Utrecht Law Review igitur

This article is published in a peer-reviewed section of the Utrecht Law Review

Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice

Sybe A. de Vries*

1. Introduction

It was not until the adoption of the Maastricht Treaty (1992) that *formal* recognition was given to human rights as part of EU law. And now the Lisbon Treaty (2009) has entered into force marking a new phase in the remarkable expansion of fundamental rights protection at the level of the European Union, by *inter alia* declaring the Charter, which was solemnly proclaimed in Nice (2000), to be legally binding. The 'constitutional coming-of-age'[1] of fundamental rights protection within the European Union, of course, triggers a number of interesting questions. One of these questions concerns the interplay between EU free movement rules and fundamental rights.

Long before the Maastricht Treaty entered into force, fundamental rights became intertwined with common market principles through the European Court of Justice's case law. The development of fundamental rights as general principles of EU law guiding the interpretation of EU law also had ramifications for the common market. More recent cases such as *Schmidberger*, *Viking, Laval* or *Omega* make this even more apparent.[2] But these cases show how fundamental rights may clash with the 'fundamental', economic freedoms as well, forcing the European Court of Justice (ECJ) to engage itself in a delicate balancing exercise. The central question in this paper is how the Court of Justice should balance conflicting economic freedoms with fundamental rights, considering the changed EU legal framework. Article 6 TEU underlines the important status that fundamental rights have gained in EU law by stating that the Charter of Fundamental Rights of the EU shall have the same legal value as the Treaties; that the 'Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms' and that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

In this paper the approach of the European Court of Human Rights (ECtHR), having to decide in cases where fundamental rights conflict with each other, will also be briefly touched upon and compared with the Court of Justice's approach. In the following the concept of balancing as a judicial methodology

* Dr Sybe A. de Vries is Associate Professor of European Law at the Europa Institute, Utrecht University School of Law, Utrecht (the Netherlands), and Jean Monnet Chair in EU Single Market Law and Fundamental Rights, email: S.A.deVries@uu.nl. This article is partly based on a contribution which is published in: S.A. de Vries et al. (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, 2013

1 G. de Búrca, '16 – The Evolution of EU Human Rights Law', in P. Craig & G. de Búrca, *The Evolution of EU Law – Second Edition*, 2011, p. 481.

2 Case C-112/00, *Schmidberger*, [2003] ECR I-5659; Case C-341/05, *Laval un Partneri Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767; Case C-438/05, *International Transport Workers' Federation v Viking,* [2007] ECR I-10779. Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgermeisterin des Bundesstadt Bonn,* [2004] ECR I-9609.

will be discussed first (Section 1). Hereafter, the balancing of conflicting interests in EU law by the ECJ in general and the balancing of conflicting fundamental rights with fundamental Treaty freedoms in particular will be examined (Section 2). The next section contains a brief account of the approach of the ECtHR to conflicting fundamental rights and public interests (Section 3), while, in Section 4, the main Treaty changes due to the Treaty of Lisbon will be assessed. In the last section, the question as to whether the balance has been rightly struck by the ECJ will be answered.

2. Introduction to balancing: possibilities for a judge to deal with conflicting interests

2.1. The theory of balancing

In legal doctrine the question has been raised how in cases of conflicting fundamental rights a judge can generally reach a reasonable and well-reasoned judgment. Is there a neutral, objective methodology which the courts can use or apply to prevent value judgments, in which the political and moral conviction of the judge is implied?[3] According to Alexy's 'Law of Balancing' the court should not be afraid to engage itself in the balancing of conflicting interests. It must be possible to justify the outcome of a case in a rational way by means of a well-reasoned judgment. The Law of Balancing has been defined as 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[4] Alexy's theory departs from the idea that it is not the weight or intrinsic value of a fundamental right or interest that is decisive, but the seriousness of the infringement and the importance of the right in realizing a general interest; hence the extent to which one principle is infringed for the benefit or satisfaction of another principle.[5] The following three phases can then be identified: first, the intensity of the infringement, i.e. the degree of detriment to a first principle; second, the satisfaction of the competing principle and, third, the evaluation phase by establishing whether the importance of satisfying the latter principle justifies the detriment to the former.[6]

The Law of Balancing, however, has been criticized for various reasons, one of which is the considerable degree of discretion in the balancing process leading to subjectivity and value judgments.[7] Balancing is therefore regarded by some as 'an irrational and illegitimate renunciation of law in favour of a largely arbitrary judicial discretion, difficult to justify according to the ideals of democracy, respect for human rights, and the rule of law and therefore, ripe for elimination from the legal process'.[8]

The practice of balancing is nevertheless far from unique and is a universal feature 'of the structure of constitutional rights throughout the contemporary world'.[9] It has a key function in the jurisprudence of constitutional courts and is often unavoidable in solving conflicts between fundamental rights.[10] As conflicting rights cannot always be fully reconciled, the courts are forced to conduct a balancing exercise. And, fundamental rights hardly ever have an absolute character; they are generally a codification of general principles of law, an application which can be limited. The courts, before which fundamental rights have been invoked, are therefore forced to adjudicate on these conflicting rights and to make a decision.[11] Looking at the EU Charter of Fundamental Rights, according to Article 52(1) of the Charter, the exercise of fundamental rights may be limited subject to the condition that, firstly, the limitations are provided for by law and, secondly, the limitations are necessary and proportionate. This reference to

---

3 J.H. Gerards, 'Belangenafweging bij rechterlijke toetsing aan fundamentele rechten', inaugural speech at Leiden University on 4 April 2006, available at <http://media.leidenuniv.nl/legacy/Schriftelijke%20versie%20oratie.pdf>.

4 X. Groussot, 'Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Judgment of the Court (Grand Chamber) of 28 January 2008, not yet reported – Rock the KaZaA: Another Clash of Fundamental Rights', 2008 *CML Rev.* 45, p. 1760; R. Alexy, *A Theory of Constitutional Rights,* 2010, p. 102.

5 Groussot, ibid., pp. 1760-1762.

6 See also X. Groussot & G. Thor Petursson, 'Balancing as a Judicial Methodology of EU Constitutional Adjudication', in S. de Vries et al. (eds.), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'tightrope' walker*, 2012, p. 51.

7 Groussot & Thor Petursson, ibid., p. 53.

8 See also S. Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate', 2004 *Cambridge Law Journal,* 63, no. 2, p. 413.

9 S. Gardbaum, 'Limiting Constitutional Rights', 2007 *UCLA Law Review* 24, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=971024>, pp. 3-4.

10 See Groussot, supra note 4, p. 1760.

11 See Gerards, supra note 3, p. 4.

limitations and *proportionality* confirms the view that fundamental rights are not absolute, embracing a balancing approach to conflicting fundamental rights.

2.2. Alternatives to balancing

However, *inter alia* Gerards in her inaugural speech at Leiden University points at the possibility for the courts to qualify or even avoid the certainly delicate and intrusive balancing exercise.[12] It would be interesting to see whether the ECJ (implicitly) makes use in its case law of techniques which could be classified as alternatives to a true balancing approach. A first example is the technique of *categorization*, which the courts may generally use to avoid balancing. Categorization defines 'bright-line boundaries and then classifies fact situations as falling on one side or the other'.[13] The judge in fact takes away the necessity to engage in a balancing exercise. In EU law the classification of certain activities as non-economic by the ECJ, for instance, excludes the applicability of the free movement and competition rules with the important consequence that at the end of the day no balancing is needed. The activity simply falls outside the scope of EU law. The Opinion of Advocate General Bot in *Josemans* may serve as an example of this approach, since, according to him, the Treaty rules on services did not apply to activities of 'coffee shops' in the Netherlands, which sell soft drugs as well as fizzy drinks and sandwiches. According to the Advocate General the activities related to the sale of soft drugs operate outside the legal economic sphere of the internal market. The case concerned a Dutch measure preventing non-Dutch nationals from having access to Dutch 'coffee shops' (selling soft drugs).[14] Although the ECJ ruled that the sale of soft drugs did not fall within the scope of application of the Treaty provision on services, since the trade in soft drugs is prohibited in all Member States, it did rule that the sale of other products in coffee shops was covered by the Treaty rules on services. As a consequence the measures restricting the sale of these products needed to be justified on grounds of public order. The Court's reasoning in *Josemans* has been described, in particular in the light of the number of tourists visiting coffee shops in the Netherlands, as absurd[15] and the outcome of this case can therefore be seen as rather eccentric.

But *categorization* is not often used by the ECJ as it generally adopts a functional approach, which entails that arguments relating to national competence do not curtail the application of the Treaty freedoms, such as the arguments raised in *Viking* and *Laval* (see hereafter, Section 3.3) on the fundamental right to strike and take collective action. In the *Laval* case the Swedish labour unions and the Danish and Swedish Governments submitted that the right to take collective action in the context of negotiations with an employer fell outside the scope of Article 49 EC (now Article 56 TFEU), since, pursuant to Article 137(5) EC (now Article 153(5) TFEU), the Community has no power to regulate that right. The Court however held that, irrespective of the fact that in the areas in which the Community does not have competence the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law.

Another example is the *Grogan* case, which concerned a dispute between the Irish Society for the Protection of Unborn Children (SPUC) and Grogan and other students distributing information in Ireland on abortion clinics in other Member States.[16] One of the questions of the national court was whether the medical termination of pregnancy constitutes a service within the meaning of Article 57 TFEU. According to the SPUC the provision of abortion could never constitute a service as it is grossly immoral and involves the destruction of the life of a human being. But the ECJ held that these arguments on the moral plane cannot influence the finding that in the Member States where abortion is provided, it is practised legally. Hence it constitutes a service within the meaning of EU law.[17] The distribution of information, however, was considered to constitute a manifestation of freedom of expression and not a

12 See Gerards, supra note 3, p. 7.
13 K.M. Sullivan, 'Foreword: The Justices of Rules and Standards', 1992-1993 *Harvard Law Review* 106, p. 59.
14 See Case C-137/09, *Josemans*, Judgment of 16 December 2010 (not yet reported).
15 S. Weatherill, 'From Economic Rights to Fundamental Rights', in S.A. de Vries et al. (eds.), *The Protection of Fundamental Rights in the EU After Lisbon,* 2013.
16 Case C-159/90, *Society for the Protection of Unborn Children Ireland v Grogan and others*, [1991] ECR I-4685.
17 Ibid., Paras. 16-21.

service within the meaning of Article 56 TFEU, which meant that the Irish courts were free to prohibit these 'voluntary publications'.[18]

A second concept may be seen as a variation of categorization and is referred to in the legal literature, *inter alia* by Gerards, as e*xclusionary reasons.* This concept implies that it is clear from the aims, or the intent of the measure, that the restriction of a fundamental right can never be justified.[19] In EU law, for instance, purely economic aims can never justify restrictions to free movement as this amounts to protectionism.[20] But if economic aims are crucial for the realisation of non-economic aims, they will be justifiable. What matters is whether the measure has a protectionist motive or purpose. This, for example, appears to have been the case in the *Spanish Strawberries* case – the forerunner of *Schmidberger* – where demonstrations by angry French farmers were intended to protect the sale of French agricultural products.[21] The protest movement 'consisted, *inter alia*, in the interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other Member States, and the damaging of those goods when on display in shops in France'.[22] In other words, the objective of the French demonstrators was, contrary to the demonstrators in *Schmidberger*, to restrict the trade in goods and not to manifest their opinion in public.[23]

Another technique that may be used by the courts is a *procedural* test, which entails an examination of the thoroughness of the decision-making procedure and whether procedural guarantees have been taken into account by the regulating state restricting fundamental freedoms or rights. We have seen that the ECJ sometimes uses this technique as part of the proportionality test to review national measures in particularly sensitive areas, such as gambling or healthcare, where Member States have remained primarily competent (see also *Dynamic Medien*, Section 3.3 and hereafter, Section 5.2).

