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“The economic freedoms and social rights within
the EU – a study of the transformation and
interplay between these two interests”

JAEM01 Master Thesis

European Business Law
15 higher education credits

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Term: Spring 2013

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Abbreviations

AG	Advocate General
ATS	Austrian Schilling
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EC Treaty	The Treaty Establishing the European Community
EEC Treaty	European Economic Community Treaty
EU	European Union
GPEU	General Principles of the European Union
IP	Intellectual Property
TEC	Treaty on the European Community
TFEU	Treaty on the Functioning of European Union
TEU	Treaty on European Union
TOA	Treaty of Amsterdam
TOL	Treaty of Lisbon
TOM	Treaty of Maastricht
TOR	Treaty of Rome

Summary

The first chapter of this thesis will examine the origins of two interests of the EU, the economic freedoms and the social rights. It shall be noted that the social rights and economic freedoms are hereinafter referred to as interests of the EU, however, the European Union (EU) as an institution is certainly keeping further objectives as interests to obtain, foremost the peace between the Member States. The thesis shall further provide for the birth of the two interests through providing for relevant legislation. The economic purpose was initiated with the commencement of the union and already incorporated as an aim and objective of the union following the Second World War in 1951 with the TOP. It was later emphasised with its actual status of being the internal market freedoms, through the European Economic Community Treaty (EEC Treaty) and the Treaty of Rome (TOR) in 1957. The social fundamental rights were, as aforementioned, distinguished as being general principles with the ECHR during the same decade; however the status has changed over time, and this to a greater, more compressed extent than that of the economic freedoms.

Following sections shall provide for definitions of what the two interests actually are; the economic freedoms are referring to fundamental freedoms and the free movement of persons, capital, goods and services. This is commonly referred to as the economic freedoms as it, in this thesis, is contrasted with the social rights, the latter holding a purpose referring more to the human right than the economic such. The social rights are fundamental rights and those the human citizen of the Member States of the EU holds in order for them to enjoy a life according to an absolute minimum standard.

Furthermore, the subsequent chapter comes to deal with the current sources of the two interests and holds that the economic freedoms are to be found in and defined through the Treaty on the Functioning of European Union (TFEU) and the Treaty on European Union (TEU) and similarly to the social rights, also in the Court of Justice of the European Union (CJEU) judgments; case law. Social rights are for most EU Member States to be found in the Charter of Fundamental Rights of the

European Union (CFREU), and for those countries claiming an opt out to this protocol; the fundamental rights are to be found under the ECHR. Finally, social rights additionally are considered fundamental rights thus are found under the General Principles of the European Union (GPEU). Both interests are together enjoying the status of being primary sources of EU legislation due to the sources in which they are to be found.

The two interests has come to see a development in standing and position within the EU; before its current equal weight the economic freedoms held a somewhat more significant importance within the EU. The following sections deals with the transformation of the two interests, how it came about and why it seemed to have happened when it did. This section is existent due to the following section, in order to understand the gone through by the CJEU in current case law, one shall find the importance in educating oneself thoroughly in the previous events leading up to and perhaps causing the current view of the judges and the legislation. Thus, this heading will foremost provide for an of the more apparent transformation of the social rights and its development; through the Treaty of Lisbon (TOL) and additionally with the CFREU. Nonetheless, the development in the economic sphere with the change in status through the citizen's directive shall indeed also be accentuated.

The next chapter shall enhance the actual meeting of the two interests through the judgement and case Schmidberger. The case concerns the conflict between the social fundamental right to assembly and expression balanced against the economic fundamental freedom of movement of goods. The case before the CJEU had not been witnessed earlier to this extent, as the similarities in the value of the presentation of the two interests came to constitute a conflict. In the Schmidberger case the CJEU resorted to the proportionality test as distinguished by T. Tridimas; a test based on establishing whether one can justify the restriction of one interest through the necessity of achieving the other.

Subsequent chapters will bring light to the CJEU judgements that came to follow the Schmidberger judgement, starting with Omega, concerning the conflict between the social right of human dignity balanced against the freedom of

movement of goods and services. This was the first recognised case after Schmidberger as the CJEU came to adopt the proportionality test in order to make certain an existing balance before judging in favour of either interest. Omega was followed by Viking Line where the CJEU established that the proportionality test was for the national courts of the Member States to decide. Laval, similarly to Viking Line concerned the right of collective action contra the freedom of establishment, here however, the proportionality test was not carried out to the full. The two last cases analysed are Promusicae and Scarlet Extended, concerning the right to protection of data balanced with the freedom to conduct business and right to intellectual property.

Following disagreements and speculations since the Omega up until Scarlet Extended, it was argued that leaving the discretion to the Member States may result in consequences harming the harmonisation, and worse, the Supremacy of EU law, should the correct instructions by the EU not be followed. It can be concluded that there still is a notion of uncertainty as regards this area, despite the fact that the CJEU seems to have decided its measures to deal with the said conflict.

Preface

Following a bachelor's degree in commercial law, undertaken and completed in the United Kingdom, I decided to broaden my knowledge of European Business Law at the University of Lund in Sweden. At a first glance of the programme I found the constitutional EU law course particularly interesting, a notion not changing after having commenced in late August 2012. Here I was familiarised with the topic chosen for this master thesis and I appreciated the angle that our course leader Xavier Groussot had decided to present this material by. After some thorough research I realised that the conflict itself between the two interests caught my attention and with great help of my supervisor Sanja Bogojevic I can finally present my 15p master thesis. I sincerely hope that you will enjoy your reading as much as I have enjoyed my writing.

May 2013

Julia Andersson

Purpose and delimitation

This thesis shall seek to scrutinise the transformation but also current interplay between EU economic freedoms and social rights when met, foremost through CJEU judgements. These rights and freedoms will be referred to as interests for the purpose of this thesis. In order to do so it shall in the first chapter provide for information necessary for the readers understanding, such as definitions, origins and legislation linked to EU economic freedoms and social rights. This chapter however shall be limited in terms of any wider historic .

Furthermore, this thesis shall shed some, but limited, light to the expansion of the EU objectives; the economic freedoms formed its shape just after the birth of the Union, whereas the social rights came to develop and receive more attention several decades later, through the enforcement of the TOL. Despite the somewhat brief declaration of the abovementioned extended emphasis of objectives, this thesis shall omit to provide a deeper scrutiny as to whether economic freedoms today hold a stronger position than social rights within the EU.

In order for this thesis to promptly determine the interplay and conflict between the two interests when met, a thorough of relevant judgements of the CJEU shall be conducted. Finally, judgements analysed shall be; foremost Schmidberger, closely followed by Omega, Viking Line, Laval, Promisucæ and Scarlet extended. Limitations as regards judgements shall lie beyond the mere referral to other cases when analysing the six judgments mentioned.

