



ARTICLES

CONFLICTS BETWEEN FUNDAMENTAL FREEDOMS AND FUNDAMENTAL RIGHTS IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION: A COMPARISON WITH THE US SUPREME COURT PRACTICE

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ABSTRACT: This *Article* analyses how the Court of Justice decides on conflicts between fundamental freedoms and fundamental rights in the EU. The practice of the Court will be compared with similar cases from the practice of the US Supreme Court where rights protecting economic activity and other rights come to conflict. This comparison demonstrates that the challenges faced by the Court of Justice regarding conflict of rights cases are not peculiar. The relevant case law of the Court has been the subject of criticism. The criticisms raised in relation to the way of resolving conflicts of rights by the Court of Justice could be eliminated either by the refinement of judicial argumentation of the Court or, following the example of US law, by legislation.

KEYWORDS: fundamental rights – fundamental freedoms – conflict of rights – tests – balancing – proportionality.

I. INTRODUCTION

One of the fundamental objectives of the European integration has been the establishment of the internal market: a market without internal frontiers, in which the

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free movement of goods, persons, services and capital is ensured. In parallel with guaranteeing these fundamental freedoms, fundamental (human) rights have also gradually gained recognition in the EU. The simultaneous recognition and application of the four fundamental freedoms and fundamental rights sometimes result in conflicts between them that require the Court of Justice and national courts to decide which one should prevail.

Human rights play a legitimising role in any legal system. However, not only can the recognition of human rights contribute to the legitimacy of a social system, but also how courts settle conflicts between different rights can increase or decrease that legitimacy. This brings the legal argumentation of adjudicating organs to the fore. In any legal culture, the judicial reasoning appearing in decisions must have a convincing force to ensure acceptance by the parties concerned and by the society. An appropriate justification is indispensable for any judicial decision. Judicial argumentation is built upon legal reasoning. Interrelated legal sources must constitute a coherent legal argumentation in order to appropriately justify a decision. Appropriate legal justification helps to exclude interpretative uncertainties and to further the legitimacy of the court marginalising non-legal (for instance political) considerations and arguments. This also promotes legal certainty, since it enables individuals to foresee the rules applicable to them and adapt their conduct appropriately to these rules.

In construing EU law, the Court of Justice relies on grammatical, contextual, comparative and teleological methods of interpretation.¹ The use and interplay of these techniques aim at giving a single convincing answer to any issue related to EU law. Moreover, principles, such as the proportionality test, provide a formal framework by which the Court of Justice can adhere to legal reasoning instead of political or moral considerations. Delivering a well-justified judgment may be particularly difficult if a court has to address a conflict between different rights. From this perspective, the decisions of the Court have been the subject of strong criticism for various reasons. First, it has been asserted that the Court of Justice does not treat fundamental freedoms and fundamental rights as equal, but gives automatic priority to fundamental freedoms. In the relation between fundamental freedoms and fundamental rights, fundamental rights are simply treated as exceptions to the fundamental freedoms and the protection of fundamental rights may justify the restriction of the fundamental freedoms. Second, it has often been called into question whether its method of balancing, based on the proportionality test, is predictable enough. Third, the Court of Justice has sometimes been criticised for not being sufficiently sensitive regarding certain non-economic values, such as social rights.

¹ L.N. BROWN, T. KENNEDY, *The Court of Justice of the European Communities*, London: Sweet & Maxwell, 1994, p. 299 *et seq.*

Many times, these features of the judicial reasoning of the Court of Justice have been explained by the economic-oriented teleology of EU integration or the need to apply the methodology used by the Court in internal market law cases. As a matter of course, the internal market case law of the Court has been centred on the fundamental freedoms principally promoting economic integration. However, the economic orientation does not imply that cases concerning conflicts of rights could not be addressed in a way more responsive to the criticisms related to the relationship between fundamental freedoms and fundamental rights.

The aim of the *Article* is to reveal that most of these criticisms related to judicial reasoning are not peculiar to EU law and they are not inevitable. To demonstrate this, I will refer to some similar cases from the judicial practice of the US Supreme Court, where it had to decide on the conflict between rights protecting economic activity and other rights. The concerns raised in the legal literature related to the practice of the Court of Justice could be eliminated primarily by the refinement of the case law.² This would require the following changes in the approach of the Court of Justice: as fundamental rights are not only about public interest, but they are based largely on individual interests, they cannot be seen as an exception following the pattern of the public policy exception of the TFEU or overriding reasons related to the public interest in accordance with the case law of the Court; accordingly, fundamental rights should be treated as an independent factor and not simply as a means which advances the general interest; fundamental freedoms serve equally private interests and not only public interests; therefore, fundamental freedoms and fundamental rights should be treated as equal, even formally; in the framework of the proportionality test, the Court should examine not only the restrictions inflicted by the exercise of the fundamental rights on fundamental freedoms, but also the restrictions caused by the fundamental freedoms on fundamental rights. Moreover, the analysis will also demonstrate that US federal law offers an alternative way to address conflicts between rights of economic nature and other rights: legislation. I will argue that, although legislation could promote legal certainty in conflict of rights cases in EU law, the refinement of the case law of the Court still seems necessary and, at the moment, a more viable option.

The practice of the Court of Justice and the US Supreme Court has already been compared from various perspectives, including the protection of fundamental rights in

² From the vast literature see in particular V. TRSTENJAK, E. BEYSEN, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU*, in *European Law Review*, 2013, p. 293 *et seq.*, and S. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford: Hart, 2013, p. 59 *et seq.* Further literature discussing particular concerns is cited in detail below.

general³ or in terms of multilevel constitutionalism.⁴ However, less attention has been paid so far to the comparison of the judicial practice of the two courts regarding conflict of rights. More specifically, the emphasis is put on the conflicts between fundamental freedoms or fundamental rights before the Court of Justice which will be compared with US Supreme Court cases on collisions between rights protecting the economic activity of business players and other (fundamental) rights. US law does not know the term “fundamental freedoms” as EU law does. This explains why this *Article* focuses on rights protecting economic activity in the context of US law, since these may be considered as functional equivalent to EU fundamental freedoms.

