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The Interaction Between the Fundamental Market Freedoms and Fundamental Rights in the Proportionality Review of the Court of Justice of the European Union

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Preface

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A. Introduction

Fundamental rights are relatively new to the constitutional system of the European Union (EU). This is because *"(t)he EEC Treaty started out as an economic treaty, of limited ambitions, with the aim of creating a Common Market."*[1] However, as the realization of the internal market started to conflict with national constitutional rights of the citizens of the Member States (MSs), the Court of Justice of the EU (Court or CJEU), was inclined to find fundamental rights *"[…] enshrined in the general principles of Community law and protected by the Court."*[2] From that moment on, fundamental rights have increasingly gained a more formal and central role in the EU constitutional framework, culminating with the proclamation of the Charter of Fundamental Rights of the EU (Charter or EUCFR)[3], in 2000, and the subsequent adoption of the Lisbon Treaty in 2009. Accordingly, as it stands now, the EU fundamental rights protection regime is engraved in the Treaty on the European Union (TEU)[4]. Art. 2 of that Treaty states that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. Art. 6 (1) TEU grants the Charter the same legal value as the Treaties. On the other hand, Art. 6 (3) TEU, as a written testament of the Court's jurisprudence, establishes that fundamental rights deriving from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[5] and the common constitutional traditions of the MS constitute general principles of EU law.

The Treaty adoption of fundamental rights has, as already mentioned, taken place in a constitutional setting that has always been principally concerned with achieving economic objectives.[6] The cornerstone of such economic objectives, enshrined in Art. 3 (3) TEU and Art. 26 (1) and (2) of the Treaty on the Functioning of the European Union (TFEU)[7], is the establishment and maintenance of the functioning of a common, internal market where the free movement of goods, persons, services, and capital is guaranteed. Accordingly, fundamental rights have been adopted into a legal framework where the market freedoms

[1] *Douglas-Scott*, H.R.L. Rev. 11:4/2011, p. 645, p. 647.
[2] CJEU, Case C-29/69, *Erich Stauder v City of Ulm – Sozialamt*, ECLI:EU:C:1969:57, para. 7.
[3] Charter of Fundamental Rights of the European Union/OJ C326/12.
[4] Consolidated Version of the Treaty on European Union [2008]/OJ C115/13.
[5] European Convention for the Protection of Human Rights and Fundamental Freedoms [1950].
[6] *De Witte*, in: Dupuy/Francioni/Petersmann (eds.), p. 197, 198.
[7] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016]/OJ C202/1.

operate as instrumental constitutional rights.[8] Moreover, it appears that while EU fundamental rights were constitutionally evolving, the market freedoms were also undergoing a significant transformative process. In this respect, as testified mainly by the jurisprudence of the CJEU, they were evolving from instrumental market freedoms, which ultimately benefit the internal market and the common economies of the MSs, to far-reaching rights of a fundamental character, ultimately concerned with the comprehensive protection of economic and non-economic interests of the individual right-holders.

These two parallel and ongoing developments of EU law, namely the *"[…] constitutional coming-of-age […]"*[9] of fundamental rights and the attainment of *"[…] a certain degree of maturity […]"*[10] of the TFEU market freedoms have brought about a most compelling interaction between the two categories of law. The peculiarity of this interaction seems to be specially manifested in, and influenced by, the employment of the proportionality test by the CJEU. Accordingly, this article aims to shed light on the following question:

"How is the interaction between the TFEU market freedoms and EU fundamental rights reflected in the proportionality test of the Court of Justice of the European Union?"

In answering this question, the CJEU's case law will be assessed in accordance with two scenarios. According to the first scenario, fundamental rights are invoked as limitations to limitations imposed on the market freedoms. According to the second scenario, fundamental rights are invoked as a *per se* limitation on the market freedoms. By analyzing the proportionality review employed in both scenarios, the aim is to show where the TFEU market freedoms and fundamental rights stand with each other.

[8] *De Sousa*, p. 58.
[9] *Craig/De Burca*, p. 481.
[10] *Tryfonidou*, E.L. Rev. 35:1/2010, p. 36, p. 39.

B. The Origin and Context of the Interaction Between Fundamental Rights and the EU Market Freedoms

I. The Fundamental Character of the EU Market Freedoms

The establishment of the EU internal market and the maintenance and operation of thereof through the free movement provisions is based on the ordoliberal theories of economic integration. According to these theories, constitutional protection is indispensable to the creation and functioning of a free market economy.[11] This means that the freedoms of the market participants to engage in labor and business transactions ought to be enshrined in and protected by a constitutional document. Consequently, the ultimate purpose of the free market shifts from a strictly economic one to a more legal and *"[…] political one: the protection of a free and equal society."*[12]

The implication of the above, within the context of the EU, is that the TFEU free movement provisions, as the substantive core of the economic constitution of the EU,[13] ought to be treated as EU constitutional provisions of a fundamental character. In supporting this view, it has been noted that identically to fundamental rights, the free movement provisions protect individual autonomy and restrict abusive state regulatory intervention.[14] Moreover, the EU market freedoms constitute fundamental political rights as they are *"[…] essential instruments in the distribution of power within the Constitutional order of the Union […]."*[15] Accordingly, since they are*"[…] as integral to the protection of human dignity, and as indicative of a free society, as political freedoms […]"*[16]*,* the free movement provisions are conceived as fundamental rights of the Union's constitutional order.

The free movement of persons (FMP), for instance, which encompasses the free movement of workers (FMW), freedom of establishment (FoE), and freedom to provide and receive services (FMS) enshrined respectively in Arts. 45, 49, and 56 TFEU, seems to be inextricably and intrinsically connected with fundamental human rights. This is because people are

[11] *Maduro*, p. 126.
[12] Ibid., p. 127.
[13] *De Witte*, (Fn. 6), p. 202.
[14] *Biondi*, E.H.R.L. Rev. 1/2004, p. 51, p. 53; See also *Maduro*, (Fn. 11), p. 129.
[15] *Maduro*, (Fn. 11), p. 167.
[16] *de Vries*, U.L. Rev. 9(1)/2013. p. 169, p. 176.

principally regarded as human beings,[17] rather than a mere economic factor of production. Accordingly, the implication is that whenever a natural person moves from one MS to another, in accordance with Art. 45, 49, and 56 TFEU, that person can rightfully expect to be treated in conformity with a certain standard of human rights protection.[18] In other words, by exercising their right to move, albeit with an economic purpose, nationals of the different MSs become beneficiaries of human rights protection, under the same conditions as the nationals of the host MS. This way, the FMP provisions become *"[…] an end in itself, rather than a means to an end."*[19] Therefore, they can no longer be deemed as market freedoms, instrumental to the maintenance of the internal market, but self-executing individual rights of a fundamental character, concerned with the comprehensive protection of the right-holders' interests.

