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This is a draft chapter/article. The final version is available in Research Handbook on General Principles in EU Law edited by Katja S. Ziegler, Päivi J. Neuvonen, and Violeta Moreno-Lax, published in 2022, Edward Elgar Publishing Ltd

https://doi.org/10.4337/9781784712389.00032

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TITLE	General principles in free movement law: applicability and application
YEAR	2022
DOI	https://doi.org/10.4337/9781784712389.00032
VERSION	Author's accepted manuscript
CITATION	Snell, J. (2022). "Chapter 21: General principles in free movement law: applicability and application". In Research Handbook on General Principles in EU Law. Cheltenham, UK: Edward Elgar Publishing.

Chapter XX

General Principles in Free Movement Law: Applicability and Application

Jukka Snell

I. Introduction

The relationship between the four freedoms and general principles of law is of great significance for the EU legal order both from a practical and from a theoretical perspective. It is also a topic of intense controversy. As a matter of *practice*, most free movement cases are decided under the principle of proportionality. The Court of Justice has created such a broad concept of restriction that there is often little doubt that the national measure at issue qualifies as a prima facie violation of free movement rules. The Court is also prepared to entertain an open-ended category of justifications, meaning that, as long as the argument the defendant puts forward is not purely economic, the Court is willing to hear it. However, the real scrutiny takes place at the level of proportionality, where the case is normally won or lost. For a practicing lawyer, it is the detailed application of the general principle of proportionality that is of most interest. As a matter of *theory*, the applicability of fundamental rights in free movement cases has given rise to conflicting case law, as well as to attempts to curb the reach of the Court. This is due to the federalizing effect of supranational fundamental rights and the challenge they pose to national legal orders. At the same time, the balancing of the free movement rules and fundamental rights may prove highly controversial: to what extent and how can fundamental rights be traded off against the market freedoms?

The purpose of the present chapter is to investigate the relationship between the four freedoms and general principles of law. The focus is on the general principle of proportionality and on fundamental rights[1] - another species of general principles - as it is these principles that have resulted in most case law and discussion in the area of free movement law. It proceeds in two parts. First, the issue of applicability is examined: what triggers the application of general principles, and can they

[1] For a more general discussion of proportionality, see Bjorge and Zglinski, Chapter XX (above/below) , and on fundamental rights see Ziegler, Chapter XX (above/below).

influence the scope of free movement law? Second, the chapter turns from the *when* question to the *how* question: how are the general principles applied in the Court's free movement case law? In both parts, the analysis is directed to and a distinction is drawn between the principle of proportionality and fundamental rights. Proportionality is a principle that has been seen as internal to or inherent in free movement law from the earliest days of the common market and is in practice activated in almost every case. By contrast, fundamental rights have started to feature only more recently and are not routinely applied in each and every case, although their prevalence is growing. The overall picture that emerges is that the relationship between general principles and market freedoms is still far from settled and remains under-theorized.[2]

II. Applicability

1. Proportionality: internal to free movement law

The applicability of the proportionality principle has not been a subject of controversy in free movement law. It has been simply accepted that the principle applies as soon as a restriction is found. This is because the principle has been seen as inherent in the Treaty articles that offer Member States an opportunity to justify their restrictive rules, and from there it has spread to all corners of free movement law, including to the application of the overriding requirements in the public interest that the Court has developed in its case law.[3] The practical effect is that free movement cases are almost always decided under a tripartite structure. First the Court examines whether the measure at issue is a restriction in the first place, usually finding that this is the case. Second, the respondent proffers reasons that it claims justify the measure, whether under an express Treaty derogation or under the open category of overriding reasons just mentioned. Normally the Court accepts that there is a justification in theory. However, the case then enters the third stage where the proportionality of the measure is scrutinized, often in great detail and frequently to the detriment of the respondent.[4]

While the applicability of the principle of proportionality goes unnoticed these days, perhaps it should not be so. In fact, Article 36 TFEU on justifications in the field of free movement of goods, under which the Court constructed the basic template of its free movement case law, does not mention

[2] More broadly, Daniel Thym, 'The Constitutional Dimension of Public Policy Justifications' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016) 170, 178 points to 'the ambiguous theoretical foundations of the doctrinal structure' of free movement law.

[3] Case C-120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 (Cassis de Dijon).

