**The legitimacy of area-based restrictions to maintain public order: giving content to the proportionality principle in the European legal sphere**

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Contents

[INTRODUCTION 1](#_Toc462591607)

[THE NATURE OF AREA-BASED RESTRICTIONS: CIVIL, CRIMINAL OR BOTH? 7](#_Toc462591608)

[THE PROPORTIONALITY OF AREA-BASED RESTRICTIONS 11](#_Toc462591609)

[THE EUROPEAN COURT OF HUMAN RIGHTS 11](#_Toc462591610)

[THE PROPORTIONALITY PRINCIPLE IN THE BELGIAN COUNCIL OF STATE’S CASE LAW 14](#_Toc462591611)

[THE PROPORTIONALITY PRINCIPLE IN THE UK CASE LAW 17](#_Toc462591612)

[CONCLUSION 21](#_Toc462591613)

# INTRODUCTION

The Belgian and UK legislator increasingly provide the executive and the judge with powers to maintain public order that restrict the freedom of movement of the individual. In Belgium, the maintenance of public order is primarily a competence of the local administrative authorities, in particular the mayor. For example, a new Article 134*sexies* has been inserted in the Belgian New Municipality Act (“NMA”), which gives mayors the power to maintain public order by imposing a so-called ‘temporary prohibition of place’[[2]](#footnote-2). On this ground, a mayor can, in case of public order disturbance or nuisance, prohibit the offender to enter a certain public place for up to one month[[3]](#footnote-3). Similar police powers were introduced in the United Kingdom by Part 3 of the Anti-social Behaviour, Crime and Policing Act 2014 (“ACPA”). This part provides constables in uniform with dispersal powers, enabling them to impose a ‘direction to leave’ on a person who engaged in, or is likely to engage in, problematic behaviour (i.e. anti-social behaviour, crime or disorder) in a certain public area[[4]](#footnote-4). This direction to leave comprises – besides the obligation to leave the area as such – the obligation not to return to that place, thus excluding the offender from that area[[5]](#footnote-5). However, the exclusion can only be applied for up to 48 hours, in contrast to the Belgian prohibition of place’s duration of one month. It is important to note that the direction to leave obligates the offender *to leave* the locality and *not to return* to it, in contrast to the Belgian prohibition of place, which only refers to the prohibition *to enter* the locality. Despite this difference, both measures have the same goal, namely maintaining public order by imposing *area-based restrictions*, in other words by prohibiting an individual to be in a certain public place for a certain period.

The above-mentioned techniques are not the only area-based restrictions that can be imposed in order to maintain public order. For instance, in Belgium and in the United Kingdom, public servants or the judge, respectively, can impose on the individual a temporary prohibition to enter a football stadium in order to tackle football-related violence and disorder[[6]](#footnote-6). In both legal systems, the freedom of movement can also be limited with the aim of maintaining public order by a public transport ban imposed by civil servants or by the judge comprising the prohibition to use public transport[[7]](#footnote-7).[[8]](#footnote-8)

The above trend of increased public order powers that restrict the individual in his or her free movement is unlikely to end soon. After all, at present, there is an increase in dangerous situations and situations of threat, such as terror threat, which might lead to an increase in public order powers. Moreover, the powers of judges and the executive to safeguard public order are nowhere listed in a limited way, so that new forms of public order powers may be introduced. For instance, in Belgium, the introduction of the electronic tag is debated, imposed by the executive in order to fight radicalisation[[9]](#footnote-9). Similar freedom-restricting measures imposed in the fight against terrorism already exist in the United Kingdom. For example, the Secretary of State can impose so-called ‘non-derogating control orders’[[10]](#footnote-10), which have recently been replaced by the terrorism prevention and investigation measures or “TPIMs”[[11]](#footnote-11). These measures can contain exclusions from particular areas, with the possibility to monitor these exclusions via electronic tagging[[12]](#footnote-12).

However, the above-mentioned public order powers constitute serious restrictions of our fundamental rights and freedoms, more specifically the right to freedom of movement, guaranteed in *inter alia* Article 2 of the Fourth Additional Protocol of the European Convention on Human Rights (“FAP”)[[13]](#footnote-13), which reads as follows:

*“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*2. Everyone shall be free to leave any country, including his own.*

*3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

*4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”*

This right prohibits the national authority to *restrict* the individual’s free movement in an arbitrary way[[14]](#footnote-14). Note that every individual also has the right not to arbitrarily lose all freedom of movement and thus not to be arbitrarily *deprived* of his or her liberty, as guaranteed in the *right to liberty and security* anchored in *inter alia* Article 5 ECHR. The literature often refers to these rights with the overall concept of the *right to personal freedom*[[15]](#footnote-15).

As is apparent from above, the right to personal freedom aims to protect the individual against arbitrary State action. Yet, it is not an unlimited or absolute right and restrictions are possible, *inter alia* to maintain public order. These restrictions can occur in various gradations, ranging from the mere limitation of the individual’s free movement under Article 2 FAP to the more far-reaching deprivation of all liberty under Article 5 ECHR. As to area-based restrictions, they may be considered to be mere limitations of the individual’s free movement without depriving the individual of all liberty[[16]](#footnote-16). Consequently, this contribution focuses on Article 2 FAP and not on Article 5 ECHR.

It is important to point out that, according to the European Court of Human Rights’ case law, the right to liberty of movement in Article 2 FAP must be clearly distinguished from the right to liberty and security in Article 5 ECHR. In *Austin*[[17]](#footnote-17), the European Court of Human Rights stated that the rights guaranteed under the ECHR – which are incorporated into UK domestic law by the Human Rights Act 1998 via the so-called Convention rights – and more specifically the right to liberty and security in Article 5, may not be interpreted as (also) providing the requirements of the Fourth Additional Protocol as regards Contracting States to the ECHR who have not yet ratified this protocol[[18]](#footnote-18), such as the United Kingdom[[19]](#footnote-19). Thus, UK citizens cannot bring claims for breaching Article 2 FAP before the national courts, since the United Kingdom has not ratified the Fourth Additional Protocol. In Belgium, on the contrary, an individual can bring a claim for the national court for breaching Article 2 FAP itself, since Belgium did ratify the Fourth Additional Protocol which has direct effect in domestic law.

However, the freedom of movement is not only a fundamental right as such. It is also a fundamental precondition for the enjoyment of many other fundamental rights[[20]](#footnote-20). This is important for Contracting States who have not yet ratified the Fourth Additional Protocol. In *Iletmis v Turkey*[[21]](#footnote-21)*,* the Strasbourg Court concluded that there was a violation of the applicant’s right to freedom of movement due to the fact that his passport had been withdrawn for over seven years, without taking into account the fact that he had family, economic and professional ties outside Turkey. However, Turkey had not ratified the Fourth Additional Protocol. This was, according to the Strasbourg Court, ‘irrelevant’, as it considered the restriction on the applicant’s freedom of movement to be a breach of his right to privacy in Article 8 ECHR. Thus, arbitrary restrictions of the freedom of movement may also interfere with other fundamental rights such as the right to privacy, but also the right to freedom of expression and the right to freedom of assembly and association, enshrined in Article 10 and 11 ECHR, respectively. By consequence, UK citizens can bring claims for breaching the right to freedom of movement before the national court based on other Convention rights, such as Articles 8, 10 and 11, provided that the limitations on the freedom of movement amount to limitations to any of these rights.

The question arises under what conditions freedom-restricting public order powers are compatible with the aforementioned fundamental rights and freedoms. This question is not an easy one to answer. After all, there is no clear and general assessment framework for freedom-restricting measures imposed to maintain public order, in particular at the European human rights level. This has two main causes. First, as the above indicates, the ECHR distinguishes between restrictions on the individual’s free movement and the deprivation of all liberty. However, the boundary between these ‘mere’ restrictions and the more severe deprivation of all liberty is not always clear. Nevertheless, this distinction has important consequences, since the restriction grounds are very different. A deprivation of all liberty is only possible in a limited number of cases listed in Article 5(1) ECHR, whereas a restriction on the individual’s free movement is already possible according to Article 2(3) FAP when the restriction is in accordance with the standard restriction requirements. These are, first, that the restriction must be ‘prescribed by law’, i.e. having a basis in national law. Second, it must pursue ‘a legitimate aim’, such as the maintenance of public order. Third, the restriction must be ‘necessary in a democratic society’. To assess this necessity, the Strasbourg Court has developed a number of criteria, including the condition that the restriction must respond to ‘a pressing social need’ and that it must be ‘proportionate’ (see *infra*).