Subsequent to the introduction, section II will briefly discuss the relation between fundamental freedoms and fundamental rights in EU law. Section III examines the comparability of the judicial practice of the Court of Justice and the US Supreme Court as far as conflict of rights is concerned, and then, section IV discusses the criticisms raised regarding the case law of the Court of Justice. Section V demonstrates that similar situations and concerns are not unfamiliar in US law. This will be followed by elucidating that some of the concerns raised by the legal literature regarding the case law of the Court of Justice on conflict between fundamental freedoms and fundamental rights could be eliminated either by the refinement of the approach of the Court or by legislation (section VI). The conclusion summarises the lessons which may be drawn from the analysis (section VII).

II. FUNDAMENTAL FREEDOMS AND FUNDAMENTAL RIGHTS IN EU LAW

As known, the Treaty establishing the European Economic Community (EEC Treaty) did not contain any provision on human rights, let alone certain specific rights significant in terms of the free movement of persons.⁵ It was the Court of Justice which gradually contributed to the acknowledgment of the role of fundamental rights in the EU legal system.

³ See in particular F. FABBRINI, *Fundamental Rights in Europe*, Oxford: Oxford University Press, 2014; M. ROSENFELD, *Comparing Constitutional Review by the European Court of Justice and the US Supreme Court*, in *International Journal of Constitutional Law*, 2006, p. 623 *et seq.*

⁴ See in particular A. TORRES PÉREZ, *Conflicts of Rights in the European Union*, Oxford: Oxford University Press, 2009; A. TORRES PÉREZ, *The Dual System of Rights Protection in the European Union in Light of US Federalism*, in E. CLOOTS, G. DE BAERE, S. SOTTIAUX (eds), *Federalism in the European Union*, Oxford: Hart, 2012, p. 110 *et seq.*; M. WELLS, *Judicial Federalism in the European Union*, in *Houston Law Review*, 2017, p. 697 *et seq.*; D. HALBERSTAM, *Comparative Federalism and the Role of the Judiciary*, in G.A. CALDEIRA, R.D. KELEMEN, K.E. WHITTINGTON (eds), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, 2008, p. 142 *et seq.*; H. RASMUSSEN, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, Dordrecht, Boston, Lancaster: Martinus Nijhoff, 1986.

⁵ S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 59. See Art. 7 of the EEC Treaty on the prohibition of discrimination and Art. 119 of the EEC Treaty on equal pay for male and female workers for equal work. See also G. DE BÚRCA, *The Evolution of Human Rights Law*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 475 *et seq.*

In *Stauder*, the Court treated fundamental human rights as “enshrined in the general principles of Community law and protected by the Court”.⁶ In the *Internationale Handelsgesellschaft* ruling, the Court laid down that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice”.⁷ It also added that the protection of fundamental rights has been inspired by the constitutional traditions common to the Member States.⁸ In *Nold*, the Court further stated that international treaties for the protection of human rights on which the Member States collaborated or of which they are signatories also constitute a yardstick to be followed in Community law.⁹ The judiciary practice of the Court has been complemented only later by treaty amendments. The Single European Act referred to the promotion of “democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States”. Due to the amendments introduced by the Treaty of Maastricht, the TEU required the respect of fundamental rights by the EU as guaranteed by the European Convention of Human Rights and, as they result from the constitutional traditions common to the Member States, as general principles of Community law.¹⁰ The Treaty of Amsterdam inserted a provision into the TEU which declares that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.¹¹ The Charter of Fundamental Rights of the European Union (Charter) was adopted together with the Treaty of Nice and became binding when the Treaty of Lisbon entered into force.

In relation to the fundamental freedoms, the role of fundamental rights is manifold. First, in the case law of the Court of Justice, fundamental rights have appeared at the level of the justification when a Member State wished to derogate from any of the fundamental freedoms. Any derogation from the fundamental freedoms must comply with fundamental rights.¹² In this function, fundamental rights foster the effectiveness of fundamental freedoms, because the required compliance with fundamental rights decreases the cases when the fundamental freedoms may be derogated. Second, several cases arose later in which the enforcement of fundamental rights led to a restriction of the fundamental freedoms and *vice versa*.¹³ This is an opposite tendency to the first one. Here, fundamental rights restrict fundamental freedoms and they give

⁶ Court of Justice, judgment of 12 November 1969, case 29/69, *Stauder*, para. 7.

⁷ Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*, para. 4.

⁸ *Ibid.*

⁹ Court of Justice, judgment of 14 May 1974, case 4/73, *Nold*, para. 13.

¹⁰ Art. F, para. 2, TEU.

¹¹ Art. 6, para. 1, TEU.

¹² The first case where this was established is Court of Justice, judgment of 18 June 1991, case C-260/89, *ERT AE*, para. 43.

¹³ See in particular Court of Justice: judgment of 12 June 2003, case C-112/00, *Schmidberger*; judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, discussed later.

some latitude to those Member States and private persons which rely on fundamental rights against fundamental freedoms.

Conflicts between fundamental freedoms and fundamental rights may imply a collision between the provisions of the TFEU on fundamental freedoms and fundamental rights. However, it may also happen that it is not directly the TFEU free movement provisions that are concerned, but instead some secondary EU legislation adopted to apply fundamental freedoms in a specific field.¹⁴

The practice of the Court of Justice contributed to the reception of fundamental rights in the system of EU law and thus brought about a potential conflict between fundamental rights and fundamental freedoms. In a series of cases, the Court had to interpret the relation between fundamental freedoms and fundamental rights. Resolving the conflicts of fundamental freedoms and fundamental rights is not an easy task. They share certain similar features, but they also have distinguishing characteristics.¹⁵ Fundamental freedoms as well as fundamental rights enjoy a constitutional status in the legal system of the EU.¹⁶ Fundamental freedoms are based on the provisions of the TFEU, while fundamental rights are enshrined by the Charter of Fundamental Rights. The Charter may be interpreted as granting the rank of “fundamental right” to fundamental freedoms, to the extent that it includes the right of Union citizens “to move and reside freely within the territory of the Member States”¹⁷ and the freedom to conduct a business.¹⁸ From the practice of the Court of Justice, it follows that both are considered as principles of EU law and to be fundamental.¹⁹ Despite their fundamental nature, neither of them is absolute: they may be subject to restrictions.