3. Balancing free movement and fundamental rights by the ECJ

3.1. Balancing according to EU law: the importance of the principle of proportionality

When it comes to balancing opposing interests in *EU law*, the EU courts and in particular the ECJ have had the most experience with cases where one of the Treaty exceptions to free movement was invoked, or the so-called 'rule of reason', allowing Member States – under certain conditions – to deviate from the rules on free movement whenever a general, non-economic interest is at issue. These interests can be defined as horizontal and flanking policy interests.[24] Here the principle of proportionality plays a key role.

Three elements of the proportionality principle

The proportionality principle or test usually contains the following three elements:

- There must be a causal connection between the national measure and the aim pursued; the measure is relevant or pertinent.
- There is no alternative measure available, which is less restrictive concerning trade or free movement generally.
- And there must be a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective thereby pursued and its actual attainment. This is referred to

18 See also R. Lawson, 'The Irish Abortion Cases: European Limits to National Sovereignty?', 1994 *European Journal of Health Law* 1, pp. 173-174.
19 See Gerards, supra note 3, p. 12.
20 Case C-398/98, *Commission v Greece*, [2001] ECR I-7915, Para. 30.
21 Case C-265/95, *Commission v France,* [1997] ECR I-6959 *(Spanish Strawberries)*.
22 Ibid., Para. 2.
23 T. Tridimas, *The General Principles of EU Law*, 2006, p. 338.
24 See S.A. de Vries, *Tensions within the internal market: the functioning of the internal market and the development of horizontal and flanking policies*, 2006.

as proportionality *stricto sensu*; meaning that the measure will be disproportionate if the resulting restriction is out of proportion to the aim sought by or the result brought about by the national rule.[25]

However, the Court rarely applies the third element of proportionality. An example of a case where the Court did question the proportionality *stricto sensu* of a national measure is the *Danish Bottles* case. A Danish environmental measure stipulated that manufacturers must market beer and soft drinks in reusable containers only.[26] The containers must be approved by the national agency for the protection of the environment, which may refuse the approval of new kinds of containers under certain circumstances. However, these rules were amended in such a way that, provided a deposit-and-return system was established, non-approved containers, except for any form of metal container, may be used for quantities not exceeding 3,000 hectolitres a year per producer and for drinks which are sold by foreign producers in order to test the market. The Court held that measures adopted to protect the environment must not 'go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection'.

It is therefore necessary to examine whether all restrictions which the contested rules impose on the free movement of goods are necessary to achieve the objectives pursued by those rules.[27] Although the ECJ regarded the deposit-and-return system as an indispensable element of the environmental measure, which did not cause a disproportionate infringement of the free movement of goods, it considered the licence requirement and the consequential restriction of the quantity of the products, which may be marketed by importers, to be disproportionate to the environmental objective pursued. The Court, however, admitted that such a licence requirement contributed to a considerable degree of protection of the environment as it ensured the maximum reuse of containers, but nevertheless decided that it was disproportionate. The ECJ in effect balanced the level of environmental protection against the restriction on the free movement of goods, thereby reducing the level the Member State could choose.[28] According to Advocate General Slynn in that case there has to be a balancing of interests between the free movement of goods and environmental protection, even if in achieving the balance the high standard of protection sought has to be reduced. Although *Danish Bottles* may have been an isolated incident,[29] where environmental product standards are involved they are subject to a high level of scrutiny by the Court.

The *Schmidberger* case which will be discussed more in detail hereafter can also be seen as a case wherein the Court assessed the proportionality *stricto sensu* of the Austrian measure to allow a demonstration on the Brenner motorway. According to the Court the interests involved must be weighed against all the circumstances of the case in order to determine whether a fair balance was struck between those interests (see hereafter, Section 5.2).[30]

The impact of the legitimate interest and regulatory instrument on the proportionality test

How intrusively the proportionality test will be employed by the ECJ eventually depends on a number of factors. First, the public interest at stake is relevant. In the field of public health, for instance, the ECJ gives more discretion to the regulating state than in the field of consumer policy. With regard to consumer policy, the more intrusive proportionality test can be explained by the fact that the Court relies on the capacity of the consumer to process information and make informed choices about available products and services.[31] A European notion of an average consumer who is reasonably well informed and reasonably circumspect has developed in the case law. The fact that the consumer is also a beneficiary of the internal market process has allowed the Court to depart from a reasonable level of consumer protection, excluding certain sensitive policy areas like gambling. By contrast, regarding the field of

25 See J.H. Jans, 'Proportionality Revisited', 2000 *Legal Issues of Economic Integration* 27, p. 239.
26 Case 302/86, *Commission v Denmark,* [1988] ECR 4607*(Danish Bottles)*.
27 Ibid., Paras. 11-12.
28 Ibid., Paras. 17 and 21.
29 See the different approach of the Court in Case C-309/02, *Radlberger Getränkegesellschaft and S Spitz*, [2004] ECR I-11763; see also D. Geradin, *Trade and the environment: a comparative study of EC and US law*, 1997, p. 62.
30 See *Schmidberger*, supra note 2, Para. 81; see also Groussot & Thor Petursson, supra note 6.
31 See De Vries, supra note 24, p. 70; S. Weatherill, *EC consumer law and policy*, 1997, p. 48.

health, it has been argued that the protection of the health and life of humans, including healthcare, which is also mentioned by Article 36 TFEU, occupies a special position amongst public interests.[32] Also in the field of gambling, for instance, which is a sensitive policy area from the Member States' perspective, the Court takes a particularly precautionary approach.[33]

Second, the regulatory instrument used by the Member State is also relevant for the application of the proportionality principle. National rules on product standards are generally considered to restrict intra-Community trade. The same holds true for measures hindering market access or forming an obstacle to the free movement of workers. Import bans are particularly problematic in the light of the proportionality test. And so are discriminatory measures in the context of services and persons.[34]

Imposing procedural requirements on Member States as part of the proportionality test

Apart from these three elements of proportionality, we can also discern another dimension of proportionality, which is of a different nature as it does not focus on the measures as such but on the procedural context. Particularly in certain sensitive areas or areas where Member States are primarily competent, like gambling, culture, public health and healthcare, the Court does not always question the use of a particular instrument by the state to attain its goals, but instead requires the state to include certain procedural guarantees in its legislation, such as the possibility of judicial review, transparency requirements, procedures which are readily accessible and concluded within a reasonable period of time. In the *Watts* case, for instance, which concerned the compatibility of the British system of prior authorization for medical treatment in another Member State with the free movement of services, the Court held the following:

> '[I]n order for a system of prior authorisation to be justified even though it derogates from a fundamental freedom of that kind, it must in any event be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Such a system must furthermore be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings.'[35]

The *Dynamic Medien* case discussed hereafter is also an example of a more procedural approach by the Court. But even as early as the famous *Reinheitsgebot* case the Court imposed procedural requirements on Member States.[36] In the more recent *United Pan-Europe Communications* case the ECJ also took a deferential approach.[37] It regarded Belgian legislation requiring cable operators to broadcast programmes transmitted by certain private broadcasters ('must carry') as constituting a restriction on the free movement of services, but justified on grounds relating to the maintenance of pluralism in the bilingual region of Brussels-Capital. In assessing the justifiability of the Belgian measure, the Court first stated that the maintenance of pluralism as part of a cultural policy is connected with the freedom of expression, which is a fundamental right, and then held that Member States have a wide margin of discretion in protecting this general interest. Within the context of the proportionality test the ECJ held that the legislation was suitable considering the bilingual nature of the Brussels-Capital region. On the question of necessity the ECJ granted broad discretionary powers to the Member State but laid down certain conditions of good governance as these powers must not be used in a manner which diminishes the

32 De Vries, ibid., p. 351.
33 See Jans, supra note 25, p. 239.
34 See De Vries, supra note 24, pp. 353-354.
35 Case C-372/04, *Watts*, [2006] ECR I-4325, Para. 116.
36 Case C-244/06, *Dynamic Medien*, [2008] ECR I-505; see *Watts*, ibid.; Case 178/84, *Commission v Germa*ny, [1987] ECR 1227 (*Reinheitsgebot*); see also S. Prechal, 'Topic One: National Applications of the Proportionality Principle – Free Movement and Procedural Requirements: Proportionality Reconsidered', 2008 *Legal Issues of Economic Integration* 35, p. 203.
37 C. Barnard, *The substantive law of the EU: the four freedoms*, 2010, p. 259.

effectiveness of a fundamental freedom. The state must take account of certain procedural guarantees, such as transparency requirements.[38]

The question has been raised, however, whether procedural requirements should form part of the proportionality test, which is by its very nature concerned with means-ends relationships, or must be seen as general principles of administrative law and good governance.[39]

3.2. The conflict between fundamental rights and economic freedoms: a conflict between fundamentals?

Before we turn to the case law in which the Court has been forced to balance fundamental rights with fundamental, economic freedoms, the fact that fundamental rights may conflict with the 'economic' Treaty freedoms raises the question as to how the tension between fundamental rights and economic freedoms can actually be seen: as a conflict between two 'constitutional' principles that are both fundamental?