It is important to note that Article 2 FAP contains another restriction ground in the fourth paragraph. This paragraph already enables the national authorities to restrict the freedom of movement when it is ‘justified by the public interest in a democratic society’, which seems to be less strict than the standard formula of ‘necessary in a democratic society’ in the third paragraph. In this case, the measure does not have to respond to ‘a pressing social need’; it suffices that it is ‘not disproportionate’[[22]](#footnote-22). As a result, and regardless of whether the restriction ground in the third or the fourth paragraph is applied, the measure must always be at least ‘proportionate’. The fourth paragraph was introduced to enable restrictions that – although they serve the general interest – do not necessarily require a situation in which there is a disturbance of public order as well[[23]](#footnote-23). However, this restriction ground is only applicable in particular geographical areas, such as areas with a lot of drug trafficking[[24]](#footnote-24).

Second, as discussed above, the national authorities might not only have to take into account the requirements of Article 2 FAP. After all, freedom-restricting measures might also interfere with other fundamental rights, such as Articles 8, 10 and 11 ECHR. These Articles contain similar restriction conditions as Article 2 FAP, providing that the restriction must ‘be in accordance with the law’, ‘pursue a legitimate aim’ and ‘be necessary in a democratic society’, i.e. being ‘proportionate’[[25]](#footnote-25). Thus, the compatibility of freedom-restricting public order powers with our fundamental rights and freedoms is not a single and distinct problem, only relating to the right to freedom of movement in Article 2 FAP. Freedom-restricting measures may also interfere with several other fundamental rights, thus being a multi-faceted problem. Consequently, it is difficult to appropriately determine the criteria that freedom-restricting measures must meet in order to be compliant with the ECHR.

To date, only a small amount of case law of the Strasbourg Court exists with regard to the right to freedom of movement and the compatibility of freedom-restricting measures with this right and other fundamental rights. Therefore, the Strasbourg Court’s case law is of only limited help and offers only limited inspiration for a clear and general assessment framework. However, such a framework is essential to strike a good balance between the need to maintain public order and our fundamental rights and freedoms, more specifically the right to freedom of movement.

That freedom-restricting measures find a sufficient basis in the law and have a legitimate aim is not generally questioned[[26]](#footnote-26). The Belgian prohibition of place and the UK direction to leave both have a basis in national law[[27]](#footnote-27). In addition, given the fact that the legitimate aims mentioned in Article 2 FAP as well as Articles 8, 10 and 11 ECHR are interpreted broadly by the Strasbourg Court[[28]](#footnote-28), it can be assumed that both area-based restrictions pursue a legitimate aim, namely the maintenance of public order. After all, the prohibition of place and the direction to leave are imposed to tackle ‘public order disturbance and nuisance’ and ‘anti-social behaviour, crime and disorder’*,* respectively[[29]](#footnote-29)*.* Therefore, the decisive criterion will be the requirement of being ‘necessary (or justified, according to Article 2(4) FAP) in a democratic society’, in other words being *proportionate.*

There is no discussion of the fact that the proportionality principle is applicable to freedom-restricting measures. Although neither the text of the Convention nor its Additional Protocols expressly refer to the proportionality principle, it has been identified in the Strasbourg Court’s case law as a general principle of the Convention[[30]](#footnote-30). In Belgium, the proportionality principle is a part of the unwritten general ‘principles of good administration’, which the executive must take into account. In the United Kingdom, on the contrary, the proportionality principle is relatively new. It was incorporated into UK domestic law by the Human Rights Act 1998 via the Convention rights and only qualified as a general principle of public law in 2001[[31]](#footnote-31). However, the question arises how this proportionality principle must be interpreted and what the content of this principle is as regards freedom-restricting measures imposed to maintain public order, such as area-based restrictions. Hence, the aim of this contribution is to analyse the content of the proportionality principle at the European level, via a first exploratory analysis of the very limited relevant Strasbourg Court’s case law, compared with the content of this principle at the national level, more specifically Belgium and the United Kingdom. The domestic case law can offer entry-points of leads for criteria that must be taken into account when assessing the proportionality of freedom-restricting measures, in the absence of a clear and general human rights assessment framework. For pragmatic reasons, I will limit this analysis to area-based restrictions, more specifically the highly topical Belgian prohibition of place and its UK variant, the direction to leave.

Therefore, this contribution starts with identifying the nature of area-based restrictions. Given the fact that, today, lawyers and judges at the national level have to comprehend the principle of proportionality primarily because it is part and parcel of the Strasbourg Court’s case law, the contribution then offers a brief overview of the content of the proportionality principle as conceived of by the Strasbourg Court. It then analyses whether and to what extent this interpretation has been implemented by the Belgian Council of State (this is the highest general administrative court in Belgium). The Council of State’s case law is interesting to examine, since the Council applies a different proportionality test depending on the legal classification of the measure imposed. This is then followed by an analysis of the proportionality principle in UK case law[[32]](#footnote-32), where it is a relative newcomer used in cases that fall under the ECHR[[33]](#footnote-33). In cases that do not concern these Convention rights, the national courts generally continue to apply the traditional Wednesbury unreasonableness test[[34]](#footnote-34). The contribution ends with some concluding remarks.

# THE NATURE OF AREA-BASED RESTRICTIONS: CIVIL, CRIMINAL OR BOTH?

In the Strasbourg Court’s case law, a distinction is made based on Article 6(1) ECHR between measures which are punitive in purpose (the so-called ‘criminal charges’) and those with a more preventive object. When considering whether the measure imposed is punitive or not for the purposes of Article 6, the Strasbourg Court applies an autonomous interpretation, involving a number of criteria of which the domestic legal classification is the starting point, though not the most decisive. More important is the nature of the measure, in particular whether or not the measure has a punitive purpose.[[35]](#footnote-35) For instance, the area-based restrictions contested in *Landvreugd* and *Olivieira*[[36]](#footnote-36), both imposed to tackle the traffic in and the use of hard drugs in a public place, were treated as preventive and thus non-criminal measures, because they were imposed for ‘the maintenance of public order and the prevention of crime’[[37]](#footnote-37). This distinction is important. Only if the measure imposed is to be regarded as criminal within the meaning of Article 6, the individual is entitled to the procedural protections guaranteed in that Article, such as the right to a court with full jurisdiction.

It is important to note that the above distinction is not the only one made in the Strasbourg Court’s case law. [After all, Article](http://www.echr.coe.int/Documents/Convention_ENG.pdf) 6 ECHR is not only applicable to criminal matters, but also to measures involving the determination of a civil right or obligation, though certain procedural safeguards specified are only applicable to criminal matters. Whether or not the measure imposed involves the determination of a civil right or obligation, is also interpreted autonomously by the Strasbourg Court, based on a number of criteria. Again, the domestic legal classification of the right concerned is not conclusive. According to the Strasbourg Court’s case law, the content and effects of the right under the domestic law will be of particular importance.[[38]](#footnote-38) One can wonder whether a measure restricting the right to freedom of movement implies the determination of a civil right as well. To my knowledge, this question has not yet arisen before the Strasbourg Court. However, in my opinion, this might be possible, especially when the freedom-restricting measure has repercussions on other, civil rights, such as the individual’s private life in Article 8 ECHR[[39]](#footnote-39).

The Belgian Council of State does not expressly refer to Article 6 ECHR to distinguish between public order powers with a punitive or criminal purpose and those which are more preventive. However, it does take into account the purpose of the measure contested. In Belgium, the purpose of the measure is important, since it brings along a different legal classification of that measure. In general, two categories of public order powers are distinguished in Belgian administrative law, depending on their purpose. First, public order powers can be imposed as an ‘administrative sanction’, which aims to punish the offender for the offences he or she committed, thus reacting to past actions. Second, these powers can also be imposed as an ‘administrative measure’ (so-called ‘police measure’), which is more preventive in nature and does not aim to punish the offender for past actions, but to safeguard public order[[40]](#footnote-40). Therefore, it is not necessary that an offence has already been committed.

The Belgian legislator has clearly qualified the prohibition of place as a police measure, since the prohibition is being imposed ‘to safeguard public order’[[41]](#footnote-41), without the necessity of an offence that has already been committed. Thus, the prohibition of place mainly aims to maintain public order instead of punishing the offender for past actions[[42]](#footnote-42). This legal classification was questioned before the Belgian Constitutional Court by the ‘Human Rights League’ – this is a non-governmental organisation that aims to tackle injustices and any attack on the individual’s fundamental rights and freedoms, but the Court confirmed this classification[[43]](#footnote-43). However, this does not prevent the Council of State from deciding in a particular case that the contested prohibition of place is in reality imposed as an administrative sanction, since it aims to hurt the offender for the infringements that he or she committed in a certain public area. This will be the case when, for instance, the reasoning of the decision imposing the prohibition of place does not sufficiently indicate its preventive nature[[44]](#footnote-44). Moreover, the imposed prohibition of place may be so punitive in nature that it must be regarded as a criminal charge, in line with the above-mentioned Strasbourg Court’s case law. In addition, it may even be possible that the Council of State considers in a particular case that the prohibition of place must be regarded as civil within the meaning of Article 6 ECHR, as discussed above.