Nevertheless, there are also some differences between them. Fundamental freedoms are limited to situations related to the internal market and necessitate a cross-border element. On the contrary and generally speaking, fundamental rights have a broader field of application and apply also in purely domestic situations. In the context of EU law, however, the application of fundamental rights is more limited. The

¹⁴ V. TRSTENJAK, E. BEYSEN, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU*, cit., p. 311.

¹⁵ On the comparison of fundamental human rights and economic freedoms, for example, see V. SKOURIS, *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance*, in *European Business Law Review*, 2006, p. 233 *et seq.*; E. SPAVENTA, *Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, in M. DOUGAN, S. CURRIE (eds), *50 Years of the European Treaties*, Oxford: Hart, 2009, p. 354 *et seq.*

¹⁶ R. LANE, *The Internal Market and the Individual*, in N.N. SHUIBHNE (ed.), *Regulating the Internal Market*, Cheltenham: Elgar, 2006, p. 258.

¹⁷ Art. 45, para. 1, of the Charter.

¹⁸ Art. 16 of the Charter.

¹⁹ See in particular concerning the free movement of goods Court of Justice: judgment of 9 December 1997, case C-265/95, *Commission v. France*, paras 24 and 27; *Schmidberger*, cit., para. 51 and para. 78; concerning the free movement of workers, judgment of 15 December 1995, case C-415/93, *Bosman*, para. 93.

Charter of Fundamental Rights is applicable to the institutions, bodies, offices and agencies of the EU and to the Member States only when they are implementing Union law.²⁰ According to the Court of Justice, fundamental rights as general principles of EU law are to be taken into consideration within the scope of application of EU law.²¹ Thus, outside the scope of EU law, fundamental rights cannot have an impact on the assessment of a case in the system of EU law.

It has been claimed by several authors that fundamental rights and fundamental freedoms are functionally different. In this view, fundamental freedoms aim principally at eliminating protectionism and promoting economic integration and they promote individual freedom only incidentally, while fundamental rights are devoted to safeguarding the autonomy of individuals.²² Although this argument undoubtedly has merits, some qualification must be made. While, the economic teleology of fundamental freedoms is undeniable, the Court of Justice has already pointed to the protection of individuals through market freedoms very early. It follows from the *Van Gend en Loos* judgment that EU law grants rights to individuals and these include fundamental freedoms.²³ Legal unification and harmonisation by EU legislation, as well as the judiciary practice of the Court of Justice aim at breaking down the hurdles imposed by the Member States on the economic activity of private persons. The fundamental freedoms ensure the autonomy of individuals in the internal market and confer on them a weapon primarily against state intervention, but in some cases also against hindrances raised by private persons.²⁴ Fundamental freedoms are means in the hands of individuals to strike down the obstacles to their market activity pursuing their self-interests. "The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by [the provisions of the EEC Treaty] to the diligence of the Commission and of the Member States".²⁵ In this way, market actors

²⁰ Art. 51, para. 1, of the Charter.

²¹ See in particular *ERTAE*, cit., paras 41-42; Court of Justice, judgment of 18 December 1997, case C-309/96, *Annibaldi*, paras 12-13. The relation between the scope of the Charter and fundamental rights as the general principles of EU law is debated in the legal literature. See for example L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon – The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions*, pure.uva.nl, p. 26 et seq.; S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 72 et seq.

²² E.J. LOHSE, *Fundamental Freedoms and Private Actors – Towards an "Indirect Horizontal Effect"*, in *European Public Law*, 2007, p. 172 et seq.; J. MORIJN, *Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?*, in E. BREMS (ed.), *Conflicts between Fundamental Rights*, Antwerp: Intersentia, 2008, p. 608.

²³ Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend & Loos*.

²⁴ Court of Justice, judgment of 6 June 2000, case C-281/98 *Angonese*, paras 31-36; *Bosman*, cit., para. 83.

²⁵ *Van Gend en Loos*, cit., para. 13.

become agents of economic integration.²⁶ Private autonomy promotes the free market and economic progress. As Lane asserted, "it is the pursuit of self-interest through the autonomy of the individual that he or she best serves the interests of the Community".²⁷ Derogations from the fundamental freedoms are admitted exceptionally based on various state or public interests, but they are to be construed narrowly. Too far-reaching limits tighten not only private autonomy, but have a harmful effect on the operation of market forces.²⁸ As Petersmann remarks, the autonomy of the individual is the "common core" of the markets and human rights.²⁹

Of course, the above statements do not rule out that the enforcement of fundamental freedoms by individuals equally serves the broader objective of market integration, which is in the interest not only of individuals, but also the societies of the Member States. In promoting individual interests and autonomy, fundamental freedoms resemble fundamental rights. Moreover, broadening the scope of economic freedoms beyond economically active persons and the introduction of Union citizenship attenuate the exclusivity of the economic orientation of fundamental freedoms. In addition, the incorporation of certain aspects of the fundamental freedoms into the Charter of Fundamental Rights also contributes to the approximation of fundamental freedoms and fundamental rights.

Neither the Treaties nor the Charter give any guidance on how to resolve a conflict between fundamental freedoms and fundamental human rights. The Court of Justice has never analysed the similarities and differences between fundamental freedoms and fundamental rights in its decisions. Still, at present the Court is the body which has to resolve conflicts between fundamental freedoms and fundamental rights. As my intention in this *Article* is to compare the adjudication of the Court of Justice with the US Supreme Court, it is pertinent to examine as a next step whether the case law of the two courts is comparable at all.

