on EU Law Enforcement

Working Paper Series

Conference:

Enforcement of European Union Law: New Horizons,

19-20 September 2024 at King's College London

A. Cover Page

The Role of Impact Assessments in the Judicial Enforcement of EU Law

Dr Darren Harvey[1]

Abstract

The EU relies upon the authorities in Member States to apply and enforce Union law in many policy fields. Evidently, for this system to function properly, those Member State authorities must be certain that the law they are enforcing is legally valid. Recently, there have been multiple challenges to the validity of EU legislation brought by Member States on the grounds that there was an infringement of the "principles of sound legislative procedure" by the EU institutions when preparing and adopting legislation. It has been argued that the absence or insufficiency of Impact Assessments carried out by the Commission should result in the invalidation of the contested EU legislation. The most explosive example of this growing body of "process-oriented review" comes in a recent set of 15 annulment actions brought by 7 Member States against new EU road-transport legislation. The opinion of AG Pitruzzella represents a landmark development in the enforcement of "better regulation" standards against the EU institutions. For the first time ever, the AG has found that, by not carrying out an assessment of the economic, social and environmental impact of proposed legislation prior to its adoption, the EU legislature breached the principle of proportionality. Against this background, this paper argues that these cases are best understood as an attempt by the Member States to convince the CJEU to judicially enforce more robust principles of "sound legislative procedure" against the EU institutions. This development represents a reversal of the typical enforcement dynamic in the EU's multilevel system of governance, in that it is the Member States driving attempts at better enforcement of EU norms vis-à-vis the EU level. The paper further argues that this nascent body of case law carries further implications for enforcement in EU law, in that Member States are becoming increasingly uncomfortable with having to apply and enforce EU legislation that they believe has been adopted through a defective legislative process.

Keywords:

Judicial Review, Enforcement, Impact Assessments, Proportionality.

[1] Senior Lecturer in Law, King's College London.

I. Introduction

The EU relies upon the authorities in Member States to apply and enforce Union law in many policy fields. Evidently, for this system to function properly, those Member State authorities must be certain that the law they are enforcing is legally valid. Recently, there have been multiple challenges to the validity of EU legislation brought by Member States on the grounds that there was an infringement of the "principles of sound legislative procedure" by the EU institutions when preparing and adopting EU legislation.[2] In particular, it has been argued that the absence or insufficiency of Impact Assessments carried out by the Commission should result in the invalidation of the contested EU legislation. These Impact Assessments examine the existence, scale and consequences of a problem and the question whether Union action is needed. They often explore alternative solutions to identified problems. They assess the economic, environmental and social impacts of possible policy solutions. Moreover, Impact Assessments should ensure that any proposal for legislative action respects the principles of subsidiarity and proportionality. [3]

In previous work, I have examined the increased reliance upon Impact Assessments and other legislative documents by both the EU legislature and the CJEU when it comes to reviewing the validity of EU legislation for compliance with the principles of subsidiarity and proportionality.[4] In particular, I have drawn attention to the ways in which the CJEU now adopts a process-oriented approach to judicial review of EU legislation by examining the processes by which contested legislation was enacted.[5] This typically takes the form of the CJEU insisting that the EU legislature demonstrate that when enacting legislation they "actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate."[6] In a number of recent cases, Impact Assessments have formed an integral part of both demonstrating and subsequently reviewing whether the EU legislature considered all facts and circumstances relevant to the subsidiarity and proportionality principles when legislating.[7]

The present paper seeks to build on my previous work by analysing what I consider to be a most politically and legally explosive example of the Court's engagement with Impact Assessments when conducing "process-oriented review" of EU legislation. [8] The case in question is a recent set of 15 annulment actions brought by 7 Member States against the new EU "mobility package" in the road transport field.[9] As shall be further examined below, it is submitted that the opinion of AG Pitruzzella in this case represents a landmark

---

[2] *Case C-482/17, Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035; *Case C-620/18, Hungary v Parliament, ECLI:EU:C:2020:1001*; *Case C-358/14, Poland v European Parliament and Council,* ECLI:EU:C:2016:323; *Case C-176/09 Luxembourg v Parliament and Council,* ECLI:EU:C:2011:290.

[3] Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, [2016] OJ L 123, p. 1–14 para 12.

[4] Darren Harvey, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (2021) 46 European Law Review 460; Darren Harvey, 'Towards Process-Oriented Proportionality Review in the European Union' (2017) 23 European Public Law 93.

[5] See generally K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3.

[6] *Case C-482/17, Czech Republic v Parliament and Council* (n 2) 81; *Case C-5/16, Poland v Parliament and Council (MSR),* ECLI:EU:C:2018:483 para 152-153.

[7] *Case C-482/17, Czech Republic v Parliament and Council* (n 2); *C-128/17, Poland v Parliament and Council* ECLI:EU:C:2019:194; *Case C-151/17, Swedish Match AB v Secretary of State for Health* ECLI:EU:C:2018:938.

[8] Harvey, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (n 4).

[9] *Joined Cases C- 541/20 to C - 555/20, Lithuania et al v European Parliament and Council of the European Union (Judgment Pending)*.

development in the enforcement of "better regulation"[10] standards against the EU institutions.[11] For the first time ever, the Advocate General has found that, by not carrying out an assessment of the economic, social and environmental impact of proposed legislation prior to its adoption, the EU legislature has breached the principle of proportionality.[12]

Against this background, this paper argues that these cases are best understood as an attempt by the Member States to convince the CJEU to judicially enforce more robust principles of "sound legislative procedure" against the EU institutions. This development represents a reversal of the typical enforcement dynamic in the EU's multilevel system of governance, in that it is the *Member States driving attempts at better enforcement of EU norms vis-à-vis the EU level*. The paper further argues that this nascent body of case law carries further implications for the enforcement of EU law, in that Member States are becoming ever more uncomfortable with having to apply and enforce EU legislation that they believe has been adopted through a defective legislative process.

