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The Balance between Fundamental Freedoms and Fundamental Rights in the European Community

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Contents

SUMMARY 1

SAMMANFATTNING 2

ABBREVIATIONS 3

1 INTRODUCTION 4

1.1 Purpose and delimitations 4

1.2 Method and material 5

1.3 Disposition 5

2 FUNDAMENTAL RIGHTS AND FUNDAMENTAL FREEDOMS 6

2.1 Fundamental rights 6

2.2 Fundamental freedoms 7

2.3 Similarities between fundamental rights and fundamental freedoms 7

2.4 Differences between fundamental rights and fundamental freedoms 8

2.5 Theory of balancing rights 8

2.6 Is there a hierarchy between fundamental rights and fundamental freedoms? 9

3 THE PRINCIPLE OF PROPORTIONALITY 11

3.1 Introductory remarks 11

3.2 Proportionality in Community law 11

3.2.1 The proportionality test 12

4 THE BALANCE BETWEEN FUNDAMENTAL RIGHTS AND FUNDAMENTAL FREEDOMS IN THE EU 14

4.1 Introduction 14

4.2 Schmidberger – balancing freedom of expression and assembly with the free movement of goods 15

4.2.1 Background and facts 15

4.2.2 The AG's opinion 16

4.2.3 The judgment of the Court 16

4.2.4 Analysis 17

4.2.4.1 Proportionality stricto sensu in Schmidberger 18

4.3 Omega – balancing human dignity with the freedom to provide services 19

4.3.1 Background and facts 19

4.3.2 The AG's opinion *20*

4.3.3 The judgment of the Court *21*

4.3.4 Analysis *22*

4.3.4.1 Justification of a restriction by a right which lacks a common conception of Member States 23

4.4 Viking Line and Laval – Balancing social rights with fundamental freedoms 25

4.5 Introductory remarks 25

4.5.1 Background and facts *25*

4.5.2 The AG's opinions and judgments of the Court *26*

4.6 The flexible application of the proportionality test by the ECJ 29

4.6.1 Schmidberger *29*

4.6.2 Omega *30*

4.6.3 Viking Line and Laval *30*

5 THE EU CHARTER OF FUNDAMENTAL RIGHTS 33

5.1 The impact of the EUCFR on the balance between fundamental rights and fundamental freedoms 33

6 CONCLUDING REMARKS 35

BIBLIOGRAPHY 38

TABLE OF CASES 41

Summary

Fundamental rights and the four fundamental freedoms co-exist in Community law. These two fundamental interests have been placed on the highest normative level by the ECJ. Notwithstanding its similarities, fundamental rights and fundamental freedoms are two different notions, where the former is typically human rights and the latter applies primarily to economic circumstances. When these two fundamental interests come in to direct conflict with each other, it is necessary for the ECJ to strike a fair balance. This was imperative in the cases of *Schmidberger*, *Omega*, *Viking Line* and *Laval*.[1] It is in those conflicting situations that one can really see the relationship between these two fundamental interests in the EU.

In the balancing process between fundamental rights and fundamental freedoms, the Court applies the principle of proportionality. This general principle of Community law has been applied in a flexible manner. Nevertheless, in the proportionality test one can distinguish three steps that can be summarised as suitability, necessity and proportionality *stricto sensu*. Generally, the Court does not reach the third step of the test. In *Schmidberger*, however, the Court reached the proportionality *stricto sensu* and formulated the principle of proportionality as an explicit balance of interests. In *Omega*, the Member State inflicted human dignity under the heading of public policy as a justification of the restriction of free movement. As regards to the vague notion of human dignity, the Court held that it is not necessary that the Member State's conception of this fundamental right is shared by all other Member States. Even though that the proportionality principle must be respected, the approach suggest a rather wide margin of discretion to the Member State. In *Viking Line* and *Laval*, the trade unions' fundamental right to take collective action came into direct conflict with the free movement. The Court left it to the national court to apply the proportionality test in *Viking Line*, whereas in *Laval* the Court itself applied the test. The examined cases demonstrate that the Court applies a nuanced case-by-case analysis when a fair balance needs to be struck between a fundamental right and a fundamental freedom. The conclusion can be drawn that the type of fundamental right at stake seems to be of particular importance in that analysis.

Following the ratification of the Lisbon Treaty, the EU Charter of fundamental rights will acquire binding force. The impact that that will have for the balance between fundamental rights and fundamental freedoms is uncertain. By giving fundamental rights, and specifically social rights, a more prominent position in the Union, it could have an effect on the balance in favour of fundamental rights.

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[1] Case C-112/00 *Schmidberger* [2003] ECR I-5659, Case C-36/02 *Omega* [2004] ECR I-09609 , Case C-341/05 *Laval* [2007] ECR I-00000 and Case C-438/05 *Viking Line* [2007] ECR I-00000.

Sammanfattning

Mänskliga rättigheter och de i fördraget fundamental friheterna som reglerar den fria rörligheten existerar sida vid sida i EU. Dessa två fundamentala intressen återfinns i primärrätten och är således på samma normativa nivå. När mänskliga rättigheter och de fundamentala friheterna kommer i konflikt är det upp till EG-domstolen att balansera de två intressena mot varandra. Detta utfördes i *Schmidberger*, *Omega*, *Viking Line* och *Laval*.[2] Det är i dessa konfliktsituationer som man på ett påtagligt sätt kan se och förstå relationen mellan dessa två fundamentala intressen.

I balansprocessen mellan mänskliga rättigheter och de fundamentala friheterna använder sig EG-domstolen av proportionalitetsprincipen. Denna grundläggande gemenskapsrättsliga princip har applicerats på ett flexibelt sätt. I proportionalitetstestet kan dock urskiljas tre olika steg, vilka kan sammanfattas som lämplighet, nödvändighet och proportionalitet *stricto sensu*. Det är sällan som Domstolen når testets tredje steg. Detta hände emellertid i *Schmidberger* där Domstolen formulerade proportionalitetsprincipen som ett explicit balanserade av intressen. I *Omega* framhöll medlemsstaten att ”mänsklig värdighet” kan rymmas i ”skyddet för den allmänna ordningen” vilket, i princip, rättfärdigar ett hinder av den fria rörligheten. Vad gäller den vaga benämningen ”mänsklig värdighet” framhöll Domstolen att medlemsstatens specifika tolkning av denna mänskliga rättighet inte behöver delas av övriga medlemsstater. Detta tillvägagångssätt innebär att medlemsstaten tillerkänns ett utrymme för skönsmässig bedömning. Proportionalitetsprincipen måste dock respekteras.

I *Viking Line* och *Laval* ställdes rätten till att vidta fackliga stridsåtgärder emot den fria rörligheten. Domstolen applicerade själv proportionalitetstestet i *Laval* medan den i *Viking Line* lämnade det till den nationella domstolen att genomföra testet. De behandlade fallen visar att domstolen använder sig av en metod där de specifika fakta i varje enskilt fall är av avgörande betydelse för domslutet. Vilken typ av mänsklig rättighet som är vid handen tycks vara av särskild betydelse för domstolens beslut.

Den Europeiska unionens stadga om de grundläggande rättigheterna kommer att ha bindande kraft efter ratifikationen av Lissabonfördraget. Det är oklart vilken effekt denna utveckling kommer att ha på relationen mellan mänskliga rättigheter och den fria rörligheten. Genom att ge mänskliga rättigheter, och i synnerhet sociala rättigheter, en tydligare position i EU är det möjligt att dessa intressen kommer att tillerkännas mer tyngd i balansprocessen mellan de två fundamentala intressena.

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[2] Case C-112/00 *Schmidberger* [2003] ECR I-5659, Case C-36/02 *Omega* [2004] ECR I-09609 , Case C-341/05 *Laval* [2007] ECR I-00000 och Case C-438/05 *Viking Line* [2007] ECR I-00000.

Abbreviations

AG	Advocate General
CMLRev.	Common Market Law Review
EBLR	European Business Law Review
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EC	European Community
ECT	European Community Treaty (originally: Treaty of Rom
ELJ	European law journal
EU	European Union
EUCFR	EU Charter of Fundamental Rights
FSU	Finnish Seamen's Union
GLJ	German Law Journal
ILJ	Industrial Law Journal
ITF	International Transport Workers' Federation
REFGOV	Reflexive Governance in the Public Interest
TEU	European Union Treaty

1 Introduction

The European Union has undergone a significant change during the last 50 years from being a system based pre-dominantly on economic co-operation into a Union that could be described as a constitutional polity. European integration has been said to promote economic freedoms by leaving fundamental rights, and in particular social rights and policies, in a secondary position.[3] However, while the integration has both widened and deepened, the discussion of fundamental values and standards of fundamental rights has gained new ground. Both fundamental rights and the four fundamental freedoms are considered as interests of fundamental character in Community Law. What happens when these two interest come into direct conflict with each other?

1.1 Purpose and delimitations

In this thesis, I will examine the balance between fundamental rights and fundamental freedoms within the EU. Fundamental freedoms stand for the free movement provisions in the EC Treaty. These rights are economic and constitute the very cornerstone of the internal market. Fundamental rights are traditionally human rights, which the Court of Justice shall respect.[4] There are situation where fundamental rights and fundamental freedoms oppose each other and it is in those situations that the ECJ is obliged to strike a fair balance between these two opposing interests. The analysis will be made through the cases where this issue has been highly relevant, namely the cases of *Schmidberger*[5], *Omega*[6], *Viking Line*[7] and *Laval*[8].

For a better understanding of the balance of fundamental rights and fundamental freedoms, it is necessary to have some basic knowledge of these two notions and the relationship between them. The author has therefore dedicated one chapter to that information. The ECJ applies the proportionality principle when fundamental rights and fundamental freedoms oppose each other. Hence, this general principle of Community law are examined and discussed in one chapter. There is also a brief presentation of Dworkian's and Alexy´s theories on the balancing of rights.