[4] See e.g. Catherine Barnard, 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart 2009) 273.

the principle. Instead, the provision stipulates that Member State restrictions on free movement of goods may be justified by grounds listed, such as public security or public health, subject however to the requirement that the national rules not constitute arbitrary discrimination or disguised trade restrictions. It is of course possible to read the principle of proportionality into these expressions, as the Court did.[5] However, it is not the only option. [6] The listed grounds could also be interpreted to give Member States a free hand to legislate in areas such as public security or public health, [7] subject only to a check that the Member State is not abusing the privilege or acting in bad faith. Had the Court chosen to follow this second course the internal market might look very different today, with entire areas of activity carved out by Member States.[8] In essence, from today's perspective, the unremarked and seemingly unremarkable decision of the Court to read proportionality into Article 36 TFEU, and from there into all parts of free movement law, was one of the most important decisions in the setting up of the EU internal market.[9]

2. Fundamental rights: implementation and scope

In contrast to the principle of proportionality, which has been viewed as inherent in free movement law, fundamental rights have been seen as external to it and their applicability has been much more controversial. As will be explained, the Court's earlier jurisprudence went through an important expansion, the Charter of Fundamental Rights arguably attempted to push back against this case law and to narrow the applicability of fundamental rights in the free movement context, while the Court in its recent case law reacted by both sticking to its guns in principle and by becoming more careful in practice.[10]

The story begins with *Cinéthèque* concerning the free movement of goods, where the Court refused to apply fundamental rights in a situation where a Member State was seeking to derogate

[5] See implicitly Case 7/68 *Commission v Italy* EU:C:1968:51, and explicitly e.g. Case 174/82 *Sandoz* EU:C:1983:213, para. 18.
[6] This was noted in the earlier literature; see e.g. Laurence W Gormley, *Prohibiting Restrictions on Trade within the EEC* (TMC Asser Instituut 1985) 123: 'Article 36, although looking like a vehicle to drive clear pathways in important areas through the principle of the free movement of goods – and thus constitute a source of reserved powers – is, in fact, nothing of the sort.'
[7] This argument was made by Italy and expressly rejected by the Court in Case 35/76 *Simmenthal* EU:C:1976:180, paras 13-14.
[8] Something of this nature was attempted for national security in the now defunct new settlement for the UK European Council Conclusions, EUCO 1/16 which recorded at 18 that national security 'does not constitute a derogation from Union law and should therefore not be interpreted restrictively'.
[9] See also the contrast drawn between international trade regimes and the EU in William Phelan, *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (OUP 2015) 91-92.
[10] See Jukka Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' (2015) 21 *EPL* 285.

from EU law.[11] It reasoned that although the French rules at issue on the sale and rental of video cassettes were a barrier to free movement, they could be justified by overriding reasons in the public interest, namely encouraging the production of movies. However, it refused to entertain arguments by the plaintiff according to which the rules were a violation of the freedom of expression. The Court reasoned that:

> '[a]lthough it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.'[12]

In other words, a justified national measure fell outside the scope of free movement rules and therefore EU fundamental rights were inapplicable.

The Court soon changed its mind. First, in *Wachauf*,[13] outside the field of free movement law, the Court famously applied fundamental rights in a situation where a Member State was *implementing* EU law. Second, it held in *ERT*,[14] concerning the compliance of Greek TV broadcasting rules with the free movement of services, that if a national rule constitutes a barrier to free movement and the Member State seeks to justify it by one of the express Treaty derogations, EU fundamental rights standards *are* applicable and the compatibility of the national legislation with the freedom of expression must be examined. It reasoned that national rules which restrict one of the four freedoms fall within the *scope* of EU law, and that this determines the applicability of EU fundamental rights standards. The rulings in *Cinéthèque* and *ERT* could still be reconciled, as the former dealt with judge-made overriding reasons and the latter with Treaty derogations. However, in *Familiapress* on the conflict between the free movement of goods and the Austrian law on unfair competition the Court completed the move, extending EU fundamental rights scrutiny also to the overriding reasons.[15]

The extension attracted criticism from a cast of distinguished lawyers and scholars, such as Goldsmith, Huber, Jacobs, and Weiler.[16] This should not come as a surprise. While it is natural and self-evident that EU fundamental rights are applicable when Member States are implementing EU rules, it is much less clear that they should also apply when Member States are seeking to avoid the

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[11] Joined Cases 60 and 61/84 *Cinéthèque* EU:C:1985:329.
[12] ibid para. 26.
[13] Case 5/88 *Wachauf* EU:C:1989:321.
[14] Case C-260/89 *ERT* EU:C:1991:254.
[15] Case C-368/95 *Familiapress* EU:C:1997:325.
[16] Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *CMLRev* 1201, Peter M Huber, 'The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to Be Reviewed' (2008) 14 *EPL* 323, Francis G Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' (2001) 26 *ELRev* 331 and Joseph HH Weiler, *The Constitution of Europe* (CUP 1999) 126.

application of EU rules by relying on exceptions. Given the broad reach of free movement law,[17] this subjects innumerable national measures to EU fundamental rights scrutiny, with a significant federalizing effect.[18] This can be seen graphically in the US, where the extension of the Bill of Rights to state action under the doctrine of selective incorporation has, for example, resulted in the Supreme Court striking down local gun controls in the name of the fundamental right to keep and bear arms.[19]

The Charter of Fundamental Rights may have sought to rein in the case law.[20] According to Article 51(1) CFR, the Charter is addressed to the Member States only when they are *implementing* Union law. The wording does not determine the applicability by reference to the scope of EU law used in *ERT*, but returns to the notion of implementation employed in *Wachauf*. However, the Charter is not entirely coherent in its approach. The explanations that must be taken into account when the Charter is applied refer to *ERT* and use the term 'scope'.[21] Some language versions of the Charter itself do not employ the word 'implementation' but rather the word 'application',[22] which does not as readily suggest a desire to overturn *ERT*. In other words, if there was an attempt to reset the law to its original 1980s settings and to roll back the 1990s upgrade, it was a botched one.