The same can be said regarding the free movement of goods (FMG). In *ADBHU*, for instance, the CJEU stated the following: *"[…] it should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance."*[20] What stems, rather unequivocally, from the aforementioned is the existence of a connection between the FMG and the fundamental right to freely engage in trade due to them both constituting general principles of EU law.[21] By doing so, the Court seems to have exported the uncontested fundamentality of the freedom to unhindered pursuit of trade into the FMG. Moreover, the fundamental character of the FMG seems to have been further solidified by the ongoing conversion of that freedom with the FMS. In *GB – INNO*, for instance, the Court, after stating that the *"(f)ree movement of goods concerns not only traders but also individuals,"*[22] proceeded, in a similar fashion to the way it did in the *Cowan* judgment,[23] to hold that consumers are entitled to travel freely from one MS to another to benefit from the sale of products.[24] In another decision, the CJEU confirmed the application

[17] *De Sousa*, E.L.J. 20:4/2014, p. 499, p. 505.
[18] Opinion of AG Jacobs, Case C-168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt*, ECLI:EU:C:1992:504, para. 46.
[19] *Jeffrey*, Comp. Lab. L. & Pol'y J. 23 :1/2001, p. 211, p. 213.
[20] CJEU, Case C-240/83, *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)*, ECLI:EU:C:1985:59, para. 9.
[21] *ADBHU*, (Fn. 29), paras. 5 and 12.
[22] CJEU, Case C-362/88, *GB-INNO-BM v Confédération du commerce luxembourgeois*, ECLI:EU:C:1990:102, para. 8.
[23] CJEU, *Case C-186/87, Ian William Cowan v Trésor public, ECLI:EU:C:1989:47*, para. 17.
[24] *GB-INNO-BM*, (Fn. 35), para. 8.

of the FMG to a situation where a trader, just like a service provider, moved from Germany to Austria to sell jewelry in private homes.[25] Therefore, it seems that, by increasingly converging with the FMS, the FMG has availed itself of being treated similarly to a FMP provision, ultimately concerned with the interests of individual right-holders rather than the free flow of goods in the context of inter-state trade and the internal market.

II. The Constitutionalization of EU Fundamental Rights

In the context of the EU, human rights were first mentioned in the early 1950s as part of the discussions for the drawing up and establishment of the European Political Community Treaty.[26] However, as the talks for the adoption of the Treaty failed to come to fruition,[27] the ambition of realizing a civil and political Union had to be postponed. Nevertheless, while fundamental rights failed, initially, to be introduced in the EU by means of a political or democratic process, they were slowly adopted through judicial means by the Court. In this regard, during the late 1960s and early 1970s, the Court decided to readjust its previous stance,[28] by finding *"[…] fundamental human rights enshrined in the general principles of Community law and protected by the Court."*[29] This view, which was further cemented in the CJEU's subsequent case law,[30] marked the beginning of the constitutional maturation of EU fundamental rights.

The CJEU's approach to introduce fundamental rights as unwritten principles of law has been considered a reflection of the French constitutional tradition, according to which fundamental rights are constructed as rights of an objective character.[31] Moreover, in addition to their objective attribute, the unwritten provisions enshrined in the general principles of EU law are deemed to possess a subjective attribute, in that they are capable of conferring individually enforceable rights.[32] Following *De Sousa's* argument, the combination

[25] CJEU, Case C-441/04, *A-Punkt Schmuckhandels GmbH v Claudia Schmidt*, ECLI:EU:C:2006:141, para. 9.
[26] *Craig/De Burca*, (Fn. 9), p. 467.
[27] *Schütze*, p. 411.
[28] See for example: CJEU, Joined cases 36, 37, 38/59 and 40/59, *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1960:36, p. 438.
[29] *Stauder*, (Fn. 2), para. 7.
[30] See for example: CJEU, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, para. 4; See also: CJEU, Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51, para. 13.
[31] *Blanke*, in: Blanke/Mangiameli (eds), p. 159, 162.
[32] *Thorson*, pp. 194 and 295.

of these two attributes would suggest that fundamental rights found in the general principles of EU law, regardless of their unwritten form, ought to be considered, and therefore treated, as EU constitutional rights of a fundamental nature.[33] Indeed, this approach has been confirmed by the Court in *Audiolux*, where it held that it is the constitutional status of a principle that qualifies that principle as a general principle of EU law.[34]

Notwithstanding the above, the fact stood that fundamental rights were adopted without an express legal basis in the Treaties. Consequently, the way that they were effectively treated in the CJEU's subsequent case law, especially vis-à-vis the organization of the internal market and operation of the free movement provisions, did not reflect their solid constitutional status. Indeed, according to *Weiß*, the Court has traditionally exercised a higher degree of fundamental rights scrutiny on measures adopted by the MSs, rather than on measures enacted by the Union.[35] This means that instead of being rigorously protected when applied in the capacity of a constitutional watchdog for EU measures, fundamental rights have been granted a higher degree of protection when applied as a limitation to a MS's limitation on the fundamental market freedoms. This view implies that, instead of being genuinely interpreted as constitutional provisions concerned with protecting the interests of EU citizens, fundamental rights have been interpreted as an instrument to facilitate the economic agenda of the Union.[36] It seems, therefore, that the constitutional status of fundamental rights, as laid down in the general principles of EU law, while theoretically solid, was effectively fragile.

It was not until the proclamation of the EUCFR in 2000 that fundamental rights started to be taken more seriously. While initially adopted as a soft law instrument,[37] with the entry into force of the Lisbon Treaty in 2009, the Charter, which essentially represents a written compilation of rights, freedoms, and principles deemed fundamental in the EU legal order, became constitutionally binding. Accordingly, as it stands now, the EU fundamental rights protection regime is a bifurcated one, since, in addition to Art. 6 (3) TEU which prescribes

[33] *De Sousa*, (Fn. 17), p. 501.
[34] CJEU, Case C-101/08, *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:626, para. 63.
[35] *Weiß*, in: Morano-Foadi/Vickers (eds), p. 69, p. 73.
[36] *Biondi*, (Fn. 14), p. 55.
[37] *Nielsen*, E.L.L.J. 1:1/2010, p. 19, p. 20.

the protection of fundamental rights as they derive from the general principles of EU law, Art. 6 (1) TEU recognizes the EUCFR provisions to possess the same legal value as the provisions of the Treaties. In this regard, it has been pointed out that while not entirely replacing the existing standard of fundamental rights protection, the incorporation of the Charter in the EU constitutional framework has provided more visibility, foreseeability, and legitimacy to it.[38] In other words, without affecting the interpretation of the Court regarding fundamental rights found in the general principles of law,[39] the Charter has ultimately strengthened the overall protection and constitutional standing of fundamental rights in the EU.