II. The Role of Impact Assessments in the EU Legislative and Judicial Process

The rules governing Impact Assessments are governed by the Inter-Institutional Agreement between the Commission, Parliament and Council on Better Law-Making.[13] As noted above, Impact assessments are primarily conducted by the European Commission and should be conducted whenever proposals for EU measures are expected to entail significant environmental, economic or social impacts. Crucially, Impact Assessments are intended to assist the Commission, Parliament and Council in reaching well-informed decisions. They are not a substitute for political decisions within the democratic decision-making process at EU level.[14] Impact Assessments should cover the existence, scale and consequences of a problem and the question whether action on the EU level is needed. They should be based on accurate, objective and complete information and should present alternative solutions to law-makers, identifying, where possible, potential short and long-term costs and benefits. This involves assessing the "costs of Non-Europe" and the impact that different policy solutions would have on competitiveness and administrative burdens. Quantitative and qualitative analyses should also be utilised to assess the economic, environmental and social impacts of possible solutions. Impact Assessments should ensure that the principles of subsidiarity and proportionality, as well as fundamental rights, are respected.[15]

With regards to their legal effects, settled case law of the CJEU confirms that the failure by the EU institutions to carry out an Impact Assessment in the preparation of EU legislation is not, in itself, a violation of EU law.[16] The relevant provisions of the Inter-Institutional Agreement are not binding on the EU legislature, who is free to arrive at a different solution and/or depart from the solutions proposed in the Impact Assessment and the Commission proposal (provided the latter's right of initiative is respected.) Indeed, even where the Parliament and the Council depart from the Commission's proposal - and from the underlying Impact Assessment - by amending substantial elements of that proposal, the fact that they do not update the Impact Assessment when doing so does not automatically render the EU legislation invalid.[17]

Nonetheless, the Court has indicated that the absence or insufficiency of an Impact Assessment weighs in the balance when assessing whether contested legislation complies with the principle of proportionality.[18] The principle of proportionality requires that EU legislation: (i) be appropriate for attaining the legitimate

[10] 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, "Better Regulation: Joining Forces to Maker Better Laws", COM(2021) 219 Final'.
[11] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union*.
[12] ibid para 655.
[13] Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, [2016] OJ L 123, p. 1–14.
[14] ibid para 12.
[15] ibid para 12.
[16] *Case C-482/17, Czech Republic v Parliament and Council* (n 2) paras 82-85.
[17] *C-128/17, Poland v Parliament and Council* (n 7) para 43.
[18] *Case C-482/17, Czech Republic v Parliament and Council* (n 2); *Case C-151/17, Swedish Match AB v Secretary of State for Health* (n 7); *Case C-358/14, Poland v European Parliament and Council,* (n 2).

objectives pursued by the legislation (suitability); (ii) not go beyond what is necessary to achieve those objectives (necessity); and (iii) 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 (proportionality stricto sensu).[19] When it comes to reviewing EU legislation for compliance with the principle of proportionality, the EU legislature is afforded a wide margin of discretion when its action involves choices of a political, economic or social nature, and in which it is called upon to undertake complex assessments and evaluations. Consequently, the substantive standard of review to be applied by the CJEU is whether the contested measure is manifestly disproportionate, having regard to the objectives which the EU legislature is trying to pursue.[20] This has resulted in the CJEU typically applying a light-touch or low-intensity review of the proportionality of EU legislation in areas where a wide discretion is afforded, with considerations pertaining to the separation of powers, democratic legitimacy and institutional expertise all justifying this approach.[21]

However, in recent years, the CJEU has begun to build a clearly process-oriented approach to proportionality review into its jurisprudence.[22] In addition to the above, the Court now also insists that, even where the EU legislature enjoys wide discretion, it must base its choices upon "objective criteria" and "examine whether the aims pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators."[23] In this regard, the EU institutions must be able to demonstrate that in adopting the legislation they "actually exercised their discretion", which "presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate."[24] Thus, the EU legislature "must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended."[25] In reviewing whether the EU legislature has discharged this justificatory burden, the Court has increasingly had recourse to Impact Assessments and other documents used throughout the legislative process.[26]

To be clear, much like the finding above in relation to the non-binding effect of the Inter-Institutional Agreement, the CJEU has held that the failure by the EU legislature to carry out an Impact Assessment cannot, in itself, constitute a breach of the principle of proportionality. What matters is that the EU legislature can either provide reasons as to why an Impact Assessment had to be dispensed with in a particular situation, or has sufficient information from elsewhere that enables it to assess the proportionality of an adopted measure.[27] Thus, the form in which the basic data taken into account by the EU legislature is recorded is irrelevant, and the EU legislature is entitled to take into account not only the Impact Assessment, but also any other source of information.[28] In principle, therefore, the EU legislature may act in the absence of an Impact Assessment and may adopt a specific provision in a legislative act that was not the subject of an Impact Assessment accompanying a Commission proposal.[29] The EU legislature has the freedom to enact measures which were not initially envisaged by the Commission proposal and/or Impact Assessment, including measures which are different or more onerous, without automatically leading to the conclusion that the legislature manifestly exceeded the limits of what was necessary to achieve the stated objective.[30] In short, therefore, the failure to