Moreover, the relationship between fundamental rights and fundamental freedoms is an interesting subject in the light of the ongoing ratification of

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[3] Maduro, "Striking the Elusive Balance Between Economic Freedom and Social Rights in the European Union", in Alston, Cassese, Lalumière and Leuprecht, *An EU Human Rights Agenda for the New Millennium*, Oxford, 1999, at p. 449.
[4] TEU Art 6(2).
[5] Case C-112/00 *Schmidberger* [2003] ECR I-5659.
[6] Case C-36/02 *Omega* [2004] ECR I-09609.
[7] Case C-438/05 *Viking Line* [2007] ECR I-00000.
[8] Case C-341/05 *Laval* [2007] ECR I-00000.

the Lisbon Treaty, which will give the EU Charter of Fundamental Rights binding force. With this new Treaty, there will also be possible for the EU to adhere to the European Convention of Human Rights. What effects will a binding EU Charter of Fundamental Rights have on the balance between fundamental rights and fundamental freedoms? These are the questions and issues that are to be examined in the thesis.

Since the EU and the ECJ constantly enlarge its competence, the necessity to strike a fair balance between fundamental rights and fundamental freedoms is not a temporary issue, but will most likely increase in the future. Thus, the subject treated in this thesis is of highly relevance in Community law.

1.2 Method and material

The approach chosen for this thesis is a dogmatic method of traditional legal analysis where legal sources are described and analysed. The focus of the analysis has been set on the ECJ's judgments in *Schmidberger*, *Omega*, *Viking Line* and *Laval*. Furthermore, the review of doctrine in the form of books and, in particular, articles has been used in order to discuss and draw conclusions regarding the balance between fundamental rights and fundamental freedoms in the EU.

1.3 Disposition

A general introduction to the thesis can be found in the first chapter. In the second chapter, there is a discussion on fundamental rights and fundamental freedoms, and the similarities and differences between those interests. Moreover, a brief section is dedicated to the theories of balancing rights and the question of hierarchy between fundamental rights and fundamental freedoms. The third chapter is devoted to the proportionality principle and its application in Community law. A thorough examination and discussion of how the balance between fundamental rights and fundamental freedoms has been struck in *Schmidberger*, *Omega*, *Viking Line* and *Laval* is undertaken in the fourth chapter. The fifth chapter concerns the EU Charter of Fundamental Rights and the impact that that might have on the balance between the two fundamental interests. Conclusions and reflections are presented in the sixth chapter.

2 Fundamental rights and fundamental freedoms

As held above, my aim with this thesis is not to give a detailed account of the fundamental rights and the fundamental freedoms in the EU but rather examine how the ECJ has manage to strike a balance between these two interests. Nevertheless, for a better understanding of this balance, I find it appropriate to begin with a short description of the characteristics and a comparison of these two fundamental interests.

2.1 Fundamental rights

Fundamental rights have gradually developed in the EU from being outside the scope of the ECJ to its important position that it has today. Much of this development can be attributed to the jurisprudence of the ECJ.[9] Since the Union from the beginning was intended to be a purely economical community, there was no need for a bill of rights. Therefore, the Court has based its fundamental rights protection on the common constitutional traditions of the Member States and to international treaties to which they are signatories. The ECHR is considered of particular importance and the ECJ often refers expressly to the case law of the ECtHR. It was not until the Maastricht Treaty 1992 that the Community turned in to a Union with explicit reference to protection of fundamental rights.

An important development is that the EU Charter of Fundamental Rights will acquire legally binding force in the Member States following the ratification of the Lisbon Treaty. However, exceptions have been made for Poland and the UK. The Charter mainly establish the case-law of the ECJ and we will thus have to wait and see if it would in any way strengthen the protection of fundamental rights in Community law. A further discussion on whether the Charter could affect the balance between fundamental rights and fundamental freedoms can be found in the fifth chapter.

Notwithstanding its important role in the EU, fundamental rights are not absolute and can thus be restricted. This will be evident further on when examining the balance between these rights and fundamental freedoms.

[9] See e.g. Case 29/69 *Stauder* [1969] ECR 419, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, Case 4/73 *Nold* [1974] ECR 491 and Case 5/88 *Wachauf* [1989] ECR 3967.

2.2 Fundamental freedoms

The four fundamental freedoms secure the free movement of goods, services, persons and capital. These fundamental freedoms are essential for the correct functioning of the internal market and they are therefore well protected by the case law of the ECJ.[10] However, similarly with fundamental rights, the freedoms are not absolute and can therefore be restricted. Member States may interfere with their exercise on either the specific grounds laid down in the Treaty, or by relying on the more general justifications that can be found in the case law of the Court. As we shall see, fundamental rights are interests that are capable of justifying a restriction of the fundamental freedoms.

2.3 Similarities between fundamental rights and fundamental freedoms

Fundamental rights and fundamental freedoms are similar in many respects and it has even been suggested that fundamental freedoms can be considered as fundamental rights.[11] To begin, fundamental rights and fundamental freedoms are, after the Treaty of Amsterdam amendments, both explicitly mentioned principles on which the Union is founded. Secondly, comparable to fundamental rights, fundamental freedoms have a specific scope of protection that can be crucial in defining the limits of competence of the Court. As much as the national constitutional courts and the ECtHR with reference to fundamental rights, the ECJ has always construed the scope of protection of fundamental freedoms extensively to safeguard the effectiveness of Community law.[12] A good example is the case law on the freedom of movement for workers where the Court has interpreted the Community concept of a "worker" broadly.[13] Thirdly, fundamental freedoms and fundamental rights undergo the same type of test regarding their justification.[14] A restriction can only be justified for specific reasons normally pertaining to the general interest, and according to settled case law of the ECJ, it must fulfil the criteria of non-discrimination and proportionality.[15]

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[10] See e.g. the following line of case law; concerning goods; Case 120/78 *Rewe* [1979] ECR 649, concerning workers; Case C-415/93 *Bosman* [1993] ECR I-4921, concerning services; Case C-55/94 *Gebhard* [1999] ECR I-4165.

[11] See e.g. AG Lenz in *Bosman*, *supra* n. 10 where the Court held that free movement of workers is a fundamental right. For a further discussion see *Maduro, We the Court: the European court of Justice and the Economic Constitution*, Oxford, 1998.

[12] Skouris, "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance", EBLR 2006, p. 233.

[13] See e.g. Case 66/85 *Lawrie-Blum* [1986] ECR 2121 at para. 16 and Case C-292/89 *Antonissen* [1991] ECR I-745.

[14] Skouris, 2006, *supra* n. 12, at p. 234.

[15] See e.g. *Schmidberger, supra n. 5*, *Omega, supra n. 6*, *Viking Line, supra n. 7* and *Laval, supra n. 8*.

2.4 Differences between fundamental rights and fundamental freedoms

Nevertheless its similarities, there are also major differences in the way fundamental rights and fundamental freedoms function in Community Law. To begin, fundamental freedoms are expressly enumerated in the EC Treaty. As mentioned above, until the Lisbon Treaty is ratified there is no legally binding Bill of Rights. Furthermore, fundamental freedoms confer rights with respect to the internal market and thus apply primarily to economic circumstances and with the necessity of a cross-boarder element.

Fundamental rights are typically human rights and they are applicable universally and regardless of the nationality or the statelessness of the persons concerned. The scoop of fundamental freedom is not as wide even though they have developed towards a role which primarily consists of the protection of individuals. This is especially true in the fields of free movement of persons.[16] A good example is the free movement of workers that was defined by the Court as a fundamental right already in the early 1980s.[17]

The EUCFR marks a clear distinction between fundamental rights and fundamental freedoms by not incorporating the four freedoms within the Charter. They are, however, recognised in the preamble. Nevertheless, the distinction made between these two fundamental interests clearly shows that the drafters of the Charter did have the intention to maintain this distinction.[18]

2.5 Theory of balancing rights

Before examining the balance between fundamental rights and fundamental freedoms in the EU, we will briefly look at the constitutional rights theories developed mainly by Dworkin and Alexy. The theories on balancing address the situation of balancing between different constitutionally protected fundamental rights in a strict sense. It is necessary to undertake this balancing in the case of a collision of those rights. The question could be raised whether these theories are even applicable to the situation where the balance between fundamental rights and fundamental freedoms is discussed. As held above, notwithstanding their similarities, these two fundamental interests constitute two different concepts. However, since fundamental rights and fundamental freedoms play on the same normative level and have been balanced by the ECJ, it is suggested that they should both be treated as

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[16] See e.g. Case C-413/99 *Baumbast* [2002] ECR I-7091 and *Bosman*, *supra* n. 10.
[17] 152/82 *Forcheri,* see also AG Lenz in Bosman *supra* n. 10, para. 203.
[18] Lindfeldt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*, Åbo, 2007, p. 193.

constitutionally protected fundamental "rights" in Community law.[19] Hence, the theories of balancing are relevant for the aim of this thesis.