In any event, the Court chose not to retreat. In *Åkerberg Fransson* the Grand Chamber reasoned that the Charter confirmed its earlier case law according to which national rules falling within the scope of EU law are subject to EU fundamental rights scrutiny.[23] This finding was put into effect for the four freedoms in *Pfleger* by the Third Chamber.[24] The case concerned an Austrian law on gambling. Under it, unauthorized gaming machines could be confiscated and destroyed and the relevant premises shut down by authorities. This was considered to restrict the free movement of services, but could potentially be justified by overriding reasons relating to the protection of gamblers and the fight against crime. Additionally, it was argued that the rules constituted a violation of various Charter rights under Articles 15-17 CFR. A number of Member States intervened on this point to argue that the Charter was inapplicable as there was no implementation of Union law within the

[17] See generally e.g. Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CMLRev* 437.
[18] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CMLRev* 945.
[19] *McDonald v Chicago*, 561 US 742, 130 S Ct 3020 (2010).
[20] See on the drafting history Gráinne de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *ELRev* 126. On the debates in the European Convention that drafted the failed Constitutional Treaty, Allard Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 *CMLRev* 367, 373-374.
[21] According to Art. 6(1) TEU and Art. 52(7) CFR, the Charter shall be interpreted with due regard to Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.
[22] E.g., the Finnish version uses the word 'soveltaa'. See e.g. the Opinion of AG Sharpston in Case C-390/12 *Pfleger* EU:C:2013:747, para. 40, and Allan Rosas, 'The Applicability of the EU Charter of Fundamental Rights at National Level' [2013] *European Yearbook on Human Rights* 97, 105.
[23] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.
[24] Case C-390/12 *Pfleger* EU:C:2014:281.

meaning of Article 51(1) CFR. The Court cited *Åkerberg Fransson* and *ERT* and, following Advocate General Sharpston,[25] held in paragraph 36 that:

> 'where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the Treaty, it may benefit from the exceptions provided for by EU law in order to justify that fact only in so far as that complies with the fundamental rights enforced by the Court. That obligation to comply with fundamental rights manifestly comes within the scope of EU law and, consequently, within that of the Charter. The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded… as 'implementing Union law' within the meaning of Article 51(1) of the Charter.'

In sum, the Charter has not formally changed anything when it comes to the applicability of fundamental rights in the field of the four freedoms. However, it can be argued that it has rendered the Court more conscious of the need to police the relevant limits. This is evident when a ruling in *Karner* that predates the Lisbon Treaty,[26] where the Charter was given binding force, is compared with the more recent judgment in *Pelckmans Turnhout*.[27]

In *Karner*, the Fifth Chamber was faced with Austrian rules concerning misleading advertising. It found them to fall outside Article 34 TFEU on free movement of goods due to the *Keck* test,[28] as they concerned selling arrangements and did not discriminate. In other words, they did not violate the four freedoms in the first place and, therefore, did not need to be justified. Nevertheless, the Court proceeded to consider the Austrian law also from the perspective of the freedom of expression, ultimately finding that the restriction on that freedom was 'reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading.'[29] This suggested that there could be cases where the national law that escaped the reach of free movement of goods under the *Keck* formula could, nonetheless, be connected to it in a way that brings it within the scope of EU law.

By contrast, the post-Lisbon *Pelckmans Turnhout*, decided by the First Chamber without an Opinion of an Advocate General, takes a more cautious line and implicitly overrules *Karner*. At issue were Belgian rules on shop opening hours. Again, the Court held that these non-discriminatory rules on selling arrangements did not constitute barriers to the free movement of goods under *Keck*. As a

[25] *Pfleger* (n 22).
[26] Case C-71/02 *Karner* EU:C:2004:181.
[27] Case C‑483/12 *Pelckmans Turnhout* EU:C:2014:304.
[28] Joined Cases C-267 and 268/91 *Keck* EU:C:1993:905.
[29] ibid para. 52.

result, they were outside the scope of Union law and fell entirely outside the EU fundamental rights scrutiny under Article 51(1) CFR. In contrast to *Karner*, the absence of a barrier meant the absence of fundamental rights jurisdiction. Altogether, the increased attention that the Charter has directed at the application of EU fundamental rights on actions of Member States may have rendered the Court more careful and conservative in its approach.[30]

3. Fundamental rights: influencing the scope of the freedoms?

A further question concerns the limits of the four freedoms.[31] It has already been alluded to that they are very broad; the Court has interpreted the concept of restriction widely for all freedoms.[32] But could that interpretation become wider still due to the influence of fundamental rights? After all, the Charter of Fundamental Rights provides, *inter alia*, for a freedom to choose an occupation and right to engage in work, and a freedom to conduct a business. Could these rights be used to influence the interpretation of the scope of the Treaty freedoms?[33]

On the one hand, it seems natural to interpret the Treaty in accordance with general principles. It is well known that one of the main functions of general principles in all legal systems is to guide interpretation.[34] On the other hand, there is a danger of a breach of the safeguards expressly written into the Treaty and the Charter. According to Article 6(1) TEU the 'provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties', while Article 51(2) CFR states that the 'Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' Further, such an approach would entail a certain circularity. As a matter of logic, how can the application of general principles influence the scope of EU law, when they only become applicable if the matter is within the scope of EU law?