In this regard, it should first be noted that, while bearing the same legal value as the Treaties, the Charter is technically a separate catalog of rights. In this sense, by being filtered outside of a predominantly economic, market-driven legal system, fundamental rights are conceived in a more comprehensive manner.[40] As a result, it becomes easier for the Court to view and treat them as self-standing, independent, and intrinsically important rights of a solid constitutional character rather than a mere interpretative instrument to facilitate the enforcement of the free movement provisions.

Moreover, it has been suggested that *"(i)f the Lisbon Treaty is to strengthen the substance of human rights protection in the EU, it has to add some force to the proportionality requirements also with regard to the assessment of EU legal acts in the light of HR by the CJEU."*[41] As discussed more in detail in the next section, this consideration seems to have been addressed, at least in principle, by Art. 52 (1) EUCFR. According to this provision, fundamental rights can only be limited by measures that are prescribed by law, respect the essence of the rights enshrined in the Charter, and are necessary for achieving one of the objectives of the Union or the safeguard of the rights and freedoms of others. In other words, Art. 52 (1) EUCFR imposes a higher degree of scrutiny on restrictive measures imposed on EU fundamental rights. Therefore, the introduction of this more fundamental rights-friendly proportionality test suggests that fundamental rights ought to be given a wide

[38] *Blanke*, (Fn. 31), p. 167; *Hofmann/Mihaescu*, E.C.L. Rev. 9/2013, p. 73, p. 82.
[39] See for example: CJEU, Case C-1/11, *Interseroh Scrap and Metal Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)*, ECLI:EU:C:2012:194, para. 43.
[40] *Blanke*, (Fn. 31), 159.
[41] *Weiß*, (Fn. 35), p. 71.

interpretation, instead of a strict one. This way, Art. 52 (1) EUCFR reinforces the constitutional standing of fundamental rights *vis-à-vis* measures enacted by the EU and the TFEU fundamental market freedoms.

Finally, it has been noted that *"(t)he introduction of the Charter of Fundamental Rights and its incorporation in the Treaty, helps legitimize the Court's increasing reference to human rights and gives it a further steer as to what constitutes Union fundamental rights."*[42] In this respect, the Charter confers upon the CJEU the express competence to adjudicate cases concerning EU fundamental human rights. Furthermore, the, now written, provisions of the Charter challenge the Court's title as the conceiver of EU fundamental rights. By doing so, the EUCFR, not only restricts the Court's discretion in picking and choosing which human right constitutes a fundamental right in the EU legal context but delegitimizes any overimaginative interpretation of thereof. Consequently, due to the Charter, the Court gains more power and comfortableness to act as a genuine human rights court and is put under an obligation to treat fundamental rights as constitutional rights on par with the EU fundamental market freedoms provisions.

C. A Structural Assessment of the CJEU Proportionality Test

I. The Traditional Model

The principle of proportionality is composed of three sub-principles, namely the principles of suitability, necessity, and proportionality *stricto sensu*.[43] Accordingly, the CJEU typically initiates its proportionality assessment by determining whether the limiting measure is suitable, in that it is not completely irrelevant to the pursuit of a legitimate aim. After successfully satisfying the suitability principle, the restrictive measure should prove to be necessary, in that there should be no alternative measure available that would restrict the constitutional right less, while not affecting the effectiveness of the realization of the

[42] *Barnard*, p. 191.
[43] *Alexy*, Ratio Juris. 16:2/2003, p. 131, p. 135; See also de Vries, (Fn. 16), pp. 172-173.

legitimate aim pursued.[44] If the measure subjected to review is found to be necessary, it should then satisfy the proportionality *stricto sensu* requirement. According to this final step of the test, the measure will be considered disproportionate *"[…] if the resulting restriction is out of proportion to the aim sought by or the result brought about […]"* by that measure.[45] In other words, the purpose of the proportionality *stricto sensu* is to ensure that the overall result of the proportionality test reflects a well-balanced approach to the rights and interests involved in the assessment of a specific case. Conclusively, if a measure satisfies all the above steps, it will be considered proportionate and, therefore, permissible in a given legal system.

However, the above structure seems to constitute a theoretical represenatation of the CJEU proportionality review. Indeed, in practice, the Court appears to employ the three steps in a rather loose manner, meaning that it does not expressly or strictly adhere to all of them. For this reason, it has been pointed out that *"[…] the Court rarely applies the third element of proportionality."*[46] Therefore, when applying the proportionality test in practice, the Court relies primarily on the sub-principles of suitability and necessity. In this Article, such exercise will be referred to as 'the traditional model of the proportionality test'.

II. The Balancing Theory

The constitutional theory of balancing was constructed by *"[…] one of the most prominent proponents of proportionality in international legal scholarship,"*[47] and German constitutional lawyer, *Robert Alexy*. According to *Alexy*, the principle of balancing is embodied in the third step of the proportionality test, proportionality *stricto sensu*.[48] This principle, which is the same as the 'Law of Balancing' is formulated as follows:

"The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other."[49]

[44] Ibid, para. 52.
[45] *de Vries*, (Fn. 16), p. 173.
[46] Ibid.
[47] *Petersen*, G.L.J. 21/2020, p. 163, p. 163.
[48] *Alexy*, (Fn. 43), p. 136.
[49] Ibid.

According to *Alexy*'s theory, the balancing step of the proportionality test is a consequence of, *inter alia*, the nature of fundamental rights as principles that seek to optimize certain values.[50] Since those values are considered to be *"incommensurable",*[51] and, at the same time, prone to conflict with one another,[52] the idea of balancing is to make the most out of an undesirable, but sometimes unavoidable, confrontation between two equally fundamental values by seeking to optimize the realization of both those values. Such simultaneous achievement of conflicting fundamental rights is made possible, in more practical terms, by means of the 'Weight Formula', which constitutes the mathematical construction of the 'Law of Balancing'.[53] It is in accordance with this formula that, by weighing the non-satisfaction of a certain fundamental right against the importance of satisfying a competing fundamental right, constitutional courts should render a final decision.