[19] *Case C-156/21, Hungary v Parliament and Council, EU:C:2022:97* aragraph 340 and the case-law cited therein.
[20] *Case C-620/18, Hungary v Parliament, ECLI:EU:C:2020:1001* (n 2) paragraph 112 and the case-law cited therein; .
[21] Harvey, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (n 4) 471.
[22] Harvey, 'Towards Process-Oriented Proportionality Review in the European Union' (n 4).
[23] This stems also from Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaties, which requires draft legislative acts to take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved. See *Case C-620/18, Hungary v Parliament, ECLI:EU:C:2020:1001* (n 2) para 115; *Case C-482/17, Czech Republic v Parliament and Council* (n 2) para 79..
[24] *Case C-5/16, Poland v Parliament and Council (MSR),* (n 6) paras 152-153.
[25] *Case C-482/17, Czech Republic v Parliament and Council* (n 2) para 81.
[26] Harvey, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (n 4).
[27] *Case C-482/17, Czech Republic v Parliament and Council* (n 2) para 85.
[28] *C-128/17, Poland v Parliament and Council* (n 7) para 31.
[29] *Case C-482/17, Opinion of Advocate General Sharpston in Czech Republic v Parliament and Council* para 97.
[30] *Case C-477/14, Pillbox 38 (UK) Ltd v The Secretary of State for Health,* ECLI:EU:C:2016:324, paras 64-65.

conduct an Impact Assessment when enacting legislation cannot, in and of itself, constitute a violation of either the (non-binding) Inter-Institutional Agreement or the principle of proportionality.

Nonetheless, shortcomings in the legislative process *may* indicate that the EU legislature failed to adequately consider all relevant facts and circumstances when legislating; particularly by failing to consider the economic and social impact that proposed EU legislation will have.[31] To this end, to exercise their discretion lawfully, the Parliament and Council must be able to demonstrate that they considered all relevant facts and circumstances during the legislative process. This process-based obligation requires, inter alia, that the EU legislature consider scientific data and other findings that have become available – including documents used by the Member States – during Council meetings that the Council does not have.[32]

Writing elsewhere, I have described this increased reference by the CJEU to the processes by which contested EU legislation was enacted as forming an integral part of an emerging doctrine of "process-oriented federalism" in the European Union.[33] The foundations of this emerging doctrine of process-oriented federalism lie in the recognition that much of the disagreement over the balance of competences between the EU and the Member States in the post-Lisbon Treaty era relates to the *exercise* as opposed to the *existence* of EU legislative competence.[34] Given that they speak to the exercise of legislative power, the principles of subsidiarity and proportionality are vital principles in the operation of process-oriented federalism, both with respect to the EU's legislative process and the conduct of judicial review. The doctrine of process-oriented federalism rests upon the idea that it is principally for the political process to resolve substantive disputes over whether to act on the EU or Member State level. In the contemporary EU, particularly in areas of shared competence, it is emphatically the EU's political institutions that must initially consider the purported benefits and costs of pursuing particular objectives through European or national legislation.[35] The EU Treaties mandate that those same institutions consult widely throughout the legislative process and accompany any proposals for EU legislation with a detailed statement setting out why such proposals comply with various aspects of the subsidiarity and proportionality principles.[36] For its part, the CJEU considers whether the EU legislature has demonstrated that it considered all facts and circumstances relevant to the subsidiarity and proportionality principles when deciding to exercise its legislative powers. By engaging in process review, the Court considers "whether, in reaching an outcome, the EU political institutions [have] followed the procedural steps mandated by the authors of the Treaties."[37] In this way, the Court utilises its powers of judicial review in order to reinforce the political safeguards of federalism in the EU.[38] In contentious and complex areas of shared competence such as the internal market, the CJEU's powers of review have recently been "directed toward maintaining a vital system of political and institutional checks on federal power, not on policing some absolute sphere of state autonomy."[39] In line with the letter and spirit of the Lisbon Treaty reforms in this area, process-oriented review of this nature contributes to a better division of competences, by ensuring that the outcomes of the political process are justified in light of the principles of subsidiarity and proportionality.

III. The Actions for Annulment and the Opinion of AG Pitruzzella

i. Background

[31] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) paras 71-74.
[32] *Case C-482/17, Czech Republic v Parliament and Council* (n 2) para 86; *Case C-5/16, Poland v Parliament and Council (MSR),* (n 6) paras 160-163.
[33] Harvey, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (n 4).
[34] Takis Tridimas, 'Competence after Lisbon: The Elusive Search for Bright Lines' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012).
[35] This much is made clear by Article 5 TEU, Protocol No. 2 of the TFEU on the Application of the Principles of Subsidiarity and Proportionality, and the Inter-Institutional Agreement on Better Law-Making.
[36] Articles 2 and 5, Protocol No.2 of the TFEU on the Application of the Principles of Subsidiarity and Proportionality.
[37] Lenaerts (n 5) 4.
[38] Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' (2009) 68 Cambridge Law Journal 525.
[39] Ernest A Young, 'Two Cheers for Process Federalism' (2001) 46 Villanova Law Review 1349, 1351.