III. COMPARABILITY OF THE CASE LAW OF THE COURT OF JUSTICE AND THE US SUPREME COURT ON CONFLICTS OF RIGHTS

A preliminary question is whether the case law of the Court of Justice and the US Supreme Court is comparable at all as far as conflicts of rights are concerned. No doubt, the comparison is rendered difficult by several circumstances. The Court of Justice and

²⁶ C. HARDING, *Economic Freedom and Economic Rights: Direction, Significance and Ideology*, in *European Law Journal*, 2018, p. 25.

²⁷ R. LANE, *The Internal Market and the Individual*, cit., p. 273. See also J. BAQUERO CRUZ, *Free Movement and Private Autonomy*, in *European Law Review*, 1999, p. 617.

²⁸ See R. LANE, *The Internal Market and the Individual*, cit., p. 271 *et seq.*

²⁹ E.-U. PETERSMANN, *Theories of Justice, Human Rights, and the Constitution of International Markets*, in *Loyola of Los Angeles Law Review*, 2003, p. 435.

the US Supreme Court represent undoubtedly different legal cultures: the US Supreme Court is deemed to be a common law court, while the adjudication of the Court of Justice follows in many respects civil law traditions. The Court of Justice is the highest level court of a multi-layered court system of a regional integration, whereas the US Supreme Court carries out judicial functions in a federal state. The composition of the US Supreme Court may be seen as more political due to the appointment process. The judicial style of reasoning of the two courts is also different. The Court of Justice uses an impersonal magisterial style, so that the decision does not reflect any disagreement between judges. On the contrary, the opinions of the US Supreme Court contain both the majority opinion and the dissenting views in a far less formal style.

Nevertheless, the author's view is that a comparison is possible. This follows from several factors. First and foremost, the position and the role of the Court of Justice and the US Supreme Court show a resemblance; they are both the highest courts in multilevel judicial systems.³⁰ Second, the progress of the development of human rights was similar in the EU and in the US. The US Constitution did not contain human rights. They gained acknowledgment some years later in the Bill of Rights. The absence of fundamental rights in the US Constitution was explained by the limited powers enjoyed by the federal government and the vigilance over human rights by the states. The development of EU law is parallel to this, as fundamental rights gained recognition only at a later stage of the integration process.³¹ Finally, the rights examined in this *Article* and the problems (the conflicts) faced by the two courts have similar nature. The US Supreme Court does not use the same categories as the Court of Justice. Most importantly, the concept of "fundamental freedoms" or "economic freedoms" is missing in US law and we do not even find a list of rights protecting the economic activity in the US Constitution or its Amendments. This is not to say, however, that economic activity is not protected in the US constitutional system. Business activity is protected *inter alia* through the Due Process Clause enshrined in the Fourteenth Amendment and the right of property under the Fifth Amendment. Both fundamental freedoms and fundamental rights enjoy constitutional status in the EU.³² Therefore, their conflict may be comparable with the conflicts of rights ensured by the Amendments of the US Constitution. Regarding the US Supreme Court, the enquiry will also cover the conflict between the rights protecting economic activity under the Amendments and the statutory right to take

³⁰ See E. MAK, *The US Supreme Court and the Court of Justice of the European Union*, in E. FAHEY, D. CURTIN (eds), *A Transatlantic Community of Law*, Cambridge: Cambridge University Press, 2014, p. 13.

³¹ M. CAPPELLETTI, D. GOLAY, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, in M. CAPPELLETTI, M. SECCOMBE, J.H. WEILER (eds), *Integration through Law. Vol. 1. Methods, Tools and Institutions. Book 2. Political Organs, Integration Techniques and Judicial Process*, Berlin: de Gruyter, 1986, p. 339.

³² M. POIARES MADURO, *Striking the Elusive Balance between Economic Freedom and Social Rights*, in P. ALSTON (ed.), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, p. 452.

collective action. Terminological differences do not change the fact that the conflict between the same interests and rights exist in both the EU and the US legal systems. Following a functional approach, it may be noticed that adjudication at the highest level in both the EU and in the US fulfils an equivalent role concerning settling conflicts between various rights. This is the reason why I find the comparison between the Court of Justice and the US Supreme Court viable.

This conclusion is not altered by the fact that the application of the fundamental freedoms requires as a main rule some cross-border element in EU law. This is not a necessary precondition with fundamental rights in the US, but in most cases the cross-border element is present or at least could be easily created by the interstate provisions of services or the mobility of customers.

The US Supreme Court has had to address cases involving a conflict of different rights on several occasions. There are, however, fewer cases where the US Supreme Court had to consider a collision between a right of an economic nature and another right. The next sections will prove that the conflict of rights adjudication of the Court of Justice and the US Supreme Court shows certain similarities and the comparison can throw a different light upon the relevant case law of the Court of Justice.

IV. CRITICISMS RELATED TO THE COURT OF JUSTICE CASE LAW

The judicial practice of the Court of Justice has been the subject of severe criticisms in the legal literature. Most importantly, the pertinence of the hierarchical priority of fundamental freedoms over fundamental rights, the treatment of fundamental rights as an exception, the balancing between fundamental freedoms and fundamental rights and the role attributed to social rights have been called into question. The *Article* centres on these concerns. This does not mean, however, that other questions may be ignored, amongst which, for example, those related to the impact of the judiciary practice of the Court on the allocation of competences between the EU and the Member States.

Several authors explain the above features of the Court of Justice case law by the economic nature of integration³³ or by the fact that the examination of the applicability of fundamental freedoms enjoys priority in order to ascertain whether the case falls under the scope of application of EU law.³⁴ My intention is to demonstrate that this approach is not self-evident at all and that there are other ways available to approach such cases. First and foremost, I will discuss the criticisms raised in relation to the judicial practice of the Court on the conflict between fundamental freedoms and fundamental rights.