The Treaty freedoms as fundamental principles

There are several arguments which advocate a close nexus between fundamental freedoms and fundamental rights and, accordingly, treating the Treaty freedoms as fundamental rights. When we look at the four economic freedoms in the case law of the ECJ we can find various references to the fundamental character of the fundamental freedoms.[40] The Court itself uses words like fundamental freedom,[41] one of the fundamental principles of the Treaty,[42] or fundamental Community provision.[43] The 'fundamental nature' of the freedoms can furthermore be deduced from the substantive scope of the Treaty freedoms, a dogmatic foundation which is provided for in *Dassonville,* very broadly defining measures having an equivalent effect to quantitative import restrictions.[44] The very fact that an indirect and potential effect on trade suffices for the national measure to fall within the scope of Article 34 TFEU means that citizens have a far-reaching right to challenge national legislation which they find in their way and which restricts their (economic) rights.[45] In a similar vein, Article 34 TFEU has been described as a 'fundamental political right', or as 'subjective public rights'.[46]

The fundamental nature of the Treaty freedoms also appears, although in an indirect fashion, from their institutional dimension, where some provisions have (a limited form of) horizontal direct effect.[47] Interesting in this respect is the Opinion of Advocate General Maduro in the *Vodafone* case arguing in favour of, more generally, a horizontal application of the free movement rules, as a consequence of which the scope of Article 114 TFEU – the legal basis for internal market legislation – could be extended to the regulation of private behaviour as well. In this case the validity of a Regulation regulating roaming prices in the telecom sector was at issue.[48] The Court, though, did not follow the Advocate General's Opinion on the extensive scope of Article 114 TFEU but took another and more cautious approach.[49] Rather than extending the scope of Article 114 TFEU to the regulation of private behaviour, the ECJ looked at future

38 Case C-250/06, *United Pan-Europe Communications Belgium and others*, [2007] ECR I-11135, Paras. 41-47.

39 See Prechal, supra note 36, p. 216.

40 P. Oliver & W.-H. Roth, 'The Internal Market and the Four Freedoms', 2004 *CML Rev.* 41, pp. 407-411.

41 For instance, see *Schmidberger* (goods), supra note 2; Case C-281/98, *Angonese* (workers), [2000] ECR I-4139; see *Laval* (services), supra note 2, and *Omega* (services), supra note 2.

42 See *Commission v France (Spanish Strawberries)*, supra note 21.

43 See Case C-49/89, *Corsica Ferries France*, [1989] ECR I-4441, Para. 8: 'As the Court has decided on various occasions, the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited'. See recently the cases which the Commission has started against a couple of Member States regarding the profession of a notary, such as Case C-50/08, *Commission v France*, Judgment of 24 May 2011 (not yet reported), Para. 67.

44 See S.A. de Vries, 'Dassonville', in T.W.B. Beukers et al. (eds.), *Het recht van de Europese Unie*, 2010, p. 90.

45 See Barnard, supra note 37, pp. 73-74.

46 M.P. Maduro, *We the Court. The European Court of Justice and the European Economic Constitution*, 1998, p. 81; T. Kingreen, *Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts*, 1999, p. 15; see also Oliver & Roth supra note 40, p. 410.

47 The *Viking* and *Laval* cases confirm this approach in respect of the freedom of establishment and the free movement of services. It is however not clear how broad the scope of horizontal direct effect is: see also S. Prechal & S. de Vries, 'Seamless web of judicial protection in the internal market?', 2009 *EL Rev*. 34, p. 5.

48 Opinion of AG Maduro of 1 October 2009 in Case C-58/08, *Vodafone and others*, Judgment of 8 June 2010 (not yet reported), Paras. 19-22; see also the interesting Opinion of AG Trstenjak of 28 March 2012 in Case C-171/11, *Fra.bo SpA*, in which she advocates the horizontal direct effect of Article 34 TFEU on the free movement of goods.

49 Case C-58/08, *Vodafone and others*, ibid., Para. 46.

distortions of competition and obstacles to trade as a result of divergences between national laws to justify the EU's intervention in roaming prices.[50]

Other arguments to support the fundamental character of the freedoms are that, firstly, the freedoms have played a vital role in building Europe's economic constitution. According to the Ordo-liberal school, which originated in the German town of Freiburg in the 1930s, the constitution should protect the economic freedoms 'which are as integral to the protection of human dignity, and as indicative of a free society, as political freedoms, which are themselves liberal in nature and which therefore underscore individual economic freedoms'.[51] Secondly, economic freedoms can often be defined in terms of the freedom to pursue a trade or profession, which is a fundamental right laid down in Article 16 of the Charter of Fundamental Rights.[52] Lastly and very importantly, rights that are implicit in the economic freedoms, such as the right to equal treatment (non-discrimination), the right to move and reside in another Member State, transcend beyond the economic dimension of the free movement rules. The principle of non-discrimination is in fact transformed into a fundamental right to protect individual personality and human dignity.[53]

But there are limits to the application of the Treaty freedoms. In other words, they are not absolute, which is essential as this underlines their relative importance in the Treaty and may even put their 'fundamental nature' into perspective[54] First, not all market interventions hinder *market access*. Where national rules address particularly local interests, such as the opening hours for shops or the prohibition of a resale at a loss, the impact of trade must be assumed to be negligible. This is made clear by the ECJ in its *Keck* judgment.[55] From *Keck* it could be deduced that the legal commitment to free trade appears to entail the abolition of discrimination, or protectionism, but no more than this.[56] This would mean that the free movement rules primarily serve transnational integration rather than supranational legitimation. Supranational legitimation entails that the four freedoms intend 'to complement the national and supranational protection of the individual by fundamental rights and service the purpose of general liberalisation', whereas transnational integration implies that the four freedoms merely serve gaps of protection in cross-border transactions.[57] Hence, supranational legitimation suggests that the freedoms are rights of individuals serving to safeguard against all undue and disproportionate restrictions of cross-border restrictions.[58] Although a case such as *Keck* may be evidence of the more limited scope of the freedoms, its importance must be put into perspective. Not only has the ruling been difficult to apply in practice, its application so far does not extend beyond the free movement of *goods*.

A second limitation to the scope of fundamental freedoms originates from the concept of 'internal situation' in which the Treaty rules do not apply. In such situations no cross-border link can be established. But the case law is evolving here and a more subtle approach by the ECJ suggests that in some situations EU law may be applicable, even where no cross-border link can be established. Not only the provisions on citizenship, but also the rules on the free movement of goods, most notably the provisions on charges, have been broadly interpreted and applied.[59]

50 See also M. Brenncke, 'Case law', 2010 *CML Rev*., 47, p. 1793.

51 D. Chalmers, 'The single market: from prima donna to journeyman', in J. Shaw & G. More (eds.), *New legal dynamics of European Union*, 1995, p. 57.

52 S. Prechal & S. de Vries, 'Viking/Laval en de grondslagen van het internemarktrecht', 2008 *SEW* 11, p. 434.

53 Ibid., p. 435.

54 See for a critical view of the fundamental character of the EU Treaty freedoms: N.J. de Boer, *Justice, Market Freedom and Fundamental Rights: Just how fundamental are the EU Treaty Freedoms? A Normative Enquiry based on the Political Theory of John Rawls into whether there should be a Hierarchy between Fundamental Rights and the Treaty Freedoms*, 2012, available at: <http://www.uu.nl/SiteCollectionDocuments/REBO/REBO_RGL/REBO_RGL_EUROPA/Treaty%20Freedoms%20and%20Fundamental%20Rights%20-working%20paper%20-%20Nik%20de%20Boer[1].pdf>, and the amended version of this paper in 2013 *Utrecht Law Review* 9, no. 1, pp. 148-168; see in particular Oliver & Roth, supra note 40, p. 410.

55 Case C-267-268/91, *Keck and Mithouard*, [1993] ECR I-6097.

56 De Vries, supra note 24, p. 42.

57 T. Kingreen, 'Fundamental Freedoms', in A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, 2010, p. 532.

58 Ibid.

59 Case C-34/09, *Ruiz Zambrano*, Judgment of 8 March 2011 (not yet reported). With regard to tariff barriers: Cases C-485-486/93, *Simitze v Dimos Kos,* [1995] ECR I-2655; Cases C-363/93 and 407-411/93, *Lancry and others,* [1994] ECR I-3957; with regard to Article 34 TFEU: Case C-184/96, *Commission v France,* [1998] ECR I-6197 *(Foie Gras)*; Case C-448/98, *Guimont,* [2000] ECR I-10663; Case C-254/98, *TK-Heimdienst Sass,* [2000] ECR I-151; with regard to Article 45 TFEU: see *Angonese*, supra note 41. The fact that the Court did not address the 'appreciable Community element' in this case may also reflect an unwillingness to further compromise internal Member State autonomy and sensibilities: See annotation by R. Lane & N. Nic Shuibhne, 'Case law', 2000 *CML Rev.* 37, p. 1243; regarding Article

And finally, market integration is not pursued in isolation but must be counterbalanced by social considerations and public interests, which has most recently been 'confirmed' by the concept of social market economy introduced by the Lisbon Treaty. Whereas the internal market originally seemed to be mainly concerned with the abolition of trade barriers, later a broader conception of the internal market can be found, conceptualized in more holistic terms, including consumer safety and environmental protection.[60] The realization of an internal market and the liberalization of trade are not ends in themselves, but are key tools to increase welfare and promote sustainable development, which are important objectives mentioned in Article 3 TEU

Fundamental rights

Looking at *fundamental rights*, they are linked at the EU level, as stated above, to general principles of law, which is confirmed by Article 6(3) TEU. But alongside the general principles of EU law, the Charter of Fundamental Rights and the ECHR constitute, according to Article 6 TEU, the sources of EU fundamental rights. Fundamental rights are understood as being at the very heart of our understanding of humanity, which do not necessarily need to be codified, are available to any person and could therefore be regarded as different from the free movement rights, which are economic in nature, derive their status from the Treaty and cannot exist outside the EU Treaty.[61] However, as argued above, the economic nature of the freedoms does not as such exclude the fundamental nature of the Treaty freedoms.