1 Introduction

The EU has, from its formation to its current state of being a union, seen a constant development on many different levels and in many different aspects. The objectives of the EU, as found in the TFEU and foremost TEU¹ indicate, amongst other, the aim to sustain an internal market and to promote social justice.² The internal market being the ground for the interest of the economical fundamental freedoms, free movement of capital, persons, goods which was given emphasis already with the EEC Treaty in the late 1950's.³ The social justice was already incorporated in the ECHR with the Treaty of Amsterdam (TOA) and simultaneously given status of general principle; it has however not had its current central status for as long as the freedoms.⁴ This thesis shall firstly bring to light the transformation of the status of the two named interests; the economic freedoms and the social rights within the EU. However, it shall foremost provide for an of how the CJEU has dealt with the actual meeting of these two interests, the balancing of priority and measures used to establish a fair such followed by potential consequences, through examining relevant case law such as Schmidberger, Omega, Laval, Viking Line, Promusicae and Scarlet Extended⁵ and scholarly opinions. To start, however, it shall shortly provide for the origins of the interests.

¹ TEU Title 1, Article 1, TEU Article 3(3).

² *Id.*

³ J. Fairhurst, *Law of the European Union* (8th edition, Pearson Education Ltd 2010) pp. 3-33.

⁴ J. Fairhurst, *Law of the European Union* (8th edition, Pearson Education Ltd 2010) pp. 3-33.

⁵ Case C-112/00 Schmidberger [2003] ECR I-5659, Case C-36/02 Omega [2004] ECR I-9609, Case C-438/05 Viking Line [2007] ECR I-10779, Case C--341/05 Laval [2007] ECR I-11767, Case C-275/06 Promusicae [2008] ECR I-271 and Case C -70/10 Scarlet Extended [2011] ECDR 4.

2 The origins of economic freedoms and social rights

2.1 Introductory Remarks

This chapter shall seek to provide for general information on the accrument, legal definitions and sources of the economic fundamental freedoms and the social fundamental rights of the EU. The four freedoms; the movement of capital, persons, goods and establishment (hereinafter and commonly referred to as the economic freedoms) are one component of the two folded conflict where the social rights serve as the second. Economic freedoms are held to promote the internal market of the EU where free trade and movement configure to aid the mutual aims and objectives of the member states of the EU. Social rights advert to those serving to balance circumstances for the citizens of the EU, conditions that are considered essential for human beings to live their life in dignity.

2.2 The birth of the two interests

The EU as an institution has long seen a development of economic freedoms conjointly with a progress of forming its social and fundamental rights. Following the Second World War, in 1951, the European nations initiated the European Coal and Steel Community through the TOP, with the aim to promote peace through sharing objectives with regards to politics and economy.⁶ The community was in 1957 followed by the European Economic Community: based on the EEC Treaty and developed through the TOR with the idea to formulate a common market of economic interests.⁷ The EEC Treaty came to distinguish the task of the union to work towards a market promoting the four freedoms; the free movement of

⁶ J. Fairhurst, *Law of the European Union* (8th edition, Pearson Education Ltd 2010) pp. 3-33.

⁷ *Id.*

goods, persons, services and capital.⁸ In 1992, after years of refining aims and purposes of the union, the Treaty of Maastricht (TOM) formed what we today know as the European Union and the TEU. Moreover, following the subsequent enforcement of the TOL at the end of 2009, the EEC - the later the Treaty Establishing the European Community (EC Treaty) - was renamed into TFEU and the CFREU came into force seeking to serve as an initiative supporting social rights.⁹ The EU as an institution hold, as abovementioned, one of its main objectives to promote the peace between the Member States, however this being the union's interest doesn't necessarily place it on the same level as the two interests of social rights and economic freedoms hereinafter discussed. The objective of peace can be distinguished as the reason that the citizens of the EU hold their rights and freedoms, in order for the Member States and their citizens to peacefully be united through the EU.¹⁰

The TEU together with the TFEU provides for aims and objectives of the EU, as stated in TEU.¹¹ The objectives of the EU, in relation to social rights and economic freedoms, as provided in Article 3 (3) TEU declares that:

“The Union shall **establish an internal market**. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress (...). It shall combat social exclusion and discrimination, and shall **promote social justice and protection** (...).”¹²

The fact that the EU today through the TEU and TFEU has codified their aims to establish an internal market and promote social justice shows that these two interests are of high significance for the EU to maintain. It can be argued that the actual importance lies within the interplay between these interests when met, this

⁸ *Id.*

⁹ *Id.*

¹⁰ J. Fairhurst, *Law of the European Union* (8th edition, Pearson Education Ltd 2010) pp. 3-33.

¹¹ TEU Title 1, Article 1.

¹² *Ibid.* at Article 3(3).

however, shall be dealt with in chapter three and four.

2.3 Defining economic freedoms and its sources

In order to fully grasp the conflict that may occur when considering economic and social interests within the EU, it could be argued to be of importance to first define the concepts discussed. Further, after understanding the two prerogatives, there may in certain cases exist a distinction of whom these rights applies to. Moreover, having two interests conflicting with one another, a second matter may be brought to light: if one may justify the restriction of the other, how does their legal status then appear?

The TFEU, a source of primary legislation, has direct effect and together with all other EU Treaties, the CFREU and the GPEU, it may impose rights or obligations on individuals forcing it to be recognised by national courts and, indeed, the CJEU itself.¹³ In the TFEU, Article 26 states that the EU shall, in relation to the internal market, make certain the use of measures with the objective to establishing an internal market in accordance with the EU Treaties.¹⁴ It further describes that the internal market shall be an area lacking of borders where a free movement of persons, services, capital and goods shall be promoted. Finally, it gives the Council the responsibility to ensure, on the initiative of the Commission, a sustainable progress in respective areas.¹⁵ When considering Article 26 TFEU, it may be argued to be of importance to additionally review the impact that Article 114 may have.¹⁶ The article has as its aim to work towards the progression of harmonisation of the EU and is a codified source encouraging to the bodies of the EU to make certain that the member states contrastively work to ensure the efficiency of the internal market. The certain emphasis put on harmonisation, and a positive such, aims to create a uniform idea of what the internal market between the different national constitutions shall seek to rest

13 A. Kaczorowska, *European Union Law* (3rd edition, Routledge 2013) pp. 108-19.

14 TFEU, Article 26.

15 *Ibid.* at Title 1, Article 26.