³³ M. CAPPELLETTI, D. GOLAY, *The Judicial Branch in the Federal and Transnational Union*, cit., p. 323.

³⁴ V. SKOURIS, *Fundamental Rights and Fundamental Freedoms*, cit., p. 237.

IV.1. HIERARCHY

First of all, the decisions of the Court of Justice have been contested because fundamental rights are subordinated to fundamental freedoms. Fundamental rights have been considered as part of public policy or requirements related to public interest, which may justify a restriction of the fundamental freedoms.

Neither the Treaties nor the Charter addresses the issue of the hierarchical relation between fundamental freedoms and fundamental rights explicitly. While most authors advocate for the equivalence of fundamental freedoms and fundamental rights,³⁵ the case law of the Court of Justice shows a different approach, at least in formal terms. In *Schmidberger*, which will be discussed later in detail, the referring court explicitly asked whether the free movement of goods provisions prevail over the fundamental rights concerned in the case, namely the freedom of expression and freedom of assembly.³⁶ The Court did not provide a clear answer to this question as to the hierarchy regarding fundamental freedoms and fundamental rights. Even so, the approach of the Court on the hierarchy between fundamental freedoms and fundamental rights may be decipherable from its decisions.

In most judgments, where the Court of Justice has measured fundamental rights against fundamental freedoms, fundamental rights were considered as exceptions which may justify restrictions to fundamental freedoms. Fundamental rights are usually considered as a component of public policy, an explicitly mentioned derogation in the TFEU, or as overriding reasons in the public interest, i.e. exceptions elaborated by the Court, which may justify restricting the fundamental freedoms. This implies that fundamental freedoms are hierarchically superior to fundamental rights.

In a first line of cases, human rights arguments have been linked to the protection of public policy. Human dignity (*Omega*)³⁷ and the principle of equality (*Sayn-Wittgenstein*)³⁸ were protected, for instance, as part of public policy. In other decisions, the Court of Justice treated fundamental rights as overriding requirements related to the public interest. In the *Familiapress* judgment,³⁹ concerning the Austrian prohibition on the sale of newspapers which included prize games, the maintenance of press diversity and thus safeguarding the freedom of expression qualified as “an overriding re-

³⁵ V. TRSTENJAK, E. BEYSEN, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU*, cit., p. 311 *et seq.*; V. SKOURIS, *Fundamental Rights and Fundamental Freedoms*, cit., p. 237 *et seq.*; C. LADENBURGER, *European Union Institutional Report*, in J. LAFFRANQUE (ed.), *The Protection of Fundamental Rights Post-Lisbon. The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Reports of the XXV FIDE Congress Tallinn 2012, Tallin: Tartu University Press, 2012, p. 200.

³⁶ *Schmidberger*, cit., para. 70.

³⁷ Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega*.

³⁸ *Sayn-Wittgenstein*, cit.

³⁹ Court of Justice, judgment of 26 June 1997, case C-368/95, *Familiapress*.

quirement justifying a restriction on the free movement of goods”,⁴⁰ while in *UPC*, the Court considered cultural policy and, through this, the freedom of expression as “an overriding requirement relating to the general interest”.⁴¹

Both approaches permitted the Court of Justice to use its usual scheme of examination applied in internal market law: any restriction on the fundamental freedoms must be justified either based on an express provision of the TFEU or based on an exception developed in the Court case law. The consequence of this is that a restriction of the fundamental freedoms, even based on the protection of the fundamental rights, is presumed to be unlawful. This also implies that fundamental freedoms enjoy priority over fundamental rights, although the Treaties and the Charter do not provide for such a hierarchy between them. Moreover, in practical terms, this means that the person relying on fundamental rights against the application of a fundamental freedom has to bear the burden of proof.⁴²

From a purely formal perspective, the Court of Justice does not solve a collision between a fundamental freedom and a fundamental right. Instead, fundamental freedoms are juxtaposed with public policy or an overriding reason related to the general interest. In my view, this practice might intend to mitigate the conflict between fundamental freedoms and fundamental rights.

There is a narrow area where the Court of Justice explicitly laid down a hierarchy between rights. The Court established that there are rights which admit no restriction, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment.⁴³ This implies that the right to life or the prohibition of torture enjoys priority even over fundamental freedoms. There is a hierarchical relationship here. The priority of these rights seems straightforward. However, we can find instances where there was a potential conflict between these non-restrictable rights and fundamental freedoms. In the *Grogan* case, the Court held that the national prohibition on distributing information about clinics in other Member States where abortion is lawfully carried out falls outside the scope of Community law if the information had been spread by a student association not related to the clinics concerned. But what would happen if the advertisement had been published by the clinics themselves, or if a pregnant woman had gone to another Member State to benefit from abortion as a service?⁴⁴ This would clearly fall un-

⁴⁰ *Ibid.*, para. 18.

⁴¹ Court of Justice, judgment of 13 December 2007, case C-250/06, *UPC*, para. 41.

⁴² S.A. DE VRIES, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, in *Utrecht Law Review*, 2013, p. 187; S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 88; C. HARDING, *Economic Freedom and Economic Rights*, cit., p. 25.

⁴³ *Schmidberger*, cit., para. 80.

⁴⁴ N.N. SHUIBHNE, *Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law*, in *European Law Review*, 2009, p. 246 *et seq.*

der the scope of the free movement of services. How should the conflict between the freedom to provide services and the right to life of the foetus and of the mother be resolved? We can just try to guess at it. Similar problems may also arise when someone travels to another Member State for the purpose of having recourse to euthanasia as a lawful service, while this is prohibited in the Member State where he lives.⁴⁵

However, this pre-defined relation between fundamental freedoms and fundamental rights involves a formal assessment of the collision. The formal priority of fundamental freedoms over fundamental rights aims rather at fitting conflict of rights cases into the traditional scheme of examination of internal market law cases. In this sense, this is rather a rhetoric device. Conflicts between fundamental freedoms and fundamental rights are not necessarily solved in favour of the fundamental freedoms. Therefore, the substantive assessment of the concrete case may have the result that the fundamental freedoms must give way to fundamental rights. I will address this question in detail in the following sub-section.