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[30] See for a somewhat different take Michael Dougan, 'Judicial Review of Member State Action Under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52 *CMLRev* 1201, who places more emphasis on the creative elements in the recent case law.

[31] I have dealt with the themes of this section in my short editorial 'Do fundamental rights determine the scope of EU law?' (2018) 43 *ELRev* 475.

[32] With Art. 35 TFEU on the export of goods remaining a partial exception; see Case 15/79 *Groenveld* EU:C:1979:253.

[33] Vassilios Skouris, 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance' (2006) 17 *EBLR* 225, 239 wrote that the difficult task of the Court to reconcile the four freedoms and fundamental rights 'becomes even more delicate when fundamental rights are used to interpret and expand the scope of a fundamental freedom'.

[34] See for a practical example *Wachauf* (n 13) where the Court ordered the national authorities to adopt a fundamental rights compliant interpretation of the relevant measure. The same can take place for primary law; see e.g. Case C-50/00 P *Unión de Pequeños Agricultores* EU:C:2002:462, para. 44.

There is no clear answer to the issue in the case law. In the field of citizenship, the Court has given mixed signals. In *Dereci*,[35] the Court was careful to treat the determination of the violation of EU law, and therefore its scope, as a separate question that preceded and was not influenced by the application of fundamental rights.[36] Yet in *Chavez-Vilchez* the Court took the view that when the referring national court examines whether the Treaty had been violated in the first place, it has to take account of the Charter rules on the right to family life and on the best interests of the child.[37]

In the field of the four freedoms the matter arose in *AGET Iraklis*,[38] a ruling that will be examined in more detail later in the chapter.[39] Suffice to say, Advocate General Wahl argued straightforwardly that the relevant Greek legislation violated Article 49 TFEU on the right of establishment when interpreted in accordance with Article 16 CFR on the freedom to conduct a business.[40] He did not in any way acknowledge the difficulty of interpreting the scope of the right of establishment in the light of the Charter that only applies within the scope of the right of establishment. In this respect, the Grand Chamber followed the substance of the Opinion but did not explicitly invoke the Charter or Fundamental Rights. It held that there was a restriction on the right of establishment as the

> 'national legislation constitutes a significant interference in certain freedoms which economic operators generally enjoy…. That is true of the freedom of economic operators to enter into contracts with workers in order to be able to carry out their activities or the freedom, for their own reasons, to bring the activity of their establishment to an end, and their freedom to decide whether and when they should formulate plans for collective redundancies on the basis, in particular, of factors such as a cessation or reduction of the activity of the undertaking or a decline in demand for the product which they manufacture, or as a result of new working arrangements within an undertaking unconnected with its level of activity...'[41]

[35] Case C‑256/11 *Dereci* EU:C:2011:734.
[36] See Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 13,53.
[37] Case C‑133/15 *Chavez-Vilchez* EU:C:2017:354, para. 70. See also Case C‑82/16 *KA* EU:C:2018:308. For a detailed analysis, see Hanneke van Eijken and Pauline Phoa, 'The Scope of Article 20 TFEU Clarified in *Chavez-Vilchez*: are the Fundamental Rights of Minor EU Citizens Coming of Age?' (2018) 43 *ELRev* 949.
[38] Case C‑201/15 *AGET Iraklis* EU:C:2016:972.
[39] In Section III, 2.
[40] *AGET Iraklis* (n 38) para. 49.
[41] ibid para. 55.

While the Court did not mention the Charter by name, its reasoning clearly reflects the freedom to conduct a business.

At first glance, the approach of the Court makes sense. As mentioned above, it is normal to use fundamental rights to interpret the Treaty – it is one of their key roles and well recognised in long-standing case law. It may also be attractive on the facts. In an Article 20 TFEU case like *Chavez-Vilchez*, where a third-country national mother of an EU national child is facing deportation on grounds that a separated EU national father in principle could assume custody, any judge with a heart is likely to wish to interject a consideration of the best interest of the child into the assessment. The argument of the national government that the father is assumed not to be able to care for the child if he is dead, in jail or confined to an institution[42] may not fully reassure.