Against this background, we can now turn to the recent litigation which sits at the heart of the present contribution. The case concerns a series of 15 actions for annulment brought by 7 Member States (Lithuania, Bulgaria, Romania, Cyprus, Hungary, Malta and Poland) against certain provisions of three EU legislative measures forming part of a new 'Mobility Package' in the field of transport policy. These legislative measures, taken together, set out various rules including: maximum daily and weekly driving times for haulage drivers, minimum breaks and daily and weekly rest periods for drivers, an obligation for drivers and vehicles to return to an operational centre or place of residence after a period of time, the conditions to be complied with to pursue the occupation of road transport operator and common rules for access to the international road haulage market.[40] The legislative measures in question were accompanied by two Impact Assessments.[41] As we shall see, the extent to which these Impact Assessments were of sufficient quality, along with the question of whether the EU legislature could permissibly enact legislative provisions that were not the subject of an Impact Assessment, formed a core part of the Member States' challenge against the EU mobility package. Following protracted negotiations between the EU institutions, a compromise on all three legislative measures was reached during negotiations within the framework of interinstitutional trilogue. When it came to adopting these measures by Qualified Majority Vote in the Council, a passing majority was achieved despite 9 Member States voting against the proposals.

The stakes involved in the litigation were clearly stated by Advocate General Pitruzzella, who noted that:

> "[r]arely has a legislative undertaking given rise to such a grouped and intense contentious reaction at EU level…On an issue that is fundamental to the internal market, the [mobility package] proposal brings clearly into view the risk of a split between two visions of the European Union. Over and above the legal issues at stake, it is therefore also, in a way, the pursuit of a desire to live together on common economic and social foundations that is at stake in these actions…[42]

It is evident that these actions for annulment were motivated, in part, by political considerations in the applicant Member States, who viewed the EU mobility package reforms as protectionist measures designed for the benefit of rival freight companies in Western Europe. Nonetheless, it is submitted that the lasting impact of this litigation will be its status as a landmark development in enforcement of "better regulation" standards against the EU institutions.[43] In this regard, certain Member States contended, inter alia, that the EU legislature had breached the "principles of sound legislative procedure" on the grounds that various provisions of the three legislative acts were adopted "without any assessment as to [their] impact and without a proper examination of [their] negative social and economic consequences and [their] effect on the environment."[44] In essence, the contention here is that the EU legislature had failed during the legislative process to adequately examine the proportionality of certain aspects of the new EU mobility package.

---

[40] Regulation of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC)No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs (OJ 2020 L 249, p. 1); Regulation of the European Parliament and of the Council of 15 July 2020 amending Regulations (EC)No 1071/2009, (EC) No 1072/2009 and (EU) No 1024/2012 with a view to adapting them to developments inthe road transport sector (OJ 2020 L 249, p. 17); Directive of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012(OJ 2020 L 249, p. 49).

[41] Impact assessment accompanying the proposal for a working time regulation and the proposal for a posting directive ('Impact assessment – social section'), and impact assessment accompanying the proposal for an establishment regulation ('Impact assessment – establishment section').

[42] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) para 3.

[43] ibid.

[44] The terminology "sound legislative procedure" was utilised by Lithuania when lodging their application for annulment before the CJEU. In the AG's opinion, this concern is phrased in terms of the EU legislature's failure to consider the proportionality of various aspects of the EU mobility package when legislating, which amounts to the same idea, albeit phrased differently. See Action brought on 23 October 2020, Republic of Lithuania v European Parliament and Council of the European Union (Case C-542/20).

In response, Advocate General Pitruzzella confirmed that, in the contemporary EU legal order, the question of whether the EU legislature took into consideration all the relevant factors and circumstances of the situation which the measure was intended to regulate (along with the question of whether the EU legislature had to carry out or supplement an Impact Assessment) falls to be examined in light of the principle of proportionality.[45] Crucially, the Advocate General considers that this process-oriented approach to proportionality review should be examined separately from the question of whether the substance of the contested measures violate the substantive aspects of the proportionality principle (i.e. suitability, necessity and proportionality stricto sensu).[46] Thus, there is a distinction being drawn here between: (i) whether the legislation is substantively proportionate, in the sense that its provisions are manifestly disproportionate to the objective pursued and; (ii) whether the legislation violates process-oriented aspects of proportionality, in the sense that the EU legislature failed to consider relevant facts and circumstances when legislating, thereby undertaking a defective examination of the proportionality of the measures when legislating.[47]

The AG then moved to examine four separate claims by the Member States that the EU legislature failed to examine the proportionality of certain provisions of the EU mobility package reforms when enacting that legislation. In what follows, I shall examine two of these claims, which are distinct and yet closely related. The reasons for focusing on these two claims are as follows. First, in my judgement, they provide the best illustration of the CJEU's approach to process-oriented and substantive proportionality review and the implications this has for the enforcement of EU law. Second, they deal with two similar issues (the obligation of drivers to return and the obligation of vehicles to return) and yet the AG reaches fundamentally different conclusions about the quality of the legislative process and ultimately the compliance with the principle of proportionality for each of them. Third, in an opinion stretching to 1167 paragraphs across 221 pages, some degree of selectivity is inevitable.