16 *Ibid.* at Article 26, 114.

upon.¹⁷ The four freedoms are defined to be the free movement of persons, capital, goods and services, nonetheless, the EU citizen may also enjoy the right of establishment, referring to the right to pursue a career as self-employed or other business and employment related activities as distinguished in Chapter 2, Article 49.¹⁸

2.4 Defining social rights and its sources

With the development of the EU and reorganisation of its aims and objectives, the status of the citizen and its social fundamental rights has come to adopt different forms. When the EEC Treaty conjointly with the Euratom was outlined, there were no indications towards implementing neither fundamental nor social rights favouring the EU citizens status.¹⁹ Today, in accordance with Article 6 TEU, there are three express provisions providing for social rights, namely; the CFREU, the ECHR and the GPEU, the latter referring to rights holding the legal status of primary legislation such as the fundamental rights as distinguished in both CFERU and ECHR.²⁰ Furthermore, the EU has during the 21st century continued to develop agencies and mediators for the citizen's fundamental rights to be respected, amongst them is the EU Fundamental Rights Agency which foremost seeks to provide advice in order for the EU and member states to follow set out legislation.²¹

It could be argued of great importance to see to the individual member states and their specific relations relating to the social rights in order to retrieve a full understanding of how they would come to form a part of national law. However, it could be considered most efficient to view the CFREU as the main source of social rights prior to the ECHR for most member states, partly as the CFREU is

17 I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market* (1st edition, Edwar Elgar Publishing Lited 2013) pp. 1-28.

18 TFEU, Chapter 2, Article 49.

19 P. Craig, G. De Burca, *EU Law* (15th edition, Oxford University Press 2011) pp. 362-70.

20 *Id.*

21 EU Fundamental Rights Agency website, <http://fra.europa.eu/en/about-fra>

amongst other sources, stemming from the ECHR.²² Additionally, the CJEU has manifested its desire to consider the CFREU as its main source of law in its judgements.²³ Further, the CFREU, through the TOL, is held to carry the same legal status as the Treaties, as stated in Article 1(8) TOL.²⁴ However, for a member state to hold the obligation to observe the rights under the CFREU, the state must have agreed to the TOL in full, as is not the case with the Czech Republic, Poland and the United Kingdom, citizens of the opposing nations would consequently apply the social rights of the second and third sources mentioned when the matter has a distinguishable EU nature.²⁵ As one of the main keystones of social fundamental rights of the EU, the GPEU, considered primary legislation, were developed and referred to by CJEU.²⁶ The principles are partly to be found codified in EU legislation such as the EU Treaties or CFREU and are additionally serving as one of the EU sources of law. The fundamental right as a part of the GPEU explains the citizens' rights through the ECHR and subsequently the CFREU.²⁷

22 CFREU

23 Discussion document of the CJEU on accession of the EU to the ECHR, Luxembourg, 5 May 2010, para 2.

24 TOL, Article 1(8).

25 P. Craig, G. De Burca, *EU Law* (15th edition, Oxford University Press 2011) pp. 362-70.

26 T. Tridimas, *The General Principles of EU Law* (2nd edition, Oxford University Press 2006) pp. 1-38.

27 *Id.*

3 The transformation of economic freedoms and social rights

3.1 Introductory Remarks

My objective with this chapter has neither been to dissect in depth the historic background of these two interests, nor to investigate whether either of the two interests today holds any superiority above the other. It can be argued to, throughout time, these interests have not been separated with borders that are too definite, however, in order to correctly measure the conflict possibly occurring when the two interest meet, it ought to be of importance to understand the transformation in standing of these interests. The economic freedoms were founded to be a cornerstone of the EU long before its social rights reached equal status. The social rights of the EU can on the one hand be argued to have witnessed a more explosive and somewhat compressed development as the citizen of the EU today, as opposed to merely 4 years ago, may enjoy a protection of its social rights with the TOL and the incorporated CFREU. The economic freedoms on the other hand have indeed come to develop, this, however occurring over a longer span of time with less expeditious changes. Notwithstanding, with the Citizens Directive, the EU citizen can now enjoy a wider array of economic freedoms, and in particular its free movement within the internal market.

3.2 The Treaty of Lisbon and the motion of social rights

With the TOL in 2009, and its mandate of the CFREU to transform into its now binding form, the EU came to see further changes in the field of social rights. The TOL came along with the accession to the ECHR and together with the demand of a framework comprising of especially on the topic learned people, the new era demanded hired experts in the human rights sector to counsel the Fundamental

Rights Agency, Council Secretary General and to aid the Representatives of Foreign and Security Policy.²⁸ With the development and reorganisation following the TOL, public recognition were granted to judgements of the CJEU regarding fundamental rights, additionally, the approval of fundamental rights stemming from the ECHR as a source of EU legislation.²⁹

3.3 The Charter of Fundamental Rights of the EU

The CFREU is based around its 6 Chapters comprising of 54 Articles where human dignity, freedoms, equality, solidarity, citizens rights, justice and general provisions are being dealt with.³⁰ The Second Chapter provides for the freedoms such as right to protection of personal data, freedom of expression and information and freedom of assembly. These rights can be argued to be political rights, and they are adopted from the ECHR. This is the chapter where the distinction between the social right and economic freedom more commonly is to be found and come to conflict.³¹ In the cases defined in this thesis, chapter three and four, the conflicting meeting of social rights are commonly balanced against the economic freedom of movement of goods and freedom to provide services.³²

3.4 Free movement of workers

The social rights and the economic freedoms have both come to see development and transformation with the evolvments of the EU. It can be argued that these interests overlap in some areas and that there are not always clear distinctions between the two of them. The free movement of workers and, later persons, has

²⁸ P. Craig, G. De Burca, *EU Law* (15th edition, Oxford University Press 2011) pp. 480-82.

²⁹ *Id.*

³⁰ TFEU, Chapter 1.

³¹ *Ibid.* at Chapter 2.

³² Case C-112/00 Schmidberger [2003] ECR I-5659, Case C-36/02 Omega [2004] ECR I-9609, Case C-438/05 Viking Line [2007] ECR I-10779, Case C--341/05 Laval [2007] ECR I-11767, Case C-275/06 Promusicae [2008] ECR I-271 and Case C -70/10 Scarlet Extended [2011] ECDR 4.

been a vital component in the field for both economic and social interests in the EU.³³

When the TOR in 1957 first came to introduce the concept of free movement of workers, it could be argued to have been holding a rather economical angle in terms of objective, as it was narrowed down to benefitting merely the moving workers and economically active persons rather than EU citizens and persons in general.³⁴

Since April 2004 the Citizens Directive has together with the TFEU governed the area of law concerning the free movement of persons and now also non-economically active persons and unemployed persons can enjoy more freedoms.³⁵ Citizens Directive, Article 6 entitles the EU citizen to a right of residence in any other EU member state for a time period of up to three months, irrespective of whether the citizen is economically active or not.³⁶ Should the citizen seek to stay for a time period beyond the three months threshold, he or she must fulfil certain conditions provided for in the directive. One of these conditions rest upon the criteria of being just economically active, however, further approved categories are also citizens proving the possession of sufficient resources in addition to having a sickness insurance, and citizens to family members fulfilling the conditions.³⁷

³³ J. Fairhurst, *Law of the European Union* (7th edition, Pearson Education Limited 2010) pp. 370-75

³⁴ TOR, Article 48.

³⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.

³⁶ *Ibid* at Article 6.

³⁷ *Ibid* at Article 7.

4 The meeting of the prerogatives and the approach by the CJEU

4.1 Introductory Remarks

As the change in the positioning of the two interests came to develop over time and to see final arrangements with the commencement of the new millennium, the new judgements of the CJEU and its jurisprudence came to see a change. In 2003 the reasoning by the CJEU in the Austrian case Schmidberger³⁸ came to shape new initiatives though its questioning whether the disputed social rights or economic freedoms were to be favoured. The conflict itself was not of complete novelty since the case Commission v France³⁹ as argued had some distinct similarities, however, the assessment of the outcome – the balancing of the two interests measured against the proportionality principle had not been carried out similarly before.

³⁸ Case C-112/00 Schmidberger [2003] ECR I-5659

³⁹ Case C-265/95 Commission v France [1995] ECR I-6959

4.2 Schmidberger 2003

4.2.1 Facts

In June, 1998, an Austrian association working to protect the biosphere in the Alpine region sent a notifying letter to the Austrian government informing them that a demonstration was to be undertaken a month later.⁴⁰ This demonstration would result in the temporary closure of the A13 Brenner Motorway, a highly trafficked transport route spanning from Germany, through Austria to Italy. By this stage, the association had informed concerned parties and the Austrian authorities took the initiative not to ban the demonstration but omitted to consider whether it could infringe EU law.⁴¹

Due to the closure of the motorway, Schmidberger, an international vehicle transport company lost an estimation of Austrian Schilling (ATS) 140 000 as their lorries could not make use of the said transport route. Schmidberger brought forward a claim to the Austrian authorities seeking damages for its loss, arguing that its economic freedom; the movement of goods, was restricted as the authorities had failed to ban the demonstration. Furthermore, Austria was according to the claimant not able to justify the closing of the motorway with claiming the protesters social rights; right to freedoms of expression and assembly, consequently Austria was argued in breach of EU law. The claim was met by rejection on the grounds that the Austrian authorities had made certain the facts that the actors in Germany, Austria and Italy were properly informed of the ban and that the demonstration did not constitute in any traffic jams or similar. Following the national judgement, Schmidberger appealed, whereupon the question was referred to the CJEU for a preliminary ruling.⁴²

⁴⁰ Case C-112/00 Schmidberger [2003] ECR I-5659

⁴¹ *Id.*

⁴² *Id.*

4.2.2 Judgement

The main question referred for a preliminary ruling was whether the omission by Austrian authorities to ban the demonstration constituted in an unjustified restriction of the said economic freedom, and fundamental freedom of the EU, the free movement of goods, and foremost Article 34, 35 and 36 TFEU.⁴³ In the judgement, the CJEU referred to Article 36 TFEU⁴⁴ declaring that quantitative restrictions on imports and measures having equivalent effect, as in *Cassis de Dijon*⁴⁵, are prohibited between the EU member states. Further, that a quantitative restriction on exports and all measures having equivalent effect indeed too are prohibited. This, as settled in *Dassonville*⁴⁶ and effectively discussed in *Commission v France*,⁴⁷ was said to intentionally eliminate the free intra community trade as it, directly or indirectly, actually or potentially did not intend to eliminate internal barriers in the market of the EU. Consequently, the CJEU argued that it was the duty of the Member state to fulfil obligations required to respect economic freedoms, as cited from *Commission v France*.⁴⁸ Therefore, only if the failure to ban the demonstration be objectively justified, the CJEU would see that Austria had not breached EU rules in its actions.

In aiming to seek for a justification of the restriction, the desire by the Austrian authorities to consider and respect the social rights of the protesters, then derived from the ECHR, was apparent. For reference, the Austrian court further questioned whether the economic freedoms here prevailed of the social rights. The CJEU further mentioned that, as the fundamental social rights are forming an integral factor of the GPEU, it was indeed of high importance to consider the constitutional traditions of the Member State in relation to the ECHR, as distinguished in *Connolly v Commission*.⁴⁹ However as the Member States and the EU, in this matter concerning the protection of social rights, are both to respect and protect them, a valid objective was formed which justified the

⁴³ TFEU, Article 34, 35, 36. The original text of the judgement refers to Article 28, 29 and 36 TEC.

⁴⁴ TFEU, Article 30.

⁴⁵ Case C-120/78 *Rewe-Zentral AG* [1979] ECR 649

⁴⁶ Case C-8/74 *Procureur du Roi v Dassonville* [1974] ECR ECR 837

⁴⁷ Case C-265/95 *Commission v France* [1995] ECR I-6959

⁴⁸ *Id.*

⁴⁹ Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para 37.

restriction, consequently the CJEU held that the restriction of the freedom was proportionate to achieve the aim imposed by EU law.

4.2.3 Analysis

The CJEU raised the question of the importance to merge or balance the requirements of protection of fundamental right and freedoms, in particular the balance between the freedoms of expression and assembly and the free movement of goods.⁵⁰ The court distinguished firstly that the free movement of goods in certain circumstances may be subject to restrictions or for overriding requirements as regards to the interest of the public, as referred to in *Cassis de Dijon*.⁵¹ Secondly, the court pointed out that, as the freedom of expression and the freedoms of assembly, unlike the social right such as right to life or prohibition of torture, are not absolute, they may indeed together with the free movement of goods be restricted. Nonetheless, should these rights be restricted, it must be justified by a social need and be proportionate to the legitimate aim pursued, as referred to in both *Familiapress*⁵² and *Carpenter*.⁵³

The CJEU continued by declaring that in circumstances like these, a fair balance must be given between the two interests. More, it was emphasised that national authorities are to enjoy their margin of discretion, but with care, that is to say that each Member State may not need the same argument for a justification or restriction due to the many differences each Member State hold compared to the other.⁵⁴ However, in any case, it shall be of crucial importance of the Member State to thoroughly assess the proportionality of the restriction.