Yet, there are reasons for caution. From the perspective of the black letter law, the Court is doing what Articles 6(1) TEU and 51(2) CFR were meant to prevent. As a matter of logic, it is relying on a circular argument where rights applying within the scope of the Treaty serve to determine that scope. This also has the capacity to drive a coach and horses through the Court's interpretation of Article 51(1) CFR. Any insistence that the limits to the application of the Charter are respected by confining it to the scope of EU law are unconvincing if that scope itself is influenced by the Charter. From the perspective of free movement law, the development casts doubts on the few remaining limits to the scope of the four freedoms.[43] If free movement of goods is interpreted in the light of the freedom to conduct a business, how can it not apply to national rules that operate even-handedly and relate to selling arrangements or exports?[44] For citizenship, the right to family life has the potential to push the application of *Ruiz Zambrano*[45] from an exception to a rule with significant consequences for national immigration regimes.

It is also doubtful whether the extension is truly needed. *AGET Iraklis* could have been decided on more traditional grounds. It is well-recognised in competition law that barriers to exit, which were in issue, also act as barriers to entry. A company contemplating entry to a market will always consider whether an exit is possible if the entry proves unsuccessful.[46] It is easy to view an exit restriction as an obstacle to market access; there was no need to bring the freedom to conduct a business into the equation. In the citizenship cases like *Chavez-Vilchez* it must be remembered that the Court is not supposed to act as a general human rights court. If national immigration rules result in human rights

[42] *Chavez-Vilchez* (n 37) para. 67.
[43] See also Francesco De Cecco, 'False Friends and True Cognates: On Fundamental Freedoms, Fundamental Rights and Union Citizenship' in Mads Andenas et al (eds), *The Reach of Free Movement* (Asser Press 2017) 253, 260.
[44] See *Keck* (n 28) and *Groenveld* (n 32).
[45] Case C‑34/09 *Ruiz Zambrano* EU:C:2011:124.
[46] See e.g. Roger J Van den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Sweet & Maxwell 2006), 141.

violations, that is in the main a matter for the national courts and the ECtHR, as emphasized by Advocate General Mengozzi and accepted by the Court itself in *Dereci*.[47] Fundamental rights are of critical importance for the EU legal order, but so are the jurisdictional limits that the EU's system of divided government depends upon. Undermining these limits is risky, even when it is done in the name of fundamental rights.

III. Application

1. Proportionality, but not as we know it

The previous section highlights that the principle of proportionality has always been at the heart of free movement law. It has been seen as inherent in the Treaty provisions on justifications, such as Article 36 TFEU, and in practice that cases are typically won or lost at the proportionality stage of the analysis. However, the way the principle is actually applied differs significantly from other areas of law. Proportionality is normally thought to be about balancing of some kind. But this does not really take place for the law of the four freedoms.[48]

The principle of proportionality typically consists of three elements: appropriateness, necessity and true proportionality (also known as proportionality *sensu stricto*).[49] For free movement law, the first two elements dominate the analysis, while the last, which contains the actual balancing, is seldom considered.

The appropriateness test is about causality between the ends and the means. Under it, the Court investigates whether the measure that constitutes a barrier to free movement is apt or pertinent, or suitable to protect the public interest that has been put forward as a justification. If the measure in fact does not contribute to the end that it claims to protect, it is likely that the state in question has acted in bad faith and is simply inventing noble-sounding justifications for acts that in reality pursue protectionist purposes.

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[47] *Dereci* (n 35) paras 72-73.

[48] See generally e.g. Jukka Snell, 'Who's Got the Power? Free Movement and Allocation of Competences in EC Law' (2003) 22 *Yearbook of European Law* 323, 339-344 and Gareth Davies, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests' in Panos Koutrakos, Niamh Nic Shuibhne, and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016) 218.

[49] In the field of the common agricultural policy in Case C-331/88 *Fedesa* EU:C:1990:391, para. 13 the Court defined proportionality as follows: '[b]y 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.' For a classic exposition, see Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 2006) 685-692.

In recent times, the appropriateness test has been of particular importance for cases concerning gambling services.[50] Often a state has limited the offer of these services to a small number of domestic operators or to a single national undertaking. Normally the state claims that this has been done to reduce the harm that gambling can cause. At the same time, the state often receives significant income from these operators, which could be threatened if companies from other Member States were free to enter the market. There is an economic motive to limit free movement. Further, the operators frequently advertise their services quite aggressively, putting into question whether the measures actually are capable of reducing gambling-related harm. The Court solves these cases through the application of the appropriateness test. It asks whether the restrictions limit the activities in a systematic and consistent manner,[51] or whether they in reality emanate from a purely economic revenue interest not capable of justifying a restriction on free movement.

The necessity test is in practice the dominant part of the proportionality enquiry in the field of free movement law. It involves the question whether the public interest could have been protected equally well by alternative means that are less restrictive of free movement. [52] In other words, the Member States are under a duty to select the least restrictive of equally effective means. This is in practice a challenging test for a court to administer. It is hard to assess whether alternative means were realistically available and whether they would have been equally effective. Yet the necessity test is in practice usually the critical element in deciding a free movement case and for good reason: Member States may be tempted to select more restrictive means than strictly necessary with a view to protecting domestic economic operators. Again, the test can be employed to ferret out hidden protectionism. After all, if a State opts for a measure that is more restrictive than necessary, it has either been incompetent or protectionist.