Similar to the Treaty freedoms, fundamental rights are generally not absolute,[62] but can be restricted as well. And this proposition does not only hold true for EU law, but also for national law. Furthermore, Article 52 of the Charter refers to limitations on rights and principles, which must be provided for by law, which must respect the essence of those rights and which must be necessary and genuinely meet the objectives of the general interest (the proportionality test). In other words, the ECJ should employ a proportionality test to assess whether restrictions imposed on fundamental rights are justified.[63]

Since Lisbon, the Charter of Fundamental Rights has distinguished between rights and principles (see hereafter, Section 5). *Principles* are, contrary to *rights*, only judicially cognizable when they have been implemented by legislative or executive acts. The important question is, of course, which of the fundamental rights in the Charter should be regarded as rights and which as principles? And are there fundamental rights which were previously or according to the ECJ's case law to be considered as rights but should now be regarded as principles? The answer is probably no, as it is unlikely that the Court will accept a deterioration in fundamental rights' protection just like that. It has been put forward by some Member States, especially the United Kingdom, that Title IV, 'Solidarity', should contain principles which do not have direct effect, rather than rights. But Article 28 of the Charter, which falls under Title IV and includes the right to collective action, is, as discussed above, recognized by the Court in *Viking* and *Laval* as constituting a fundamental right which forms part of the general principles of EU law.[64]

No a priori hierarchy between fundamental freedoms and fundamental rights

The point of departure for balancing conflicting fundamental rights with fundamental economic freedoms is, considering the above brief analysis, that it is very difficult and not really desirable to establish an *a priori* hierarchy between fundamental rights and economic freedoms. Although the fundamental freedoms have a fundamental character, they should not be given 'a higher status than that awarded to other fundamental rights and values in the Community legal order'.[65] Yet at the same time the economic

63 TFEU: Cases C-515/99, C-519-524/99 and C-526-540/99, *Reisch and others,* [2002] ECR I-2157.

60 This developed over time, see: P. Craig, 'The Evolution of the Single Market', in C. Barnard & J. Scott (eds.), *The Law of the Single European Market – Unpacking the Premises*, 2002, p. 32.

61 E. Spaventa, 'Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU', in M. Dougan & S. Currie, *50 years of the European treaties: looking back and thinking forward*, 2009, p. 355.

62 But a few fundamental rights have a more absolute character, like freedom from torture, although the recent development of anti-terrorist policies and detention camps have shown that the words absolute can also be put into perspective: see P. Craig & G. De Búrca, *EU Law. Text, cases, and materials*, 2011, Ch. 11 'Human Rights in the EU', p. 396.

63 See Cases C- 92-93/09, *Volker und Markus Schecke GbR v Land Hessen*, Judgment of 9 November 2010 (not yet reported).

64 C. Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform', in P. Craig & G. De Búrca, *The Evolution of EU Law*, 2011, p. 659-660.

65 See Maduro, supra note 46, pp. 166-168.

origins of the European Union and the freedoms, which continue to remain the backbone – or spine – of the Union, entail that fundamental rights do not prevail over economic freedoms, at least not in the Union model.[66] The statement that in principle no a priory hierarchy exists between fundamental rights and fundamental freedoms alludes to the seemingly indivisibility of these rights, which should be equally promoted and protected.[67] But is this affirmed by the EU model where the economic freedoms – at least to a considerable extent – represent the structure of the Union[68] and the corresponding Court's approach in balancing fundamental rights with the Treaty freedoms?

3.3. Fundamental rights and economic freedoms in the case law of the ECJ

It took some time before the Court was confronted with cases where fundamental rights were invoked as a justification *per se* for restrictions on free movement. *Schmidberger* was the first crucial case in which the ECJ was forced to balance the free movement of goods with the protection of fundamental rights. In the following section a series of judgments, beginning with *Schmidberger,* will be presented in which the Court has sought to determine the margins of fundamental rights' protection by Member States within the EU internal market framework.

Schmidberger

Schmidberger is, of course, a famous example of a case where a fundamental right, the right to freedom of expression and assembly, had to be balanced with a 'fundamental' freedom, the free movement of goods.[69] A *locus classicus* for conflicting rights in EU law.

The case involved a demonstration by environmentalists on the Brenner motorway in Austria, thereby closing the motorway to traffic for nearly 30 hours. Permission for this demonstration was (implicitly) granted by the Austrian authorities. The question was whether the Austrian authorities could be held liable for an infringement of EU law under Article 34 TFEU (the free movement of goods) in conjunction with the principle of Community loyalty as now laid down in Article 4(3) TEU, as the Austrian authorities had not completely banned the demonstration on such an important motorway. According to the Court, thereby referring to its judgment in *Commission v France (Spanish Strawberries)*, the free movement of goods as laid down in Article 34 TFEU was indeed restricted.

But these restrictions were justifiable by the protection of fundamental rights, which form an integral part of the general principles of EU law. The Austrian Court had explicitly asked whether the free movement of goods should prevail over the fundamental rights at issue. In answering that question the Court held that the freedom of expression and assembly is not absolute – unlike other fundamental rights enshrined in the European Convention on the Protection of Human Rights – and must be viewed in relation to its social purpose. At the same time the ECJ recognized that

> 'whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law'.[70]

Hence, a fair balance between the interests of free trade and freedom of expression must be struck, and Member States enjoy a wide margin of discretion in that regard. According to the ECJ, 'the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger'.[71]

---

66 See also J. Dutheil de la Rochère, 'Challenges for the protection of fundamental rights in the EU at the time of the entry into force of the Lisbon Treaty', 2010 *Fordham International Law Journal* 33, p. 1787.

67 See with regard to economic and social rights J. Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility', in T.K. Hervey & J. Kenner (eds.), *Economic and social rights under the EU charter of fundamental rights: a legal perspective*, 2003, pp. 1-25.

68 See Dutheil de la Rochère, supra note 66, p. 1787.

69 See *Schmidberger*, supra note 2.

70 Ibid., Para. 78.

71 Ibid., Para. 66.

The ECJ then summed up a number of factors which makes restrictions on the free movement of goods proportionate in the light of the protection of fundamental rights. Firstly, the demonstration took place following a request for authorization from the national authorities. Secondly, the demonstration took place on a single route, on a single occasion and during a limited period and was thus limited in comparison with the geographical scale and intrinsic seriousness. Thirdly, the purpose of the demonstration was not to restrict trade in goods of a particular type or from a particular source. Fourthly, supportive administrative measures were taken to limit the implications of the demonstration. Moreover, it was clear, according to the Court, that the demonstration did not give rise to a general climate of insecurity, which had a negative effect on trade. Lastly, an outright *ban* on the demonstration would lead to unjustifiable interference with the fundamental rights of the demonstrators.[72]

Omega

Omega was a German company operating the *laserdrome* in Germany, a place used to practice laser games. In such a laser game the players should try to 'shoot', with a so-called laser submachine gun, targeting devices called *sensory tags* which are normally fixed to jackets worn by the players and this equipment and technology were supplied by the British company Pulsar. In other words, we are dealing here with a kind of 'clash of the titans' simulation game with modern weapons in modern times.

But the police of the German state North Rhine-Westphalia ordered a prohibition of these games as they constituted a danger to public order. Acts of simulated homicide and the trivialization of violence were contrary to fundamental values prevailing in public opinion. Omega *inter alia* argued that the order was contrary to EU law, in particular the free movement of services.

The ECJ held that the free movement of services was affected, but could be justified. According to the Court it was clear that the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity. The Court then held that 'the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law'. And

> '[t]here can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right'.[73]

After having defined human dignity as a general principle of EU law, it went on to assess the proportionality of the German order in the light of the protection of human dignity. According to the Court, the need for and the adoption of provisions such as the German prohibition on laser games are not excluded merely because one Member State has chosen a different system of protection than another. In other words, there is no need for one conception which is shared by all Member States as to the way in which fundamental rights are to be protected. And it came – rather quickly – to the conclusion that the German measure corresponded to the level of protection of human dignity, which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany.

The particular nature of this case is that the Court first defined a typically *German* concept of human dignity as a general principle of *EU* law, and then, while applying the proportionality test, it demonstrated a predominantly Member State-friendly approach.[74]

Sayn-Wittgenstein

A case that is similar to *Omega* is the *Sayn-Wittgenstein* case. This fairly unique case involved a refusal by the Austrian authorities to register the name *Fürstin* von Sayn-Wittgenstein. Under the Austrian Law on the abolition of the nobility, which has a constitutional status in accordance with Federal Constitutional Law, it is prohibited to use titles like 'Fürst' or 'Fürstin'. Ilonka Fürstin von Sayn-Wittgenstein is an Austrian

72 Ibid., Paras. 84-89.
73 See *Omega*, supra note 2, Para. 34.
74 N. Nic Shuibhne, 'Margins of appreciation: national values, fundamental rights and EC free movement law', 2009 *EL Rev*. 34, p. 254.

citizen and was originally named Havel, née Kerekes. After her adoption by the German Fürst von Sayn-Wittgenstein, she obtained the title 'Fürstin'. Upon this adoption the Austrian authorities granted her a birth certificate with the name and title she had acquired in Germany. But later on it was established that the title 'Fürstin' could not be registered in Austria under Austrian law. Ilonka von Sayn-Wittgenstein challenged this decision before the Austrian administrative court, which asked whether Article 21 TFEU precludes legislation pursuant to which the competent authorities of a Member State refuse to recognize the surname of an (adult) adoptee, determined in another Member State, in so far as it contains a title of nobility which is not permissible under the (constitutional) law of the former Member State. According to the Court,

> 'the refusal, by the authorities of a Member State, to recognise all the elements of the surname of a national of that State as determined in another Member State, in which that national resides, and as entered for 15 years in the register of civil status of the first Member State, is a restriction on the freedoms conferred by Article 21 TFEU on every citizen of the Union'.[75]

For a justification of this restriction the Austrian authorities referred to the objective of public policy. Regarding this exception ground the ECJ stated that

> 'the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions (…). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.

The Court thereby referred to the *Omega* case (see above). It then continued by stating that

> 'the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty'.[76]

The Austrian Government had stated that the Law on the abolition of the nobility constitutes the implementation of the more general principle of equality before the law of all Austrian citizens and, considering this argument, the Court referred to the Charter of Fundamental Rights, which includes the principle of equality as a general principle of Union law. Interestingly it also referred, within the context of the proportionality test, to Article 4(2) TEU, which states the following: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The EU thus recognizes and respects the national identity of its Member States, which also encompasses the republican state form.