ii. Regulation 2020/1054 and the Obligation for Drivers to Return

Point 6(d) of Article 1 of Regulation 2020/1054 requires transport companies to organise the work of haulage drivers in such a way that they can return either to the haulier's operational centre where the driver is normally based, or their place of residence, every 4 weeks to undertake a rest period there. The AG's opinion first engages with the claim that this obligation infringes the substantive aspects of the principle of proportionality. To this end, the AG examines the objectives pursued by the legislation to determine whether they are legitimate, before examining whether the measure is manifestly disproportionate given its impacts upon drivers, the haulier industry and the environment. There is also consideration of whether less restrictive alternatives were available to the EU legislature. Whilst recognising the wide discretion of the EU legislature in this field, the AG nonetheless scrutinises the substance of the contested measure, along with addressing substantive questions such as whether legislative choices are arbitrary, manifestly disproportionate to their stated objectives and go beyond what is necessary to achieve those objectives.[48]

Having undertaken this rather extensive substantive proportionality assessment, the AG then moved to the separate, process-oriented arguments that the EU legislature breached the principle of proportionality by enacting into law provisions of the Regulation that departed from the Impact Assessment and Commission proposal. According to the applicant Member States, the EU legislature breached the principle of proportionality by enacting an obligation for drivers to return every 4 weeks (the original proposal for was 3 weeks), by mandating that drivers return to an operational centre or their place of residence (the original proposal only listed the place of residence) and by requiring hauliers to keep records of how they were complying with the return obligation (there was no such obligation in the proposal), all without carrying out an updated Impact Assessment of these changes. Moreover, the legislature was said to have ignored an opinion

[45] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) para 61; *Case C-482/17, Czech Republic v Parliament and Council* (n 2) paras 76-81, 84-85; *C-128/17, Poland v Parliament and Council* (n 7) para 73.
[46] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) paras 182-185, 349, 904-905.
[47] ibid para 349; For discussion see Harvey, 'Towards Process-Oriented Proportionality Review in the European Union' (n 4).
[48] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) paras 182-245.

of the European Economic and Social Committee (EESC) that had regretted the fact that the proposed amendments were not accompanied by a detailed assessment of driver, passenger or road safety in relation to driver fatigue. Consequently, it was argued that the EU legislature had failed to analyse several relevant circumstances that the legislation was intended to regulate.[49] The AG noted that the obligation for drivers to return every 4 weeks and the obligation to return drivers to the hauler's operational centre, or their place of residence, did broadly correspond to the Commission proposal based upon the Impact Assessment, thus leading to the conclusion that no violation of the process-oriented aspects of the proportionality principle had occurred. Regarding the EU legislature's disregarding of the EESC opinion, despite the committee playing "a very important role in the legislative procedure" it followed from Article 13(4) TEU and from Article 300(1) TFEU that its role was advisory and not binding."[50] Accordingly, the EU legislature is not required in every case to follow the recommendations contained in an EESC opinion, particularly when it "considers that it has sufficient information at its disposal to make non-substantial amendments to a provision by comparison with that envisaged in the Commission proposal on the basis of an impact assessment."[51] Notably, the impact assessment had concluded that "no environmental impact ha[d] been identified." For the AG, in the absence of other explanations, such an assertion would not be sufficient to demonstrate that the EU legislature had weighed up various objectives and interests when concluding that the measure was proportionate in terms of its impact upon the environment. However, based on other documents in the file that the EU legislature had at its disposal, the AG was satisfied that the EU legislature had demonstrated that it considered relevant elements and circumstances of the situation that the provision was intended to regulate, thus complying with the principle of proportionality.[52]

iii. Regulation 2020/1055 and the Obligation for Vehicles to Return Home Every 8 Weeks

The above obligation for drivers to return every 4 weeks may be contrasted with the obligation for vehicles to return every 8 weeks. Relevant EU legislation in the road transport sector requires undertakings economically engaged in that sector to have an effective and stable establishment in an EU Member State. Following the entry into force of Point 3 of Article 1 of Regulation 2020/1055, that legislation was amended to now include an obligation upon undertakings established in a Member State to organise its vehicle fleet's activity in such a way as to ensure that vehicles used in international carriage return to one of the operational centres in that Member State within eight weeks after leaving it.[53]

The validity of this obligation for vehicles to return to an operational centre in the Member State of establishment within 8 weeks (the 8-week return rule) was also challenged by several Member States in their actions for annulment. Most notably for present purposes, the Member States contended that there had been a breach of both the Inter-Institutional Agreement on Better Law-making and the principle of proportionality, since the EU legislature did not carry out an Impact Assessment of the obligation to return after 8 weeks.[54] The 8-week return rule did not feature in the initial Impact Assessment and was not included in the Commission proposal, with the consequence that the EU legislature should have carried out a new Impact Assessment for the rule, as recommended by the Interinstitutional Agreement on Better Law-making. The need for a further Impact Assessment was said to also flow from Articles 2 and 5 of Protocol (No 2) annexed to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality, particularly since the new rule was substantially different from the Commission proposal and entailed significant economic and environmental consequences. The Council and Parliament had allegedly failed to state any reasons why they had decided to dispense with the need for a new Impact Assessment of the novel 8-week return rule. They also had no economic assessments or other data capable of demonstrating the proportionality of the new rule, which substantially differed from the original proposal. This shortcoming in the legislative procedure was said to be made even more egregious by the fact that several Member States and other interested parties had provided the EU legislature with information that demonstrated the disproportionate impacts of the new 8-week return rule and the need for a new Impact Assessment, but this was ignored. Consequently, it was argued that the EU

[49] ibid paras 246-250.
[50] ibid para 261.
[51] ibid para 261.
[52] ibid paras 263-266.
[53] Point 3 of Article 1 of Regulation 2020/1055.
[54] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) para 626.