The theories developed by Dworkin and Alexy are based on a distinction between rules and principles of legal norms and, in particular, on constitutional rights being the basis for theories of limitation and conflict of rights and the role of constitutional rights in legal systems.[20] The important difference between rules and principles is that principles do not rule out each other in the sense as rules do, but rather compete or collide and are therefore weighed or balanced against each other. According to Alexy, "principles are optimizing commands, i.e. norms commanding that something be realised to the highest degree that is actually and legally possible".[21] The weighing and balancing of principles can thus be seen as a process of optimising the content and scope of applicable principles in a given case. The fact that one principle is given precedence in relation to other competing principles does not necessarily result in a situation where those other competing principles are completely ruled out, but rather given less weight. A problem that arises is that it is not always easy to characterise a norm as either a rule or a principle. According to Dworkin, sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone.[22]

2.6 Is there a hierarchy between fundamental rights and fundamental freedoms?

My aim with this thesis is not to have a thorough examination of different kinds of rights and the hierarchy between them. Apart from the separation of rights that are absolute and rights than can be restricted, it exists no clear schema of these rights different status and relation to each other. For this reason, it would be a very difficult task, or even impossible, to set up a system that states the hierarchy between fundamental rights and fundamental freedoms. In addition, the need to undergo such a project can also be discussed since its outcome would probably be less than clear and therefore of little practical value. Concerning the balancing theories, neither Dworkin nor Alexy makes any statement on whether principles could or should be organised hierarchically in relation to each other. Thus, the question of hierarchy will not be examined in a detailed manner in this thesis. The question, however, will be raised in a more implicit manner when examining particular cases and the special circumstances that were essential for deciding those cases.

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[19] *Ibid*., p. 197.
[20] Dworkin, "The Model of Rules I" in *Taking Rights Seriously*, Duckworth, 1996, 8th edition, pp 15-45 and Alexy, *A theory of constitutional rights translated by Rivers*, Oxford, 2002.
[21] Alexy, "In the Structure of Legal Principles", Ratio Juris 2000, at p. 295.
[22] Dworkin, *supra* n. 20, at pp. 27-28.

The ECJ has treated both fundamental rights and fundamental freedoms as fundamental interests in Community law. The Court has not tried to set up a hierarchy but has made it clear that one of these interests can justify a restriction of the other.[23] However, with support from the ruling in Schmidberger and Omega, it has been argued that the fundamental freedom is the fundamental value against which all interests, including fundamental rights, are to be reviewed. The argument has been that this suggests that there is a kind of hierarchical order between the economic freedoms, which form the basic paradigm, and fundamental rights.[24] On the other hand, the approach by the ECJ in this balancing situation has been defended as non-hierarchical since it is only a consequence of the fact that the Court has jurisdiction only when fundamental freedoms comes into play.[25]

For the reasons held above, I will not have an extensive discussion on the question of hierarchy between fundamental rights and fundamental freedoms. For this thesis, suffice is to say that both these fundamental interests are of considerate importance to protect in Community law.

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[23] See *Schmidberger, supra* n. 5, *Omega, supra* n. 6*, Viking Line, supra n. 7 and Laval, supra n. 8.*

[24] Heliskoski, "Fundamental Rights versus Economic Freedoms in the European Union: Which paradigm?" in Nordic Cosmopolitanism: Essays in International Law for Koskenniemi 2004, p. 439, and Lindfeldt *supra* n. 18, at p. 216.

[25] Skouris, *supra* n. 12, at p. 238.

3 The principle of proportionality

3.1 Introductory remarks

Naturally, in a dispute between two parties, a Court has to make a final decision. That is the most essential part of its work and the very reason to why this institution exists. The question that arises in this thesis is what to do when there is a direct collusion of two fundamental interests in the society. In those cases, the ECJ applies the principle of proportionality to resolve the issue, and we will therefore look at this principle more thoroughly. To begin, the notion of proportionality goes back to ancient times, but as a general principle of law in modern legal systems it is inspired by ideas supporting liberal democracy, in particular, the concern to protect the individual vis-à-vis the State and the premise that regulatory intervention must be suitable to achieve its aims.[26] The principle of proportionality was developed in continental legal systems, especially in Germany, in the twentieth century. Its development as a ground of review can be seen as the judiciary's response to the growth of administrative powers and the augmentation of administrative discretion.[27]

3.2 Proportionality in Community law

The principle of proportionality was not incorporated expressly as a general principle in the Treaty until the entry of force of the Maastricht Treaty. Article 5 ECT states that "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.[28] Nevertheless, it has been considered by the Court as a general principle of Community law long before that. Already in *Nold*, the Court recognised the principle as a fundamental principle deriving from the rule of law.[29] AG de Lamothe held in *Internationale Handelsgesellschaft* that "the individual should not have this freedom of action limited beyond the degree necessary in the public interest".[30] The principle is today considered omnipresent in the Community legal order. This was illuminated by AG Jacobs who stated that "there are few areas of Community law, if any at all, where [the principle of proportionality] is not relevant".[31] The underlying issue which proportionality seeks to protect in different areas of Community law varies.

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[26] Schwarze, *European Administrative Law*, Sweet and Maxwell, 2006, at p. 679.
[27] See Tridimas, *The General Principles of EC Law*, Oxford, 1999, at p. 89 and footnotes there cited.
[28] Art 5(3) EC Treaty.
[29] AG Trabbucchi in *Nold, supra* n. 9, at 513-14 per AG Trabbucchi.
[30] AG de Lamothe in *Internationale Handelsgesellschaft, supra* n. 9, at 1147.
[31] Case C-120/94 *Commission* v. *Greece* [1996] I-ECR 1513, 1533.

As a result, the intensity of review exercised by the Court varies considerably. Relevant for this thesis is when proportionality is invoked in order to challenge the compatibility with Community law of national measures affecting one of the fundamental freedoms, which means that the Court is called upon to balance Community interests vis-à-vis national interests. In that case, the principle is applied as a market integration mechanism and the intensity of review is strong. It is usually based on the notion of "necessity" exemplified by the "less restrictive alternative" test. This means that a national measure which affects the fundamental freedoms of the Treaty will be found incompatible with Community law unless it is necessary to achieve the legitimate aim and provided that that aim cannot be achieved by employing other measures which less restrict intra-Community trade.[32]

3.2.1 The proportionality test

When applying the proportionality principle, it is obvious that the interests involved must be identified, and that there will be some ascription of weight or value to those interests, since this is a necessary condition precedent to any balancing operation. The proportionality test has been applied in a very flexible manner by the Court. However, one can distinguish three steps in the proportionality inquiry. The first refers to the relationship between the means and the end. Secondly, it must be established whether the measure is necessary to achieve that aim, namely, whether there are other less restrictive means capable of producing the same result. Thirdly, whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved.[33] These three steps can be summarized as suitability, necessity and proportionality *stricto sensu.* However, there has been uncertainty as to whether the third element, proportionality *stricto sensu*, is also part of the test.[34] The argument has been raised since the Court often finishes and ends its judicial analysis with consideration of suitability and necessity. Yet, the fact that the Court will address the third part of the test when the applicant contesting the legality of the measure puts arguments coached in those terms, demonstrates that the Court accept that this can be regarded as a proper part of the proportionality analysis.[35] This third part of the test, the proportionality *stricto sensu,* is an explicit balance of interests. AG van Gerven has held that "a measure which has a causal connection with the objective it pursues, and to which there is no less restrictive alternative, must subsequently be assessed in the light of the criterion of proportionality between the obstacle introduced and the

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[32] See Tridimas, *supra* n. 27, chapter 4 for a further discussion.
[33] Craig, EU, *Administrative Law*, Oxford, 2006, at pp, 656-657.
[34] For a further discussion see *ibid*., at p. 657 ff, and Van Gerven "The effect of Proportionality on the Actions of Member Ststes of the European Community: National Viewpoints from Continental Europe", in Ellis (ed), *The principle of proportionality*, at 37-38.
[35] Craig, supra n. 33, at p. 670, referring to cases Case C-331/88 *Fedesa* [1990] ECR I-04023, Case C-183/95 *Affisch* [1997] ECR I-04035, Case T-13/99 *Pfizer* [2002] ECR II-03305 and Case C-426/93 Germany v. Council [1995] ECR I-03723.

objective pursued and/or the result actually achieved thereby”.[36] Thus, this test of proportionality in the strict sense ought to be realised after the application of the tests of suitability and necessity.

Jans and others argue that the ECJ should only proceed to assess the suitability and necessity of a national measure when it is convinced that it has all the relevant facts at its disposal.[37] If that is not the case, it should supply the national court with the criteria and conditions, but leave the actual assessment to the national court. The case law of the Court seems to support this position.[38] Concerning the proportionality *stricto sensu*, Jans and others suggest a different approach. First, they call for extreme caution in applying this third step in a proportionality test. Would it nevertheless be a reason to carry out a genuine balancing of interests, one should leave this to the ECJ. The reason for this is that such a balancing implies that it is necessary to decide what level of protection should apply within in the community and it is not suitable to let a random national court settle that standard.[39] In the following chapter we will look at how the Court has applied the proportionality test in the four cases examined in this thesis.

[36] AG van Gerven in Case C-169/89 *Gourmetterie* [1990] ECR I-02143, para 10.
[37] Jans, Lange, Prechal and Widdershoven, *Europeanisation of Public Law*, Groningen 2007, at p. 162.
[38] *Ibid* p. 163, Case C-169/91 *Stoke-on-Trent* [1992 ECR I-6635], and Jacobs, “Recent Developments in the Principle of Proportionality in European Community Law” in Ellis, *The Principle of Proportionality in the Laws of Europe*, Oxford, 1999, p. 19.
[39] Jans and Others, *supra* n. 37, at p. 163.

4 The balance between fundamental rights and fundamental freedoms in the EU

4.1 Introduction

There are cases where fundamental rights and fundamental freedoms have acted as two competing interests. In those cases, it has been necessary for the ECJ to strike a balance between these two fundamental interests. It is in such kinds of situations that one can really understand the relationship between the four freedoms and fundamental rights. In *Familiapress,* the Court had to consider whether Austrian legislation prohibiting the sale of magazines published by a German publisher that offered readers the opportunity to take part in games to win prizes was a breach of the free movement of goods.[40] The purpose of the legislation was to protect smaller newspapers and publishers with the aim of preserving media diversity. The Court held that such diversity helps to safeguard the freedom of expression which is of fundamental character. It made a reference to *ERT*[41] when stating that, "where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in light of the general principles of law and in particular of fundamental rights".[42] The case raised the question of a collision between fundamental freedoms and fundamental rights. Fundamental rights, however, were not directly inflicted as a possible justification but rather as an additional tool to decide upon whether a public policy framed as press diversity was justifiable as a means of restricting the free movement of goods. Hence, the question of the direct relation between fundamental rights and fundamental freedoms was left opened.