Contrary to Belgium, the United Kingdom does not formally acknowledge the distinction between ‘administrative sanctions’ and ‘preventive measures’ with regard to the legal classification of public order powers, depending on the nature of the imposed technique[[45]](#footnote-45). In general, in the United Kingdom, techniques to tackle problematic behaviour are considered to be *civil* orders, i.e. orders where the nature of the proceedings followed by the competent authority is civil and not criminal, since it is not necessary that a crime has been committed[[46]](#footnote-46). The new direction to leave, for instance, must be regarded as civil, since the imposition of it does not require a criminal offence[[47]](#footnote-47). Moreover, an offence is not even necessary at all. The direction to leave can already be imposed when problematic behaviour is *likely to be committed*, without the requirement of problematic behaviour that has already been committed, criminal or not[[48]](#footnote-48). Thus, the direction to leave can be regarded as a civil order with a more preventive purpose, primarily aiming at tackling future problematic behaviour instead of sanctioning an individual for past actions[[49]](#footnote-49). It is important to note, however, that this does not mean that the direction to leave cannot be imposed as a reaction to the individual’s past actions. After all, section 35(2) ACPA also refers to the possibility to impose the direction in attempts to tackle problematic behaviour to which the individual *has already contributed*.

However, this domestic legal classification as civil, i.e. not criminal, is not conclusive. It appears from UK case law that the domestic courts, referring to the Strasbourg Court’s case law concerning Article 6 ECHR, increasingly take into account the nature of the measure imposed[[50]](#footnote-50) in order to appropriately classify that measure as criminal or not within the meaning of Article 6[[51]](#footnote-51). Thus, the primarily civil, i.e. non-criminal domestic legal classification of the direction to leave does not prevent the UK courts from considering in a particular case that the imposed direction must be regarded as a criminal charge, in line with the Strasbourg Court’s case law.

In addition, the UK courts must also take into account, in the light of Article 6, the distinction between civil and non-civil matters. The fact that the direction to leave is considered to be civil under domestic law is a starting point, but not conclusive, as discussed above. Nevertheless, it might be possible that the direction to leave must be regarded as civil within the meaning of Article 6 ECHR, especially when interfering with other, civil rights, such as the right to private life. This has already been confirmed in UK case law as to other freedom-restricting public order powers. In *McCann*, for instance,concerning the former anti-social behaviour orders and more specifically, amongst others, the order prohibiting the individual to be in a certain area for a certain period[[52]](#footnote-52),Lord Hope stated the following: ‘Although the jurisprudence of the Strasbourg Court appears to me as yet to be unclear on this point, I would hold that the fact that prohibitions made under section 1(6) of [the Crime and Disorder Act 1998] may have this effect [i.e. interfering with, amongst others, the individual’s private life] is sufficient to attract the right to a fair trial which is guaranteed by article 6(1) (emphasis added)[[53]](#footnote-53).

As a result, as the above indicates, it is likely that freedom-restricting public order powers must be considered as civil within the meaning of Article 6 ECHR, especially when these powers interfere with other, civil rights, such as the right to private life in Article 8 ECHR. In other cases, though, these powers may be classified as (also) criminal for the purposes of Article 6 and not (only) civil.

# THE PROPORTIONALITY OF AREA-BASED RESTRICTIONS

## THE EUROPEAN COURT OF HUMAN RIGHTS

The proportionality principle has been identified in the Strasbourg Court’s case law as a general principle of the Convention, as mentioned above. The principle is ‘inherent in the whole of the Convention’ and requires the Strasbourg Court to search for ‘a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental right’[[54]](#footnote-54). In general, as is apparent from its case law, the Strasbourg Court applies the following three criteria, when analysing the proportionality of measures restricting the individual’s fundamental rights, such as Article 2 FAP and the conditional rights in Articles 8, 10 and 11 ECHR:[[55]](#footnote-55)

* The restriction must be relevant and sufficient and thus *suitable* in order to achieve the pursued aim;
* The restriction must be *necessary*. This means that the restriction must be imposed due to ‘a pressing social need’. According to the Strasbourg Court’s case law, this concept does not necessarily indicate that the imposed measure must be ‘indispensable’. However, it may not be interpreted as merely ‘useful' or ‘desirable’ either. Therefore, the concept of ‘necessary’ must be interpreted as something in between[[56]](#footnote-56);
* The restriction must be *proportionate in the strict sense*. This means that the severity of the restriction on the fundamental right must stand in fair proportion to the importance of the legitimate aim pursued.

However, the content of the proportionality principle in the Strasbourg Court’s case law is not always clear-cut, because the Strasbourg Court does not systematically apply these criteria in each case and even if the criteria are applied, they are hardly ever examined separately. In addition, these criteria also differ in their relative importance. With regard to freedom-restricting measures, neither the necessity criterion nor the suitability criterion is often used when analysing the proportionality of that measure[[57]](#footnote-57). Therefore, it can be tentatively stated that these criteria seem to be of less importance. For instance, in the above-mentioned cases *Landvreugd* and *Olivieira*, the Strasbourg Court referred to none of the criteria. However, as to the necessity criterion, this can be explained by the fact that freedom-restricting measures are already possible when ‘justified in a democratic society’, according to the fourth paragraph of Article 2 FAP. This only requires the measure to be proportionate, without the necessity of responding to a pressing social need as well[[58]](#footnote-58). In *Landvreugd* and *Olivieira*, for example, the Strasbourg Court applied the fourth paragraph of Article 2 FAP and it only assessed whether the restriction complained of was ‘not disproportionate’, without examining whether there was a ‘pressing social need’ [[59]](#footnote-59).

The most used criterion of the proportionality test in the Strasbourg Court’s case law as to freedom-restricting measures, is the requirement of proportionality in the strict sense[[60]](#footnote-60). According to Hidalgo, the Strasbourg Court has often limited its proportionality review to only this third limb[[61]](#footnote-61). In *Landvreugd*, for example, the Strasbourg Court refers to the third limb - and only to this limb - when taking into account the fact that the applicant had already been banned from the area concerned for the overt use of hard drugs and that he totally ignored the ban, whereupon he was informed of the consequences thereof and concluded that ‘in these circumstances, the Court finds that the restriction on the applicant’s freedom of movement cannot be regarded as disproportionate’ (emphasis added)[[62]](#footnote-62).

It is in the third limb that the required ‘fair balance’, as mentioned above, is clearly present. The restriction of the fundamental right caused by the measure imposed must stand in fair proportion to the importance of the legitimate aim pursued by the measure, which requires balancing means and ends[[63]](#footnote-63). Consequently, the proportionality test used in the Strasbourg Court’s case law is often referred to as an ‘aims-means’ balance. However, the third limb does not only require the means being balanced with the aim pursued, but also the means being balanced with the *consequences* of the means for the individual, more specifically the impact caused on the individual’s fundamental rights and freedoms. The third limb compares the consequences of the measure for the individual’s rights (the ‘costs’) with the contribution of the measure to the realisation of the aim pursued (the ‘benefits’). In *Landvreugd*, for instance, the Strasbourg Court took into account the consequences of the imposed area-based restriction on the applicant’s personal circumstances, when considering that the applicant did not live or work in the prohibited area and that certain provisions had been made, so that he could enter the prohibited area to collect, amongst others, his mail[[64]](#footnote-64). It is thus more correct to say that the proportionality test at the European human rights level constitutes an ‘aims-means-consequences’ balance instead of only an ‘aims-means’ balance[[65]](#footnote-65).

However, the national authorities must not only take into account the right to freedom of movement in Article 2 FAP and/or via the conditional rights in Articles 8, 10 and 11 ECHR, when assessing the proportionality of freedom-restricting measures, such as area-based restrictions. If the area-based restriction is to be considered as a criminal charge or as civil for the purposes of Article 6 ECHR, it must also meet the requirements resulting from that Article. As mentioned above, these requirements primarily constitute procedural protections, such as the right to a court with full jurisdiction. Article 6 does not comprise any substantive safeguards, let alone an independent proportionality test.