Another conception of the balancing step is the one elaborated in the context of the relationship between the fundamental market freedoms and fundamental rights by the former AG of the CJEU, *Verica Trstenjak*. In this regard, *Trestenjak* has pointed out the following:

"A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realize that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realize the fundamental freedom."[54]

Conclusively, as far as EU law and the interpretation of the CJEU are concerned, balancing constitutes a logical result of the simultaneous application of two proportionality tests and

[50] *Alexy*, in: Himma/Spaić (eds.), p. 63, p. 64.
[51] *Petersen*, (Fn. 47), p. 166.
[52] *Jääskinen*, in: Morano-Foadi/Vickers (eds.), p. 11, p. 18.
[53] *Alexy*, (Fn. 50), p. 67.
[54] Opinion of AG Trestenjak, Case C-271/08, *European Commission v Federal Republic of Germany*, ECLI:EU:C:2010:183, para. 109.

the equal fundamentality and, therefore, limitability of the rights that are subjected to constitutional review.[55]

III. The Impact of Art. 52 (1) EUCFR

As already touched upon in the previous chapter, with the entry into force of the EUCFR and inspired by the proportionality test exercised by the ECtHR, the Court has been instructed to accommodate a *"more sophisticated judicial proportionality review."*[56] This novel proportionality test is enshrined in Art. 52 (1) EUCFR, which prescribes the following:

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

This provision seems to introduce three novelties. First and foremost, in a similar vein to the proportionality review exercised by the ECtHR, it expressly establishes that any limitation imposed on the Charter rights must be provided by law. Second, it introduces the *"essential core doctrine"*, according to which, when a Charter right is subjected to a limitation, the latter can be proportionate only if it does not jeopardize the very substance of that right.[57] Third, and most importantly, it expressly introduces the idea that limitations may be imposed on the rights of the Charter not only to pursue a legitimate aim recognized by the Union but also to protect the rights and freedoms of others. Of course, the protection of the rights and freedoms of others is a well-recognized justification ground in the jurisprudence of the ECtHR, the interpretation of which usually leads to the balancing exercise.[58] Therefore, since the protection of the rights and freedoms of others is a more horizontal ground of justification than, for instance, public safety, public policy, or public morality, its

[55] *de Vries*, (Fn. 16), p. 192.
[56] *Weiß*, (Fn. 35), p. 71.
[57] *Schütze*, (Fn. 27), p. 418.
[58] *Chassagnou and Others v. France* [GC], (Fn. 64), paras. 106 ff.

acknowledgment as a limiting ground by the EUCFR incentivizes the CJEU to rely more on the *stricto sensu* proportionality step when scrutinizing restrictive measures.[59]

D. The Interaction Between the EU Fundamental Market Freedoms and Fundamental Rights in the Case Law of the CJEU

I. Fundamental Rights as Limitations to Limitations Imposed on the EU Fundamental Market Freedoms

1. *Familiapress* – The Freedom of Expression as a Limitation to the Maintenance of Press Diversity

a) Facts of the Case

Heinrich Bauer Verlag was a German newspaper publisher that distributed and sold a weekly magazine in Austria. This magazine contained crossword puzzles that, upon correct completion and submission, entitled the readers to potentially win money as a prize. Each edition of the magazine stated that more puzzle games would come in the following week. Because of this, Familiapress, an Austrian newspaper publisher and competitor, brought legal action before the Commercial Court in Vienna, claiming that the distribution of the German magazine was contrary to the Austrian Law on Unfair Competition since the latter prohibited the offering of prizes linked to the sale of goods and provision of services. The reason why such a prohibition was prescribed by Austrian law was that prize competitions tied to the sale of goods have an impact on driving smaller competitors, which cannot offer such gifts, out of the market. Furthermore, since the offerors competing under the circumstances of this case were press publishers, the implication was that by selling its magazine and, consequently, driving the smaller competitors out of the market, Heinrich Bauer Verlag's activity constituted an affront to the maintenance of press diversity. Considering this and the lack of an analogous provision in German law, the referring court,

[59] Ibid.

suspecting possible friction with EU law, decided to stay the proceedings and refer the matter to the CJEU. Accordingly, the referring court decided to ask whether Art. 34 TFEU on the FMG precluded Austrian law from imposing a prohibition on the cross-border selling of magazines containing prize puzzles.

b) Findings of the Court

In this case, the Court had to decide whether the prohibition imposed by Austrian law, aiming at ensuring the maintenance of press diversity, constituted a proportionate interference with Art. 34 TFEU. In this regard, it should first be pointed out that the Court, concurring with the view of AG *Tesauro*,[60] recognized the maintenance of press diversity as an overriding mandatory requirement, capable of, in principle, justifying a restriction imposed on the FMG.[61] In order, however, for that to be the case, the restrictive measure had to satisfy the requirements of the proportionality test.

Regarding the way that the latter had to be exercised, AG *Tesauro* suggested that any restriction imposed on the fundamental market freedoms, including the one in the present case, ought to be interpreted strictly and, therefore, subjected to scrutiny of the traditional proportionality test.[62] Moreover, he suggested that the assessment of the suitability sub-principles, in the present case, would require an analysis of the Austrian press market. Such an analysis would have to consist of, *inter alia*, establishing the relevant product market and determining the market shares held by the different press publishers.[63] Finally, he pointed out that the CJEU would have to review the compatibility of the Austrian measure with Art. 10 ECHR since that measure prohibited the selling of the German magazine.[64] In other words, the Court would have to interpret the freedom of expression as a limitation to a limitation, in accordance with the *ERT* formula.[65]

[60] Opinion of AG Tesauro, Case C-365/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, ECLI:EU:C:1997:150, para. 20
[61] CJEU, Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, ECLI:EU:C:1997:325, para. 18.
[62] Opinion of AG Tesauro, *Familiapress*, (Fn. 84), para. 16.
[63] Ibid, para. 23.
[64] Ibid. para. 26.
[65] CJEU, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, ECLI:EU:C:1991:254, paras. 42 f.