Two interesting features of this case, which to some extent can be found in the *Omega* judgment as well, are that, firstly, the Court explicitly referred to Article 4(2) TEU and appeared to be very sensitive to the argument based on the constitutional identity of Austria.[77] And, secondly, there is the rather broad interpretation of the concept of public policy. After all, since cases like *Bouchereau* and *Calfa*[78] one of the conditions that need to be fulfilled in order to successfully rely on public policy is that there must be a genuine and sufficiently serious threat to a fundamental interest of society. This strict requirement is also laid down in article 27 of Directive 2004/38, the 'Citizenship Directive', which allows Member States to

75 Case C-208/09, *Sayn-Wittgenstein*, Judgment of 22 December 2010 (not yet reported), Para. 71.
76 Ibid., Paras. 86-87.
77 Regarding this see in particular: L. Besselink, 'National and constitutional identity before and after Lisbon', 2010 *Utrecht Law Review* 6, no. 3. p. 36. See also L. Besselink, 'Case Law', 2012 *CML Rev.* 49, pp. 671-694.
78 Case C-30/77, *Bouchereau*, [1977] ECR 1999; Case C-348/96, *Calfa*, [1999] ECR I-11.

restrict the migration rights of EU citizens only under very limited circumstances.[79] But apparently in some cases the Court is willing to accept a broader reading of the public policy exception. In the *Josemans* case, for instance, the Court held that 'combating drug tourism and the accompanying public nuisance is part of combating drugs. It concerns both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and also of the European Union'.[80] It can be argued that the ECJ in fact 'fills in' the public policy exception, which was raised by the intervening parties, Belgium, Germany and France, with a rule of reason exception. It is unclear to what extent the public policy exception could have been invoked as an independent justification ground without involving the fight against drugs as an additional interest.[81]

Dynamic Medien

Just like in *Omega* and *Sayn-Wittgenstein* the Court in *Dynamic Medien* accepted the Member States' considerable discretion in protecting fundamental rights and fundamental interests vis-à-vis economic freedoms.[82] In this case the dispute concerned the importation of Japanese cartoons called 'Animes' in DVD or video cassette format from the United Kingdom to Germany. The cartoons were examined before importation by the British Board of Film Classification (BBFC). The image storage media bore a BBFC label stating that they could only be viewed by adolescents aged 15 years or older. The German Law on the protection of young persons, however, prohibits the sale by mail order of image storage media which have not been examined in Germany in accordance with that Law, and which do not bear an age-limit label corresponding to a classification decision from a higher regional authority or a national self-regulation body ('competent authority'). Dynamic Medien, a company and competitor of the importing company of the Japanese cartoons, started a procedure before the German court, which submitted preliminary questions to the ECJ. The questions were whether such a prohibition was contrary to the free movement of goods and, if so, whether this could be justified.

In examining the justification of the German law the ECJ held that the protection of the rights of the child is recognized by various international instruments and that those international instruments are among those concerning the protection of human rights of which it took account in applying the general principles of Community law. Furthermore, the Court *inter alia* referred to the Charter of Fundamental Rights, which provides in Article 24(1) that children have the right to such protection and care as is necessary for their well-being. Regarding the proportionality of the German law and the examination procedure established by the national legislature in order to protect children against information and materials injurious to their well-being, the Court reiterated that

> 'the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the national provisions enacted to that end. Those provisions must be assessed solely by reference to the objective pursued and the level of protection which the Member State in question intends to provide'.[83] (See also *Omega* and *Sayn-Wittgenstein* above.)

A particularly interesting feature of this case is that, contrary to the *Omega* and *Sayn-Wittgenstein* cases, the ECJ applied the proportionality test in a more procedural fashion in that the examination procedure must be one which is readily accessible, can be completed within a reasonable period, and, if it leads to a refusal, the refusal decision must be open to a challenge before the courts. This has the consequence that Member States in exercising their powers to pursue fundamental rights have to take account of principles

79 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77.

80 See *Josemans*, supra note 14, Para. 65.

81 See H.J. van Harten & H. van Eijken, '"Lookin' for a little green bag…" en de werkingssfeer van het Unierecht', 2011 *Nederlands tijdschrift voor Europees recht*, no. 4, p. 112.

82 See *Dynamic Medien*, supra note 36.

83 Ibid., Para. 49.

of good governance.[84] As stated above, this approach is also clearly visible in other cases where Member States traditionally enjoy broad discretionary powers, like in the field of healthcare or gambling.

Viking and *Laval*

The well-known *Viking* and *Laval* cases are of quite a different nature.[85] Viking is a Finnish company that wished to reflag its vessel 'the Rosella' under the Estonian flag. The reason for the change was a plan to man the ship with an Estonian crew that could be paid considerably less than a Finnish crew. The International Transport Workers' Federation ordered its affiliates to boycott the Rosella and to take other solidarity industrial action. Viking sought an injunction in the English High Court, restraining the ITF and Finnish Seaman's Union, now threatening strike action, from breaching the free movement of services and freedom of establishment provisions.

Laval was a Latvian company which won a contract to refurbish a school near Stockholm. The Latvian workers earned 40 per cent less than their Swedish equivalent. The Swedish Labour Union wanted Laval to apply the collective agreement, but it refused, which led to a blockade of the building site by Swedish construction workers.

In both cases the questions raised by the Swedish and English courts were whether the actions by the trade unions constituted a restriction on the EU's economic freedoms, i.e. the freedom of establishment and the free movement of services, and whether their actions were justifiable. Focusing here on the Court's judgment in *Viking*, the ECJ first held that the right to take collective action and the right to strike is a fundamental right forming an integral part of the general principles of Community law. It thereby referred to the European Social Charter, the ILO Convention and to the Charter of Fundamental Rights.[86] But the Court also held that the right to strike is subject to certain conditions – it hereby referred to article 28 of the Charter on Fundamental Rights and to restrictions in national law. It continued by stating that collective action is not excluded from the scope of the free movement provisions and that these provisions can be invoked against actions by trade unions. In other words, these free movement provisions have horizontal direct effect.[87]

It then went on to assess whether collective action can justify restrictions on the freedom of establishment. According to the Court, the right to take collective action for the protection of workers is a legitimate interest which in principle justifies a restriction of one of the fundamental freedoms. The Court stated that the Community not only has an economic, but also a social purpose and that social policy interests must be balanced with the free movement rules.

Although this reference to the social purpose of the Community should not only be seen as merely rhetoric as it may create its own social dynamic in future case law,[88] in assessing the proportionality of the collective action the ECJ left little room for the trade unions to justify their actions.[89] The national court must take into account that the right to collective action must serve the protection of workers, that jobs and labour conditions are indeed under serious threat by reflagging the Rosella, that collective action is one of the ways that may serve members' interests, that account should be taken of less restrictive means before initiating a strike.

84 See Prechal, supra note 36, p. 201.

85 See *Viking*, surpa note 2 and *Laval*, supra note 2. See also A. Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', 2013 *Utrecht Law Review* 9, no. 1, pp. 104-117.

86 *Viking*, ibid., Para. 43.

87 See Prechal & De Vries, supra note 47, p. 5.

88 See Prechal & De Vries, supra note 52, p. 433.

89 See J. Malmberg & T. Sigeman, 'Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice', 2008 *CML Rev.* 45, p. 1130. With regard to the follow-up of in particular the *Laval* case, see U. Bernitz & N. Reich, 'Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No. 89/09 of 2 December 2009, Laval un Partneri Ltd. v. Svenska Bygggnadsarbetareförbundet et al.', 2011 *CML Rev.* 48, p. 603.

4. Balancing according to the European Court of Human Rights (ECtHR) in short

As it was originally agreed that the European Economic Community should not have its own Charter of Human Rights but that the European Convention on the Protection of Human Rights (ECHR) 'would be the authoritative source for the new European Political Community's human rights system', the domain of human rights protection in Europe became the primary concern of the ECtHR.[90] It would therefore be interesting to see how the ECtHR has been dealing with conflicting human rights.

When it comes to balancing opposing fundamental rights the ECtHR generally uses a 'margin of appreciation test'.[91] It has been submitted that the ECtHR generally uses three steps to analyze a conflict between human rights:[92] First, any restriction of a right must be in accordance with or prescribed by law. Second, the purpose of the restriction must be within the remit of the legitimate aims prescribed by the article. And, third, the restriction must be necessary in a democratic society. But the ECtHR allows the state to have a wide margin of appreciation when two fundamental rights clash. According to Groussot this appears from the settled case law of the ECtHR, such as the *Chassagnou v France case*, where the ECtHR clearly embraced the balancing approach but with a wide margin of appreciation for the states:

> 'Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society". The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention.'[93]

The way in which the ECtHR has used the 'margin of appreciation test' has evolved over time and may be more or less intrusive depending on each individual case. The ECtHR has shown particular deference to local values, whereby the extent to which national restrictions on fundamental rights are allowed varies from state to state,[94] thereby according the states 'a range of margins of discretion'.[95] This also holds true for the ECJ in balancing public interests or fundamental rights with the Treaty freedoms, as, for instance, the Court in the *Dynamic Medien* case held that the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the national provisions enacted to that end.[96] In addition, the *Sayn-Wittgenstein* case makes clear that Member States have considerable leeway in protecting their internal constitutional space, thereby restricting fundamental economic rights (see above).[97]

5. The possible impact of the Lisbon Treaty and the Charter of Fundamental Rights

5.1. Intermezzo: taking a closer look at the content of the Charter

Nearly all cases that are discussed above were decided before the Treaty of Lisbon was adopted. The recognition of fundamental rights as general principles of EU law has so far provided sufficient ground

90 See De Búrca, supra note 1, p. 486.
91 See, for example, J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 2011 *European Law Journal* 17, no.1, pp. 80-120.
92 J.A. Sweeney, 'A "Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights', 2007 *Legal Issues of Economic Integration* 34, no. 1, p. 30.
93 See Groussot, supra note 4, p. 1760; *Chassagou and others v France*, Appl. nos 25088/94, 28331/95 and 28443/95 (ECHR, 24 April 1999), Para. 113.
94 See Sweeney, supra note 92, p. 31.
95 A. Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights', 2010 *Human Rights Law Review* 10, no. 2, p. 316.
96 See *Dynamic Medien*, supra note 36.
97 See *Sayn-Wittgenstein*, supra note 75.

for the ECJ to at least admit these rights as legitimate interests which may justify restrictions on the four freedoms. But as stated before, the position of fundamental rights in EU law has been given a new impetus by the inclusion of Article 6 TEU. Article 6 of the EU Treaty now recognizes the binding force of the Charter of Fundamental Rights, it embraces the intention to accede to the European Convention on the Protection of Human Rights and Fundamental Freedoms and codifies the European Court of Justice's case law that fundamental rights shall constitute general principles of Union law. The question which now looms is whether the Charter is still merely a codifying document adding little to the existing case law or an autonomous, self-standing source of law generating its own meaning.[98]

Mixed approach

Taking a closer look at the Charter it is striking to see that there is no clear distinction between classic political and civil rights on the one hand, and social and economic rights on the other. There appears to be a more 'mixed approach' to fundamental rights in general. Furthermore, some innovative rights and prohibitions are included in the Charter, such as the prohibition on reproductive human cloning, whereas others are not. An example is the protection of minorities. According to Craig and De Búrca, 'the Charter could perhaps best be described as a creative distillation of the rights contained in the various European and international agreements and national constitutions on which the ECJ had for some years already drawn'.[99]

Although no clear distinction between classic civil rights and social rights is made, there is, as already noticed above (Section 3.2), a distinction between 'rights' and 'principles'. Article 52(5) states that

> '[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be *judicially cognisable only* in the interpretation of such acts and in the ruling on their legality [emphasis added].'