IV.2. BALANCING BY THE COURT OF JUSTICE

Although, from the above analysis, it would follow that fundamental freedoms prevail over fundamental rights, this is only the formal point of departure of the Court of Justice. The *a priori* primacy of fundamental freedoms must be examined in the light of the method of balancing used by the Court of Justice and national courts. The Court cannot escape a substantive assessment of the conflict between fundamental freedoms and fundamental rights despite the formal priority of fundamental freedoms. In a given case, either a fundamental freedom or a fundamental right may gain priority against the other one. This leads us to take under scrutiny the substantive assessment of conflicts between fundamental freedoms and fundamental rights by the Court.

The proportionality test serves the function of legally justifying the decision of the Court of Justice. It plays a legitimising role in the judicial reasoning. When fundamental freedoms and fundamental rights must be measured against each other, the Court applies the proportionality test. As a matter of fact, this determines in a given case whether fundamental freedoms or fundamental rights will prevail. The substantive balancing carried out by the Court can mitigate the formal, pre-defined hierarchy between fundamental freedoms and fundamental rights.

The proportionality test is widely used in constitutional and human rights adjudication as a method of legal reasoning. This is a flexible tool which enables the court to give a legally buttressed and structured answer to the question before the court. Concerning conflicts between fundamental freedoms and fundamental rights, the way how the principle is interpreted and applied, allows the Court to give

⁴⁵ *Ibid.*, p. 251 *et seq.*

preference either to an integrationist or a human rights favouring interpretation. Undoubtedly, the proportionality test is usually considered as an appropriate tool to balance between diverging interests and justify a judgment. The use of the proportionality test may provide a legal reasoning which ensures that the decision is not arbitrary. Nevertheless, the outcome of the application of the proportionality test is not always predictable. The Court of Justice makes proportionality decisions on the basis of the facts of the case concerned. As it is almost always possible to distinguish cases along the facts, the proportionality review provides the judges with considerable room to manoeuvre.⁴⁶ In addition to the singularity of the facts, the intensity of the proportionality test and the margin of discretion left to the referring national court are also changing, hence a proportionality review rarely has a precedent creating force.⁴⁷

The proportionality test applied by the Court of Justice has been the subject of criticisms by some authors in particular from two angles: from the point of view of the respect for national standards of human rights protection and from the perspective of the room left to national courts in the framework of the preliminary ruling procedure.⁴⁸

It has been said that the Court of Justice applies “oscillating methods”⁴⁹ or it “is struggling to find the right test”.⁵⁰ It seems indeed that the proportionality test applied by the Court has its own variations. *Omega* and *Sayn-Wittgenstein* may be contrasted with *Viking* and *Laval*, as has been done by some authors.⁵¹ In *Omega* and *Sayn-Wittgenstein*, the Court showed deference to national constitutional orders permitting the restriction of the fundamental freedoms based on the protection of fundamental rights. In *Omega*, the Court acknowledged that the level of protection of public policy may vary between the Member States.⁵² The game which could be prohibited by Germany on the basis of the protection of public policy was permitted in the UK. In *Viking* and *Laval*, the Court gave priority to the freedom of establishment and the freedom to provide services respectively over the right of trade unions to take collective action, in spite of a higher level of protection ensured in some national laws for that right. This is particularly striking in *Viking*, where the Finnish Constitution acknowledged explicitly the right to strike. To put in another way, *Omega* and *Sayn-Wittgenstein* recognise the

⁴⁶ G. BECK, *The Legal Reasoning of the Court of Justice of the European Union*, Oxford: Hart, 2012, p. 324.

⁴⁷ See *ibid.*, p. 325.

⁴⁸ *Ibid.*, p. 178.

⁴⁹ A. VELDMAN, *The Protection of the Fundamental Rights to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR*, in *Utrecht Law Review*, 2013, p. 109.

⁵⁰ S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 90; S.A. DE VRIES, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, cit., 188.

⁵¹ S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 90 *et seq.*

⁵² *Omega*, cit., para. 31.

competence of the Member States to determine the content of their public policy, while in *Viking* and *Laval* the Court imposed a limit on the national competence in defining the content of fundamental rights. Moreover, *Viking* and *Laval* seem to suggest that trade unions have a much narrower leeway to justify a restriction than do Member States.⁵³ It is generally acknowledged that private parties may rely on the same express TFEU exceptions and overriding requirements related to the public interest as Member States may do.⁵⁴ However, contrary to Member States, private actors can rarely justify a restriction on grounds of public interest.⁵⁵

Under Art. 267 TFEU, the task of the Court of Justice is the interpretation of EU law, while its application in the given case, including the balancing exercise, the proportionality review and the choice between the fundamental freedoms and fundamental rights is left to the courts of the Member States. Spaventa asserts that treating fundamental rights as a general interest exception, which may justify a restriction on the free movement provisions, imposes “upon the Member States a restrictive approach to fundamental rights”.⁵⁶ This is somewhat counterbalanced by the margin of discretion conferred to the Member States through the proportionality test.⁵⁷ However, the leeway left to the referring national court varies. It is less transparent when the Court of Justice applies the proportionality test in a manner which does not leave any practical autonomy for the referring national court and when the application of the proportionality test is allowed to be carried out by national courts. *Familiapress* is an example of granting some freedom of decision to the national court,⁵⁸ while the breadth of the margin of discretion of the national court was much limited in *Viking* and *Laval*.⁵⁹

As discussed above, in solving conflicts between fundamental freedoms and fundamental rights, the Court faces difficult questions. As we have already anticipated, the accommodation of social rights in the EU legal order has posed a further challenge for the judges of the Court. This is examined in the next sub-section.