One in practice hugely important aspect of the necessity test is that it outlaws the replication of requirements already carried out in another state. Often products are subject to inspections or tests in their state of origin. When they are taken across a border, the host state may seek to inspect or test them again. In these kinds of situations, the necessity aspect of proportionality is activated. Instead of re-testing, the importing host State could ask for the results of the original tests. [53] This would offer

[50] For an overview, see Stefaan Van den Bogaert and Armin Cuyvers, '"Money for Nothing": The Case Law of the EU Court of Justice on the Regulation of Gambling' (2011) 48 *CMLRev* 1175.
[51] See e.g. Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* EU:C:2007:133, para. 53. For discussion of the requirements, see Gjermund Mathiesen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 *CMLRev* 1021.
[52] For a flavour of the case law, see e.g. the various examples from the fields of public health, environmental protection and consumer protection in Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 109-121.
[53] See classically Case 272/80 *Biologische Producten* EU:C:1981:312.

protection for the relevant public interests, but do so in a fashion that is less burdensome for intra-EU trade.

The third element of proportionality involves the actual balancing. Under the true proportionality test, the Court asks whether the selected means are excessive given the ends that are pursued. For example, would a minor improvement in the protection of environment justify a measure that costs the industry billions? In fact, when we call something disproportionate, it is the result of this kind of weighing exercise that we have in mind. In free movement law, this is done very rarely.[54] The best example is the *Danish Bottles* case,[55] where the Court objected to elements of the bottle and can recycling system that Denmark had put in place. The system offered the maximum level of environmental protection but at a high cost for importers, and therefore was deemed disproportionate. The ruling resulted in a howl of protests,[56] and the Court has been more cautious ever since. This is understandable. The philosophical and epistemic problems that attach to such an inquiry are formidable: why should this done by a court rather than a legislature, how can interests that are incommensurate be weighed against each other, and so on[57]

Although the Court in the main does not openly engage in actual balancing these days, there are still traces of this approach lurking in the case law. Sometimes the Court objects under the necessity test to national measures that impose a significant burden on trade but bring only a minor public interest benefits. The best example is the labelling cases.[58] In these decisions the Court condemns national product composition rules by reasoning that the public interest can be protected equally well by labelling. For example, instead of banning certain foods to protect the consumers from being misled, the state could select the less restrictive means of requiring adequate labels that allow consumers to inform themselves of the ingredients used. Yet this is not strictly speaking necessity analysis. Labelling rules do not protect consumers as well as rules that ban a product, unless all consumers in practice read and understand the labels. In fact, an element of balancing is going on, but not openly acknowledged: a product composition rule that offers maximum protection, but is

[54] See e.g. for consumer protection Stephen Weatherill, 'Justification, Proportionality and Consumer Protection' in Panos Koutrakos, Niamh Nic Shuibhne, and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016) 264.
[55] Case 302/86 *Commission v Denmark* EU:C:1988:421.
[56] See e.g. Ludwig Krämer, 'Environmental Protection and Article 30 EEC Treaty' (1993) 30 *CMLRev* 111, 122-127.
[57] In the US context, Justice Scalia wrote in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc., et al.*, 486 U.S. 888 (1988), 897 (concurring) on the application of the dormant commerce clause that the weighing of State interests against the needs of the interstate commerce 'is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy... [The task is] squarely within the responsibility of Congress and "ill suited to the judicial function."' (Citations omitted.) Similarly e.g. Hoffmann J in *Stoke-on-Trent City Council v B&Q Plc* [1990] 3 CMLR 31 paras 47-48.
[58] See e.g. Case C-120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 (Cassis de Dijon).

highly destructive to trade, is set aside in favour of a labelling rule that offers adequate protection, at least as long as health threats are not involved, but is much less problematic for free movement.

Altogether, the Court's approach to the principle of proportionality in the field of free movement law is idiosyncratic. The actual balancing that we normally think of is largely absent. Instead, the tests of appropriateness and necessity are applied in a manner that seeks to disallow measures that are not fit for purpose or that in reality serve protectionist ends. Even this more limited analysis is highly valuable; there are thickets of old national rules that may serve little purpose but create problems for free movement, and national legislators and regulators are continuously tempted and lobbied to protect domestic economic operators at the expense of those from other Member States. The limited approach also avoids some of the problems that an attempt at real balancing would entail for any court.