As held above, in the four cases before us the Court had to strike a fair balance between fundamental rights and fundamental freedoms. I will in this part of the thesis examine how this was made in each one of the cases and then make an analysis of the Courts approach when balancing fundamental interests. How does the court apply the proportionality test when balancing these interests? Which facts were decisive for the Courts ruling? And is there a different approach when dealing with different kinds of fundamental rights? These are some of the issues and questions that are to be discussed and answered below.

[40] Case C-368/95 *Familiapress* [1997] ECR I-03689.
[41]Case C-260/89 *E.R.T* [1991] ECR I-2925.
[42] *Familiapress*, *supra* n. 40, para. 24.

4.2 Schmidberger – balancing freedom of expression and assembly with the free movement of goods

In *Schmidberger,* the Court had to balance freedom of expression and assembly with Article 28 ECT. It was the first case where the respect and protection of a fundamental right were directly relied upon by a Member State as a justification for a restriction of a free movement provision.

4.2.1 Background and facts

The Transitforum Austria Tirol, an environmental protection association, gave notice to the Austrian authorities of an intention to hold a demonstration against the pollution caused by the heavy transport in the Tirol Region. The demonstration would involve a temporary closure of the Brenner motorway lasting 28 hours. The competent authorities granted permission to hold the demonstration and made sure that information was wildly publicised were alternative routes were suggested.

Schmidberger, an international transport undertaking based in Germany, brought proceedings against Austria claiming that the authorities failed to guarantee the freedom of movement of goods in accordance with the EC Treaty. The undertaking transported steel and timber between southern Germany and northern Italy by using the Brenner motorway and claimed damages in respect of standstill periods, loss of earnings and additional related expenses.[43] Austria contended that the claim should be rejected on the grounds that the decision to allow the demonstration was taken following a detailed examination of the specific facts, namely that information had been given of the closure of the Brenner motorway and that the demonstration did not result in substantial traffic jams or other incidents. Since the obstacles were neither permanent nor serious, Austria considered that the restriction of the freedom provision was permitted. Assessment of the interest involved should lean in favour of the freedoms of expression and assembly since fundamental rights are inviolable in a democratic society.[44] The national court made a reference to the ECJ asking in essence whether free movement of goods requires a state to keep major transit routes open, and whether that obligation takes precedence over the protection of fundamental rights such as the freedom of expression and assembly guaranteed by the national constitution and Article 10 and 11 of the ECHR.[45]

[43] *Schmidberger, supra* n. 5, para. 16.
[44] *Ibid* para. 17.
[45] *Ibid* paras. 20-25.

4.2.2 The AG's opinion

AG Jacobs came to the conclusion that the Austrian authorities' decision to not prohibit the demonstration that hindered the free movement of goods was a *prima facie* breach of article 28. However, the breach was justifiable on the ground that the authorities were protecting the fundamental right of expression and assembly laid down in the Austrian constitution and the ECHR. The restriction of free movement caused by not banning the demonstration was considered proportionate since the competing interests were being balanced by the authorities and in particular the limited extent of the hindrance of free movement. In that regard, AG Jacobs compared but distinguished the case from that of Commission v France.[46] Important differences were that in the present case there was only a single route blocked, on a single occasion and for a comparatively short period. Moreover, neither the intention nor the effect was to prevent imports of a particular kind or origin and no criminal conduct was involved.[47]

The AG also acknowledged the importance of the demonstrators to be able to put their point of views across. They could not have made their point nearly as forcefully if they had not blocked the motorway long enough for the demonstration to bite.[48] According to this reasoning, it is inherent, and accepted, that a demonstration like the one in question disturbs and restricts other fundamental interest in the society. This view is especially interesting in the light of AG Jacobs statement that the specific aim of the demonstration was of no significance when assessing the possible liability of the Member State. Instead, it was only the objective pursued by the authorities that should be taken into account. In this specific case, these objectives were to protect the demonstrators' constitutional rights of freedom of expression and assembly.[49]

4.2.3 The judgment of the Court

The ECJ followed the same line of reasoning as the AG and held that the demonstration constituted a restriction of free movement of goods but that the restriction was justifiable in the light of the authorities' concerns for the protection of the demonstrators' fundamental freedom of expression and assembly. The specific aim of the demonstrators was not considered as important in the dispute at hand.

In light of its preceding fundamental right jurisprudence the Court held that the protection of fundamental rights is a legitimate interest, which in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as

[46] Case C-265/95 *Commission* v *France* [1997] ECR I-6959.
[47] AG Jacobs in *Schmidberger, supra n. 5,* AG para. 78.
[48] *Ibid*., para.110.
[49] *Ibid.,* para. 54.

the free movement of goods.[50] The right to expression and assembly are, however, not absolute but must be viewed in relation to its social purpose. A restriction of these rights are thus possible, provided that the restriction corresponds to objectives of general interest and does not constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.[51] In those circumstances, where both interests can be restricted, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance has been struck.[52] The Court held that the competent national authorities enjoy a wide margin of discretion in that regard. Nevertheless, the Court proceeded to weigh the legitimate interest of fundamental rights protection directly against the free movement of goods applying a proportionality test.[53] It is fair to say that the line of reasoning is very similar as to the one of AG Jacobs.

4.2.4 Analysis

The need to reconcile the two competing interest with each other means that a fundamental right can restrict a fundamental freedom and vice versa. Thus, the conclusion can be drawn that it exist no hierarchy par se between these two fundamental interests in Community law. Moreover, since "the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests"[54] the Court suggested that their should be a "case to case" approach where the competent authorities enjoy a wide margin of discretion. In the light of the different status and protection of different types of fundamental rights, this is not a surprising reasoning. Furthermore, as we shall see in *Omega*, it is possible that the protection of a fundamental right can vary from one Member State to another wherefore it can be argued that it is reasonable to allow the Member State a margin of discretion even in the case of a restriction of a fundamental freedom.

The judgement in *Schmidberger* has attracted considerable scholarly attention from Union law specialists and I will now continue by discussing the comments that are pertinent and within the framework of this thesis. First, it has been criticized that the Court of Justice came to the conclusion that the aim of the demonstration, carried out by private individuals, is immaterial for establishing Union law state liability on the basis of the protection of freedom of expression and assembly. Brown contest the case in this regard by referring to the jurisprudence of the ECtHR which suggests that political speeches are given a greater protection under the Convention

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[50] *Schmidberger, supra n. 5,* para. 74.
[51] *Ibid.,* para 80.
[52] *Ibid.,* para 81.
[53] *Ibid.,* para 82.
[54] *Ibid.,* para 81.

than commercial or artistic speeches.[55] Since the nature of the demonstration is an important factor in the ECHR, which is considered by the ECJ to hold special significance, the same line of reasoning should be applied by the Court.[56] Brown support his view saying that if the demonstrators used the Brenner motorway as a space for performing drama or for promulgating neo-Nazi opinions the authorities would clearly have been under an obligation under Community and Convention law to weigh that purpose in the balance. Morijn is also of the opinion that the aim of the demonstration should have been considered relevant and support his theory with the essential same reasoning.[57]

In *Schmidberger*, both the AG and the Court of justice make a comparison with *Commission v France*[58] since there are many similarities between these two cases. *Commission* v *France* concerned French farmers who used different kinds of protest methods to hinder the import of fruits and vegetables from Spain and thus impeded to the free movement of goods. However, these two cases differ fundamentally in substance when taking a closer look. In *Schmidberger*, as held above, the Member State relied explicitly on the protection of fundamental rights as a justification of a restriction of the free movement of goods. This was not the case in *Commission v France*, which lacked the fundamental right dimension. It is therefore fair to say, that with the explicit balancing between fundamental rights and fundamental freedoms in Schmidberger, the Court of Justice was entering into new territories.

4.2.4.1 Proportionality stricto sensu in Schmidberger

Where a Member State has the power to determine the level of protection, a test of the proportionality *stricto sensu* is ruled out. In these cases, it is therefore an inevitable result that different levels of protection must be accepted. A further discussion concerning the Member States' rights to invoke specific national rights will be held in connection with the analysis of *Omega*. It should be pointed out that there are only a few cases where the Court has explicitly formulated the proportionality principle as an obligation to balance interests. One example is *Stoke on Trent* where the Court balanced the interest of employee protection against that of free movement of goods.[59] As held above, the Court had a similar approach in *Schmidberger*.[60] Hence, the Court will not rule out a genuine balancing of interests in the context of a proportionality test, although as a general rule, it

[55] Brown, "Case C-112/00" CMLRev. 2003, at p. 1505.
[56] Ibid. See also Morijn, "Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution", ELJ 2006, p. 29.
[57] Morijn, *supra* n. 56. at p. 29.
[58] *Commission* v *France, supra* n. 46.
[59] *Stoke-on-Trent, supra* n. 38.
[60] *Schmidberger, supra n. 5,* para. 81. See also Case C-413/99 *Baumbast* [2002] I-07091,and in English Court of Appeal 28 January 1997 *R v. Chief Constable of Sussex*, ex parte *International Trader's Ferry* [1997] EWCA Civ 861.

will not carry out such a balancing itself. This has been commentated as a sensible approach from a constitutional point of view.[61]

We will now move on and examine how the balancing of fundamental rights and fundamental freedoms has been struck in similar subsequent cases. Has the line of reasoning in Schmidberger being upheld or is there a new approach form the Court of Justice?