Despite this absence of an independent proportionality test in Article 6 ECHR, it appears from the Strasbourg Court’s case law that this Article might yet have an effect, albeit indirectly, on the content of the proportionality principle. This indirect effect can be derived from the Strasbourg Court’s case law with regard to the right to a court with full jurisdiction, which is a procedural safeguard resulting from Article 6(1) ECHR and which is applicable to both criminal and civil matters within the meaning of that Article. This right requires in general that the domestic court has the competence to examine the case on points of facts and law[[66]](#footnote-66). However, it appears from the Strasbourg Court’s case law that it also demands the domestic court to be able to assess the *proportionality* of the measure imposed. For instance, the Strasbourg Court referred to the proportionality principle, when considering that the requirement of full jurisdiction includes ‘review of the facts and assessment of the proportionality between the fault and the sanction’ (emphasis added)[[67]](#footnote-67) and ‘the competence to examine the case on points of fact and law as well as the power to assess the proportionality of the penalty to the misconduct’ (emphasis added)[[68]](#footnote-68). In addition, it can be observed from the above case law, that the requirement of full jurisdiction not only requires the power for the domestic court to assess the proportionality of the measure as such. This requirement also has implications for the *content* of the proportionality test. It can be tentatively stated that, as is apparent from the above case law, the requirement of full jurisdiction seems to demand, at least implicitly, the power for the domestic court to consider the proportionality between the individual’s misbehaviour, i.e. the facts, and the measure imposed[[69]](#footnote-69), thus implying a ‘means-facts’ test.

The Strasbourg Court refers, albeit implicitly, to this ‘means-facts’ test for both criminal and civil matters within the meaning of Article 6 ECHR[[70]](#footnote-70). Consequently, it is of great importance for the national authorities to take into account the purpose of the imposed area-based restriction and to ascertain whether or not it is to be regarded as criminal or civil within the meaning of Article 6 ECHR. If the area-based restriction is to be considered as criminal or civil, the national authorities must take into account the requirements of this Article, which presumably imply the application of a ‘means-facts’ test. However, the Strasbourg Court’s case law appears to be still unclear on this point. It remains indistinct whether or not the national authorities must take into account the nature of the measure imposed in order to apply the ‘means-facts’ test or not and whether this test is to be applied simultaneously with the ‘aims-means-consequences’ test.

We turn now to the proportionality principle in the Belgian Council of State’s case law, in an attempt to find leads for tackling the above lack of clarity at the European human rights level.

## THE PROPORTIONALITY PRINCIPLE IN THE BELGIAN COUNCIL OF STATE’S CASE LAW

To be in accordance with Article 2 FAP, the temporary prohibition of place must be *proportionate*, as discussed above. Although this is not expressly required by Article 134*sexies* NMA, it also stems from the proportionality principle as a part of the Belgian unwritten general ‘principles of good administration’, which the executive must take into account. There is no relevant case law with regard to the temporary prohibition of place yet. However, it can be derived from the Council of State’s established case law concerning public order powers that the proportionality principle must be assessed in a different way, depending on the legal classification of the measure imposed. It is thus necessary to make a distinction between the proportionality test regarding police measures and the test as regards administrative sanctions. Since the prohibition of place is to be considered as a police measure[[71]](#footnote-71), this contribution starts with the proportionality review for police measures. It proceeds with analysing the proportionality test concerning administrative sanctions.

*Temporary prohibition of place as a police measure*

In its case law, the Council of State emphasises the fact that the aim of police measures is to maintain public order. For this reason, a police measure is a *preventive* measure and not an administrative sanction, regardless of the fact that the measure may entail a disadvantage to the person concerned[[72]](#footnote-72). The fact that the measure harms the individual does not *per se* turn it into a disproportionate measure. What is decisive for the proportionality test of police measures is thus not the harm caused to the individual, but what is necessary from a viewpoint of restoring public order[[73]](#footnote-73).

The Council of State usually examines two preliminary questions to consider whether the imposed police measure is proportionate. It first analyses whether there is a specific need to maintain public order[[74]](#footnote-74). Subsequently, the Council of State examines whether the imposed measure is adapted to the specific need to maintain public order. Therefore, it generally considers the following three questions[[75]](#footnote-75):[[76]](#footnote-76)

* Is the measure *useful* to counter the public order disturbance?;
* Is the measure *necessary* to counter the public order disturbance? According to the Council’s case law, ‘necessary’ must be interpreted as a synonym for ‘prerequisite’ and thus ‘indispensable’, in contrast to the Strasbourg Court’s case law. This implies that the government should apply the least intrusive measure[[77]](#footnote-77);
* Are the *disadvantages* for the individual caused by the measure *proportionate to the seriousness of the public order disturbance* which the executive wishes to counter? This requires a fair balance between the consequences of the measure for the individual and the benefits of it for the realisation of the pursued aim, i.e. the reduction in public order disturbance (also called ‘proportionality *sensu stricto’*).

Following these three steps, the Council of State balances the aim of maintaining public order and the measure used to pursue this aim (the police measure), thus balancing means and ends. However, it appears from the last limb of the proportionality test above that the Council also takes into account the consequences of the measure for the individual, albeit not as a decisive criterion, as mentioned above. This third limb thus clearly constitutes an ‘aims-means-consequences’ test, which complies with the test mostly applied by the European Court of Human Rights. However, the Council of State does not always follow this three-step method. Especially with regard to restrictions of the freedom of trade caused by a local regulation or by an individual decision based on a local regulation, the Council seems to apply these three questions[[78]](#footnote-78).

In cases not concerning the right to free trade, the Council of State limits its review to the question whether the imposed measure ‘does not go further than necessary from a view point of maintaining public order’[[79]](#footnote-79). This means that the imposed measure may not cause more harm to the individual than necessary for the realisation of the pursued aim, thus balancing the means and ends against the means and their consequences for the individual. The prohibition of place, for instance, is to be primarily understood as a restriction of the right to freedom of movement and not the right to free trade. By consequence, it may be possible that the Council of State will not apply the three above-mentioned questions, but will only assess whether the imposed prohibition of place stands in fair proportion to the public order aim (i.e. tackling the public order disturbance in the area concerned), taking into account the consequences of the prohibition for the individual’s free movement, albeit not as a conclusive element.

*Temporary prohibition of place as an administrative sanction*

It is conceivable that, in a specific case, the Council of State considers that the imposed prohibition of place is, given the specific circumstances of that case, imposed as an administrative sanction and not as a ‘mere’ police measure[[80]](#footnote-80). Administrative sanctions are, as stated above, to be considered as a punishment imposed in order to hurt the offender for the infringement that he or she committed. This has important implications with regard to the proportionality test. In its case law, the Council of State frequently confirmed that it is because of the fact that the imposed administrative sanction essentially constitutes a punishment for the infringement of a local regulation, that the proportionality test may not be interpreted as whether or not the imposed measure goes beyond what is necessary to stop the public order disturbance, in contrast to the proportionality test for police measures. To be proportionate, the administrative sanction must stand in fair proportion to the severity of the facts committed, i.e. the infringement.[[81]](#footnote-81) Thus, as an administrative sanction, the prohibition of place must be proportionate to the facts for which it was applied.

The interpretation of the proportionality test as being a reasonable proportion between the imposed sanction and the facts, in other words the ‘means-facts’ test, is not new. It is the traditional interpretation of the proportionality principle given by the Council of State, as developed in disciplinary law[[82]](#footnote-82). This interpretation in turn originates from the proportionality test as it has been developed in domestic criminal law: the criminal sanction applied must stand in fair proportion to the severity of the facts, i.e. the criminal behaviour committed[[83]](#footnote-83). The interpretation of the proportionality principle as regards administrative sanctions is thus more in line with the concept of proportionality in criminal matters than the administrative concept applied to police measures.

As the above indicates, the Council of State applies a different proportionality test depending on whether the measure imposed is preventive in nature or has a more punitive object. It can be argued that this distinction is in line with Article 6 ECHR. After all, this Article also seems to require a distinction between punitive measures (i.e. criminal charges) and those which are more preventive in nature and to apply the criminal ‘means-facts’ to only criminal charges and not to preventive measures.

However, two remarks should be made here. First, assessing the proportionality of freedom-restricting measures, such as the prohibition of place, does not only seem to require a distinction between preventive and punitive measures. Another distinction has to be made, namely whether or not the measure concerned implies the determination of a civil right or obligation within the meaning of Article 6 ECHR. Thus, even if the prohibition of place is preventive in object and not punitive, it might be possible that it must be regarded as civil for the purposes of Article 6, as discussed above. Although the Strasbourg Court’s case law is still unclear on this point, inspiration can be found in UK case law. After all, the UK courts have already confirmed the classification as civil within the meaning of Article 6 as to certain freedom-restricting public order powers[[84]](#footnote-84). It is thus not unconceivable that the prohibition of place, which is also a public order power restricting the individual in his or her free movement, is to be regarded as civil within the meaning of Article 6. If this is the case, it must meet the criminal ‘means-facts’ test as well, since this test is also applicable to civil matters.