IV.3. FUNDAMENTAL FREEDOMS AND SOCIAL RIGHTS

The original objective of the EU was economic integration. However, successive treaty amendments brought certain social objectives and social rights to the fore. The European Social Charter (ESC) was adopted in 1961, but the EU is not a party thereto.

⁵³ A. VELDMAN, *The Protection of the Fundamental Rights to Strike within the Context of the European Internal Market*, cit., p. 109.

⁵⁴ L.W. GORMLEY, *Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?*, in *Fordham International Law Journal*, 2015, p. 1010 *et seq.*

⁵⁵ *Ibid.*

⁵⁶ E. SPAVENTA, *Federalisation Versus Centralisation*, cit., p. 357.

⁵⁷ *Ibid.*

⁵⁸ A. TORRES PÉREZ, *Conflicts of Rights in the European Union*, cit., p. 173.

⁵⁹ G. BECK, *The Legal Reasoning of the Court of Justice of the European Union*, cit., p. 304.

Even so, the Single European Act referred to the ESC,⁶⁰ and later the TEU has been amended by the Treaty of Amsterdam to include an equivalent reference.⁶¹ In some judgments, the Court of Justice has also relied on the ESC.⁶² Moreover, Chapter IV of the Charter of Fundamental Rights also includes social rights.

There is undoubtedly a tension between the promotion of the internal market and other objectives. The relation between fundamental freedoms and fundamental rights has not been made unequivocal by the Treaties, the Charter of Fundamental Rights and Court of Justice case law. Market integration, fundamental rights and social objectives all find some buttress in the text of the Treaties, which can support divergent interpretations in the event of conflict between fundamental freedoms and fundamental rights.⁶³ As a consequence, the institutions interpreting these provisions, such as the Court, enjoy a considerable freedom in pursuing a free market objective or the promotion of social rights.⁶⁴ I will focus here on the relation between fundamental freedoms and the right to take collective action, as this has been discussed by the Court of Justice and similar cases may be also found in the practice of the US Supreme Court.

There are two much debated judgments where the Court of Justice had to interpret the right to collective action by trade unions, the above-mentioned *Viking* and *Laval* decisions. *Viking* and *Laval* do not differ much from the previous judgments. The Court found that the right to take collective action for the protection of workers is a legitimate interest which may justify a restriction of one of the fundamental freedoms as an overriding reason of public interest.⁶⁵ The fact that the Court favoured in these cases fundamental freedoms over the right to take collective action sparked, however, heated debates.

In most of the conflict of rights cases, the reasoning of the Court of Justice and the outcome of the cases were welcomed by the legal literature. This was the case, even if the proportionality test used by the Court has shown some volatility and this has been sometimes criticised. On the contrary, *Viking* and *Laval* were fiercely contested by trade unions and workers' organisations, as well as by some representatives of legal science, for favouring the free movement rights of employers over the rights of employees and for ignoring the different levels of protection adopted in the Member States.⁶⁶ This is undoubtedly due to the fact that *Viking* and *Laval* concerned more broadly the issue of social dumping. Giving priority to the freedom of establishment and the freedom to

⁶⁰ Preamble, Single European Act.

⁶¹ Preamble, TEU.

⁶² See in particular Court of Justice: judgment of 15 July 2010, case C-271/08, *Commission v. Germany* [GC], para. 37; judgment of 18 December 2007, case C-341/05, *Laval* [GC], para. 90; judgment of 11 December 2007, case C-438/05, *Viking* [GC], para. 43.

⁶³ See D. NICOL, *Europe's Lochner Moment*, in *Public Law*, 2011, p. 322.

⁶⁴ *Ibid.*

⁶⁵ *Viking* [GC], cit., paras 75 and 77; *Laval* [GC], cit., paras 101 and 103.

⁶⁶ See, for example, European Trade Union Confederation, *ETUC Response to Court Judgements Viking and Laval*, www.etuc.org.

provide services involved a decision permitting social dumping and the reduction of the standards of working conditions.

Viking and *Laval* are often distinguished from the other cases. While, for example in *Omega* and *Sayn-Wittgenstein*, the Court of Justice preferred the protection of fundamental rights to fundamental freedoms, in these cases the freedom of establishment and the freedom to provide services prevailed. The previous cases could be better explained by weighing the conflicting interests by the proportionality test. Formally speaking, the judicial reasoning of the Court in *Viking* and *Laval* does not differ from the earlier judgments. It might seem, however, that in *Viking* and *Laval* the Court made a policy decision in the disguise of the proportionality test. From the perspective of legal argumentation, perhaps the Court could have clarified why it granted priority to fundamental freedoms over the right to take collective action. Here, the elucidation of policy considerations could have contributed to this. The formalistic tool of the proportionality test seems not to be suitable to give weight to such policy considerations. As it has been argued, the template of proportionality simply hides the policy-oriented motivation of the decisions of the Court.⁶⁷ The proportionality test gives the pretence of legal argumentation for policy decisions. It must be noted, however, that if the Court had made its policy choice explicit where the proportionality test does not function, it would have taken over the role of legislation in policies (sometimes intentionally) not well articulated. Such an approach would also affect the interinstitutional relations within the EU.

The room of the referring national court to give weight to the protection of fundamental rights according to national standards was significantly limited. This is often explained by the fact that, in *Viking* and *Laval*, the reliance on the right to collective action could be seen as a means of protectionism infringing the free movement provisions.⁶⁸ An interesting corollary of the Court of Justice case law is the scope of permitted restrictions. It must be stressed that, according to the established practice of the Court, fundamental freedoms may not be restricted, neither by a Member State nor by a private person, for economic reasons. The purpose of this rule is the prevention of protectionism. However, this does not hold for fundamental rights. Fundamental rights may be restricted for economic reasons, such as the unhindered exercise of the fundamental freedoms.