4.3 Omega – balancing human dignity with the freedom to provide services

In *Omega*, Germany successfully invoked the protection of human dignity as a public policy justification ground for the restriction of free movement of services.

4.3.1 Background and facts

In 1994, a German Company, Omega Spielhallen, opened a facility called "Laserdrome", which caught the attention of the local authorities. "Laserdrome" was a game were the participants were equipped with sub-machine-gun-type laser targeting devices for the purpose of hitting sensory tags affixed to the chest areas and the backs of players. The authorities considered that this simulated killing of human beings posed a threat to public order because of its violation of common fundamental values, such as human dignity. Consequently, Omega was prohibited to continue these activities. Omega challenged the ban by arguing that it infringed Community law, particularly the freedom to provide services, since its "laserdrome" had to use equipment and technology supplied by Pulsar International Ltd., a British company.

Omega lost in the first and second instances and lodged an appeal to the Bundesverwaltungsgericht, the Federal Administrative Court. The Bundesverwaltungsgericht ruled that the "killing-game" violated the principle of human dignity protected under the German Constitution. However, having in mind Omega's business relationship with Pulsar, the Court could not rule out that this result was incompatible with Community Law. Therefore it requested the Court of Justice for a preliminary ruling regarding the question whether the prohibition of a commercial activity such as the operation of a " laserdrome" which involved simulated killing action, prohibited under national law, was compatible with the provision on the freedom to provide services and the free movement of goods. Thus, the question arose to whether the right to human dignity constituted a justifiable ground for restricting the relevant free movement provisions.

[61] Jans and Others, supra n. 37, at p. 160.

4.3.2 The AG's opinion

AG Stix-Hackl identified a direct conflict between fundamental freedoms and fundamental rights and drew a parallel to *Schmidberger*.[62] The question whether the protection of human dignity could justify the restriction of the freedom to provide services was examined through the construction of a three-step analysis. The first step consisted of a general review of the status and role of fundamental rights in the Community legal order. The AG stated that fundamental rights should be protected as general legal principles of the Community. They ought to be considered as parts of its primary legislation and therefore rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms.[63]

In a second step, the AG examined the concept of human dignity as a concept of Community law. She stated that generally "human dignity is an expression of the respect and value to be attributed to each human being on account on his or her humanity".[64] This is a very large notion and the question thus rose of how the legal status of human dignity can be defined under Community law. After examining international instruments such as the ECHR together with the Court of Justice's jurisprudence, the AG proposed that it had to be possible to admit considerations of human dignity as recognized in Community law under the public policy exception to provide services.[65]

The third step of the analysis concerned the interpretation of the concept of public policy in the light of the principle of human dignity. The prohibition of the simulated killing action in the "Laserdrome" game could only be justified if it constituted a genuine and sufficiently serious threat to a fundamental interest of society.[66] The AG found evidence to support the existence of such a threat and argued that the Member States could invoke the protection of human dignity in order to impede the freedom to provide services. She stressed that the question whether human dignity was affected had to be determined in the light of national value judgments and that the *Schindler* judgement did not contradict this view.[67] In *Schindler,* the issue was whether a legislation on lottery in the UK that hindered the free provision of services could be justifiable on the ground of public policy. The Court held that "it is not possible to disregard the moral religious or cultural aspects … in all the Member States".[68] According to the AG Stix-Hackl, the ruling in *Schindler* should be understood in the way that such general opinion on the need to restrict a fundamental freedom is an indication of its legitimacy and not that this general opinion is a requirement for the recognition of such legitimacy. She continued by stating that neither the

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[62] AG Stix-Hackl in *Omega, supra n. 6,* para 44.
[63] *Ibid*., para. 49.
[64] *Ibid.,* para. 75.
[65] *Ibid.,* paras. 82-97.
[66] *Ibid.,* para. 100.
[67] *Ibid*., paras 105-106.
[68] Case C-275/92 *Schindler* [1994] ECR I-1039, para. 60.

appropriateness of the police authority's measure nor its necessity and proportionality had been doubted.[69] The AG concluded by stating that an individual public order notice such as the one at stake is compatible with the provisions relating to the freedom to provide services "if that order is genuinely justified for public policy purposes relating to the public interest and it is ensured that that purpose cannot be achieved by measures that are less restrictive of the freedom to provide services".[70]

4.3.3 The judgment of the Court

The Court examined the question of whether the restriction imposed by the national authorities was justified with Article 46 EC in conjunction with Article 55 EC as the starting point. It was obvious to choose the public policy justification ground since the national authorities relied on the argument that the activities in the "Laserdrome" constituted a threat to public policy.[71] The Court then continued by stating that the justification for derogating from the fundamental freedom to provide services must be interpreted strictly. Its scoop cannot be determined unilaterally by each Member State without any control by the Community institutions.[72] However, the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another, leaving the competent national authority a certain margin of discretion.

The Court held that the Community strives to ensure respect for human dignity as a general principle of law and that, in Germany, this right has a particular status as an independent fundamental right.[73] It then cited the ruling in *Schmidberger* by stating that the safeguarding of fundamental rights constitutes a legitimate interest that is capable of justifying a restriction of a free movement provision. For the restriction to be justified it has to be appropriate, necessary and proportionate with regard to the legitimate interest pursued. Following the reasoning of the AG, the Court addressed the concern as to whether the ruling in *Schindler*[74] meant that a restriction could only be justified if it is based on a legal conception that is common to all Member States. The Court came to the conclusion that this was not the case. The "common conception" mentioned in Schindler was not intended to formulate a general criterion for assessing the proportionality. Restrictions imposed under the public policy provision are to be reviewed "in casu" and thus do not need to be shared by all Member States. By citing case law subsequent to *Schindler*, the Court held that Member States must have the possibility to choose a system of protection

[69] *Omega*, *supra* n. 6, para. 111.
[70] AG in *Omega, supra n. 6,* para. 114.
[71] *Omega, supra n. 6,* para. 28.
[72] *Ibid*., para. 30.
[73] *Ibid*., para. 34.
[74] *Schindler, supra* n. 68.

different from that adopted by another Member State.[75] Having this in mind, the Court concluded that the prohibition imposed by the national authorities concerning a game that simulates acts of homicide corresponds to the protection of human dignity in the German constitution and that the measure imposed did not go beyond what is necessary in order to obtain the objective pursued by the competent national authorities.

4.3.4 Analysis

As held above, the Court declared in *Schmidberger* that the protection of fundamental rights is a legitimate interest that, in principle, justifies a restriction of a fundamental freedom provision such as the free movement of goods.[76] It appears that the *Omega* judgment adds three new aspects to the understanding of this type of justification ground.[77] Firstly, it was stated in *Omega* that the protection of fundamental rights belongs to the concept of public policy. That is a difference from *Schmidberger* where the Court did not expressly mention public policy. However, this ruling ought not to be surprising or controversial. It has already been argued by Oliver and Roth that the protection of fundamental rights is surely to be ranked as one of the fundamental interest of society and can thus be regarded as a matter of public policy.[78]

Secondly, while in *Schmidberger* the Member State was granted a wide margin of discretion in its assessment as to whether there is a duty to act in order to prevent a restriction of a fundamental freedom, the ruling in *Omega* makes clear that that discretion is also granted when a Member State actively restricts a fundamental freedom for the sake of safeguarding fundamental rights. Consequently, national authorities do not only have a duty to abstain from any action that would violate fundamental rights, but also a duty to take action in order to prevent violations of fundamental rights that do not originate from the State itself. By intervening in a relationship between private individuals, the fundamental right at stake is given horizontal effect.[79]

Thirdly, *Omega* held that not only specific human rights like the freedom of expression and the freedom of assembly can constitute a justification of a restriction of a free movement provision, but also the principle of human dignity. A problem with the principle of human dignity is that it is a generic concept that has no justiciable shape in the legal instruments that refer to it. Its legal value in Community law is thus not clear. As put by Smith and

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[75] *Omega, supra n. 6,* para. 39; citing Case C-124/97 *Läärä* [1999] ECR I-6067, para. 36, Case C-67/98 *Zenatti* [1999] ECR I-7289, para. 34 and Case C-6/01 *Anomar and others* [2003] ECR I-0000 para. 80.
[76] *Schmidberger, supra n. 5,* para. 74.
[77] Ackermann, Case C-36/02, ”Omega Spielhallen- undAutomatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn”, CMLRev. 2005, at p. 1115.
[78] Oliver and Roth, “THE INTERNAL MARKET AND THE FOUR FREEDOMS”, CMLRev. 2004, at p. 435.
[79] Ackermann, *supra* n. 77 at p. 1117.