2. Fundamental rights: a shield and a sword

Generally speaking, fundamental rights have often been viewed as a shield in the context of free movement jurisprudence. The best known cases concern situations where a Member State is seeking to justify a restriction on free movement on fundamental rights grounds.[59] For example, in *Schmidberger* environmental protesters shut down an Austrian motorway – a restriction on free movement of goods – but the defendant government responded with an argument based on freedom of expression and assembly.[60] In *Omega Spielhallen,* the German prohibition of 'laserdrome' shooting games – a restriction on free movement of services - was justified by the need to protect human dignity against an activity involving simulated killing.[61] In *Viking*, the right to take collective action was put forward as a justification for industrial action that interfered with the right of establishment. [62]

While each case has hinged on its particular facts, some general observations can be offered. First, the Court has been prepared to accept that different Member States have different views of the values they see as fundamental. For example, if one Member State considers the right to life of an unborn a fundamental right, the Court will not question it even if other Member States take different

[59] For an overview of the Court's approach, see Niamh Nic Shuibhne, 'Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017).
[60] Case C-112/00 *Schmidberger* EU:C:2003:333.
[61] Case C-36/02 *Omega Spielhallen* EU:C:2004:614.
[62] Case C-438/05 *Viking* EU:C:2007:772.

views.[63] Second, each Member State is entitled to set the level of protection that it deems appropriate, and the fact that other Member States may have opted for lower levels does not affect the legality of the national rules. Thus the fact that 'laserdromes' operated perfectly lawfully in the UK did not stop Germany from outlawing them in the name of its own conception of the demands of human dignity.[64] Third, the protection of fundamental rights can be subsumed under the public policy derogation, which is available for all four freedoms.[65] This is important, since it allows in principle even the justification of overtly discriminatory national rules, provided that their proportionality can be demonstrated.[66] Finally, despite this tolerant approach, the structure of this case law can give rise to critical remarks. The free movement is seen as the rule and the fundamental right as the exception that must not impinge excessively on the market freedom. The respondent must show that the protection of fundamental rights truly justifies the interference with free movement, instead of the claimant having to show that the limitation on the fundamental right is justified by the interest of free movement.[67]

However, what is less apparent is that on a closer analysis fundamental rights can play a double role in free movement law. They can both offer a justification for a violation and bolster the relevant free movement rule. They can serve both as a shield and as a sword. This is due in particular to Articles 15-17 CFR that set out the freedom to choose an occupation and the right to engage in work, the freedom to conduct a business, and the right to property. This may often pit two fundamental rights against each other. The 'offensive' role that fundamental rights may play emerges particularly clearly in *AGET Iraklis*.[68]

AGET Iraklis involved a Greek rule on collective redundancies. A company planning to lay off workers had to seek administrative authorization, which could be refused for reasons pertaining to the conditions in the labour market, the situation of the undertaking and the interests of the national economy. In the absence of authorization, the collective redundancies would be invalid. AGET Iraklis was a Greek company producing cement. Its main shareholder was the French multinational group Lafarge. As a result of the Greek economic crisis, construction activity and the demand for cement experienced a significant downturn. This led the company to propose the closure of one of its plants,

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[63] Opinion of AG Van Gerven in Case C-159/90 *Grogan* EU:C:1991:249, para. 26.
[64] *Omega Spielhallen* (n 61) paras 37-39. See on the role played by Art. 4(2) TEU Niamh Nic Shuibhne, 'Primary Laws: Judging Free Movement Restrictions after Lisbon' in Panos Koutrakos, Niamh Nic Shuibhne, and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016), 312-317.
[65] ibid e.g. para. 41.
[66] According to rulings such as Case 113/80 *Commission v Ireland* EU:C:1981:139, para. 11 overriding requirements can only serve to justify equally applicable rules, although the Court has not always been consistent in the application of this doctrine.
[67] See for a nuanced analysis Catherine Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) 37 *ELRev* 117.
[68] *AGET Iraklis* (n 38).

with a loss of a significant number of jobs. The unions resisted the closure and the minister refused to authorize the collective redundancies. As explained earlier in the chapter, the Grand Chamber of the Court ruled that this amounted to a restriction on the right of establishment.

The Court then turned to the issue of justification. In a typical free movement case this would entail a conflict between the free movement rule and a public interest objective. However, in *AGET Iraklis*, it was remarked that it was not just the right of establishment that had been interfered with but also the freedom to conduct business as enshrined in Article 16 CFR; in particular, there was a restriction on freedom of contract. As a result, it was not sufficient to simply consider the free movement issue; it also had to be assessed whether the conditions for limiting fundamental rights set out in Article 52(1) CFR had been respected.[69]

For the most part the assessment of justification is identical for free movement law and Article 52(1) CFR. A general interest objective needs to be identified and proportionality considered. However, it cannot be ruled out that a greater normative weight might be given to a fundamental right than to a 'mere' market freedom; the interference does not just endanger the efficient operation of the single market but also impinges on one of the core values the Union is built upon. Further, Article 52(1) CFR adds a potentially important step to the analysis: the essence of the fundamental right has to be respected.[70] In other words, a violation of the essence of the fundamental right can never be tolerated, while there is no similar doctrine for the four freedoms: even the essence of a free movement rule may be limited provided it is done for a good reason and in a proportionate manner.