The Court concurred with all the above considerations. First, it confirmed the application of a two-step proportionality test by holding that, for the national measure to be proportionate, it had to be proven that the objective of maintaining press diversity could not have been achieved by a less restrictive measure than the one already enacted. Second, it held that to assess the suitability and necessity of the measure, it had to be established whether the German magazine that offered the opportunity to win a prize in money was part of the same competitive market as the smaller Austrian publishers and whether the selling of that magazine would be able to cause a shift in demand. Third, and most importantly, regarding the compatibility of the restrictive measure with Art. 10 ECHR on the freedom of expression, the Court held that whenever a MS relies on an overriding mandatory requirement to justify a rule of national law, such justification ground must be assessed in light of EU fundamental rights as enshrined in the general principles of law.[66] Bearing this in mind, and relying on the jurisprudence of the ECtHR, the Court ruled that a ban imposed on the selling of the German magazine could run counter to the freedom of expression and that it would be permitted if it was prescribed by law and if it was necessary in a democratic society. In this respect, it concluded that it was for the national court to decide whether all the above-mentioned conditions were satisfied. Because it required a complicated analysis of the press market, however, the Austrian court decided to ultimately ignore the interpretation of the Court.[67]

c) Analysis of Court's Findings

At first glance, the approach of the Court to apply a traditional proportionality scheme appears to be the correct one. After all, the maintenance of press diversity was exclusively invoked by the Austrian Government as an overriding mandatory requirement,[68] rather than as a constituting element of the fundamental freedom of expression. Furthermore, according to the jurisprudence of the ECtHR, the safeguard of media pluralism, albeit not expressly laid down in Art. 10 (2) ECHR, is indeed interpreted as a derogation to the freedom of expression.[69]

[66] *Familiapress*, (fn. 85), paras. 19 ff.
[67] *Biondi*, (Fn. 14), p. 56.
[68] Ibid, para. 13.
[69] Opinion of AG Tesauro, *Familiapress*, (Fn. 84), para. 28.

However, a deeper analysis of the above considerations might point in a different direction. First, referring to the interpretation of the ECtHR, the achievement and maintenance of media plurality does not exclusively constitute a derogation to the freedom of expression. In *Informationsverein Lentia and Others v. Austria*, for instance, the ECtHR held that the freedom of expression *"[…] cannot be successfully accomplished unless it is grounded in the principle of pluralism […]"*[70]. In this respect, Art. 10 ECHR, in addition to the freedom of press of the German publisher, is considered to equally safeguard the maintenance of media plurality and diversity, as guaranteed by the Austrian provision.[71]

Such an ascertainment, which did not go unnoticed by the Court,[72] would have required a complete reversal of the rationale of the conflict at hand. By treating the maintenance of press diversity as a constituting element of the freedom of expression, the Austrian measure would have had to be given a wide interpretation instead of a strict one. Such wider interpretation would have, consequently, required the reconciliation to the furthest extent possible, not only between the freedom of press and maintenance of media plurality as components of the fundamental right to freedom of expression,[73] but also between the FMG of the German press publisher and the freedom of expression protected by the Austrian measure. Accordingly, the application of a fully-fledged, three-step proportionality test would have been more reasonable to balance the equally conflicting values enshrined in Art. 10 ECHR and Art. 34 TFEU.

To conclude, it seems that by prejudicing the interpretation of the restrictive measure and, consequently, influencing the exercise of the proportionality test, the application of the freedom of expression as a limitation to a limitation is used as an additional argument to facilitate the enforcement of the FMG rather than to ensure the genuine protection of Art. 10 ECHR.

[70] ECtHR, *Informationsverein Lentia and Others v. Austria* [C], Applications nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, 24 November 1993, paras. 38 ff.
[71] Ibid, para. 27.
[72] *Familiapress*, (Fn. 85), para. 18.
[73] Opinion of AG Tesauro, *Familiapress*, (Fn. 84), para. 27.

2. *AGET Iraklis* – The Freedom to Conduct Business as a Limitation to the Protection of Workers and Employment

a) Facts of the Case

AGET Iraklis was a Greek undertaking, the main business of which was the production, distribution, and marketing of cement. Following the depressive economic situation in Greece at the time, the undertaking's managing board approved a restructuring program, according to which the reduction of demand for cement would be addressed by the permanent closure of one of the plants. This decision would inevitably result in collective redundancies. Consequently, AGET invited the workers' union of that plant to attend meetings with representatives of the undertaking to provide information and discuss the possible adverse consequences of the planned redundancies. Since the workers' union did not respond to the invitation, AGET decided to initiate administrative proceedings to authorize the restructuring program, as prescribed by Greek law. However, based on the opinion of the Supreme Labor Council, the Greek Minister for Labor, Social Security, and Welfare decided to refuse the authorization of the collective redundancies. Following the refusal, AGET brought an annulment action before the Council of State by contending that the authorization mechanism prescribed by Greek law, which ultimately lead to the decision of the Minister, constituted an infringement of, *inter alia,* Art. 49 and 63 TFEU read in conjunction with Art. 16 EUCFR. The Greek Government held that the authorization mechanism was justified by overriding reasons of public interest, namely, to protect the conditions in the laboring market and safeguard the interests of the national economy. Considering the foregoing, the national court decided to stay the proceedings and refer the matter to the CJEU.

b) Findings of the Court

In the present case, the Court had to render a decision on the compatibility of a Greek legal provision, in accordance with which an undertaking's decision to make collective redundancies had to be granted authorization by the competent national authority, with Art. 49 TFEU on the FoE and Art. 16 EUCFR on the freedom to conduct business. First, as pointed out by AG *Wahl*, such authorization requirement not only constituted a restriction on the

FoE in principle but, under the current circumstances, was also liable to render its exercise less attractive.[74] Furthermore, according to *Wahl*, since the Treaty provisions must be viewed in light of the Charter and considering that, in the present case, AGET's freedom to contract was hindered, Art. 49 TFEU ought to be interpreted in conjunction with Art. 16 of the Charter.[75] The Court agreed with the aforementioned considerations. Accordingly, it held that the authorization requirement constituted a *"significant interference"* with the FoE.[76] Moreover, following the *ERT* principle,[77] the Court confirmed that whenever a MS relies on public justification grounds to justify a restriction on one of the fundamental market freedoms, that restriction can only be justified if it complies with EU fundamental rights.[78] Therefore, the authorization procedure was found to constitute a restriction of Art. 16 EUCFR as well.[79] The Greek Government, however, argued that the authorization procedure was justified since it protected the rights of the workers to be protected against unjustified dismissal, enshrined in Art. 30 EUCFR.[80] Therefore, Art. 30 EUCFR had to be assessed *vis-à-vis* Art. 49 TFEU and Art. 16 EUCFR.