Fetzer, "the Community right of human dignity is hardly less mysterious than a distant star in the night sky; it exists, but few of us know much else about it".[80] The failure of the Court to create a positive vision of human dignity has therefore been criticised especially from a human rights perspective. The Court has been accused of reducing the language of fundamental rights to a series of empty labels since it now recognises a very wide variety of rights as fundamental without having determined reasons for these recognitions.[81] This has lead to a great deal of uncertainty about the effectiveness and meaning of these rights, as well as to confusion about their relationship to each other. Chalmers and Tomkins argue that in the absence of a clear logic, the circumstances when one will be preferred to the other are completely unclear.[82]

4.3.4.1 Justification of a restriction by a right which lacks a common conception of Member States

As held above, the Court left no doubt that the justification of a restrictive measure by concerns of human dignity does not depend on a common conception of Member States. *Schindler* should thus be interpreted in a way that restrictions imposed under the public policy provision are to be reviewed "in casu" and thus do not need to be shared by all Member States. This interpretation is also supported by well-established case law subsequent to Schindler.[83] In a recent case, *Dynamic*[84], the Court made a reference to the ruling in *Schmidberger* and *Omega*. The case concerns the censorship and classification of videos and DVDs sold by mail order and over the internet. More specifically, a German court asked the Court of Justice whether the principle of free movement of goods precluded the German law prohibiting the sale by mail order of DVDs and videos that are not labelled as having been vetted by the German authorities as to their suitability for young people. The Court begun by suggesting that the protection of children is a human right and thus protected as a general principle of Community law.[85] As stated in *Schmidberger*, such a legitimate interest does, in principle, justify a restriction on a fundamental freedom. Following precedent case law, however, such a restriction may be justified only if it is suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it.[86] It must thus fulfil the principle of proportionality. In *Dynamic,* the Court reaffirmed the ruling in *Omega* by stating that "…it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the

[80] Fetzer and Smith, "The uncertain limits of the European Court of Justice's authority: economic freedom versus human dignity", Columbia Journal of European Law 2004, at p. 445.
[81] Chalmers and Tomkins, *European Union Public Law*, Cambridge, 2007, at pp. 241-42.
[82] *Ibid*., p. 242.
[83] Case C-244/ 06 *Dynamic* [2008] ECR I-00000, Case C-124/97 *Läärä* [1999] ECR I-6067, para. 36, Case C-67/98 *Zenatti* [1999] ECR I-7289, para. 34, Case C-6/01 *Anomar and Others* [2003] ECR I-01039 para. 80.
[84] *Dynamic, supra* n. 83.
[85] *Ibid*., paras. 39-41.
[86] *Ibid*., para. 42.

child, referred to in paragraphs 39 to 42 of this judgment, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it.". Finally, the Court concluded that article 28 EC does not preclude the relevant national rules with the condition that the procedure is readily accessible, can be completed within a reasonable period and that a decision of refusal is open to challenge before the courts. According to the Court reasoning, it seemed as if the national regulations fulfilled these conditions.

The *Omega* judgment does not indicate any clear criteria that could set the limits for the protection of human dignity in Community law. The case has therefore been criticized for giving the Member State "carte blanche" to restrict fundamental freedoms in the name of human dignity.[87] In the light of *Omega*, it is possible to imagine a wide range of other economic activities that also may be considered as an affront to human dignity, for example, computer games and films containing violence or pornography, euthanasia and manipulation of human genes.[88] In the absence of Community regulations, it seems as if it is left to the discretion of the Member States to determine whether the protection of human dignity demands that these activities should be suppressed. However, this does not preclude the Court from examining whether the limits that generally apply to any public interest justification of a restrictive measure are respected. The Court held in *Omega* that, apart from the requirements of necessity and proportionality, the Member States are not free to pursue *economic interest* under the heading of human dignity. For example, it would be highly questionable for a Member State to justify a measure restricting a fundamental freedom by claiming that it served the purpose of maintaining a certain level of income of its citizens that is regarded as a material condition of human dignity.[89]

Another interesting question that arises concerning human dignity is whether it is even possible to justify a restriction of that right. Especially from a human rights perspective, it is hard to conceive of a situation where a weighing of conflicting interest would lead to the conclusion that the fundamental freedoms take precedence over the protection of human dignity.[90] Human dignity and its role in Community law is a subject that deserves further examination, however, it is not possible within the frame of this thesis.

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[87] Bröhmer, "Case C-36/02", 15 Europäische Zeitschrift für Wirtschaftsrecht 2004, at p. 756.
[88] See Ackermann, *supra* n. 77 pp. 1116-17 for a further discussion.
[89] *Ibid*., p. 1117.
[90] I*b*id., p. 1119.

4.4 Viking Line and Laval – Balancing social rights with fundamental freedoms

4.5 Introductory remarks

In the recent Grand Chamber cases of *Viking Line* and *Laval*, workers unions' rights came into conflict with the free movement provisions. Thus, the Court had to balance fundamental freedoms with fundamental social rights. The question can be raised whether a social right can be balanced in the same way as a traditional civil or political fundamental right. Do they play at the same normative level in Community law? Without trying to determine their exact place and status in the Union, I would say that this is the case. The conclusion can be drawn from the EU Treaty[91], the case law of the Court[92], and communications from the Commission[93]. *Viking Line* and *Laval* show that the delicate matter of how to balance social policy objectives with economic freedoms have become more apparent than ever in the EU. The Union's extensive enlargement in 2004 has created tensions on the internal market. The reason for this is that most new Member States have a labour market with considerate lower wages than many of the old Member States. This tension is the underlying factor in *Viking Line* and *Laval*.

4.5.1 Background and facts

In *Viking Line*, a Finnish ferry company, owned the Rosella, a Finnished-flagged ferry operating between Tallin and Helsinki. It was crewed by members of the Finnish Seamen's Union (FSU) which was affiliated to the International Transport Workers' federation (ITF). In October 2003, Viking Line sought to re-flag the loss-making Rosella to Estonia so it would be able to employ an Estonian crew and thereby paying lower wages. The proposal was opposed by the FSU and the ITF, which prevented the Viking Line from dealing with an Estonian Union. In August 2004, shortly after Estonia became an EU Member State, Viking Line brought the matter before a court in England where the ITF is based. Viking Line asked for an order to stop the ITF and the FSU from taking any action to prevent the re-flagging of the Rosella since it constituted a restriction on the freedom of movement. An English Court of Appeal referred a number of questions to the ECJ for a preliminary ruling concerning the application of the Treaty rules on freedom of establishment and whether the actions of the FSU and ITF constituted a restriction on freedom of movement.

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[91] The preamble (recital 4) to the TEU that makes reference to the European Social Charter from 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers.
[92] *Viking Line, supra n. 7*, *Laval, supra* n. 8.
[93] Com (97) 2001-210 Final.

Laval concerned a Latvian company, Laval un Partneri Ltd, which posted workers from Latvia to work on building sites in Sweden. The work was carried out by a subsidiary, L&P Baltic Bygg AB, and included the renovation and extension of school premises in the town of Waxholm. In June 2004, Laval and Baltic Bygg AB, on the one hand, and the Swedish building and public works trade union, Svenska Byggnadsarbetareförbundet, on the other, began negotiations with a view to determine the rates of pay for the posted workers and to have Laval to sign the collective agreement for the building sector. The parties were, however, unable to reach an agreement. Instead, Laval signed collective agreements with the Latvian building sector trade union, to which 65% of the posted workers were affiliated. Byggnadsförbundet then took collective action in the form of a blockade of all Lavals' sites in Sweden. The Swedish electricians' trade union joined in with a sympathy action. None of the members of those trade unions were employed by Laval. The work stopped, and after a certain period, Baltic Bygg was declared bankrupt and the posted workers returned to Latvia. Laval brought proceedings before a Swedish court, Arbetsdomstolen, for a declaration as to the lawfulness of the collective action and for compensation for the damage suffered. Arbetsdomstolen turned to the ECJ and asked if Community law precludes trade unions from taking collective action in the situation at hand.

4.5.2 The AG's opinions and judgments of the Court

In both cases, the Court confirmed the opinions of AG Maduro in *Viking Line* and AG Mengozzi in *Laval* who stated that the right of a trade union to take collective action is a fundamental right. It was the first time that the ECJ had to examine the right to take collective action, and through the reading of various sources, the conclusion was thus that it was of fundamental character. References were made to the ECHR, the EU Charter of Fundamental Rights, the European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers.[94] Since this right seemed to be in direct conflict with the free movement provisions, it seemed to be necessary to strike a fair balance between these two fundamental interests.

AG Maduro in *Viking Line*, after stating the fundamental character of the right to collective action, formulated the key question as to what ends collective action may be used and how far it may go. He continued this reasoning by stating that "This touches upon a major challenge for the Community and its Member States: to look after those workers who are harmed as a consequence of the operation of the common market, while at the same time securing the overall benefits from intra-Community trade."[95]

[94] AG Mengozzi in *Laval, supra* n. 8, paras. 71-76.
[95] AG Maduro in *Viking Line, supra* n. 7, para. 60.

His conclusion was that Article 43 EC does not preclude trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State in order to protect the workers of that undertaking. The AG then left it to the national court to determine whether the action taken was lawful in the light of the applicable domestic rules, provided that cases of intra-Community relocation were not treated less favourably than cases of relocation within the national borders.[96]

In *Laval*, AG Mengozzi held that the collective action taken must be proportionate to the legitimate aims of protecting workers and combating social dumping.[97] Furthermore, the collective agreement conditioned by the trade unions had to be in conformity with Article 3(10) of Directive 96/71 on the posting of workers. To pass the proportionality test, it must involve a real advantage significantly contributing to the social protection of posted workers and not constitute essentially comparable protection available to those workers under the legislation or the collective agreement applicable to the service provider in the Member State in which it is established.[98] These were in essence the guidelines given to the national court to solve the issue.

The Court handed *Viking Line* on the 11 of December 2007 and *Laval* only one week later. As held above, both of them were Grand Chamber decisions. How would the Court balance the two fundamental interests in question? The rulings were considered to have great importance since they would set the standard for coming clashes caused by the different level of wages between old and new Member States.