legislature was unable to demonstrate that they actually exercised their discretion in relation to the adoption of the new rule and were not in a position to take into consideration all the relevant circumstances of the situation which that act was intended to govern.[55]

In response, the AG first rejected the arguments based on the Inter-Institutional Agreement. Whilst that Agreement recommended the conducting of a new Impact Assessment for the 8-week return rule on accounts of its consequences from an economic, environmental and social standpoint, the Agreement is not binding and does not require an Impact Assessment to be carried out in every circumstance. The Agreement merely provides for the option for the Parliament and the Council to update an Impact Assessment where they deem it appropriate and necessary to do so for the legislative process. Indeed, failure to carry out an Impact Assessment does not automatically render EU legislation invalid on that basis. Where an Assessment does exist, the EU legislature retains the discretion to adopt a (substantially) different and even more onerous measure than that envisaged in the Assessment. Such action does not automatically lead to the conclusion that the legislature manifestly exceeded the bounds of what was necessary to achieve its objectives.[56]

In contrast, the absence of an Impact Assessment would be capable, in the AG's view, of being characterised as a breach of the principle of proportionality. This would be so whenever "the EU legislature does not have sufficient information enabling it to assess the proportionality of an adopted measure, (in other words to exercise its discretion effectively on the basis of all the relevant elements and circumstances of the situation which the act adopted is intended to govern, and is not in a particular situation requiring it to dispense with such an assessment."[57] Against this background, the AG probed the evidence base and reasoning of the EU legislature, including the findings of (and omissions from) the original Impact Assessment, when reviewing whether there was sufficient information capable of showing that the 8-week return rule had been adequately assessed in light of the principle of proportionality. In deploying this process-oriented approach to proportionality review, several defects in the legislative process and reasoning of the EU legislature were identified. First, it was established that the 8-week return rule appeared neither in the Commission's initial proposal, nor in the Impact Assessment – something which rendered this measure fundamentally different from the measure dealing with the obligation of drivers to return (see above).[58] The different policy solutions set out and assessed in the Impact Assessment bore no resemblance to the measure finally enacted by the EU legislature, meaning that the reasoning in the former could not be "transposed" to justify the latter. There had also been no consideration of the environmental impact of the 8-week return rule for vehicles in the Impact Assessment, and the EU legislature could not rely on the Impact Assessment's reasoning on the environmental impact of the driver's return obligation to support their new rule for vehicles.[59] Turning to the evidence that the EU legislature did put forward, and notwithstanding the wide discretion that the legislature enjoys as to the form and the nature of the data on which it bases its action, the importance of the policy in question and the radically opposed interests involves required more by way of justificatory evidence from the Council and Parliament. It was "not sufficient" to rely on: (i) a letter from the International Road Transport Union (IRU) that calculated the additional vehicles kilometres and CO2 emissions that a 3 or 4 week return rule would cause per year, without providing any methodology (the letter was not "genuinely capable of constituting objective information"); (ii) a positive response from the European Transport Workers' Federation (ETF) on loading and unloading obligations in the Member State of establishment; and (iii) a report produced at the request of a group of interests and in response to the amendment in the ongoing legislative procedure which did not shed light on the reasons for the legislature's choice. In the AG's view, several questions remained, and the EU legislature was unable to produce sufficient evidence to answer them. These included the overall economic consequences on the market of the new rule and, somewhat remarkably, how the EU legislature had come to opt for an 8-week timeframe for the return obligation.[60] Consequently,

> "by not carrying out an assessment of the economic, social and environment impact of the obligation for vehicles to return home every eight weeks, the Parliament and the Council breached the principle of proportionality, since they have not shown that, at the time of the adoption of that obligation, they

[55] ibid paras 627-633.
[56] ibid para 642.
[57] ibid para 643.
[58] ibid paras 644-645.
[59] ibid paras 646-650.
[60] ibid para 651-652.

> had sufficient information enabling them to assess the proportionality of that obligation in the light of the objectives which they intended to pursue and since they did not claim to be in a particular situation that made it necessary to dispense with an impact assessment."[61]

Since the AG found a violation of the principle of proportionality on process-based grounds; namely, the failure by the EU legislature to demonstrate that it examined the proportionality of the 8-week return rule, there was no need to then examine the substantive question of whether the 8-week return rule was in itself disproportionate.[62]

IV. Evaluation

It is submitted that the above finding of a violation of the principle of proportionality on the grounds that the EU legislature failed to demonstrate that it actually exercised its discretion by taking into account all relevant facts and circumstances is a positive development in the CJEU's jurisprudence. Whilst such a development had been hinted at in the past, the Court should now explicitly embrace the Advocate General's distinction between process-oriented and substantive proportionality review, with the former always preceding the latter when reviewing the validity of EU legislative acts.[63] Following years of criticism that the CJEU adopted an excessively deferential approach to the task of reviewing the validity of EU legislation on subsidiarity and proportionality grounds, the turn towards process-oriented review promises to enhance judicial scrutiny over the work of the EU legislature without second-guessing the merits of discretionary policy judgments.[64] Crucially, this increased emphasis by the Court on improving the ways in which the EU legislature takes its decisions has not resulted in the complete abandonment of substantive proportionality review. Whilst the focus has unquestionably shifted towards the question of whether the political process on the EU level can demonstrate that it took all factors relevant to the proportionality principle into account when legislating, the final output of that process is still subject to substantive proportionality review by the Court on a manifest error of assessment/ manifestly disproportionate standard of review. In this way, the Court can provide an ultimate, substantive backstop to the political safeguards of federalism in the EU.[65]