This much debated and contentious provision perhaps seeks to distinguish between 'negatively-oriented civil and political rights and positively-oriented economic and social rights, with a view to rendering the latter largely non-justiciable'.[100] But the impact of this provision may be limited in so far as principles normally have to be further elaborated by the Union and as the courts are not really capable of reviewing such principles extensively.[101]

The scope of the Charter vis-à-vis the general principles of EU law

According to Article 51 of the Charter, it only applies to acts of Member States when they *implement* EU law. How this condition should be interpreted and how it relates to the application of general principles of EU law still remains unclear. A literal reading of the term 'implementing EU law' seems to suggest that the scope of application of the Charter is narrower than the scope of application of general principles of EU law, which apply to Member States' actions falling within the scope of EU law. But the explanations relating to the Charter refer to the Court's case law on general principles of EU law instead, which requires Member States to respect fundamental rights when they act within the scope of Union law.[102]

Although the drafting process of the Charter may support a narrow interpretation of the words 'implementing EU law',[103] the prevailing opinion in the literature appears to be that the Charter should not detract from the case law of the Court of Justice and should therefore also be applicable in situations where the Member States do not implement EU law or merely act as agents of the EU, for example,

98 Cf. D. Chalmers & G. Monti, *European Union law: text and materials: updating supplement*, 2008, p. 69.
99 See Craig & De Búrca, supra note 62, p. 395.
100 Ibid., p. 398.
101 R. Barents, 'Een grondwet voor Europa (VI): de grondrechten', 2005 *Nederlands tijdschrift voor Europees recht*, no. 2, p. 44. See Tridimas, supra note 23, pp. 358-359.
102 See Cases 5/88, *Wachauf,* [1989] ECR 2609, C-260/89, *ERT,* [1991] ECR I-2925 and C-309/96, *Annibaldi,* [1997] ECR I-7493.
103 See also Editorial comments, 'The scope of application of the general principles of Union law: An ever expanding Union?', 2010 *CML Rev.* 47, p. 1596.

where the fundamental Treaty freedoms are at issue.[104] Even if the Charter were not to apply, according to Article 51(1), to situations where Member States merely act within the scope of EU law, the general principles of EU law and the case law of the Court will apply. The Court had the opportunity to clarify the relationship between the Charter and general principles of EU law in the *Yoshida Iida* case, as one of the questions of the German court put to the ECJ in this case was whether 'fundamental rights which continue to apply as general principles of Union law under Article 6(3) EU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with 6(1) EU'. But the Court did not deal with this question as no link with EU law could be established within the meaning of Article 51 of the Charter.[105] This case concerned the rights of a parent, who was a third-country national and had custody of a non-dependent child who was a Union citizen, under the Citizenship Directive 2004/38, the Charter of Fundamental Rights and Article 8 ECHR.

To prevent a dual regime giving rise to arbitrary divergences,[106] it has therefore been argued that, notwithstanding the above mentioned, the scope of application of the Charter should coincide with that of the general principles of EU law.[107]

However plausible this 'solution' may seem, it does not answer the question of what is meant by 'falling within the scope of EU law', triggering the application of fundamental rights; a question that has become even more pertinent now that the Court has considerably extended the reach of general principles of EU law in some cases. A too flexible interpretation of the scope of EU law is contentious, as it may open the door to an 'autonomous' application of EU fundamental rights.[108] In her Opinion in the *Ruiz Zambrano* case Advocate General Sharpston even suggested extending the application of fundamental rights to situations in which the EU is competent to act, whenever there exists an exclusive or shared competence, irrespective of the actual exercise of this competence, or whether a Treaty provision is directly applicable. The Court, however, did not pronounce on the applicability of fundamental rights to this case. Instead, it only referred to Article 20 TFEU, which 'confers the status of citizen of the Union on every person holding the nationality of a Member State', and held that, without hesitation and extensive argumentation, 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States'.[109] Arguably, the enjoyment of – at least certain – fundamental rights could be qualified as crucial for the enjoyment of European citizenship rights.[110] But it has also been rightly submitted that an all too expansive understanding of the scope of EU fundamental rights' protection on the basis of *Ruiz Zambrano* would meet considerable resistance on the part of the Member States; a conflict that the ECJ does not wish to see.[111] The more recent judgment in the *Dereci* case seems to reinforce a more

104 K. Lenaerts & J.A. Gutiérrez-Fons, ' The constitutional allocation of powers and general principals of EU law', 2010 *CML Rev.* 47, pp. 1658-1660; T. Barkhuysen & A.W. Bos, 'De betekenis van het Handvest van de Grondrechten van de Europese Unie voor het bestuursrecht', 2011 *Jurisprudentie Bestuursrecht Plus* 3, pp. 15-16.

105 Case C-40/11, *Yoshikazu Iida v City of Ulm*, Judgment of 8 November 2012, (not yet reported).

106 M. Dougan, 'The Treaty of Lisbon 2007: winning minds, not hearts', 2008 *CML Rev.* 45, pp. 664-665; see Lenaerts & Gutiérrez-Fons, supra note 104, p. 1660.

107 Ibid., p. 1660.

108 A case which reveals how broad the potential scope of application of EU law can be in respect of fundamental rights' protection is *Karner.* Here the ECJ proceeded with a self-standing test under Article 10 ECHR in reviewing an Austrian law, which was not caught by Article 34 TFEU since it was considered to be a selling arrangement within the meaning of *Keck*: Case C-71/02 *Karner* [2004] ECR I-3025. See for a critical reflection on this case: J. Kühling, 'Fundamental Rights', in von Bogdandy & Bast, supra note 57, p. 500. In a similar vein, the ECJ decided in *Kücükdeveci* that, due to the mere existence of Directive 2000/78 establishing a general framework on equal treatment in employment and occupation, a German law discriminating on grounds of age fell within the scope of EU law and triggered the EU general principle of non-discrimination on grounds of age: Case C-555/07, *Kücükdeveci*, [2010] ECR I-365. The judgment in *Prigge*, which concerned a collective agreement by Lufthansa and its pilots pursuant to which the employment contract for pilots is terminated when they reach 60 years of age, does not only confirm the Court's approach in *Kücükdeveci* but also extends the scope of the Directive and thus the general principle of non-discrimination on grounds of age to actions by social partners: Case C-447/09, *Prigge and others*, Judgment of 13 September 2011 (not yet reported).

109 See *Ruiz Zambrano*, supra note 59, Paras. 40-42. See also H. van Eijken & S.A. de Vries, 'A new route into the promised land? Being a European citizen after Ruiz Zambrano', 2011 *EL Rev.* 36, p. 704.

110 See also L. Azoulai, 'A comment on the Ruiz Zambrano judgment: a genuine European integration' on EUDOCitizenship', available at <http://eudo-citizenship.eu/citizenship-news/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration>. See also A. von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', 2012 *CML Rev.* 49, pp. 489-520.

111 K. Hailbronner & D. Thym, 'Case law', 2011 *CML Rev*. 48, pp. 1269-1270.

hesitant approach by the Court, refusing to extend EU fundamental rights protection through a broad interpretation of the citizenship provisions.[112]

5.2. Added value of the Charter

That the Charter is not merely a codifying document but has an important additional value to the existing fundamental rights which are recognised as general principles of EU law is shown by a number of cases.[113] The *Volker & Schecke* case[114] is of particular interest here. This case concerned the publication of information on beneficiaries of agricultural aid, which is provided for by an EU Regulation. The Regulation required the publication of the names of the beneficiaries receiving certain agricultural aids. The question was whether this requirement was not contrary to the right to have one's private life respected (Article 7 of the Charter) and the right to the protection of personal data (Article 8(1) of the Charter). The Regulation itself sought to enhance transparency regarding the use of Community funds in the Common Agricultural Policy.

In assessing the validity of these provisions of the Regulation, which require the dissemination of the information on the beneficiaries of agricultural aid, in the light of fundamental rights, the Court only briefly referred to the European Convention and decided the case by *applying* the Charter instead.[115] Furthermore, the Court had to balance the interest of the Community in increasing transparency with respect to the use of agricultural aid by revealing the names of the beneficiaries against the protection of the fundamental rights enshrined in Articles 7 and 8 of the Charter according to Article 52 of the Charter.

It has therefore been argued that the Charter 'may contribute significantly to the discovery of general principles'.[116] At the same time, it must be prevented that the Charter is too frequently used as a panacea for problems which are unnecessarily translated into a fundamental rights application.

Although questions remain as to the exact scope of application of the Charter, the distinction between rights and principles and its relationship with the general principles of EU law as developed in the Court's case law, its emphasis on the fundamentality and universality of fundamental rights in EU law cannot be ignored. This should steer the orientation and interpretation of free movement rules in this field as well. Of course, the following question remains: *how*? Two preliminary remarks should be made here. First, we have seen that the Charter played a role in recognizing a fundamental right as a mandatory requirement, a new 'mandatory requirement', i.e. the protection of the child, which may justify a restriction on free movement (*Dynamic Medien*). And second, according to Article 52(1) of the Charter, the exercise of fundamental rights may be limited subject to the conditions of, firstly, that the limitations are provided for by law and, secondly, that the limitations are necessary and proportionate (the principle of proportionality). In *Volker & Schecke* this provision was applied by the ECJ, but in the context of an appraisal of an *EU regulation* and its conformity with fundamental rights:

> 'It follows from the foregoing that it does not appear that the institutions properly balanced, on the one hand, the objectives of (…) Regulation No. 1290/2005 and of Regulation No. 259/2008 against, on the other, the rights which natural persons are recognised as having under Articles 7 and 8 of the Charter. Regard being had to the fact that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (…) and that it is possible to envisage measures which affect less adversely that fundamental right of natural persons and which still contribute effectively to the objectives of the European Union rules in question, it must be held that, by requiring the publication of the names of all natural persons who were beneficiaries of (…) aid and of the exact amounts received by those persons,

112 Case C-256/11, *Dereci*, Judgment of 15 November 2011 (not yet reported). See also N. Nic Shuibhne 'Case Law – (Some of) The Kids Are All Right', 2012 *CML Rev.,* 49, pp. 349-380.

113 Case 279/09, *DEB*, Judgment of 22 December 2010 (not yet reported), Para. 29.

114 See *Volker und Markus Schecke GbR v Land Hessen*, supra note 63.

115 A. Pahladsingh & H.J.Th.M. van Roosmalen, 'Het Handvest van de Grondrechten van de Europese Unie één jaar juridisch bindend: rechtspraak in kaart', 2011 *Nederlands tijdschrift voor Europees recht*, no. 2, p. 57.