In *Viking Line*, the Court held that the right to collective action is a fundamental right. It then stated that the actions taken by the unions constituted a restriction of the freedom of establishment. Finally, the Court examined whether the restriction was justified. The action taken by the unions had to be suitable for the achievement of the objective pursued and not go beyond what is necessary to attain the legitimate objective. Thus, the restriction had to be proportionate in attaining the legitimate objective of protection of workers.[99] The Court pointed out that the aim could not be considered legitimate if it was established that the jobs or conditions of employment at issue were not jeopardised or under serious threat. It was then left to the national court to determine whether the restriction was proportionate.[100]

In *Laval* the Court started by examining the possibilities available to the Member States for determining the terms and conditions of employment applicable to posted workers. It held that the directive 96/71 on the posting of workers does not allow the Member State to make the provision of

[96] AG Maduro *Viking Line, supra* n. 7*,* para. 73(3).
[97] AG Mengozzi *Laval, supra* n. 8, para. 309.
[98] *Ibid*., para. 310.
[99] Viking Line, supra n. 7, para. 84.
[100] *Ibid*., para. 84.

services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection.[101] Similarly as in *Viking Line*, the Court held that the right to take collective action is to be recognized as a fundamental right.[102] It continued by stating that the restriction of the freedom to provide services caused by the collective action must be proportionate.[103] It is after that statement that the judgment differs considerably from that of AG Mengozzi's opinion. Instead of giving general guidelines to the national court, the Court was much more precise in its judgment concerning the proportionality of the collective action taken.[104] It held that "…collective action such at that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 (protection of workers) of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay."[105] Thus, having in mind the facts of the case, it seems impossible for the national court to not rule in favour of Laval.

After declaring the right to take collective action as a fundamental right, the Court held that the protection of such a right is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty.[106] Thus, the Court followed the reasoning in *Schmidberger* and *Omega*. It continued this reasoning in stating that since the right to take collective action does not fall outside the scope of the provisions of the Treaty, it is necessary to reconcile this right with the requirements relating to rights protected under the treaty and in accordance with the principle of proportionality.[107] In both cases, the defending parties invoked that the right to strike falls outside the scoop of the free movement provisions with the support of Article 137 EC. The Court dismissed that argument by saying that Member States must exercise its competence consistently with Community law even in the areas in which the Community does not have competence.[108]

In *Viking Line*, the trade unions submitted that the reasoning in *Albany* must be applied by analogy to the case. In that case, the Court held that agreements concluded in the context of collective negotiations between management and labour in pursuit to adopt measures for protection of workers must, by virtue of their nature and purpose, be regarded as falling

[101] *Laval, supra n. 8* para. 80.
[102] *Ibid*., para. 91.
[103] *Ibid*., para. 101.
[104] *Ibid*., paras. 108-111.
[105] *Ibid*., para. 110.
[106] *Viking Line, supra n. 7,* para. 44, *Laval, supra n. 8* para. 93.
[107] *Viking Line, supra n. 7,* para. 46, *Laval, supra n. 8* para. 94.
[108] Viking Line, supra n. 7, para. 40, *Laval, supra n. 8* para. 87.

outside the scoop of Article 85(1) of the Treaty. The Court, however, held that that reasoning could not be applied in the context of fundamental freedoms.[109]

After establishing the restriction of a free movement provision, the Court held that that restriction must be proportionate in its pursuit of a legitimate interest.[110] In that regard, the Court pointed out that the Community's social protection dimension laid down in Article 3(1)(c) and (j), Article 2 and Article 136 must not be neglected.[111] Hence, the internal market characterised by the abolition of obstacles to the free movement must be balanced against the objectives of social policy, which includes improved living and working conditions establishing proper social protection and dialogue between management and labour. As held above, the Court left guidelines to the national court in *Viking Line*, whereas in *Laval* it went further and held that the restriction of free movement was not proportionate in the actual case.[112]

4.6 The flexible application of the proportionality test by the ECJ

4.6.1 Schmidberger

I have now examined four cases more closely where fundamental rights came into direct conflict with fundamental freedoms. The general approach for dealing with this kind of conflict was set in *Schmidberger* and upheld in the subsequent cases. Since a fundamental right is capable of restricting a fundamental freedom and vice versa, it is necessary to strike a fair balance between these two interests. That balance is struck employing the principle of proportionality. As we have seen, it is the third step of the proportionality test, namely *proportionality stricto sensu,* that involves the pure balancing of interests. It seems as if the Court reached that part of the test in *Schmidberger* whereas in *Omega*, *Viking Line* and *Laval* it settled the issue before reaching the point of *proportionality stricto sensu*. As mentioned above, it is not unusual that the proportionality test is used in a very flexible manner. Thus, it should not come as a surprise that the Court's approach is somewhat different concerning the proportionality test in the relevant cases. In *Schmidberger*, the Court held that the interests involved must be weighed having regard to all the circumstances of the case to determine whether a fair balance was struck.[113] The proportionality principle was thus explicitly formulated as an obligation to balance interests. There are only a few examples of the Court's decisions where the principle has been formulated in that way. *Stoke-on-Trent,* which concerned the English Sunday trading

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[109] *Viking Line, supra n. 7,* para., 51.
[110] *Viking Line, supra n. 7,* para. 84, *Laval, supra* n. 8*,* para. 101.
[111] *Viking* para. 78, *Laval, supra* n. 8, para. 104.
[112] *Viking Line, supra n. 7,* paras. 85-90, *Laval, supra* n. 8, paras. 108-111.
[113] *Schmidberger, supra* n. 5, para. 81.

legislation, is one of them.[114] In that case, the Court balanced the interest of employee protection against that of free movement of goods. It held that "Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods".[115]

4.6.2 Omega

In *Omega*, the Court applied proportionality differently than in Schmidberger. Despite its reference to proportionality, the Court did not actually go on to discuss the appropriate balance between the protection of human dignity and the freedom to provide services. Instead, it emphasized the fact that the restrictions on the particular service were not excessive, and the language of the judgment implies deference to the extent of protection for human dignity provided for under the German constitution.[116] The absence of an explicit balancing approach suggested that the fundamental right had primacy over the fundamental freedom. Consequently, *Omega* implies that the invocation of human dignity as a genuine public policy ground of restriction is to be accorded greater deference than some other fundamental rights[117]. In that regard it should be pointed out that even though the Court declared in *Schmidberger* that the Member States have a wide margin of discretion in striking this balance, it nevertheless went on to suggest quite a strict "no less restrictive means" test for determining the legitimacy of the Austrian authorities' actions in protecting freedom of speech and assembly.[118]

4.6.3 Viking Line and Laval

How was the proportionality applied in the cases of *Viking Line* and *Laval*, which concerned trade union rights? To begin, the Court did not reach the third step of the proportionality test, *the proportionality stricto sensu*. In *Viking Line*, the Court left it to the national Court to apply the proportionality test whereas in *Laval*, the Court itself applied the proportionality test and held that the restriction was not proportionate. One difference from *Schmidberger* is that the dispute in these two cases was between two private parties. It has been argued that this have an effect when applying the proportionality test since the margin of discretion afforded to

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[114] *Stoke-on-Trent, supra* n. 38.
[115] Ibid., para. 15.
[116] *Omega, supra n. 6,* para. 39.
[117] De Búrca, "The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (IV): The role of the European Court of Justice in balancing economi freedoms and fundamental rights", REFGOV-FR-8. Available at: http://refgov.cpdr.ucl.ac.be/?go=publications (visited 20 May 2008), at p. 7.
[118] *Schmidberger, supra n. 5,* paras. 92-93.

the state in *Schmidberger* and *Omega* is difficult to apply to private parties.[119] Commenting *Viking Line*, Bercusson argues that it is a risk in attempting to balance what are essentially opposing economic interests of trade unions and employers. The argument is that the right to strike is inextricably linked to the collective bargaining process and must be assessed in the context of that process. It is not suitable to apply a test of proportionality to the demands made by the trade unions in that process. Bercusson points out that the "courts in the Member States, very sensibly, have been extremely cautious in invoking any test of proportionality as regards the right to strike".[120]

In the light of the similarities of *Viking Line* and *Laval*, the question could be raised why the Court applied the proportionality test in Laval whereas in *Viking Line* it left it to the national court to carry out the test. In *Viking Line*, the actions of FSU and ITF were directed only against one part of the business of Viking Line, namely the re-flagging of the ferry. That is a difference from *Laval*, where the unions were less specific. In that case, there was a lack of sufficiently precise and accessible provisions, which rendered it excessively difficult in practise for Laval to determine the obligations that needed to be fulfilled.[121] Having held that, the Court simply refused to give any possibility to the national court than to declare the collective actions taken by the trade unions as unlawful.

As held above, the Court did not seem to apply the third part of the proportionality test, *the proportionality stricto sensu*, in *Viking Line* and *Laval*. Hence, there was no explicit balance of interest as in *Schmidberger*. Had this point of the proportionality test been reached, it is likely that the Court had followed a similar reasoning as in *Schmidberger* where it held that the interests involved must be weighed having regard to all the facts of the case and that the competent authorities enjoy a wide margin of appreciation in that regard.[122] One difference from *Schmidberger* concerned the aim of the respective demonstration. In that case, the demonstration seemed to have a purely political aim whereas the collective actions undertaken in *Viking Line* and *Laval* ought to be labelled as not only political but also economical. Even though the Court held in *Schmidberger* that the aim of the demonstration was not important, it is possible that the different aims were an important reason to why it awarded less margin of discretion to the national courts in *Viking Line* and *Laval* than in *Schmidberger*. One can imagine that, in general, a collective action taken by a trade union, constitute a greater obstacle to the free movement than a purely political demonstration. A political demonstration is typically limited in time and directed towards a political institution whereas a collective action normally is less limited in timed and directed towards an economical,

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[119] Bercusson, "The Trade Union Movement and the European Union: Judgment Day", ELJ 2007, at p. 304.
[120] *Ibid*.
[121] Reich, "Free movement vs. social rights in an enlarged Union – the *Laval* and *Viking* cases before the ECJ", GLJ 2008, at p. 22.
[122] *Schmidberger, supra n. 5,* paras. 81-82.

often private, interest. Therefore, a collective action undertaken by a trade union could be regarded as a considerate threat to the free movement in the EU.