The preceding case, *Commission v France*,⁵⁵ was frequently referred to in the judgement of *Schmidberger* and the court made the distinction that where the protesters in the first case had as their purpose to restrict trade of goods and to

⁵⁰ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 77

⁵¹ Case C-120/78 *Rewe-Zentral AG* [1979] ECR 649

⁵² Case C-368/95 *Familiapress* [1997] ECR I-3689

⁵³ Case C-60/00 *Carpenter* [2002] ECR I-6279

⁵⁴ Gerry Facenna 'The fundamental rights jurisprudence of the european court of justice: protection for human rights within the European Union legal order' *The European Human Rights Law Review* (2004).

⁵⁵ Case C-265/95 *Commission v France* [1995] ECR I-6959

destroy those goods, the citizens in the second were merely exercising their fundamental rights by in public manifesting a public opinion. Lastly, it was distinguished that, would the Austrian authorities instead have banned the demonstration, they would have severely interfered with the fundamental rights of the citizens to collectively and calmly express their opinions to the public.

4.2.3 AG Jacobs on Schmidberger

According to Advocate General (AG) Jacobs opinion, there is a certain importance lying within the distinction between this case and previous but similar situations. AG Jacobs argue that this is the first case situation where a Member State of the EU used the essentiality to shelter the social rights to make valid a restriction on an economic freedom of the EU. He further claims that the reason as to why situations like these have rarely occurred may be due to the fact that economic freedoms normally are used on the basis of wider general interests such as public health, rather than to the protection of the individual's right. However, although AG Jacobs recognised the differences between *Commission v France*, he argued that the similarities were to be considered when measuring a potential justification.⁵⁶

Further, the Austrian authorities were argued to have committed a *prima facie* breach of Article 28 TFEU despite that the subject for the dispute was carried out by private individuals. Jacobs continued with stating his belief that cases similar to this inevitably will arise, arguing that fundamental social rights considerations recognised by the EU could be the base of the justification. When determining a justification in a case similar to this it should, in the AG's view,⁵⁷ be dealt with through two following steps to make certain the full accuracy in the judgement. The first step would be for the court to make certain whether the member state when considering the social right was working to fulfil a valid aim in the interest of the public, capable of justifying this economic freedom. The second step would be to consider whether the restriction could be held as proportionate in relation to

⁵⁶ Opinion of AG Jacobs delivered on 11 July 2002 in Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 85-118.

⁵⁷ *Ibid* at para 120-25.

the objective or aim pursued, consequently, he here agreed with the approach adopted by the CJEU.

AG Jacobs discussed in Schmidberger the potential consequences occurring when a Member State maliciously would use the justification method and promote its social rights with the mere aim to escape the obligation to admit to the economic freedoms. He drew an example where an EU Member State holding the discretion of protection against unfair trade antitrust or where the social rights to freedom of financial activities were misused in the same way. He continued to argue that due to these intentional misinterpretations of the tool, it could be difficult to make certain or prove the illegitimate objective of the Member State.⁵⁸

4.3 The novelty of Schmidberger

As opposed to the previously leading case on the topic, *Commission v France*,⁵⁹ the demonstration in Schmidberger⁶⁰ had some characteristics worth to note making the latter case touching disputed new grounds. Firstly, the reason as to why the economic freedom was restricted - the demonstration - was not only authorised by the Austrian government according to ruling legislation, but also only limited to a certain time span. This made the actual limitation of the economic freedom controlled and the fact that it was holding a more narrow restriction in terms of geographical size and actual seriousness can be argued to make the situations initially different. Furthermore, the actual matter for which the protesters were carrying out their demonstration was considered important for the public rather than, as in *Commission v France*, for purposes to solely to restrict the sale and movement of certain goods.⁶¹

Moreover, in Schmidberger the role played by the Austrian authorities were

⁵⁸ P. Moser, K. Sawyer, *Making Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice* (1st edition, Edward Elgar Publishing Limited 2008) pp. 57-67.

⁵⁹ Case C-265/95 *Commission v France* [1995] ECR I-6959

⁶⁰ Case C-112/00 *Schmidberger* [2003] ECR I-5659

⁶¹ *Id.*

considered of higher administrative standard as measures had been sought to in order to avoid any actual or potential disruptions in traffic.

Lastly, the CJEU argued that the demonstration in Schmidberger and how it was dealt with in general made clear the lack of intention to negatively affect intra-community trade streams, this, lastly made the realisation apparent that the Schmidberger case concerned an area not dealt with before.⁶²

4.4 Proportionality

Proportionality is currently a GPEU which is drawn from the German constitution and foremost developed and incorporated in EU law with the case *Internationale Handelsgesellschaft*.⁶³

Proportionality refers to the principle that the decisions made by the EU and its extended arms shall not go beyond the absolute necessary to fulfil the aims of the Treaties governing the EU. The principle has been thoroughly defined in many a judgement, *ex parte Fedesa*⁶⁴ however hold an updated definition of the theory:

“The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”⁶⁵

This extract explains a threefold test being, first whether the measure is suitable to achieve a legitimate objective; second, if the measure is necessary to achieve

⁶² C. Barnard, *The Substantive Law of the EU The four Freedoms* (2nd edition, Oxford University Press 2007) pp. 67-74.

⁶³ Case 11-70 *Internationale Handelsgesellschaft* [1970] ECR 1125

⁶⁴ Case C-331/88 *R v Minister of Agriculture, ex parte Fedesa* [1990] ECR I-4023

⁶⁵ *Ibid* at para 13.

this objective; third, if the measure comprise of an excessive product on the claimants interest.

Furthermore, proportionality as distinguished by T. Tridimas, constitutes instead of a twofold test assessing whether the restriction used is suitable and whether it is necessary for the aim to be achieved; is the answers yes, the restriction then may be considered proportionate.⁶⁶ Moreover, the proportionality test, be it two or three fold, may be considered useful in situations where the legality and the merits of measure on both national and EU level is of dubious nature and in need of being scrutinised. The proportionality test has been argued to be a more accurate and powerful tool, partly, as it due to its flexible nature may be used on different vertical levels in relation to various purposes.⁶⁷

⁶⁶ T. Tridimas, *The General Principles of EU Law* (2nd edition, Oxford University Press 2006) pp. 139-140.

⁶⁷ P. Craig, G. De Burca, *EU Law* (15th edition, Oxford University Press 2011) pp. 367-70.

5 Following Case law

5.1 Introductory Remarks

Following Schmidberger appeared situations before the CJEU where the act of balancing of the two interests turned into a subject inevitable to thoroughly dissect. In 2004 the Omega case concerning the conflict between the social right of human dignity contra the economic freedom of movement of goods and provision of services was the first case to follow the Schmidberger nature. The CJEU declared the restriction of the economic right by the social right justified through the proportionality principle and scholars expressed their fear of end to come to the supremacy of the EU.