In this regard, AG *Wahl* suggested that the case be solved under the *Gebhard* doctrine, meaning that the protection of workers, as a justification ground ought to be scrutinized under the traditional proportionality scheme.[81] According to *Wahl*, while true that, in principle, the Court had to strike a fair balance between the protection of workers and the FoE, as well as the freedom to conduct business,[82] in this particular case, *"[…] the idea of a balancing exercise was, in fact, a fallacy […]."* This was because Art. 30 EUCFR, does not confer an enforceable right on the workers. Moreover, even if Art. 30 EUCFR did confer a directly enforceable right since a measure that imposes an authorization requirement on undertakings to approve collective redundancies could result in that undertaking becoming insolvent, that requirement could not be deemed to be suitable for attaining the protection

[74] Opinion of AG Wahl, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:429, para. 46 f.
[75] Ibid., paras. 49 f.
[76] CJEU, Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972, para. 55.
[77] CJEU, Case C-260/89, Ilıniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, ECLI:EU:C:1991:254, para. 42 f.
[78] *AGET Iraklis*, (Fn. 100), para. 63.
[79] Ibid., para. 66.
[80] Ibid., paras. 71 ff.
[81] Opinion of AG Wahl, *AGET Iraklis,* (Fn. 98), para. 51.
[82] Ibid., para. 57 ff.

of workers because it would bring about the unemployment of all the other workers, who were not made redundant. Therefore, according to *Wahl*, in the present case, not only should balancing not be exercised, but the Greek rule fails to entertain the suitability and necessity requirements of proportionality.

The CJEU decided to take a different approach, one which was more sympathetic towards balancing. After recognizing the protection of workers as an overriding mandatory requirement in the public interest,[83] the Court referred to the proportionality test enshrined in Art. 52 (1) EUCFR and held that Charter rights, such as Art. 16 on the freedom to conduct business, may be subjected to limitations if such limitations are deemed to protect the rights and freedoms of others.[84] As a consequence, the Court held that the national authorization regime had to strike a fair balance between the protection of workers against unjustified dismissal, as safeguarded by Art. 30 of the Charter, and the interests relating to the FoE and freedom to conduct business.[85] Nevertheless, in parallel, the authorization requirement had to satisfy the sub-principles of suitability and necessity,[86] as well as respect the essence of Art. 16 EUCFR in accordance with Art. 52 (1) EUCFR. In this respect, after confirming that the authorization regime was suitable, necessary, and did not affect the essence of the freedom to conduct business, the Court, surprisingly, decided that, due to the large amount of discretion that such procedure granted to the Greek authorities in taking a decision, the authorization requirement went beyond was strictly necessary to attain the protection of workers. Therefore, the Greek law provision was held to be disproportionate *vis-à-vis* the FoE. Finally, *"(o)n identical grounds […]"*, such provision was held incompatible with the proportionality requirements of Art. 52 (1) EUCFR and, consequently, with the freedom to conduct business.

c) Analysis of the Court's Findings

By dissociating its interpretation from the Opinion of AG *Wahl*, the Court demonstrated to have reflected on the problematic application of the *ERT* formula, which became apparent in the *Familiapress* case law discussed earlier. While still applying such a formula, the Court

[83] *AGET Iraklis*, (Fn. 100), para. 73
[84] Ibid., paras. 70 and 89.
[85] Ibid., para. 90.
[86] Ibid., paras. 80 ff.

repeatedly referred to the proportionality test enshrined in Art. 52 (1) EUCFR and held that the interests guaranteed by Art. 49 TFEU and Arts. 16 and 30 EUCFR had to be balanced.[87] Nevertheless, while this reflection can be seen as a success story when compared to the rather radical view of AG *Wahl*, it did not bring about any substantive results. After all, the Court, once again, did not engage in the balancing exercise, nor did it refer the case back to the national court to conduct a reconciliation of the values involved. Instead, it relied on the traditional model of the proportionality test and decided the case under the necessity sub-principle.

The reason why the Court took such an approach seems to be threefold. First, just like in *Familiapress,* the ground of justification, in this case, the protection of workers against unjustified dismissal, was regarded exclusively as an overriding mandatory requirement in the public interest,[88] rather than a fundamental right, and was, therefore, given a narrow interpretation. Secondly, throughout the whole decision, the freedom to conduct business, just like the FoE, was interpreted as a Charter right that is directly applicable and fully enforceable. This divergent interpretation of Arts. 16 and 30 EUCFR, which puts the two rights on uneven ground, would, indeed, require the application of a traditional proportionality test.

However, as it is exactly that divergent interpretation of the two Charter provisions that was problematic, the choice of proportionality in the current case becomes highly questionable. While it may be still too soon to grant a wider interpretation to Art. 30 EUCFR since it is deemed to not confer enforceable rights,[89] the interpretation of Art. 16 EUCFR should not, in principle, be any different. Indeed, in respect to the latter, it has been noted that the Court has given a *"[…] hard-core interpretation to a traditionally weak right."*[90] Therefore, since the conflict appears to be between two equally weak Charter provisions, it would be more reasonable to solve the case by resorting to balancing.

In conclusion, it seems that, just like in *Familiapress*, by prejudicing the interpretation of the restrictive measure and, consequently, influencing the exercise of the proportionality test,

[87] Ibid., paras. 77 and 90.
[88] Ibid., para. 73.
[89] Opinion of AG Wahl, *AGET Iraklis,* (Fn. 98), para. 59.
[90] *Garben*, in Vanhercke/Ghailani/Spasova/Pochet (eds.), p. 57, p. 65.

the application of the freedom to conduct business as a limitation to a limitation is used as an additional argument to facilitate the enforcement of the FoE, as a fundamental market right, rather than to ensure the genuine protection of fundamental rights.

II. Fundamental Rights as a Justification Ground for Limitations Imposed on the EU Fundamental Market Freedoms.

1. *Schmidberger v. Austria* – the Freedom of Expression and Right to Assembly as a Justification Ground for Limiting the Free Movement of Goods

a) Facts of the Case

Schmidberger was a German undertaking, the business of which encompassed the transport of steel and timber between southern Germany and northern Italy. In carrying out this business, its heavy goods vehicles made use of the Brenner motorway, which was one of the most important and busiest routes in terms of inter-state transport and trade, located in the Austrian Alpine region. Following the alarming increase of pollution in that area, Transitforum Austria Tirol, an Austrian environmental protection association, after notifying the competent Austrian authorities, decided to hold a demonstration in the motorway to denounce such pollution. The demonstration, which resulted in the Brenner motorway being blocked and inaccessible for a little less than 30 hours, made it impossible for the lorries of Schmidberger to transport the goods and, therefore, resulted in incurred losses for the undertaking. Considering these circumstances, Schmidberger initiated legal proceedings before the Austrian Regional Court, alleging that the Austrian authorities, by allowing the demonstration to take place, acted in breach of EU law under Art. 34 TFEU on the FMG and were, consequently, responsible for the suffered losses. The argument of the Austrian authorities for refusing to intervene was that the holding of the demonstration was based on fundamental rights considerations stemming from its constitution, namely the freedom of expression and freedom of assembly. As a result, the Austrian Regional Court decided to stay the proceedings and refer the matter to the CJEU.

b) Findings of the Court

In this instance, the Court was, in a way, cornered to render a decision regarding the direct confrontation between the values protected by the FMG and those safeguarded by the freedom of expression and right to assembly. What seems to have made it imperative for the CJEU to decide on such a delicate matter is the *"radical"* argument presented by the Austrian Government.[91] Accordingly, instead of relying on public policy grounds, or overriding mandatory requirements, Austria relied, expressly and exclusively, on the protection of the freedom and right to assembly, as safeguarded by its own constitution and Arts. 10 and 11 of the ECHR, to justify the restriction on the FMG.