This brings us to the second remark. It does not suffice that the Council of State, as well as a mayor when imposing the prohibition of place, takes into account the purpose of the measure in order to appropriately determine the applicable proportionality test. It appears not to be an either-or story, in which the national authorities must apply *either* the administrative ‘aims-means-consequences’ test *or* the criminal ‘means-facts’ test. It is conceivable that they must take into account multiple proportionality tests at the same time. After all, even if the prohibition of place is to be regarded as civil within the meaning of Article 6 ECHR, or punitive (under domestic law or within the meaning of Article 6 ECHR), it also interferes with the right to freedom of movement in Article 2 FAP. By consequence, in that case, the national authorities must not only take into account the criminal ‘means-facts’ test, but also the above-mentioned ‘aims-means-consequences’ test, so that the imposed prohibition of place is compliant with Article 2 FAP.

We turn now to the content of the proportionality principle in UK case law.

## THE PROPORTIONALITY PRINCIPLE IN THE UK CASE LAW

When the State imposes a measure that restricts the individual in his or her Convention rights, for instance by imposing a direction to leave, this measure must meet the proportionality test adopted by the Strasbourg Court and further developed by the UK courts[[85]](#footnote-85). Although Section 35 ACPA does not expressly refer to the proportionality principle, it does require the constable who imposes a direction to leave to ascertain that giving the direction is ‘necessary for the purpose of removing or reducing the likelihood of the problematic behaviour’[[86]](#footnote-86). This indicates that the aim for which the direction is imposed will be of particular importance with regard to its proportionality. However, there is no relevant case law concerning the proportionality of the new direction to leave yet, so we must fall back upon the already existing UK case law with regard to the proportionality of other freedom-restricting measures, imposed to maintain public order.

In *Gough*, for instance, concerning a football banning order on complaint, the domestic court applied the proportionality test used in *de Freitas*[[87]](#footnote-87) (the so-called ‘de Freitas’-test) to analyse the proportionality of the ban imposed, which comprises the following three questions[[88]](#footnote-88):

* Does the measure have a *legitimate aim,* meaning that the aim pursued is sufficiently important to justify interference with a fundamental right?
* Is the measure that has been designed to meet the aim *rationally* *connected* to it?
* Does the measure go no further than is *necessary* to achieve the aim, which is generally understood as the requirement for the competent authority to impose the measure which is the least intrusive for realising the aim pursued[[89]](#footnote-89)?

The ‘de Freitas’-test was approved in the joint opinion of the Appellate Committee in the *Huang* case[[90]](#footnote-90) as well as by the House of Lords in other cases[[91]](#footnote-91). As a result, this test must be regarded as the firmly established proportionality test in UK domestic law, at least in respect of the Convention rights[[92]](#footnote-92). However, the following question was added in *Huang*[[93]](#footnote-93):

* Does the measure strike *a fair balance* between competing interests, i.e. the individual’s rights and the interests of the community? This means that the impact of the measure on the individual’s rights must stand in fair proportion to the benefits of the measure in the light of the pursued aim (also called ‘proportionality *sensu stricto’*).

Although the content of the proportionality principle has not always been consistent, it now seems generally accepted that the proportionality test in UK domestic law comprises the above four questions[[94]](#footnote-94). Therefore, this test will probably be the test that must be taken into account when assessing the proportionality of the direction to leave, so that the direction is compliant with the Convention rights.

It is nevertheless sometimes difficult in practice to distinguish the seemingly independent criteria of the domestic proportionality test from each other[[95]](#footnote-95). Consequently, as articulated by Gordon, the entire proportionality review *de facto* requires no more than ‘a very general scrutiny of means and ends’[[96]](#footnote-96), a balance to which also Section 35(3) ACPA expressly refers, as mentioned above. However, it is important to point out that the fourth limb of the above-mentioned proportionality test also requires taking into account the impact of the adopted measure for the individual’s rights. Therefore, as to the direction to leave, the UK courts, as well as the constable in uniform who imposes this direction, must not only balance the direction and the pursued aim of maintaining public order. They must also take into account the consequences of the direction for the individual’s fundamental rights, more specifically the right to freedom of movement as guaranteed via the Convention rights. Hence, the UK proportionality principle primarily comprises an ‘aims-means-consequences’ test, which complies with the test mostly applied by the European Court of Human Rights.

However, it is not because the above ‘aims-means-consequences’ test is to be considered as the established domestic proportionality test, or at least with regard to Convention rights, and that it is the test to which section 35(2) ACPA refers, albeit partly, that this is the only test that is applicable to the direction to leave. After all, the UK courts and the competent constable must also take into account the requirements resulting from Article 6 ECHR, more specifically the required distinction between criminal and non-criminal matters. This distinction is increasingly taken into account by the UK courts, as discussed above. However, up until now, this distinction is primarily made with regard to the applicable procedural safeguards guaranteed in Article 6 ECHR[[97]](#footnote-97), but not also as regards the different content of the proportionality principle, which presumably results from that Article as well. Thus, the UK courts do not appear to make a similar distinction as is present in the Belgian Council of State’s case law, with regard to the applicable proportionality test in the light of Article 6 ECHR. They seem to apply only the established ‘aims-means-consequences’ test, at least in respect of the Convention rights.

In my opinion, though, it might be possible that, to be in accordance with Article 6 ECHR, the UK courts must take into account the nature of the measure. It can be argued that they should make a similar distinction as the one present in the Belgian Council of State’s case law and distinguish between the applicable proportionality test to punitive measures and the test applicable to preventive measures. If the measure is to be considered as punitive within the meaning of Article 6 ECHR (i.e. a criminal charge), it appears from the Strasbourg Court’s case law that it must meet the criminal ‘means-facts’ test, which is not applicable to mere preventive measures. As to the direction to leave, it is primarily regarded as a civil, i.e. non-criminal measure under UK domestic law, so that the criminal ‘means-fact’ is not applicable. However, this does not prevent the UK courts to decide in a particular case that the direction to leave is in reality imposed as a criminal charge within the meaning of Article 6 ECHR, as discussed above. If this is the case, the imposed direction to leave should meet the criminal ‘means-facts’ test.

Moreover, the distinction between criminal and non-criminal measures is not the only distinction which the UK courts, as well as the constable who imposes the direction to leave, must take into account. The Strasbourg Court’s case law also distinguishes between civil and non-civil matters, based on Article 6 ECHR. As discussed above, the UK courts have already confirmed the classification as civil within the meaning of Article 6 ECHR with regard to certain freedom-restricting public order powers. Given the fact the direction to leave is also a public order power restricting the individual in his or her free movement, it is thus not unconceivable that it is to be regarded as civil within the meaning of Article 6. If so, the national authorities might be required to apply the criminal ‘means-facts’ test as well, since this test is also applicable to civil matters. Therefore, it is of great importance that the national authorities take into account the nature of the direction to leave, in order to appropriately determine the applicable proportionality test.

However, as to the direction to leave, it does not suffice that the national authorities take into account the purpose of that direction in order to determine whether or not the criminal ‘means-facts’ is to be applied. After all, and regardless of its nature, the direction to leave is a freedom-restricting measure, thus interfering with the individual’s right to free movement as guaranteed via the Convention rights. To be compliant with these Convention rights, the direction to leave must meet the established ‘aims-means-consequences’ test, as discussed above. As a result, if the direction is criminal or civil within the meaning of Article 6 ECHR, the national authorities might have to take into account multiple proportionality tests at the same time, namely the established ‘aims-means-consequences’ test as well as the criminal ‘means-facts’ test.

# CONCLUSION

This contribution aimed to analyse the criteria that have to be taken into account at the European level and the national level, in order to assess the proportionality of freedom-restricting public order powers, such as area-based restrictions. It can be derived from the limited existing Strasbourg Court’s case law with regard to freedom-restricting measures that the applicable criteria remain unclear. To be compliant with the right to freedom of movement as guaranteed in Article 2 FAP or via other fundamental rights, area-based restrictions must stand in fair proportion to the public order aim pursued and the consequences for the individual’s free movement (the ‘aims-means-consequences’ test). However, if the area-based restriction is to be regarded as criminal or civil within the meaning of Article 6 ECHR, it appears at least implicitly from the Strasbourg Court’s case law that it must also stand in fair proportion to the individual’s misbehaviour, i.e. the facts (the ‘means-facts’ test). Nevertheless, the Strasbourg Court’s case law is still not explicit on this point. This contribution is thus primarily a call for clarity in the criteria that must be taken into account at the European human rights level.