Some three years later arose the Viking Line case concerning the freedom of establishment against the right to collective action and to strike. The CJEU argued that the restriction of the economic freedom was not proportionate to achieve the aim, this however was only guidance to the national court of the Member State and the CJEU came to decide that the proportionality test was to be carried out by the Member States themselves.

Shortly after Viking Line came Laval, concerning nearly identical matters on the first glance but instead upsetting spectators in the question as to whether the Member States were capable of the responsibility of handling the proportionality test without thorough supervision. Promisucac in 2008 touched the issue of interplay between protection of personal data and the right intellectual property. This was considered a somewhat fine line where the Member States, if deciding the case in a wrongful manner, would contribute to detrimental results impairing the harmonisation of the EU. Finally, Scarlet Extended, similarly to the prior case concerned protection of personal data but balanced against the economic freedom of the service providers' right to conduct business. The CJEU in this case went

back to arguing that a restriction of the social right would be acceptable should legislation on national level allow, it was however not a matter the EU court would accept.

5.2 Omega 2004

5.2.1 Facts

Omega,⁶⁸ a German company, later conducting a franchising contract with the British company Pulsar International, holding an arcade hall in Bonn for a variety of different games enjoyed by adolescents in Germany. The arcade hall was operating an installation called Laserdrome comprising of laser devices intending to look similar to machine guns and jackets to simulate the effect of bullet proof vests. The gun-devices that were used were developed from a childrens-toy commonly used and accessible on the market.

Before Laserdrome was launched, the public were expressing their negative views of the project and it was shortly followed by the police authorities request of a specification of what Laserdrome involved stating that if intentions with the game was 'playing at killing' it was to be prohibited. As this, however, was a fact of the game, the authorities issued, after the launch of the game, an order prohibiting the game on the grounds that it wanted to avoid the risk to public safety and order in every individual case – a protection of human dignity.

The order further declared that Laserdrome constituted a danger to the public order as it made the idea of death and violence insignificant and therefore contradicted fundamental values. After having appealed with a lack of fruitful results, Omega appeal a final round arguing that the order issued was infringing EU Law and the freedom to provide services, Article 56 TFEU⁶⁹ as it was using devices supplied from Great Britain. The case was then referred to the CJEU

⁶⁸ Case C-36/02 Omega [2004] ECR I-9609

⁶⁹ TFEU, Article 56. The original text of the judgement refers to Article 49 TEC.

questioning the relevance of the facts with both the freedom to provide services⁷⁰ and the free movement of goods.⁷¹

5.2.2 Judgement

The questions of importance distinguished by the CJEU were firstly if the ban on an economic freedom in order to protect fundamental rights and in particular, human dignity was acceptable in the view of EU law. Secondly, whether the potential discretion held by the Member State in such case as regard the restriction of free movement of services and goods makes valid a legal concept known by all member states.

The CJEU argued that the importance in this matter was to determine the extent to which the restriction is capable to affect the free movement of goods and services and they established the prohibition would affect Omega's providers and service receivers in Great Britain. This case concerned two economic freedoms simultaneously, however, in this very situation the freedom to provide services was argued primary, therefore the CJEU as a principle scrutinised only one of the two freedoms as referred to in *Karner*.⁷²

The CJEU continued to emphasise the importance to respect the now common tradition of the Member States to see to the ECHR. Further, the CJEU recognised its desire to consider human dignity a GPEU and that the social right therefore most certainly was compatible with EU law irrespective of its German status. Moreover, the protection of fundamental rights were argued to be a valid objective to justifying a restriction of the rules applied onto the Member State by EU law, despite it concerning economic freedoms.

Finally, the CJEU held that prohibiting Laserdrome could not be considered disproportionate in relation to what be considered necessary in order to achieve the aim sought by the German authorities. Thus, the restriction of the economic

⁷⁰ TFEU, Articles 56-62. The original text of the judgement refers to Articles 49-55 TEC.

⁷¹ TFEU, Articles 28-30. The original text of the judgement refers to Articles 34-36 TEC.

⁷² Case C-71/02 *Karner* [2004] ECR I-0000, para 46.

freedoms, services as well as goods, were justified on the basis of the importance to preserve the social right: human dignity.

5.2.3 Analysis

The AG Stix-Hackl argued in *Omega* for the importance of having the CJEU to follow correct definitions of the concept of human dignity – to make use of the legislated through judgments and enacted law definitions incorporated by EU law. The CJEU followed the suggestion, nonetheless the case has through its decision been argued to strongly respect the German constitutional identity. The *Omega* case can be referred to as particularly important in the sense that it was the case that came to follow the decision and reasoning in *Schmidberger* due to its recognition of the EU social fundamental rights.

It has been argued that the approach that the CJEU saw need to adopt in *Omega* will open gates for the fundamental rights to take on a stronger position within the EU, a reason to the approach have been said to be the many sources that the social fundamental rights stem from. Furthermore, an importance to deeply scrutinise the series of events has been emphasised as the CJEU rather commonly refer its duties of determination regarding social right to courts other than themselves.⁷³

One potential risk in these situations could be that other courts, through the extended arm of the EU, see past the important safeguards serving to prohibit a decision formed, not holding the objectives commonly agreed upon. Another hazard to consider could be the self-determination of EU law where the final accumulation would lead to a danger of the EU supremacy as a whole.⁷⁴

⁷³ D. Chalmers, G. Davies, G. Monti, *European Union Law* (2nd edition Cambridge University Press 2010) pp. 241-8.

⁷⁴ *Id.*

5.3 Viking Line 2007

5.3.1 Facts

The case Viking Line⁷⁵ concerned a Finnish shipping company managing a ferry called Rosella which in its turn drove the route Tallinn - Helsinki under the Finnish flag. The Rosella staff were member of the trade union FSU, an extension of the International trade union in the field, ITF with its base in Great Britain.

To enable the exercise of Estonian legislation and aid the employment of an Estonian crew, Viking Line sought to reflag Rosella. The company's greater aim however was to commence a new trade union agreement and subsequently achieve a lower minimum obligation of salaries. In order for the reflag to be approved, Viking Line sent their notification letter to FSU whereupon ITF initiated a dispatch forwarded to its associates, advising them to cautiously scrutinise and ideally decline the future dealings with Viking Line. To further avoid the situation, Viking Line was prohibited contact with Estonian workers representatives. Conjointly with the process, FSU notified authorities of its strike intention aiming to have Viking Line remain hiring Finnish staff under Finnish legislation.

For this, Viking Line brought proceedings in Great Britain against FSU for breach of the economic freedom; freedom of establishment; appealed when unsuccessful and followed the case which was forwarded through a preliminary ruling to the CJEU.