For present purposes, the more important point to be raised here is that the above developments in the jurisprudence represent a reversal of the typical enforcement dynamic that one finds in the EU's multilevel system of governance. Generally speaking, enforcement aims at preventing or responding to the violation of a norm in order to promote the implementation of set laws and policies.[66] Enforcement can either be direct or indirect in nature. Direct enforcement "implies monitoring, investigating and sanctioning vis-à-vis those subjects that are subject to substantive norms."[67] For reasons of national sovereignty, the direct enforcement of EU law has traditionally been entrusted to the Member States and their national/sub-national authorities, except for the field of EU competition law. Indirect enforcement, which traditionally has been more common in the EU legal system, involves the supervision of the application of the law by public authorities, but not directly over whether citizens as such obey that law.[68] For the most part – and for good reason – the vast majority of the literature looking at enforcement in the EU legal system has tended to focus on the ways in which EU law is enforced in the Member States.[69]

---

[61] ibid para 655.
[62] ibid para 657.
[63] The two-step approach of reviewing process first and substance second is an integral part of the idea of process-oriented federalism, see Harvey, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (n 4).
[64] Lenaerts (n 5) 3.
[65] Harvey, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (n 4) 479–480.
[66] Miroslava Scholten, 'Mind the Trend! Enforcement of EU Law Has Been Moving to "Brussels"' (2017) 24 Journal of European Public Policy 1348, 1350 and literature cited therein.
[67] ibid 1350.
[68] ibid 1350 and literature cited therein.
[69] Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) <https://www.elgaronline.com/view/book/9781802208030/9781802208030.xml> accessed 9 September 2024.

And yet, there can be no doubting that challenges to the validity of EU legislation before the CJEU, especially those brought by Member States via Article 263 TFEU, constitutes a key means of directly enforcing EU law. Such actions involve the Member States in monitoring, investigating, and ultimately trying to convince the CJEU to sanction the EU legislature for violating EU legal norms that it is subject to - such as the principle of proportionality. At one level, then, the Member States are trying to enforce the principle of proportionality against the EU legislature, in the sense that the former are trying, through judicial review, to ensure that EU legislation which they believe places disproportionate burdens on different stakeholders is declared to be invalid. By phrasing the challenge in terms of process-oriented proportionality, however, the Member States are arguably trying to simultaneously enforce better regulation standards or "principles of sound legislative procedure" against the EU legislature. Viewed thus, the proceduralised principle of proportionality is the means by which attempts can be made to enforce the ideals of better law-making against the EU legislature. Those ideals, which permeate Protocol No.2 annexed to the Lisbon Treaty and the Inter-Institutional Agreement on Better Law-Making, include the need for the EU legislature to ensure, throughout the legislative process, that consideration is given to all the facts and circumstances relevant to the situation that a proposed policy solution is intended to regulate. To this end, the EU legislature must be able to adduce sufficient justificatory evidence capable of demonstrating that, throughout the legislative process, consideration was given to whether a proposal, if enacted, would be suitable, necessary and proportionate *stricto sensu* in light of the interests affected and the objectives pursued.

This idea of the Member States attempting to enforce principles of sound legislative procedure and better law-making at the EU level is further emphasised by one of the core challenges raised against the EU mobility package; namely, that the EU legislature introduced the 8-week return rule for vehicles without such a rule being envisaged in the initial Commission proposal or Impact Assessment. As discussed above, several Member States and other interested parties had provided the EU legislature with information that demonstrated the disproportionate impacts of the new 8-week return rule and the need for a new Impact Assessment, but this was ignored. Indeed, there was no reasoning proffered by the EU legislature as to why a new Impact Assessment was not required.[70] In reading the submissions of the Member States, one senses their frustration at the EU legislature's repeated failures to fully appraise the impacts of the new rule, their repeated refusals to carry out a new Impact Assessment and their repeated oversight of scientific and other data that those Member States brought to their attention. With seemingly no other alternative avenue open to them, the Member States turned to the CJEU to have the principles of sound legislative procedure enforced in the EU legislative process.[71]

In closing, it is worth considering one final dimension to the above developments in the CJEU's case law which touch squarely upon the issue of the enforcement of EU law. That is the issue of enforcing EU legislation in the Member States. The EU mobility package, once it has fully entered into force, places Member State authorities under a vast array of obligations to monitor, inspect and investigate road transport operators to ensure their compliance with the legislation in question. By strongly challenging the validity of EU legislation on the grounds that the EU legislative process had been defective in its consideration of the principle of proportionality, the Member States may also be taken to be signalling their discomfort at having to give effect to legislation which they believe to have been enacted via a fundamentally flawed lawmaking process. This aspect of enforcement is seldom commented upon when discussing the role of Member State authorities in the enforcement of EU law. In order to faithfully and effectively enforce legal rights and obligations flowing from EU legislation, the authorities in the Member States must be satisfied that the EU law they are required to enforce has been enacted through a properly functioning legislative process. This much can arguably be read into Advocate General Pitruzzella's concluding remarks when finding a violation of the principle of proportionality by the EU legislature:

---

[70] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) para 627.

[71] It is notable that if the EU legislation in question was problematic from the perspective of the principle of subsidiarity, then perhaps national parliaments may have been able to raise concerns about this during the legislative process in accordance with their role as "watchdogs of subsidiarity" under Protocol No.2 annexed to the Lisbon Treaty. However, that role is limited to questions of subsidiarity and not proportionality and has proved to be largely ineffective. For discussion see Davor Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (First edition, Oxford University Press 2017); Ian Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU' (2006) 44 JCMS: Journal of Common Market Studies 281.