Inspiration can be found at the national level, more specifically in the Belgian Council of State’s case law. The Council of State applies a different proportionality test, depending on the preventive or punitive nature of the measure imposed and it applies the criminal ‘means-facts’ test to only punitive measures and not preventive measures. I argued that this distinction appears to be in line with Article 6 ECHR. The national authorities should thus take into account the nature of the freedom-restricting measure and distinguish in terms of applicable proportionality test in order to be compliant with Article 6. However, they must also be aware of the possibility that area-based restrictions are to be considered as civil for the purposes of Article 6 ECHR. After all, this classification has already been confirmed in UK case law as to certain freedom-restricting public order powers. If the measure is to be regarded as civil, it appears at least implicitly from the Strasbourg Court’s case law that it must meet the criminal ‘means-facts’ test as well, since this test is applicable to both criminal and civil matters.

I argued that the criminal ‘means-facts’ test is to be simultaneously applied with the ‘aims-means-consequences’ test. After all, the imposed area-based restriction must meet the latter test in order to be compliant with the right to freedom of movement. As a result, the national authorities may find themselves confronted with several proportionality tests and thus multiple criteria that they have to apply at the same time. Therefore, and although some inspiration can be found at the national level to tackle the lack of clarity at the European human rights level, this contribution also aims to warn the national authorities that assessing the proportionality of area-based restrictions continues to be anything but simple and straight- forward.

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**List of abbreviations**

|  |  |
| --- | --- |
| ACPA | Anti-social Behaviour, Crime and Policing Act 2014 |
| ECHR | European Convention on Human Rights |
| FAP | Fourth Additional Protocol of the European Convention on Human Rights |
| NMA | Belgian New Municipality Act |