5.3.2 Judgement

The CJEU recognised that the economic freedoms applied to obligations of any kind holding the objective to collectively regulating and make profitable employment or self-employment. Furthermore, the CJEU argued that a collective

⁷⁵ Case C-438/05 Viking Line [2007] ECR I-10779

action aiming to convince a company the entrance into a collective agreement is a matter of freedom of establishment⁷⁶ due to the fact that employment regulations are regulated differently in Member states.

Moreover, the social rights recognised through CFREU the right to collective action and the right to strike are additionally GPEU through its fundamental status. The rights, however, must through the proportionality test be balanced with the economic freedom in question to make an accurate judgement.

The CJEU then argued that the freedom of establishment holds the status to be imposed on trade unions and that the importance rested upon the interrogation whether the actions by the union were justifiably restricted. The CJEU held that it was a matter of national court to decide, but that the trade unions actions restricted Viking Lines exercise of its freedom of establishment and could only be justified applying the proportionality test on the question if it was made certain that the staff of Viking Line was in genuine danger of unemployment.

5.3.3 Analysis

The CJEU in Viking Line, in addition to leaving the matter to the national court to go through with the proportionality test before referring the case, stated that this was to become the new procedure each court should follow. The proposition was met with both positive and negative response, the negative side foremost arguing that EU losing control over decision could never produce great outcomes for the union, whereas their opponents thought that a greater space taken by member states in decisions like these was essential in order for EU to continue develop.⁷⁷

AG Maduro emphasised the importance of the proportionality test and its two pillars of justifications and necessity, however, he argued that although social rights are what the EU does strive to work towards, the fundamental freedoms

⁷⁶ TFEU, Article 49. The original text of the judgement refers to Article 43 TEC.

⁷⁷ Charles F. Sabel, Oliver Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' *European Law Journal*, 16 5 (2010) 511,550.

should not by any circumstance carry a lesser weight of importance.

Moreover, he argued that, since there are certain rules governing collective actions in many Member States on national basis, this could for policy reasons constitute a situation where the trade union would use the action in an abusive manner as perhaps given too much space for own interpretations.⁷⁸ Thus, the economic freedom should through an assessment of the proportionality principle prevail where a situation brought forward merely is hypothetical and cannot reasonably follow.

⁷⁸ Elina Paunio, 'Conflict, power, and understanding – judicial dialogue between the ECJ and national courts' *An Interdisciplinary Journal of Law and Justice* 7 (2010) 13.

5.4 Laval 2007

5.4.1 Facts

Laval⁷⁹, a Latvian company with one of its subsidiaries in Sweden - Baltic Bygg AB -carried in June 2004 out renovations on a school in Vaxholm, a city located near Stockholm. Byggnads, a Swedish trade union for construction workers initiated during this time the commencement of a collective agreement with clauses unacceptable according to Laval who instead entered into a somewhat milder agreement version with a Latvian counterpart. Worth to note in this context was that in this situation the Member State had no specific minimum requirement as regards for example salary but agreements like this were negotiated on a basis between trade unions and organisations themselves. However, Byggnads started an industrial action and subsequently condemned both the construction work and the building. Finally, Laval brought a claim for their freedom to provide services, Article 56 TFEU,⁸⁰ whereupon the matter was referred to CJEU for a preliminary ruling.

5.4.2 Judgement

The CJEU held that, albeit the recognition of the valid right of Byggnad to initiate its collective action, it did constitute a restriction on the freedom to provide services through making the services provided seemingly less demandable. As there was no actual national law governing minimum salary per se, the collective action in this case would only be valid if carried out under EU law to achieve a valid objective justifiable by the public interest. In this situation this, nonetheless was not considered an issue in the interest of the public, despite AG Mengozzi arguing to the contrary. Therefore the CJEU held that the collective action was not permissible.

⁷⁹ Case C--341/05 Laval [2007] ECR I-11767

⁸⁰ TFEU, Article 56. The original text of the judgement refers to Article 49 TEC.

5.4.3 Analysis

AG Mengozzi's argument did not correspond with that of the CJEU but delivered an providing that collective actions exercised to aid claims regarding minimum salaries or other pay claims commonly would fulfil the principle of the proportionality test. Should the employees already have similar or better working conditions from another Member State, the proportionality would not be satisfied but would it merely be due to an overrated salary expectation, the action would still be proportionate.⁸¹

Other voices on the case has argued that the judgement in Laval made cause to a few arching brows by observers when finding that the CJEU did not at all apply the proportionality principle to the full, a fact expected after having the case so soon follow Viking Line.⁸²

⁸¹ Case C--341/05 Laval [2007] ECR I-11767

⁸² M. Rönmar, *EU Industrial Relations v. National Industrial Relations* (1st edition, Kluwer Law International 2008) p. 185.

5.5 Promusicae 2008

5.5.1 Facts

The case concerned a dispute between the Spanish non-profit organisation of media, Promusicae and the commercial undertaking Telefonica, regarding the declined disclosure of personal data by Telefonica to Promusicae.⁸³

Promusicae requested by Telefonica addresses and identity information of individuals to whom it served internet access support as Promusicae argued that these individuals had through file sharing exploited Promusicae's rights.

Telefonica argued that this data only was given during criminal proceedings whereupon Promusicae brought a claim under EU law asking to scrutinise whether it would allow the Member State to protect the public interest, therefore excluding civil proceedings, I.E. the duty of internet operators and providers of data, to receive and forward data collected through conducting society service.⁸⁴

5.5.2 Judgement

The CJEU firstly brought light to the Directive 2002/58/EC⁸⁵ imposing the duty upon the Member State to keep data confidential and refrain from its storing due to public security. However, CJEU noted that the Directive did permit the use of the information where the matter would concern protection of the freedoms and rights of others. Hence the Directive did not prohibit the Member State to use the data in civil proceedings.

The CJEU instructed the referring court to balance the right to protection of

⁸³ Case C-275/06 Promusicae [2008] ECR I-271

⁸⁴ Directive 2002/58/EC, Directive 2000/31/EC, Article 15(2) and 18, Directive 2001/29/EC, Article 8(1), Directive 2004/48/EC, Article 8 and CFREU, Articles 17(2) and 47.

⁸⁵ Directive 2002/58/EC On the processing of personal data and the protection of privacy in the electronic communications sector.

personal data contra the right to intellectual property, and measure them through the articles discussed.