Therefore, following the approach proposed by AG Jacobs,[92] the Court first held that, since both the Union and the MSs are bound by fundamental rights, the latter constitute a legitimate objective, the pursuit of which is potentially able to justify a restriction imposed on the FMG.[93] Following this affirmation, after stating that the FMG constituted a fundamental principle of the Community, and after confirming the common constitutional traditions of the MSs, as well as the ECHR, as the relevant legal sources for EU fundamental rights, the Court held that, since both of these categories of rights can be subjected to restrictions, the interests that they safeguard must be weighed against one another with the aim of establishing whether a fair balance had been struck.[94] Moreover, in weighing such interests, the Court held that MSs enjoy a wide margin of appreciation.[95] Accordingly, by considering such discretion, and by comparing the circumstances in the present case with those of the ruling in *Commission v. France*,[96] the CJEU concluded that the Austrian 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."*[97]

[91] *Biondi*, (Fn. 14), pp. 57 f.
[92] Opinion of AG Jacobs of 11 July 2002, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2002:437, para. 102.
[93] CJEU, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333, para. 74.
[94] Ibid., paras. 78 – 81.
[95] Ibid., para. 82.
[96] Ibid., paras. 84 – 88.
[97] *Schmidberger*, (Fn. 117), para. 89.

c) Analysis of the Court's Findings

Interestingly, the Court departed from the Opinion of AG *Jacobs* regarding the way that it should have employed the proportionality test. According to *Jacobs*, a traditional proportionality review should have been applied, since *"(t)he situation was comparable with cases involving national public policy"* and *"[…] the uniform application and effectiveness of the fundamental freedoms laid down by the Treaty were at stake".*[98] Accordingly, the freedom of expression and the right to assembly would have been interpreted narrowly,[99] and subjected to more scrutiny, *vis-à-vis* the FMG. This exercise of the proportionality test would have increased the chances of the FMG prevailing in the conflict at hand. The Court, however, took an innovative approach by skipping the second step of proportionality and deciding the case under the third step, balancing. In other words, since, according to the Court, the freedom of expression, right to assembly, and the FMG were equally important and, therefore, limitable in the EU legal order, a balance would need to be established between the degree of detriment caused to one of those rights and the degree of importance of achieving another one of those rights. It is for this reason that this case has been referred to as *"(a) locus classicus for conflicting rights in EU law."*[100]

This approach appears to be the correct one for the following reasons. First, it accommodates the idea that fundamental rights and fundamental market freedoms stand on an equal footing.[101] Second, it dispels the view that fundamental rights and national public policy safeguard the same values. Indeed, while there might be some occasional convergence between the two, it seems illogical to believe that they protect the same interests, when, in accordance with the well-established case law of the ECtHR, public policy constitutes a justification ground for restrictions on fundamental human rights.

[98] Opinion of AG Jacobs, *Schmidberger*, (Fn. 116), para. 105.
[99] CJEU, Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:614, para. 30.
[100] *de Vries*, (Fn. 16), p. 178.
[101] *Schlachter*, Reconciliation between fundamental social rights and economic freedoms, https://ec.europa.eu/social/BlobServlet?docId=6923&langId=en (last accessed on 22/09/2021).

2. *Viking Line v. Finnish Seamen's Union* – The Right to Collective Action as a Justification Ground for Limiting the Freedom of Establishment and Provision of Services

a) Facts of the case

Viking Line ABP was a Finnish company and owner of the Rosella, a sea vessel that operated under Finnish law and by which transportation was provided from Tallin to Helsinki and vice-versa. Considering that the Rosella operated under Finnish law, its crew, which were members of the Finnish Seamen's Union (FSU), was getting paid in accordance with a Finnish wage standard. Accordingly, since the Rosella was operating at a loss and Estonian crew wages were lower than Finnish crew wages, Viking decided to reflag the ferry by registering it in Estonia with the purpose of entering into a new collective agreement with an Estonian union. In other words, Viking would exercise its FoE, as guaranteed by EU law, with the intention of lowering labor costs. The Finnish Seamen's Union, which opposed such a decision, with assistance from the International Transport Workers' Federation (ITWF) asked the Estonian union to act in accordance with the principle of solidarity and refuse to enter into an agreement with Viking. In this regard, Viking decided to initiate legal proceedings and seek an injunction of the solidarity of action by alleging a breach of Art. 49 TFEU on the FoE. Considering the foregoing circumstances, the seized court decided to stay the proceedings and refer the matter to the CJEU.

b) Findings of the Court

In the present case, the Court had to render a decision on whether the coordinated action adopted by the Finnish and Estonian workers' unions, in accordance with the fundamental social right to take collective action, as protected by the Finnish constitution, general principles of EU law, and the EUCFR, constituted a proportionate restriction and struck a balance with the FoE and FMS.[102] Accordingly, in contrast to the questions raised in *Schmidberger*, the referring court, in the present case, was expecting the Court to apply the

[102] ECJ, Opinion of AG Maduro of 23 May 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:292, para. 15.

innovative model of the proportionality review and, consequently, engage in the balancing of the two conflicting values. However, as demonstrated in the following paragraphs, the Court conducted its assessment in a rather chaotic and unclear fashion, by applying a traditional two-step proportionality test and only evasively mentioning balancing.