116 See Lenaerts & Gutiérrez-Fons, supra note 104, p. 1660.

the Council and the Commission exceeded the limits which compliance with the principle of proportionality imposes.'[117]

The explicit reference to *limitations* as well as to *proportionality* entails that fundamental rights are – in principle – not absolute, which appears to embrace the Court of Justice's balancing approach.

5.3. Balancing fundamental rights and Treaty freedoms in a new constitutional setting

Protection of fundamental rights as an exception to free movement

As a preliminary remark it should be observed that the very fact that the restriction on free movement within the internal market was a result of the exercise of a fundamental right in cases such as *Schmidberger* or *Viking* does not influence the finding that the Treaty rules on free movement – the fundamental economic freedoms – are applicable in the first place. In this sense, the *exercise* of fundamental rights does not escape the scope of application of the Treaty provisions. The arguments raised in *Viking* and *Laval,* i.e. that 'according to the observations of the Danish and Swedish Governments, the right to take collective action, including the right to strike, constitutes a fundamental right which, as such, falls outside the scope of Article 43 EC [now: Article 49 TFEU]',[118] are therefore exemplary of the confusion that exists regarding the question of whether the EU is competent to act or whether a certain situation falls within the scope of the Treaty. From the case law of the Court it can be deduced that, although certain policy areas are left to the Member States such as direct taxation, criminal law, certain aspects of social security law, social assistance or public health, this does not mean that national provisions or measures which concern these policy areas can escape the prohibitive rules on free movement in the Treaty.[119]

Yet the Court immediately admits the necessity to reconcile in this context fundamental rights with the Treaty freedoms. The important consequence of this approach is a shift in the burden of proof. Where in *Strasbourg* the proponents of economic rights might have to justify a restriction on human rights, in *Luxembourg* the fundamental, human rights proponents will have to justify their actions and establish that the restriction on free movement is justified on the basis of protecting fundamental rights. As Brown observed: 'the language of prima facie breach of economic rights suggests that it remains something which is at the heart wrong, but tolerated, which sits rather uneasily with the State's paramount constitutional obligation to protect human rights'.[120]After all, the very fact that the protection of fundamental rights in cases where a conflict with fundamental freedoms arises must be *justified* in the light of the economic freedoms, could jeopardise the equality or indivisibility of fundamental rights and economic freedoms. Viewed from this perspective the EU may indeed not yet have been fully transformed into a Human Rights Organization.[121] At the same time, though, the Court has managed to find ways to incorporate fundamental rights in its free movement case law and has thus provided for a 'human rights dimension' of the internal market. It will then be essential to establish, firstly, under what type of exception ground fundamental rights fall (i) and, secondly, the conditions under which fundamental rights can deviate from the Treaty freedoms (ii).

Regarding (i), whether fundamental rights should be qualified as a Treaty exception, as a mandatory requirement or as a self-standing exception ground, which could be placed somewhere in between Treaty exceptions and mandatory requirements, the case law does not make this entirely clear.[122] In *Schmidberger* the Court did not give guidance in this matter but nevertheless seemed to regard fundamental rights as

117 See *Volker und Markus Schecke GbR v Land Hessen*, supra note 63, Para. 86.

118 See *Viking*, supra note 2, Para. 42.

119 See, e.g. Case C-158/96, *Kohll,* [1998] ECR I-1931; Case C-334/02, *Commission v France,* [2004] ECR I-2229; Case C-446/03, *Marks & Spencer,* [2005] ECR I-10837; see *Calfa*, supra note 78; Case C-268/06, *Impact,* [2008] ECR I-2483. See Prechal & De Vries, supra note 52, p. 435.

120 C. Brown, 'Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court.', 2003 *CML Rev*. 40, p. 1508.

121 See also S. Douglas-Scott, 'The Court of Justice of the European Union and the European Court of Human Rights after Lisbon', in De Vries et al., supra note 15.

122 J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', 2006 *European Law Journal* 12, pp. 38-39.

a self-standing category of exception grounds.[123] In *Omega* and *Sayn-Wittgenstein* the Court referred to the concept of public policy, which, though strictly interpreted, could be applied in these cases where Member States enjoy a wide margin of discretion to protect fundamental rights which have a particularly national constitutional dimension.[124] In *Dynamic Medien* the Court classified the protection of the child as a legitimate interest, which must meet the proportionality requirement.[125] And in *Viking* the Court subsumed the fundamental right to strike under a rule of reason exception, i.e. the protection of workers, rather than examining whether the fundamental right *as such* may justify a restriction on free movement.[126] Advocate General Trstenjak in the *Commission v Germany* case stated the following:

> 'The approach adopted in *Viking Line* and *Laval un Partneri*, according to which Community fundamental social rights as such may not justify – having due regard to the principle of proportionality – a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, sit uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms.'[127]

How fundamental rights are perceived by the Court under the scheme of the justification grounds is important. Discriminatory measures are, after all, in principle only justifiable on the basis of Treaty exceptions, whereas indistinctly applicable measures can also be justified on the basis of the rule of reason, i.e. mandatory requirements.[128] Although this distinction has become increasingly artificial since the ECJ has in several cases upheld discriminatory laws on the basis of the rule reason,[129] the Court has never explicitly admitted that the rule of reason could also be applied in the case of discrimination.[130] But the fact that a national measure protecting a fundamental right is discriminatory should not be decisive for the applicability of a justification ground in the first place.

The increasing weight given to fundamental rights in the Treaty through Article 6 TEU and the binding Charter precisely entails that special account must be taken of fundamental rights in interpreting the provisions on free movement. The Court should thus proceed, more than it has done so far, to consider fundamental rights as self-standing justification grounds, which, similar to the Treaty exceptions of e.g. Articles 36 and 52 TFEU, may allow for the adoption of national discriminatory measures if deemed necessary.[131] Otherwise, the limits caused by the rule of reason on the possibilities to invoke a justification ground would accentuate 'the existence of a hierarchical relationship between fundamental rights and fundamental freedoms' and would seriously jeopardize the idea that no a priori hierarchy exists between them.[132] In a similar vein, fundamental freedoms can be equated with fundamental rights particularly where they protect equality of opportunity or, in other words, defend the principle of non-discrimination. The fact that merely restrictions of market access are at stake should thus not be decisive for the justification of a fundamental right.

The application of the proportionality test

Regarding (ii), looking at cases like *Schmidberger*, *Omega*, *Sayn-Wittgenstein*, *Dynamic Medien* and *Viking/Laval*, it is apparent that the Court of Justice, just like the ECtHR, is *struggling* to find the right test. Overall, the Court has favoured the use of, or 'referred to', a proportionality test, which sometimes

123 See *Schmidberger*, supra note 2.
124 See *Omega,* supra note 2; see *Sayn-Wittgenstein*, supra note 75.
125 See *Dynamic Medien*, supra note 36, Para. 42.
126 See Barnard, supra note 64, p. 671; see also T. Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments', 2007-2008 *Cambridge Yearbook of European Legal Studies* 10, p. 357; See Malmberg & Sigeman, supra note 89, p. 1130.
127 Opinion of AG Trstenjak of 14 April 2010 in Case C-271/08, *Commission v Germany*, Judgment of 15 July 2010 (not yet reported), Para. 183.
128 See Tridimas, supra note 23, p. 339.
129 E.g. within the field of the environment: Case C-379/98, *PreussenElektra,* [2001] ECR I-2099 and Case C-2/90, *Commission v Belgium*, [1992] ECR I-4431 (*Walloon Waste*); see also Oliver & Roth, supra note 40, p. 436.
130 See De Vries, supra note 24, p. 370.
131 See Morijn, supra note 122, p. 39.
132 See Opinion of AG Trstenjak, supra note 127, Para. 185. See for a very critical view of the Court's case law: Spaventa, supra note 61, pp. 343-364.

bears close resemblance to the 'margin of appreciation test' used by the ECtHR. In *Omega*, for instance, the Court not only limited its proportionality review of the German ban on laser games to the first element, suitability, but we also discern a rather state-centric approach by the Court, accepting a German particularity of human dignity. After all, in the United Kingdom and many other states these laser games are lawful. It has been argued after *Omega* that this decision of the Court is illustrative of the judicial deference in sensitive areas of national constitutional law which lie outside a core of nucleus of shared values and where the ECJ should respect constitutional pluralism.[133] Hence, the ECJ did not wish to impose a common legal conception of human dignity on the Member States. The 'soft' application of the proportionality test employed by the Court allowed the national court to protect a national constitutional standard vis-à-vis the EU interest of free movement. This is referred to as the 'integration model based on value diversity which views national constitutional standards not as being in a competitive relationship with the economic objectives of the Union but as forming part of its polity'.[134] And as Germany only wanted to protect its citizens from these laser games, according to *Nic Shuibhne*, it was protecting its internal constitutional space, without preventing its citizens or companies from moving elsewhere.[135]

This approach was endorsed by the Court in *Sayn-Wittgenstein*, where it fascinatingly also referred to Article 4(2) TEU by stating that 'in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic'.[136] By referring to Article 4(2) TEU, the ECJ on the one hand embraces the idea that Member States have considerable leeway in protecting their national constitutional space and identity, yet on the other that national identity is subject to a balancing approach where tensions arise with the economic freedoms.[137]

At the other – far – end of the spectrum, we find cases like *Viking* and *Laval*, which have been criticized for the way in which the ECJ dealt with the right to collective action and the right to strike. Not only is the right to strike in *Viking* subject to the wider goal of worker protection, it must also be assessed under the proportionality test whether no less restrictive means are available; in that sense, the fundamental right may only be a last resort, which may in fact undermine the fundamentality of this social right.[138] The activist approach of the ECJ could perhaps be best explained by the personal movement rights of EU citizens, which were at stake in *Viking* or *Laval*. And trade unions could easily engage in social protectionism leading to retaliatory measures and eventually to fragmentation. In other words, measures were at issue, albeit socially legitimate, which potentially cloaked protectionism and hence jeopardized the fundamental value of protectionism. At the same time the ECJ may have felt that trade unions should not have such a broad margin of appreciation as Member States have.[139] In *Laval* the ECJ held that trade unions, 'not being bodies governed by public law, (…) cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law'.[140] More generally, the fact that private actors are engaged in the protection of public interests is seen as problematic, although the Court in the *Bosman*, *Angone* and more recently *Premier League* cases did not exclude the possibility for private bodies to invoke mandatory requirements or objective justification grounds.[141] Within the context of

133 See Lenaerts & Gutiérrez-Fons, supra note 104, p. 1663.

134 See Tridimas, supra note 23, p. 341.

135 See Nic Shuibhne, supra note 74, p. 252.

136 See *Sayn-Wittgenstein*, supra note 75, Para. 92.

137 A. von Bogdandy & S. Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty', 2011 *CML Rev*. 48, p. 1425.

138 See Barnard, supra note 37, p. 259; see for a critical reflection on the *Viking* and *Laval* cases, *inter alia*, C. Barnard, 'Social Dumping or Dumping Socialism', 2008 *Cambridge Law Journal* 67, no. 2, pp. 262-264; A.C.L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', 2008 *Industrial Law Journal* 37, no. 2, pp. 126-148; Malmberg & Siegman, supra note 89; P. Syrpis & T. Novitz, 'Economic and Social Rights in Conflict: Political and Judicial approaches to Their Reconciliation', 2008 *E.L. Rev.*, pp. 411-426; F. Dorssemont & T. Jaspers, 'Collectieve actie en vrij verkeer. Eindigen grondrechten waar 'fundamentele' vrijheden beginnen?', 2007 *NjW*, pp. 2-14. For a somewhat different perspective, see L. Azoulai, 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization', 2008 *CML Rev.* 45, p. 1335.