5.5.3 Analysis

It has been argued that the judgement by the CJEU concerning the approval to have the Member States deliver personal data in civil actions, should social rights be protected, hardly could be met as, in this case, balancing the right to intellectual property with the right to data protection would be nearly impossible. The potential risks in the matter has been argued occurring when the actual problem is referred back to the Member State with no well-defined instructions as to how this just balance is to be made.⁸⁶ This, subsequently has been argued to be more serious an issue than recognised by the CJEU as it may comprise of different levels of rules throughout the EU and finally negatively affect the harmonisation of the EU.⁸⁷ Thus judging these situations on case by case basis may be the best solution.⁸⁸

⁸⁶ Andrea Biondi 'Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights' Centre of European Law EHRLR 1 (2004) 51,61.

⁸⁷ Cristopher Kuner 'Data protection and rights protection on the Internet: the Promusicae judgement of the European Court of Justice' European Intellectual Property Review 199 (2008).

⁸⁸ Anna-Sara Lind, Magnus Strand, 'A New Proportionality Test for Fundamental Rights?' (2011) 7 SIEPS EPA. 10.

5.6 Scarlet Extended 2011

5.6.1 Facts

SABAM, a Belgian undertaking working as an agent to editors and authors was aiming to terminate, similarly to Promusicae, illegal file sharing in order to protect its clients. Scarlet,⁸⁹ an internet service provider received an order sent on the initiative of SABMAN to end the software that was sharing works belonging to SABNAM. Scarlet appealed whereupon the case was referred to CJEU asking whether EU law allows Member States to have service providers filter online information to find illegal or prohibited material.

5.6.2 Judgement

The CJEU started with arguing that an injunction like this would entail the scan of a quantity of files where a great amount of innocent individuals would have their rights infringed. Further, the objective would be to safeguard all works, including future such, thus the scan would have no chronological limit.

The CJEU held that the Member States was not permitted to allow the injunction as the authors rights were not infringed directly by the service providers but by third parties. However, the CJEU sought to determine whether the potential injunction would be in accordance with the social rights contra economic freedoms, that being Intellectual Property (IP) rights and freedoms to conduct a business, the freedom to receive information and the right to protection of personal data.

The CJEU held that, should it admit to this injunction, the Member State would fail to respect the obligation to adhere to a proportionate balance between the interests as it would consequence in the infringement of the economic freedom of the service provider to conduct business and its customers right to protection of personal data and right to receive information.

⁸⁹ Case C -70/10 Scarlet Extended [2011] ECDR 4

5.6.3 Analysis

AG Cruz Villalon agreed in this case with the CJEU that the injunction to protect IP rights of the authors referred to, would constitute an infringement of the social right of the information holders. For this injunction not to be infringing, it would have to be in balance with the obligations provided for by the CFREU and must therefore be interpreted as affecting the quality of law.

Villalon further argued that the CFREU admits to the use of the social rights and economic freedoms on the permission that the restriction of either would have to be proportionate in accordance with legislation. Hence, restricting the third parties through an injunction in said situation and their freedoms and rights to the use of the internet would only be justified was it enforced through the clear national legislation of the Member State.

6 Conclusion

In conclusion, the central aim with this thesis has been to scrutinise the interplay through the transformation of the two interests, the economic freedoms and the social rights within the EU. The introductory chapters were foremost focusing on making certain the definitions and origins of the scope. The economic objectives were holding a more significant position than the social such, already by the time of the commencement of the union and its early days with the TOP. However the social aim was as abovementioned incorporated in the ECHR during these early days as well, nonetheless the social rights were not given its current status, comparable with the economic such until many years later with the restructuring and the TOL. I decided to make these chapters hold a little more space than perhaps expected as I found the actual transformation in the status of the interests an important part in the later scrutinising of the situations occurring when the prerogatives finally conflicted. In this coming conflict I found it of great importance to have the knowledge of the development in order to understand the judgements and reasoning by the CJEU and learned scholars. This conflict indeed was the aim of the following chapter and I here brought to light the first CJEU judgement on this balance of the two interests, Schmidberger. As argued, the conflict has happened prior to Schmidberger, nonetheless, the significance with this judgement was in addition to the tone in which the two interests met, how the CJEU decided to deal with the encounter. Furthermore, this chapter dealt with how the court decided to set a standard and consequently create decisions in how future cases approaching this conflict should handle the issue. The case concerned EU citizens exercising their fundamental right to expression and right to assembly. A company argued that actions infringed their fundamental freedom to exercise a free movement of goods. As stated, the two interests hold equal value and in said case the two interests exercised were on the first glance of same priority to handle, as opposed to the situation in *Commission v France*. The CJEU therefore saw no other solution than to resort to a principle so far rarely used in the context, the proportionality principle and the developed proportionality test: Was the restriction of the company's freedom of movement of goods justifiable with the EU citizen's exercise of their right to expression and assembly, although

these fundamental rights are not considered absolute?

The proportionality test considers the situation in judging both necessity and suitability for the aim to be achieved. In *Schmidberger* the CJEU therefore went through and asked whether restricting the company's freedom to transporting goods was suitable in order for the protesters to carry out their original act, demonstrating on the Brenner motorway. They then asked whether it was necessary and not an act of going 'too far' in doing so to achieve the aim. The CJEU then established that the act was proportionate through the test and held that the restriction of the economic freedom was justified. Novel to *Schmidberger* was additionally the matter of using the balancing act of the two interests in situations concerning individual rights and freedoms rather than that of the public as a whole. Furthermore, as also defined, balancing economic freedoms against rights not holding an absolute status, then having these rights weigh heavier, was somewhat surprising and original to the situation.

Following the *Schmidberger* case was the *Omega*, *Viking Line*, *Laval*, *Promisucæ* and the *Scarlet Extended* case on the same topic but concerning different economic freedoms and social rights. *Omega* contributed in showing that a trend was set and came along with stipulations of dangers and fear of the EU supremacy to be put to an end. Moreover, with *Viking Line* proceeded the decision that it was for the national court to conduct the proportionality test which in the later cases came to bring forward a potential threat to the harmonisation of the EU if the test was not carried out under strict supervision, furthermore, fear of having Member States use the test maliciously should they argue in favour of a social right just to diminish and escape the obligation to uphold an economic freedom started to grow.

Any threat to the supremacy of EU law and additionally the harmonisation of the law should indeed be taken seriously. The reason to the fear may stem in the CJEU giving more authority to national courts when decisions concerns as fragile subjects as human and economic interests, or worse, that the CJEU would

interpret the matter wrongfully themselves due to national differences.⁹⁰

Finally, the consequences could indeed be detrimental considering the fact that national standards can vary in both fields. Having any other standard, than a by the EU formed such, in considering the social rights, could constitute in human beings and their needs not being sought to in order to gain more beneficial economic situations; and indeed the other way around as well.

⁹⁰ Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' *European Law Journal* 16 2(2010) 158,185.

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