5 The EU Charter of Fundamental Rights

5.1 The impact of the EUCFR on the balance between fundamental rights and fundamental freedoms

Following the ratification of the Lisbon Treaty, the EU Charter of Fundamental Rights will acquire binding force. What impact will this development have on the balance between fundamental rights and fundamental freedoms in Community law? To begin, there is considerate uncertainty of the effect that the Charter will have on Community law. According to Maduro, the Charter reflects two opposing perspectives: for some, it reinforces limits on the power of the EU and reasserts the control of states; while for others, the Charter is the starting point of a "truly constitutional deliberative process and the construction of a European political identity".[123] The EUCFR consist of 54 articles divided in to seven chapters. The first six chapters contain substantial fundamental rights provision, and the final chapter contains the general clauses which relate to the scope and applicability of the Charter. It embodies civil and political rights, economical and social rights and rights of the third generation.

The aim of the Charter was to consolidate and render visible the EU's existing fundamental rights protection rather than create anything new. Making fundamental rights more visible to the European citizen is surely an important tool for enhancing the legitimacy of the European Union. Consequently, the Charter should not and did not provide for any new rights.[124] Nevertheless, two countries, United Kingdom and Poland, have opted out the Charter of concern that the ECJ could use the document to impose certain rights in their country. Thus, there are Member States that are concerned that the Charter will impose new obligations on them. The EUCFR will acquire binding force following the adoption of the Lisbon Treaty.

Maduro sees the Charter's potential related to the impact that it might have on the balance between economic freedom and social rights within the EU Constitutional framework.[125] Menendez, similar to Maduro, argues that "the Charter furthers the development of a more articulated system of fundamental rights, encouraging a *rebalancing* of different goals of

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[123] Maduro, "The Double Constitutional Life of the Charter", in Eriksen, Fossum and Menendez, *The European Charter of Fundamental Rights*, Baden-Baden, 2003, at pp. 282-283.
[124] Lord Goldsmith, "A Charter of Rights, Freedom and Principles", CMLRev. 2001, pp.1201-1216, at pp. 1207-1209.
[125] Lindfeldt supra n.18, at p. 203.

European integration".[126] He continues by stating that the social rights included in the charter under the heading of "Solidarity" could be used as an argument for claiming exceptions to the four freedoms in order to actively promote goals of economic and social rights. Hence, in the doctrine one can find different positions as to the potential of the Charter to affect the balance between fundamental rights and fundamental freedoms.

It has been argued in the doctrine that fundamental freedoms are treated as the basic "grundnorm" and that fundamental rights is seen only as a possible exception to that norm, suggesting that there is a kind of hierarchy between these two fundamental interests.[127] However, it is argued that the incorporation of the EUCFR might very well contribute to a situation in which fundamental freedoms and fundamental rights are truly ranked at the same level where a balancing exercise takes place.[128] Fundamental rights should not be seen as an obstacle to the fundamental freedoms but they should be seen rather as two values that need to be preserved equally without one value being sacrificed to the other. The very fact that the Charter includes both economic freedoms[129] and other, non-market, fundamental rights, implies the need for such a non-hierarchical approach, without any relationship of priority between the two sets of rights and freedoms.[130]

Morijn suggest that, in light of the Charter, the aim of the particular demonstration in Schmidberger will have to become relevant in Union law. The argument is that when assessing the facts of Schmidberger in light of the specific wording of the Charter the fundamental rights invocation by the Austrian state will no longer be a derogation from Union law but rather as an act inherent in its implementation. Moreover, Morijn points out the great significance that the addressee of the demonstration was, at least in part, the EC itself. Therefore it is logically incumbent upon Union law to assess the demonstration.[131] De Búrca has commented such situations by saying that "It can be argued that the [fundamental] rights tensions or problems which have been created or contributed by the EU's market integration project, place an onus on the EU to develop policies to remedy or redress them".[132]

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[126] Menendez, "'Rights to Solidarity' balancing Solidarity and Economic Freedoms", in *The Chartering of Europe, the European charter of fundamental rights and its constitutional implications*, Eriksen and Fossum, Baden-Baden, 2003, p. 192.
[127] Lindfeldt p 216.
[128] Lindfeldt p 216.
[129] In particular, Article 15 of the Charter recognizes the freedom of every citizen of the Union to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. And Article 16 that recognizes the freedom to conduct a business.
[130] De Schutter, "The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination", Jean Monet Working Paper Series 07/04. Available at: http://www.jeanmonnetprogram.org/papers/04/040701.pdf (visited 20 May 2008), at p. 39. See also Lindfeldt supra n.18, at p. 221.
[131] Morijn, *supra* n. 56, at p. 31.
[132] De Búrca, "Convergence and divergence in European public law: the case of human rights", in Beaumont, Lyons and Walker, *Convergence and divergence in European public law*, Hart Publishing, 2002, at p. 131.

6 Concluding remarks

An attempt was made in the preceding chapters to show how the balance has been struck between fundamental rights and fundamental freedoms in situations where these two interests oppose each other. For a greater understanding of this process, I have included a chapter with general information about fundamental rights and fundamental freedoms and a chapter on the proportionality principle. The issue of balancing fundamental rights and fundamental freedoms is highly relevant in the light of a constantly increasing area of competence for the ECJ and an ongoing development of human rights in the Member State and in the Union. One shall also have in mind the Union's recent enlargement in 2004 and 2007 and the tensions that that has created on the internal market between the new and the old Member States. This is especially true in the field of social rights. *Viking Line* and *Laval* are examples of possible conflicts that can arise when the level of wages differs considerably between two Member States. It is probable that we will see more of these kinds of conflicts in the future.

One can distinguish different approaches from the Court in the four examined cases where fundamental rights and fundamental freedoms came into direct conflict with each other. Rather than a uniform approach, the Court applies a nuanced case-by-case analysis. In *Schmidberger*, where the freedom of expression and assembly where in question, the Court attributed a wide margin of discretion to the Member State but then made a thoroughly examination of all the relevant facts of the case and applied the proportionality test. The Court explicitly formulated the proportionality principle as an obligation to balance interests, i.e. proportionality in its strict sense. In *Omega*, the Court had a different approach. It did not actually go on to discuss the appropriate balance between the protection of human dignity and the fundamental freedom provision. Instead, it emphasised the fact that the restrictions on the particular service were not excessive. In *Viking Line* and *Laval*, similarly as in *Omega*, the Court did not undertake an explicit balancing of interest. The Court did not go further than that it stated that the protection of fundamental rights must be reconciled with fundamental freedoms and in accordance with the proportionality principle.[133]

There seems to be a number of different reasons to why the approach of the Court was different in these cases. To begin, it appears as if the type of fundamental right at stake is of considerable importance in these situations. In *Schmidberger*, where the freedom of expression and assembly were at stake, the court formulated the proportionality principle as an explicit balancing of interest. It was not willing to follow the same approach in

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[133] *Viking Line, supra* n. 7, *Laval, supra* n. 8.

Omega, where the human rights invoked was human dignity. The Court readily accepted the German conception of human dignity even though it was not shared by other Member States, thus suggesting that that fundamental right is to be accorded greater deference than the fundamental rights invoked in *Schmidberger*. The conclusion can be drawn that where an important general principle like human dignity is at stake, it is for the individual Member State to protect it as they see fit, even if they do so to differing degrees and in different ways, so long as their restrictions on EC trade do not exceed what is necessary to protect human dignity as their legal system understands it.[134] Admittedly, it ought to be difficult to motivate a restriction of such a universal basic value as human dignity.

In *Schmidberger*, the Court held "that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger". As held above, this approach has been questioned and criticised. As we have seen in *Viking Line* and *Laval* where the right to take collective action were at stake, the aim of the actions were considered essential for deciding the case. A reason for that may be that trade union rights are considered as being "weaker" than those that protect "purely" political demonstrations. Moreover, the collective actions taken in *Viking Line* and *Laval* could be seen as not only political but also as having an economical aim. It can be argued that fundamental rights with a clear economical dimension is attributed less weight in a balance with fundamental freedoms than more traditional political fundamental rights. Having in mind the Court's case-by-case analysis in these situations, one could argue that the Court saw a greater threat for the internal market as regards the exercise of trade unions rights to take collective action than the political demonstration held in *Schmidberger*.

It will be interesting to see if a binding Charter of Fundamental Rights will have any impact on the balance of fundamental rights and fundamental freedoms in the EU. And if that is the case, what kind of impact it will have. Even though that the Charter was not meant to create any new rights but merely illuminate the existing ones, it has been argued that it encourage a rebalancing of different goals in the Union. Social and economical rights could gain a more prominent place in the balance with fundamental freedoms.[135] I agree that this is one possible development, however, it is far from being certain. One can also imagine the opposite. The Court has always well protected the four fundamental freedoms since they are the very core of the internal market and it is not likely that it will reduce this protection. With an ever growing number of Member State, there will be increasing pressures and tension on the internal market which could have the effect that the Court will see more strictly on fundamental rights argument invoked by the Member State as a limitation of the free movement. Moreover, the binding Charter could make the ECJ more confident when balancing fundamental rights and fundamental freedoms and thus more boldly dismiss a fundamental right argument invoked by a

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[134] De Búrca, *supra* n. 117, at p. 7.
[135] Menendez, supra n. 126, at p. 192.

Member State. However, the recent case of *Dynamic* confirms the ruling in *Omega* that a Member State's conception of a fundamental right does not need to be shared by all Member States, thus leaving a definite margin of discretion to the Member States.[136] The ruling reinforces the protection of fundamental rights invoked by Member States, which will have an effect when balancing fundamental rights and fundamental freedoms. The most probable development ought to be that fundamental rights will acquire a more important position in these balancing situations. However, as argued above, it is a possibility that a binding Charter could make the Court less reluctant to accept the individual conceptions of the Member States. It will certainly be interesting to see what impact the EUCFR will have on the balance between fundamental rights and fundamental freedoms in the EU.

[136] *Dynamic*, *supra* n. 83.

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