139 See Lenaerts & Gutiérezz-Fons, supra note 104, p. 1666.

140 See *Laval un Partneri*, supra note 2, Para. 84.

141 See *Angonese*, supra note 41, Para 42: 'A requirement, such as the one at issue in the main proceedings, making the right to take part in a recruitment competition conditional upon possession of a language diploma that may be obtained in only one province of a Member State and not allowing any other equivalent evidence could be justified only if it were based on objective factors unrelated to the nationality of the persons concerned and if it were in proportion to the aim legitimately pursued.' Case C-415/93, *Bosman*, [1995] ECR I-5040, Para. 86: 'There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or

the EU competition rules the discussion on the scope of Article 101(3) TFEU and the possibility to take account of non-economic interests, such as the protection of the environment or sport interests, alongside the competition-related interests in granting an exemption from the cartel prohibition is also illustrative in this respect.[142] After all, private actors are considered to pursue their own, private, interests first, before considering the 'public at large'. The question, however, is whether such an approach takes due account of the different regulatory instruments used in the Member States to attain public policy objectives, like the instrument of self-regulation, and where semi-private or semi-public organizations have regulatory powers; or in Sweden the typically Nordic model of collective bargaining, which leaves the regulation of industrial relations to a large extent to the discretion of the social partners.[143] Should private actors at least not have the possibility to prove that their behaviour is aimed at realizing public policy aims, and is not merely dictated by self-interest?[144]

Furthermore, whereas in *Omega* and *Sayn-Wittgenstein* the point of departure is constitutional pluralism, in *Viking* and *Laval* the ECJ clearly had a 'transnational mindset seeking to raise standards throughout the EU rather than excluding workers from other Member States'.[145] However, it has also been submitted that for the ECJ, being forced to make political decisions on the legitimacy of social policy choices in a case like *Viking*, it is still essential to gather and process all relevant cultural, economic and social data and that it does not ignore, for example, the fact that strike action in Finland is protected by the Finnish Constitution, or that political strikes are protected in various national systems.[146] But the ECJ took no account of the national traditions and differences in *Viking* or *Laval*.[147] As has been observed in the literature, this gives the impression that the Court is inclined to give preference to fundamental rights based on moral or ethical considerations, or on certain essential democratic values and a constitutional system, rather than to rights which are based on economic and social interests.[148] For that matter an attempt was made to restore the balance between social rights and fundamental freedoms by the Commission's proposal for a Regulation (the so-called Monti-II Regulation) on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, but this proposal has been withdrawn by the Commission after a number of national parliaments had adopted reasoned opinions arguing that the proposed Regulation would violate the principle of subsidiarity (the so-called yellow card procedure).[149]

In the middle – ideally – lies *Schmidberger,* in which, according to Advocate General Trstenjak in her Opinion in the case *Commission v Germany* on public procurement and social rights, 'the idea of equal ranking for conflicting fundamental rights and fundamental freedoms was central, which by examination of the proportionality of the opposing restrictions in question, were brought fairly into balance'.[150] According to the Advocate General, in order to ensure an optimum effectiveness of fundamental rights and fundamental freedoms, an analysis based on the proportionality principle would be the best option. But such an analysis should not be confined to an assessment of the appropriateness and necessity of a restriction of a fundamental freedom for the benefit of fundamental rights' protection;

public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.' See also Joined Cases C-403/08 and C-429/08, *Football Association Premier League*, Judgment of 4 October 2011 (not yet reported).

142 The above-mentioned *Premier League* case is relevant here as well as the Court simply transposed its reasoning that it applied to the justification grounds for the restriction on the free movement of services, which included the protection of intellectual property rights and the objective of encouraging the public to attend football matches in stadiums, to the cartel provision of Article 101 TFEU. See also De Vries, supra note 24.

143 See Malmberg & Sigeman, supra note 89.

144 See De Vries, supra note 24, p. 383. Another but related question concerns the possibility for private parties to invoke interests of a private law nature: see Advocate General Trstenjak in the *Fra.bo* case, supra note 48, Para. 56: '(…) it could attempt to claim justification on a special ground of private interest, emphasising its own private-law nature. Referring to the judgment in *Angonese*, DVGW might also cite "objective considerations" to justify the restriction at issue. DVGW might, furthermore, refer to its private-law nature and rely on the protection of the fundamental rights guaranteed in the Charter of Fundamental Rights (…).'

145 See Lenaerts & Gutiérezz-Fons, supra note 104, p. 1667; see also Nic Shuibhne, supra note 74, p. 253: '[I]f a fundamental boundary lens was applied to the internal significance of the social rights at stake, then that might well have defeated the freedoms of establishment and service at issue on a constitutionally enriched plane of analysis.'

146 See Barnard, supra note 37, p. 258.

147 See Malmberg & Sigeman, supra note 89, p. 1130.

148 Ibid.

149 COM(2012) 130 final.

150 See Opinion of AG Trstenjak supra note 127, Para. 195.

it must also include an assessment of whether the restriction on a *fundamental right* is appropriate and necessary in the light of the fundamental freedom.[151] Hence, a type of 'double proportionality test', which in fact can already be detected in *Schmidberger*, as the Austrian authorities were given discretion by the ECJ in authorizing the demonstration to consider the impact of the protection of the fundamental free movement of goods by banning the demonstration on the fundamental rights of assembly and speech. According to the ECJ 'the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public'.[152]

This proposal bears traces of the third element of the proportionality test, proportionality *stricto sensu*, but without only weighing fundamental rights' protection with the free movement of goods, and also the free movement of goods with the interest of fundamental rights' protection. It thus reflects a true balancing approach and should therefore be welcomed, as it also comes close to the way in which the ECJ applied the proportionality test in the *Volker & Schecke* case, according to Article 52 of the Charter (see above, Section 5.2). In this way, although balancing by the Court through the application of a *proportionality test* might not always be seen as a true panacea, it can, if properly understood and applied, be a good second-best solution.[153]

6. Conclusion

So far we cannot find a consistent approach as to how, within the context of EU law, fundamental rights should be balanced with fundamental freedoms. And although this diverging case law may have generated uncertainty and unpredictability,[154] some main lines can be deduced from these judgments. In balancing fundamental rights and fundamental freedoms the Court draws inspiration from its case law on fundamental freedoms and public interests. Furthermore, the balancing exercise by the ECJ through the application of the proportionality test appears to be – at least in some cases – rather similar to the 'margin of appreciation test' applied by the ECtHR. Where typically national or sensitive interests and values are involved, like 'gambling' or public health, Member States have a greater margin of discretion than in cases where more 'holistic' or universal values, like the protection of consumers, are at issue. The 'good old principle' of proportionality here serves as an instrument to balance the different public interests with the fundamental freedoms.

In a similar vein *Omega* and *Sayn-Wittgenstein* are examples of cases where much leeway is granted to Member States to protect certain fundamental rights, whereas in cases like *Viking* and *Laval*, the possibilities to protect a fundamental, social, right, i.e. the right to collective action, have been severely limited. From a traditional internal market perspective, looking at the ways in which the ECJ has balanced the Member States' interests with fundamental freedoms, the approach to fundamental rights is not surprising. But since we are dealing here with *fundamental* rights as well as considering Article 6 TEU and the binding character of the Charter the Court must take a more cautious approach, which has the following implications.

Firstly, fundamental rights must be accepted as legitimate interests which in principle allow for discriminatory measures to be upheld. This is essential as fundamental rights and fundamental freedoms must be placed on an equal footing.

Secondly, the Court is inevitably drawn into a balancing exercise. Keeping fundamental rights outside the framework of the four freedoms is not a real option. The Court cannot simply refute the *existence* of the fundamental freedoms as they constitute the core values of European integration.

Thirdly, this does not mean that differences, which exist between fundamental rights, between the restrictive nature of the measures seeking to protect these rights, and between the state and private parties relying upon fundamental rights, should not be taken into account at all. It elucidates the more

151 Ibid., Paras. 189-191.
152 See *Schmidberger*, supra note 2, Para. 89.
153 See also C. Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon: a question of conflicts of interests', in De Vries et al., supra note 15.
154 See Barnard, supra note 37, p. 259.

'hierarchal' approach displayed in *Viking* and *Laval* compared to 'constitutional pluralism', which is said to underpin *Omega* and *Sayn-Wittgenstein*; the ECJ being afraid that the integrity of the EU legal order would be at stake if trade unions were allowed to shield the national labour market from the citizens of new Member States.[155] But, as set out above, the reasoning of the Court is flawed and the Court hardly provides sound reasoning for its judgments. This is essential, especially where cases lead to important political, economic and moral implications. In such 'sensitive' situations, the ECJ may take a step back and resort to principles of good governance instead. The ideal situation – the good example – remains in *Schmidberger*, where the Court managed to employ a balancing exercise without subordinating the fundamental right to the fundamental freedom. Here the Court comes close to the so-called double proportionality test as proposed by AG Trstenjak in *Commission v Germany*.

As a final remark, it must be stated that in the future the Court will be confronted with cases where the Member States' margin of discretion will have to be further defined. So far, it cannot escape a 'balancing exercise', just like the ECtHR will continue to be confronted with conflicting fundamental rights. But it can use the proportionality test in different and sometimes less intrusive ways, thereby showing more deference to national constitutional traditions. Its endeavour for closer harmony will therefore continue and not end here.

155 See Lenaerts & Gutiérezz-Fons, supra note 104, p. 1666.