In this regard, the CJEU started its analysis by recognizing the fundamental right to take collective action and the right to strike, as EU fundamental rights which formed part of the general principles of EU law and the EUCFR. In that same paragraph, however, the Court emphasized that the exercise of those rights was not absolute and, as confirmed by both the Charter and Finnish law, they could be subjected to restrictions.[103] The Court then proceeded by stating that, in the present case, the collective action taken by the FSU not only made it less attractive for the FoE to be exercised but it made it pointless to a certain degree.[104] In this sense, by additionally reiterating that the FoE constituted a fundamental principle of EU law, the Court treated the fundamental right to take collective action exclusively as a restrictive measure rather than a restricted right. Indeed, notwithstanding certain awkward references to the Schmidberger formula and balancing, the Court, on the exact contrary to its interpretation in *Omega,* deradicalized the case by interpreting the protection of workers as an overriding mandatory requirement, and ultimately applying the traditional model of the proportionality test. Finally, as regards whether the collective action was suitable and necessary to the protection of workers, the Court held that it was for the national court to carry out that assessment.

c) Analysis of the Court's Findings

There seem to be two principal reasons that might have influenced the Court's reasoning and subsequent application of the proportionality test in the present case. First, it has been pointed out that the risk for workers of the MSs to lose their jobs is an inherent condition of achieving economic progress through the establishment and maintenance of a common market based on intra-Community trade.[105] In other words, because of free movement and competition, cheap labor can drive expensive labor out of the labor market. The implication

[103] CJEU, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772, para. 44.
[104] Ibid. paras. 68 – 79.
[105] Opinion of AG Maduro, *Viking*, (Fn. 126), para. 59.

of this view is that the exercise of the fundamental right to undertake collective action, in addition to *"[…] constituting a means to protect the wages and working conditions of seafarers […]"*, may be used to hamper the principle of non-discrimination and the internal market itself.[106] In this regard, the Court, possibly thinking of the difference between *Schmidberger* and *Commission v. France*, which was previously discussed, decided that, in this case, collective action constituted a restriction that could seriously jeopardize the very substance of the internal market. Consequently, the Court decided to interpret collective action in a strict manner and resorted to the application of a traditional, two-step proportionality test.

Second, as briefly mentioned above, the exercise of collective action may be used to protect the bargaining power of some unions at the expense of other unions by, therefore, partitioning the labor market.[107] In other words, collective action may be used in a way that the conflict under the present circumstances is re-dimensioned from 'collective action vs. FoE' to 'collective action vs. FMW'. Accordingly, being that the FMW guarantees the most essential economic and non-economic rights of EU workers, the Court found the collective action, taken by the FSU, to be a restriction that does not safeguard the interests of all Union workers to the same extent. In this respect, it decided to apply the traditional model of the proportionality review.

Nevertheless, the Court's reasoning in this judgment has been subjected to a lot of criticism regarding its antipathy towards fundamental rights and consequential application of the proportionality test.[108] In this respect, as pointed out by *De Witte*, even though the case was left up to the national court to be decided, its implication is clear, in that "the right of trade unions to exercise their collective fundamental right is very seriously hampered by the application of internal market law."[109] This is because the Court conducted an asphyxiating interpretation and did not give a real possibility to the trade unions to justify their collective action.[110] This stance is particularly disappointing, considering that the CJEU, on the contrary

[106] Ibid., para. 62.
[107] Ibid.
[108] *Douglas-Scott*, (Fn. 1), p. 677.
[109] *De Witte*, (Fn. 6), p. 206.
[110] *de Vries*, (Fn. 16), p. 182.

to the ECtHR, does not have to decide on the outcome of the balancing exercise.[111] In other words, there was nothing stopping the Court from treating the collective action of the FSU and the ITWF as an equally fundamental right to the FoE, as well as the FMW, by applying the balancing exercise, while still referring the case to the national court.

E. Concluding Remarks

The purpose of this article was to analyze the interaction between the EU fundamental market freedoms and fundamental rights through the lens of the proportionality test of the CJEU and draw subsequent conclusions in that regard. In the first section, the fundamental character of the free movement provisions and the constitutionalization of fundamental rights were discussed to, not only show the context of the interaction between the two categories of rights but also demonstrate that the EU Treaties are conceived as a constitutional setting where economic freedoms and human rights ought to be granted equal protection.

In the following section, the structure of the proportionality test was assessed. In that regard, it was first shown that the proportionality principle, as employed by the CJEU, is traditionally exercised as a two-step test, consisting of the sub-principles of suitability and necessity. Moreover, the most elusive step of the CJEU proportionality test, proportionality *stricto sensu*, as well as the novelties brought by Art. 52 (1) EUCFR, were presented to demonstrate the full extent of the interpretative tools that are available to the Court when assessing fundamental rights in light of the free movement provisions. In that regard, it was concluded that Art. 52 (1) EUCFR has introduced a more sophisticated, fundamental rights-friendly, proportionality test, in accordance with which the exercise of the essential core doctrine and, most importantly, balancing is incentivized.

Finally, focusing on the employment of the proportionality test regarding the interplay between fundamental rights and the fundamental market freedoms, the case law of the CJEU was analyzed in accordance with two scenarios. According to the first scenario,

[111] *De Witte*, (Fn. 6), p. 206.

fundamental rights are employed as a limitation to a limitation. In this regard, it was demonstrated that, when it comes to the genuine protection of fundamental rights, the *Schranken-Schranken* doctrine, developed by the CJEU in the *ERT* case, can be problematic. This is because, by prejudicing the interpretation of the restrictive measure and suggesting the application of a traditional proportionality test, fundamental rights are used as an additional interpretative tool to support the application of the free movement provisions and do away with any limitation that may be imposed on thereof. This instrumental role of fundamental rights is at odds with their fundamental constitutional character, as well as with their genuine protection being guaranteed.

According to the second scenario, fundamental rights are employed as a ground to justify a restriction imposed on one of the fundamental market freedoms. In this regard, the CJEU seemed to be more prone to applying the balancing step of the proportionality test and, therefore, more sympathetic towards the effective protection of fundamental rights. This approach seems to respect the equal footing between fundamental rights and fundamental market freedoms.

A particularly challenging matter, however, remains the interaction between fundamental market freedoms and fundamental social rights. This is because, as discussed in both *Viking* and *AGET*, there is something inherent in maintaining the functioning of the internal market that does not allow the protection of workers, as an EU fundamental right, to be fully enjoyed. Nevertheless, as it was already proposed in the analysis of the *Viking* case, the genuine exercise of the balancing test should be able to mitigate, to some extent, this seemingly unresolvable conflict. Accordingly, the Court does not have to decide on the result of the case, as long as it establishes that the national court is better suited to do so only by resorting to the balancing exercise.

In conclusion, whenever fundamental rights and the EU fundamental market freedoms interact, in accordance with both scenarios, the Court should strive to apply a fully-fledged proportionality review, by resorting to Art. 52 (1) EUCFR, instead of applying the traditional model of the test, whereby a case is typically decided under the necessity sub-principle. In doing so, by genuinely and indiscriminately protecting and guaranteeing the values

enshrined in both fundamental human rights and the fundamental market freedoms, the Court can fully embrace its role as the constitutional court of the EU.

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