1. PhD Candidate in Administrative Law at the University of Antwerp (Belgium), Faculty of Law, research group Government & Law. [↑](#footnote-ref-1)
2. This prohibition of place was already known in administrative law, but has been enshrined generally in a statutory text for the first time now. For a first analysis of this new temporary prohibition of place and its conditions see, e.g.Liesbeth Todts, “Het gemeentelijk plaatsverbod: een eerste verkenning en toetsing aan het fundamentele recht op persoonlijke bewegingsvrijheid” (2015) 8 Tijdschrift voor Bestuurswetenschappen en Publiek Recht 432. [↑](#footnote-ref-2)
3. Art.134*sexies*, §2 NMA. [↑](#footnote-ref-3)
4. Similar police powers already existed under the 2003 Anti-social Behaviour Act (Part 4). However, the conditions of the new direction to leave are even less stringent, thus implying increased police discretion. For a brief comparison of the old and the new dispersal powers see, e.g. Andrew Millie, “Replacing the ASBO: An opportunity to stem the flow into the Criminal Justice System” in Anita Dockley and Ian Loader (eds) *The Penal Landscape: The Howard League Guide to Criminal Justice in England and Wales* (Routledge, 2013), pp.79-81. [↑](#footnote-ref-4)
5. S.35(1) ACPA. [↑](#footnote-ref-5)
6. Art.24 wet 21 december 1998 betreffende de veiligheid bij voetbalwedstrijden, *BS* 3 februari 1999 and Art.14B Football Spectators Act 1989 (the so-called football banning order on complaint), resp. [↑](#footnote-ref-6)
7. Decreet 8 mei 2009 betreffende toegangsverbod tot voertuigen van de VVM, *BS* 6 juli 2009 and Part 1 ACPA, resp. [↑](#footnote-ref-7)
8. It is important to point out that, in the United Kingdom, the maintenance of public order is primarily a competence of judges and not the (local) executive, which is – as mentioned above – the case in Belgium. However, this does not mean that judges in Belgium cannot impose public order techniques at all. For instance, in Belgium, a criminal judge can impose a judicial football stadium ban for football-related violence. Conversely, in the United Kingdom, public order techniques can also be imposed by the executive. The above-mentioned direction to leave, for example, is imposed by the executive, more specifically by a constable in uniform. [↑](#footnote-ref-8)
9. *Hand.* Kamer 2015-16, December 2, 2015, No.7807, pp.26-27. [↑](#footnote-ref-9)
10. The orders are called ‘non-derogating’, since they do not derogate from Article 5 ECHR: they merely restrict the individual in his or her free movement instead of depriving the individual of all liberty (see David Feldman, “Deprivation of liberty in anti-terrorism law” (2008) 67(1) C.L.J. 4, 4). [↑](#footnote-ref-10)
11. Sections 2 and 3 (1)(a) of the Prevention of Terrorism Act 2005, as repealed in 2011 by Section 1 of the [Terrorism Prevention and Investigation Measures Act 2011](https://en.wikipedia.org/wiki/Terrorism_Prevention_and_Investigation_Measures_Act_2011). [↑](#footnote-ref-11)
12. Section 3(3); Schedule 1, Part 1, Section 3 and Section 29(1), resp. of the [Terrorism Prevention and Investigation Measures Act 2011](https://en.wikipedia.org/wiki/Terrorism_Prevention_and_Investigation_Measures_Act_2011). [↑](#footnote-ref-12)
13. See also Art.13 Universal Declaration of Human Rights and Art.12 International Covenant on Civil and Political Rights. [↑](#footnote-ref-13)
14. This contribution only discusses measures restricting the right to freedom of movement within the meaning of Art.2 FAP and not the right to free movement under EU law nor the right to free movement of aliens. The latter two refer to the specific rights relating to the EU free movement principles and migration law, resp., both falling outside the scope of the present contribution. [↑](#footnote-ref-14)
15. M.A.D.W. de Jong, *Orde en beweging: Openbare-ordehandhaving en de persoonlijke vrijheid,* Deventer, W.E.J. Tjeenk Willink, 2000, 143-144. [↑](#footnote-ref-15)
16. This has already been confirmed by the Belgian Constitutional Court as regards the Belgian temporary prohibition of place (GwH April 23, 2015, No.44/2015 para.B.62). [↑](#footnote-ref-16)
17. *Austin and others v United Kingdom* (2012) 55 E.H.R.R. 14. [↑](#footnote-ref-17)
18. *Austin and others v United Kingdom* (2012) 55 E.H.R.R. 14 para.55. [↑](#footnote-ref-18)
19. However, it did sign it, so that the United Kingdom may not act contradictory to the object and the aim of the Protocol (Art.18 Vienna Convention of 23 May 1969 on the Law of Treaties). [↑](#footnote-ref-19)
20. According to the Human Rights Committee the right to freedom of movement is an indispensable condition for the free development of a person (U.N. Doc CCPR/C/21/Rev 1/Add.9 (1999)). [↑](#footnote-ref-20)
21. *Iletmiş v Turkey* (2011) 52 E.H.R.R. 35. [↑](#footnote-ref-21)
22. See *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56 (“Landvreugd”), para.74 and *Olivieira v the Netherlands* (2003) 37 E.H.R.R. 32; 14 B.H.R.C. 96 (“Olivieira”), para.65. See also Jon Schilder and Jan Brouwer, “Recht op bewegingsvrijheid, kenbaarheidseis en voorzienbaarheidseis” (noot onder *Landvreugd*) (2003) 15 AB Rechtspraak Bestuursrecht16 and Christoph Grabenwarter, *European Convention on Human Rights. Commentary* (Beck, 2014), p.415. [↑](#footnote-ref-22)
23. Ben Vermeulen, “Chapter 21. The Right to Liberty of Movement (Article 2 of Protocol No. 4)” in Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds), *Theory and practice of the European Convention on Human Rights* (Intersentia, 2006), p.944. [↑](#footnote-ref-23)
24. Art.2(4) FAP. See, e.g. *Landvreugd* and *Olivieira*. [↑](#footnote-ref-24)
25. See Art.8(2), 10(2) and 11(2) ECHR. [↑](#footnote-ref-25)
26. Nuria Arenas Hidalgo, “Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)” in Javier García Roca and Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Right*  (Koninklijke Brill, 2012), pp.622-623. [↑](#footnote-ref-26)
27. I.e. the NMA (art.134*sexies*) and the ACPA (part 3) for the prohibition of place and the direction to leave, respectively. This has already been confirmed by the Belgian Constitutional Court as regards the Belgian prohibition of place (see GwH April 23, 2015, No.44/2015, paras.B.60.6-B.60.9). [↑](#footnote-ref-27)
28. Janneke Gerards, *EVRM: Algemene beginselen* (Sdu Uitgevers, 2011), p.133. [↑](#footnote-ref-28)
29. That the Belgian prohibition of place pursues a legitimate aim (the aim of public order) has already been confirmed by the Belgian Constitutional Court (GwH April 23, 2015, No.44/2015 para.B.60.7). [↑](#footnote-ref-29)
30. *Soering v UK* (1989) 11 EHRR 439,para.89. See also *infra.* [↑](#footnote-ref-30)
31. *Daly v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532. See also Tom Hickman, “The substance and structure of proportionality” [2008] P.L. 694, 694. [↑](#footnote-ref-31)
32. References in this contribution to the United Kingdom should be read as comprising (only) England and Wales. [↑](#footnote-ref-32)
33. Alan D.P. Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP, 2012), p.6. [↑](#footnote-ref-33)
34. Anne Davies and Jack Williams, “Proportionality in English Law” in Sofia Ranchordás and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge, 2015), p.73. [↑](#footnote-ref-34)
35. *Lauko v Slovakia*, Application 26138/95 (2001) 33 E.H.R.R. 40, paras.56-57; *Öztürk v Germany*, Series A No.73 (1984) 6 E.H.R.R. 409, para.50 and Engel and others v The Netherlands, Series A. No.22 (1979-80) 1 E.H.R.R. 647, para.82. [↑](#footnote-ref-35)
36. *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56 (“Landvreugd”) and *Olivieira v the Netherlands* (2003) 37 E.H.R.R. 32; 14 B.H.R.C. 96 (“Olivieira”). [↑](#footnote-ref-36)
37. *Landvreugd,* para.68 and *Olivieira*, para.61. As already pointed out by Lord Bingham of Cornhill in [*Secretary of State for the Home Department v MB* [2007] UKHL 46](http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2007/46.html&query=(Secretary)+AND+(of)+AND+(State)+AND+(for)+AND+(the)+AND+(Home)+AND+(Department)+AND+(v)+AND+(MB)+AND+(%5b2007%5d)+AND+(UKHL)+AND+(46)), para.23. [↑](#footnote-ref-37)
38. See <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> (Accessed July 27, 2016), pp.6-13. [↑](#footnote-ref-38)
39. *Cf.* *Alexandre v Portugal* *(App. No.33197), judgement of November 20, 2012,* paras.51 and 54. See also <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> (Accessed July 27, 2016), p.11. [↑](#footnote-ref-39)
40. RvS May 8, 2014, No.227.331, BVBA Wedwinkel, para.20; RvS May 15, 2014, No.227.421, BVBA Buka 2000, para.7 and RvS July 29, 2014, No.228.130, BVBA HS-Trading, para.8. See also adv.RvS, *Parl.St.* Kamer 2012-13, No.53-2712/001, pp.61-62. [↑](#footnote-ref-40)
41. Art.134*sexies*, §1 NMA. [↑](#footnote-ref-41)
42. See also Memorie van toelichting, *Parl.St.* Kamer 2012-13, No.53-2712/001, pp.5 and 28. [↑](#footnote-ref-42)
43. GwH April 23, 2015, No.44/2015 paras.B.57.7-B.57.8. [↑](#footnote-ref-43)
44. Tessa Allewaert, “Recente ontwikkelingen inzake gemeentelijke administratieve sancties: de wet van 24 juni 2013” in Steven Lierman (ed), *Actualia gemeenterecht* (die Keure, 2013), p.68. [↑](#footnote-ref-44)
45. This does not mean that administrative sanctions do not exist in the United Kingdom; see, e.g. Part 3 of the Regulatory Enforcement and Sanctions Act 2008, enabling regulatory bodies to impose administrative sanctions for regulatory breaches. However, it is still a developing field and a clear distinction between criminal and administrative sanctions has yet to emerge (see, e.g. John McELdowney, “Country analysis - United Kingdom” inOswald Jansen, *Administrative Sanctions in the European Union* (Intersentia, 2013), p.585). nevertheless, given the fact that these administrative sanctions are not primarily imposed to maintain public order as such, they fall outside the scope of this contribution. [↑](#footnote-ref-45)
46. Note that, in the United Kingdom, the notion ‘civil’ is rather conceived as ‘not criminal’, whereas in continental legal systems, such as Belgium, it is rather conceived as the opposite of ‘administrative’. [↑](#footnote-ref-46)
47. See art.35(2) ACPA. [↑](#footnote-ref-47)
48. *Ibid*. [↑](#footnote-ref-48)
49. Adam Crawford, “Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation” (2008) 71(5) MLR 753, 777. Although Crawford’s contribution relates to the old dispersal powers, the same reasoning can be applied to the new direction to leave since both orders can already be imposed when problematic behaviour is *likely* to be committed (s.30(3) 2003 Act and s.35(2) 2014 Act, resp.). [↑](#footnote-ref-49)
50. As already stated in [*Secretary of State for the Home Department v MB* [2007] UKHL46](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2007/46.html&query=administrative+and+decisions,+and+police,+and+public+and+order,+and+proportionality&method=boolean)*,* para.23. [↑](#footnote-ref-50)
51. For instance, are considered to be non-criminal within the meaning of Article 6 ECHR, the above-mentioned football banning orders on complaint(*Gough and Smith v Chief Constable of Derbyshire* [2002] Q.B. 1213 para.89)*.* The same applies to the former non-derogating control orders (see [*Secretary of State for the Home Department v MB* [2007] UKHL46](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2007/46.html&query=administrative+and+decisions,+and+police,+and+public+and+order,+and+proportionality&method=boolean), para.24). [↑](#footnote-ref-51)
52. Anti-social behaviour orders or “ASBO’s” were civil orders comprising certain prohibitions or obligations imposed by the court in order to stop problematic behaviour, such as the prohibition to return to a certain area. They were introduced by the Crime and Disorder Act 1998 and were superseded by the ‘Injunction’ and the ‘criminal behaviour order’, both introduced by the ACPA 2014. [↑](#footnote-ref-52)
53. *McCann v Crown Court at Manchester* [[2002] UKHL 39](http://www.bailii.org/uk/cases/UKHL/2002/39.html); [[2003] 1 A.C. 787](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2002/39.html), para.80. See, in the same sense, as to the former non-derogating control orders: [*Secretary of State for the Home Department v MB* [2007] UKHL46](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2007/46.html&query=administrative+and+decisions,+and+police,+and+public+and+order,+and+proportionality&method=boolean), para.24 (Lord Bingham of Cornhill) *cf.* para.79 (Lord Carswell). [↑](#footnote-ref-53)
54. *Soering v UK* (1989) 11 E.H.R.R. 439,para.89. See aso, amongst others *Baumann v France* (2002) 34 E.H.R.R. 44, para.61; *Hajlik v Hungary* (2008) 47 E.H.R.R. 11, para.32; *Stamose v Bulgaria (App. No.29713/05), judgement of November 27, 2012*,para*.*32 and *Soltysyak v Russia* (2016) 62 E.H.R.R. 5, para.48*.* [↑](#footnote-ref-54)
55. See, for instance Bernadette Rainey, Elizabeth Wicks, and Clare Ovey (eds), *Jacobs, White and Ovey. The European Convention on Human Rights* (OUP, 2014), pp.324-325; Yutaka Arai-Takahashi, “Proportionality” in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP, 2013), p.451 and *Gerards, EVRM: Algemene beginselen*, fn.28 above, pp.140-157. [↑](#footnote-ref-55)
56. *Gerards*, *EVRM: Algemene beginselen*, fn.28 above, p.145. [↑](#footnote-ref-56)
57. *Hidalgo, “Liberty of Movement Within the Territory of a State”,* fn.26 above, p.622. [↑](#footnote-ref-57)
58. See *supra.* [↑](#footnote-ref-58)
59. *Landvreugd*  paras.67-75 and *Olivieira* paras.60-66. [↑](#footnote-ref-59)
60. As already stated by Hidalgo in *Hidalgo, “Liberty of Movement Within the Territory of a State”,* fn.26 above, p.622. See also *Arai-Takahashi, “Proportionality”*, fn.55 above, pp.454-455. [↑](#footnote-ref-60)
61. *Hidalgo, “Liberty of Movement Within the Territory of a State”,* fn.26 above, p.622. [↑](#footnote-ref-61)
62. See *Landvreugd,* paras.72 and 74. See, in the same sense, *Olivieira,* para.65. [↑](#footnote-ref-62)
63. See, e.g. *Gerards, EVRM*, fn.28 above, p.158 and *Arai-Takahashi, “Proportionality”*, fn.55 above, p.452. [↑](#footnote-ref-63)
64. *Landvreugd,* para.72. See, in the same sense, *Olivieira,* para.65. [↑](#footnote-ref-64)
65. As already stated by Barak in Aharon Barak, *Proportionality, constitutional rights and their limitations* (CUP, 2012), p.132. [↑](#footnote-ref-65)
66. See, e.g. *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 E.H.R.R. 1, para.51(b), as confirmed in, e.g. *Terra Woningen BV v the Netherlands* (1997) 24 E.H.R.R. 456, para.52 and *Hummatov v Azerbaijan* (2009) 49 E.H.R.R. 36, para.142. See also <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> (Accessed July 27, 2016), pp.21-23. [↑](#footnote-ref-66)
67. *Albert and Le Compte v Belgium* (1983) 5 E.H.R.R. 533, para.36 (civil case). See, in the same sense, also *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 E.H.R.R. 1, para.51(b) (civil case); *Diennet v France* (1996) 21 E.H.R.R. 554, para.34 (civil case) and *Merigaud v France (App. No.32976/04), decision of September 24, 2009,* para.69 (criminal charge). [↑](#footnote-ref-67)
68. *Hummatov v Azerbaijan* (2009) 49 E.H.R.R. 36, para.142 (criminal charge). [↑](#footnote-ref-68)
69. # As already stated by van Emmerik and Saris in Michiel L. van Emmerik and Christien M. Saris, “Evenredige bestuurlijke boetes, Preadvies voor de Vereniging voor Bestuursrecht (VAR), [www.stibbe.com](http://www.stibbe.com) (Accessed July 27, 2016), p.135.