> "the EU legislature, in its function, clearly remains free to take the decisions which it wishes to take, but it is important for it to so in an enlightened and enlightening manner, which it must be in a position to establish. The same applies to the capacity of the forthcoming measure to be understood and accepted by all the interested parties, a fortiori in an area that, as in relation to Regulation 2020/1055, crystallises the tensions between diverging interests."[72]

V. Conclusion

This paper has examined the CJEU's increased tendency in recent years to engage in process-oriented proportionality and subsidiarity review of EU legislation. It has contended that the recent opinion of AG Pitruzzella on the validity of three EU legislative acts which make up the new EU Mobility Package constitutes a landmark development in the emergence of what I call "process-oriented federalism" in the EU. For the first time ever, the Advocate General has found that, by not carrying out an assessment of the economic, social and environmental impact of proposed legislation prior to its adoption, the EU legislature has breached the principle of proportionality.[73] Viewed from the perspective of the enforcement of EU law, it has been contended that these joined cases are best understood as an attempt by the Member States to convince the CJEU to judicially enforce more robust principles of "sound legislative procedure" against the EU institutions. To this end, it is clear that the EU relies upon the authorities in Member States to apply and enforce the rights and obligations flowing from EU legislation. Evidently, for this system of enforcement to function properly, those Member State authorities must be certain that the law they are enforcing was not enacted through a defective legislative process. It is submitted that the recent litigation over the EU mobility package highlights the legal and policy implications behind this observation quite clearly, with the 9 Member States contesting the validity of the package each having something to say about the failures of the EU legislature to properly consider the proportionality of its proposed measures. By engaging so thoroughly with the EU legislative process and the justificatory evidence adduced by the EU legislature, the opinion of the Advocate General represents a significant development in the enforcement of better regulation standards against the EU legislature by the Member States. This represents a reversal of the typical enforcement dynamic in the EU's multilevel system of governance, in that it is the *Member States driving attempts at better enforcement of EU norms vis-à-vis the EU level*.

[72] *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union* (n 11) para 654.
[73] ibid para 655.

VI. Bibliography

Legislation and Legislative Documents

- 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, "Better Regulation: Joining Forces to Maker Better Laws", COM(2021) 219 Final'

- Directive of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012(OJ 2020 L 249, p. 49).

- Impact assessment accompanying the proposal for a working time regulation and the proposal for a posting directive ('Impact assessment – social section'), and impact assessment accompanying the proposal for an establishment regulation ('Impact assessment – establishment section').
- Regulation of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC)No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs (OJ 2020 L 249, p. 1);

- Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, [2016] OJ L 123, p. 1–14

- Regulation of the European Parliament and of the Council of 15 July 2020 amending Regulations (EC)No 1071/2009, (EC) No 1072/2009 and (EU) No 1024/2012 with a view to adapting them to developments inthe road transport sector (OJ 2020 L 249, p. 17);

Case Law

- *C-128/17, Poland v Parliament and Council* ECLI:EU:C:2019:194

- *Case C-5/16, Poland v Parliament and Council (MSR),* ECLI:EU:C:2018:483

- *Case C-151/17, Swedish Match AB v Secretary of State for Health* ECLI:EU:C:2018:938

- *Case C-156/21, Hungary v Parliament and Council, EU:C:2022:97*

- *Case C-176/09 Luxembourg v Parliament and Council,* ECLI:EU:C:2011:290

- *Case C-358/14, Poland v European Parliament and Council,* ECLI:EU:C:2016:323

- *Case C-477/14, Pillbox 38 (UK) Ltd v The Secretary of State for Health,* ECLI:EU:C:2016:324,

- *Case C-482/17, Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035

- *Case C-482/17, Opinion of Advocate General Sharpston in Czech Republic v Parliament and Council*

- *Case C-620/18, Hungary v Parliament, ECLI:EU:C:2020:1001*

- *Joined Cases C- 541/20 to C - 555/20, Lithuania et al v European Parliament and Council of the European Union (Judgment Pending)*

- *Opinion of Advocate General Pitruzzella, Joined Cases C-541/20 to C-555/20 Republic of Lithuania et al v European Parliament and Council of the European Union*

Journal Articles, Books, Book Chapters etc.

- Cooper I, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU' (2006) 44 JCMS: Journal of Common Market Studies 281

- Harvey D, 'Towards Process-Oriented Proportionality Review in the European Union' (2017) 23 European Public Law 93

- ——, 'Process-Oriented Federalism in the EU: A (Partial) Response to Critiques of Process Review Advocacy in the EU' (2021) 46 European Law Review 460

- Jančić D (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (First edition, Oxford University Press 2017)

- Lenaerts K, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3

- Scholten M, 'Mind the Trend! Enforcement of EU Law Has Been Moving to "Brussels"' (2017) 24 Journal of European Public Policy 1348

- —— (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) <https://www.elgaronline.com/view/book/9781802208030/9781802208030.xml> accessed 9 September 2024

- Schütze R, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' (2009) 68 Cambridge Law Journal 525

- Tridimas T, 'Competence after Lisbon: The Elusive Search for Bright Lines' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012)

- Young EA, 'Two Cheers for Process Federalism' (2001) 46 Villanova Law Review 1349