In *AGET Iraklis* the Court proceeded in three stages.[71] First, it ruled out that the protection of national economy could act as a ground of justification, due to its purely economic nature, but accepted the aims of the protection of workers and employment, emphasizing that the Union has both an economic and a social purpose. Second, it examined whether the essence of the freedom to conduct a business had been respected. According to the Court, the setting up of a framework for collective redundancies does interfere with the freedom, but the freedom itself is not absolute, in particular given the language of Article 16 CFR, which is more permissive of limitations than the wording of the other fundamental rights in Title II of the Charter. The Court then proceeded to distinguish the severe limitations to contractual freedom in issue in the earlier *Alemo-Herron* judgment[72] from the mere framework for collective redundancies laid out by the Greek rules, ruling that the essence of the freedom had not been affected. Finally, the Court considered the principle of proportionality, noting

[69] This can be contrasted with the earlier ruling by the Third Chamber in *Pfleger* (n 24), where the Court simply held that the free movement and the fundamental rights analysis coincide.
[70] See Case C-362/14 *Schrems* EU:C:2015:650 for a striking example of this analysis.
[71] For more detail, see Ilektra Antonaki, 'Collective redundancies in Greece: *AGET Iraklis*' (2017) 54 *CMLRev* 1513.
[72] Case C‑426/11 *Alemo-Herron* EU:C:2013:521.

that the balance was to be struck between, on the one hand, the right of establishment and the freedom to conduct business, and, on the other hand, the protection of workers and employment as well as the fundamental right to protection against unjustified dismissal, enshrined in Article 30 CFR. In other words, apart from a clash between a free movement rule and a public interest objective, there was also a clash between two different fundamental rights. While the Court was satisfied that the general framework set up by Greece was both appropriate and necessary, it did find that a number of specific details of the system failed to comply with the principle of proportionality and therefore violated both Article 49 TFEU and Article 16 CFR.

Altogether, *AGET Iraklis* demonstrates the intricate interplay between the four freedoms and fundamental rights. If there is a barrier to free movement, the Charter applies. On the one hand, given that the Charter in essence replicates some of the free movement rules, it becomes easy to argue that fundamental rights are restricted as well. This may provide additional normative weight for the arguments and requires an assessment of whether the essence of the rights has been limited. On the other hand, many of the overriding interests that serve as justifications can also be articulated in terms of fundamental rights, such as the right to protection against unjustified dismissal in the case at hand. In other words, if the Court decides to follow the *AGET Iraklis* approach more generally, free movement cases may increasingly turn into fundamental rights cases.[73] This would have the virtue of disarming the doctrinal criticism, mentioned at the beginning of this section, that the system of justifications undervalues the status of fundamental rights by demonstrating that there are fundamental rights on both sides of the equation. However, the Court does have the option of avoiding the generalization of the *AGET Iraklis* approach if it so chooses. Under Article 52(2) CFR: '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.' It can be argued that this means that the requirements of free movement rules and provisions such as Article 15(2) CFR coincide. Indeed, in earlier Chamber judgments such as *Sokoll-Seebacher* and *Pfleger* the Court took the view that there was no need for a separate assessment of free movement rules and fundamental rights.[74]

[73] For a discussion of the intriguing question of whether free movement rights themselves can be seen as fundamental rights, see Jukka Snell, 'And Then There Were Two: Products and Citizens in Community Law' in Takis Tridimas and Paolisa Nebbia (eds), *European Union Law for the Twenty-First Century: Volume II* (Hart 2004) 49.
[74] Case C‑367/12 *Sokoll-Seebacher* EU:C:2014:68; *Pfleger* (n 24).

IV. Conclusion

In sum, the applicability of the principle of proportionality has not been a matter of controversy in free movement law, as it has been viewed as inherent in the system of justifications. However, its application differs from that in most other fields of law, as the Court very seldom considers whether a national measure is excessive, instead just focussing on the tests of appropriateness and necessity. This has merit: the alternate approach of actual balancing would entail great epistemic and theoretical problems. As a result, the case law to a large extent consists of the Court flushing out hidden protectionism or cutting down regulatory deadwood rather than second-guessing the merits of national laws. By contrast, the applicability of fundamental rights has been highly controversial, with conflicting case law and possibly an attempt at legislative override in the form of Article 51(1) CFR. Of particular significance at the moment is the question whether the reach of the free movement rules can be interpreted in the light of fundamental rights. While a seemingly natural move, it would involve extending the scope of EU law due to principles that only operate within the scope of EU law – a matter of constitutional and logical difficulty. The application of fundamental rights has become more multifaceted. They are today used both as a shield protecting national measures, and as a sword enhancing the power of the four freedoms to strike down Member State rules.

The interplay of free movement law and general principles is highly complex and in constant development. Neither the threshold of applicability nor the mode of application of general principles is fully settled. This is undoubtedly connected to under-theorized nature of their interaction. We still lack a firm grasp of issues such as the impact of fundamental rights on the scope of the four freedoms, their role in the justification stage of free movement cases, and how to conceptualize a principle of proportionality that does not involve actual balancing. Despite its twists and turns, the Court's case law has been highly successful at muddling through and creating a workable system of free movement law. But without firmer theoretical underpinnings it is unlikely to achieve true coherence and enduring stability.