    [↑](#footnote-ref-69)
70. See, e.g. *Albert and Le Compte v Belgium* (1983) 5 E.H.R.R. 533, para.36 (civil case); *Diennet v France* (1996) 21 E.H.R.R. 554, para.34 (civil case); *Merigaud v France (App. No.32976/04), decision of September 24, 2009,* para.69 (criminal charge) and *Hummatov v Azerbaijan* (2009) 49 E.H.R.R. 36, para.142 (criminal charge). [↑](#footnote-ref-70)
71. See *supra.* [↑](#footnote-ref-71)
72. RvS May 15, 2014, No.227.421, BVBA Buka para.7 and RvS July 29, 2014, No. 228.130, BVBA HS Trading para.8. [↑](#footnote-ref-72)
73. RvS May 15, 2014, No.227.421, BVBA Buka paras.15-16 and RvS July 29, 2014, No. 228.130, BVBA HS Trading paras.11-12. [↑](#footnote-ref-73)
74. See, e.g. RvS June 26, 2013, No. 224.084, BVBA Vision BD; RvS December 13, 2012, No. 221.751, nv Fauwater Hotel & Chaletpark; RvS December 2, 2010, No. 209.414, vzw Racing Club Roeselaere and RvS November 9, 2009, No. 197.670, Ajaz *et al*. [↑](#footnote-ref-74)
75. RvS November 9, 2009, No. 197.670, Ajaz *et al*.; RvS February 19, 2002, No. 103.730, Snellings *et al*; RvS October 24, 2000, No. 90.369, De Proft and RvS December 7, 1999, No. 83.940, BVBA Ramses. [↑](#footnote-ref-75)
76. For further discussion and references see Liesbeth Todts, “Het evenredigheidsbeginsel bij administratieve sancties en politiemaatregelen: de ene evenredigheid is de andere niet?” (case note RvS May 8, 2014, No.227.331, BVBA Wedwinkel; RvS May 15, 2014, No.227.421, BVBA Buka and RvS July 29, 2014, No. 228.130, BVBA HS Trading) (2015) 4 Tijdschrift voor Gemeenterecht 286, 289-290. [↑](#footnote-ref-76)
77. See RvS November 9, 2009, nr. 197.670, Ajaz *et al*. The Strasbourg Court, however, does not always request the national authorities to apply the least restrictive measure (see Patricia Popelier and Catherine Van De Heyning, “Procedural Rationality: Giving Teeth to the Proportionality Analysis” (2013) 9(2) E.C.L. (230) 234 and Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights* (Martinus Nijhoff Publishers, 2009), pp.111-129). [↑](#footnote-ref-77)
78. See, e.g. RvS November 9, 2009, No.197.670, Ajaz; RvS February 19, 2002, No.103.730, Snellings *et al.*; RvS October 24, 2000, No.90.369, De Proft and RvS December 7, 1999, No.83.940, BVBA Ramses. [↑](#footnote-ref-78)
79. RvS July 29, 2014, No.228.130, BVBA HS Trading para.12 and RvS May 15, 2014, No.227.421, BVBA Buka para.15. [↑](#footnote-ref-79)
80. *Supra*. [↑](#footnote-ref-80)
81. RvS May 8, 2014, No.227.331, BVBA Wedwinkel para.13. [↑](#footnote-ref-81)
82. When applying a disciplinary sanction, the disciplinary authority must strike a fair balance between the facts and the disciplinary sanction applied (see, e.g. Ingrid Opdebeek and Ann Coolsaet, *Algemene beginselen van ambtenarentuchtrecht* (die Keure, 2011), pp.86 and 214-234). [↑](#footnote-ref-82)
83. Viviane Vannes, “Titre III - L’émergence de la proportionnalité dans le droit actuel” in Viviane Vannes (ed), *Le droit de grève****.*** *Concilier le droit de grève et les autres droits fondamentaux : recours au principe de proportionnalité?* (Larcier, 2014), pp.57-60. [↑](#footnote-ref-83)
84. See *supra.* [↑](#footnote-ref-84)
85. Colm O’Cinneide, “Human Rights and the UK Constitution” in Jeffrey Jowell, Dawn Oliver, and Colm O’Cinneide, *The Changing Constitution* (8th edn, OUP, 2015), p.94. [↑](#footnote-ref-85)
86. S.35(3) ACPA. [↑](#footnote-ref-86)
87. *De Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 A.C. 69. [↑](#footnote-ref-87)
88. *Gough and Smith v Chief Constable of Derbyshire* [2002] Q.B. 1213 para.63. See also *Hickman, “The substance and structure of proportionality*”, fn.31 above, p.701. [↑](#footnote-ref-88)
89. See, e.g. *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, para.20. See also *Hickman, “The substance and structure of proportionality*”, fn.31 above, p.701 and Geoff Pearson, “Qualifying for Europe? The legitimacy of Football Banning Orders ‘on Complaint’ under the principle of proportionality” (2005) 3 ESLJ 1, 4. Note, however, that imposing the least intrusive measure is not always required in the Strasbourg Court’s case law, as mentioned above. [↑](#footnote-ref-89)
90. *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167, para.19 (joint opinion). [↑](#footnote-ref-90)
91. *Daly v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532, para.27 (Lord Steyn); *R v Shayler* [2002] UKHL 11; [2003] 1 A.C. 247, para.61 (Lord Hope of Craighead); *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, para.30 (Lord Bingham of Cornhill). [↑](#footnote-ref-91)
92. *Hickman, “The substance and structure of proportionality”,* fn.31 above, p.701. [↑](#footnote-ref-92)
93. *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167. See also *Hickman, “The substance and structure of proportionality*”, fn.31 above, p.713. [↑](#footnote-ref-93)
94. See, e.g. *Nicklinson* [2014] UKSC 38; [2015] A.C. 657 para.80; *Bank Mellat v HM Treasury* [2013] UKSC 39; [2013] H.R.L.R. 30 para.20and *R (Aguilar Quila) v The Secretary of State for the Home Department* [2012] 1 A.C. 621 para.45. See also, e.g. *Hickman, “The substance and structure of proportionality”,* fn.31 above, p.713 and Alan D.P. Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP, 2012), p.7. [↑](#footnote-ref-94)
95. As also stated by Lord Sumption in *Bank Mellat v HM Treasury* [2013] UKSC 39; [2013] H.R.L.R. 30 para.20. See also Richard Gordon QC, “Two dogmas of Proportionality” (2011) 16(3) J.R. 182, 184 para.14. [↑](#footnote-ref-95)
96. *Gordon QC, “Two dogmas of Proportionality”,* fn.95 above, p.184, para.14. [↑](#footnote-ref-96)
97. See, e.g. *Gough and Smith v Chief Constable of Derbyshire* [2002] Q.B. 1213 paras.89-90 (criminal standard of proof) and [*Secretary of State for the Home Department v MB* [2007] UKHL 46](http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2007/46.html&query=(Secretary)+AND+(of)+AND+(State)+AND+(for)+AND+(the)+AND+(Home)+AND+(Department)+AND+(v)+AND+(MB)+AND+(%5b2007%5d)+AND+(UKHL)+AND+(46)), paras.23-24 (right to a fair hearing). [↑](#footnote-ref-97)