We have seen above that the practice of the Court of Justice on solving conflicts between fundamental freedoms and fundamental rights has been challenged for various reasons. The next section will demonstrate that some of these concerns are also present in US law and thus they are not peculiar to EU law.

⁶⁷ F. FONTANELLI, *The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights*, in *Oxford Journal of Legal Studies*, 2016, p. 659.

⁶⁸ L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, cit., p. 24; C. LADENBURGER, *European Union Institutional Report*, cit., p. 200; C. SEMMELMANN, *The European Union's Economic Constitution under the Lisbon Treaty: Soul-searching Shifts the Focus to Procedure*, in *European Law Review*, 2010, p. 535.

V. THE CASE LAW OF THE US SUPREME COURT

V.1. HIERARCHY

We have seen that the Court of Justice case law gives *a priori* primacy to fundamental freedoms over fundamental rights, but this is only a formal point of departure. Due to the substantive balancing through the proportionality test, either fundamental freedoms or fundamental rights may prevail in the event of a conflict between them.

The US Constitution and its Amendments do not provide explicitly for a hierarchy between the various rights. However, fundamental rights are distinguished from other rights.⁶⁹ Fundamental rights are those rights which are explicitly or implicitly considered as fundamental by the US Supreme Court. A further difference exists between the rights from the angle of the standard of review in the event of interference and thus the level of their protection also varies. Like in EU law, neither fundamental rights nor any other rights operate as trumps in US law in the event of a conflict between rights. This is also true for the fundamental rights protecting economic interests which, like other rights, are not absolute. As we will see, a pre-defined hierarchy has not even been applied in the event of a conflict between fundamental rights protecting economic activity and the statutory right to take collective action.

There are few cases in the practice of the US Supreme Court where a conflict between a fundamental right protecting economic activity and another right had to be settled. One of the reasons for this may be that many times fundamental rights protecting an economic activity are contrasted with some public interest of the state, the legislation of which is under review. Sometimes, the public interest protected also embodies the protection of a fundamental right. The legal argumentation of the US Supreme Court does not necessarily extend to the issue of the conflict of rights but instead focuses on the interference of state legislation with one of the fundamental rights concerned. For instance, in *Sorrell v. IMS Health Inc.*, the US Supreme Court had to decide whether a Vermont statute, which prohibited the sale, disclosure and use of prescriber-identifying information (the prescribing practices of individual doctors) by pharmacies in the absence of the prescriber's consent, had violated the free speech rights of pharmaceutical manufacturers.⁷⁰ Pharmaceutical companies use these pharmacy records for promoting their drugs. The majority of the judges held that speech promoting pharmaceutical marketing is a form of expression protected under the Free Speech Clause of the First Amendment which had been violated by the Vermont stat-

⁶⁹ On the hierarchy of rights in US law, see M.R. KONVITZ, *Fundamental Rights*, New Brunswick: Transaction, 2001, p. 1 *et seq.*

⁷⁰ US Supreme Court, judgment of 23 June 2011, *Sorrell, Attorney General of Vermont, v. IMS Health Inc.*

ute.⁷¹ The US Supreme Court made a short hint to personal privacy and human dignity in relation to handling the data concerned, but it did not address the conflict between free speech and human dignity directly. The US Supreme Court reviewed state legislation and not individual rights in the light of the First Amendment. *Sorrell* and many other instances show that the US Supreme Court focuses on the restriction of certain rights by governmental measures. The latter are usually supported by some broader general interest objective, such as the protection of public health, although they could be often formulated as reflecting the protection of individual rights. This approach followed also in other cases hides direct conflicts between rights and has the consequence that there are not too many cases where rights protecting economic interests and other rights collide directly. In the remaining cases, however, fundamental rights protecting economic activity are treated independently and not as a part of a broader public interest criterion, unlike in EU law. In these cases, the US Supreme Court cannot avoid weighing the conflicting rights against each other.

V.2. BALANCING

The constitutionality review of governmental measures by the US Supreme Court takes different forms and ranges from the rational basis review to strict scrutiny through various intermediate standards. When assessing conflicts of rights, the same applies. The US Supreme Court does not rely on a single uniform test, but instead a tiered scrutiny. The test applicable varies according to the nature of the case and the right concerned. Each type of the tests examines the relation between the measure and the governmental objective or interests pursued by that measure. Strict scrutiny requires that the measure must be narrowly tailored, must be the least restrictive means of achieving the objective and the government act must be justified by a compelling state interest. Intermediate scrutiny requires that the governmental measure substantially promotes an important governmental interest. Finally, the most relaxed rational basis review simply requires that a governmental measure shall be rationally related to a legitimate government interest. It is often subject of dispute which level of judicial scrutiny is to be applied in a given case. The inconsistency of the application of the tiered review by the US Supreme Court has been challenged in the legal literature.⁷²

Unlike in the EU multilevel judicial system, the opinions of the US Supreme Court do not, however, require "implementation" by state courts. The US Supreme Court decides rights conflicts directly and the outcome of the case depends entirely upon the test applied by the US Supreme Court. On the contrary, strictly formally and legally the

⁷¹ US Constitution, Amendment I: "Congress shall make no law [...] abridging the freedom of speech, or of the press".

⁷² J. MATHEWS, A. STONE SWEET, *All Things in Proportion? American Rights Review and the Problem of Balancing*, in *Emory Law Journal*, 2011, p. 797.

Court of Justice is limited to interpret EU law and then the referring national court has to decide the case, though Court rulings often predetermine the correct application of EU law and thus the decision of the referring court.

In *PruneYard Shopping Center v. Robins*, the US Supreme Court had to deal with the conflict between the freedom of expression and the right to property.⁷³ A group of students solicited signatures in PruneYard Shopping Center in order to protest against a resolution by the United Nations condemning Zionism. The students' conduct was peaceful. A security guard requested them to leave the shopping centre as the shopping centre's regulations prohibited any publicly expressive activity not directly related to the commercial purposes of the shopping centre. The students left the shopping centre immediately, but later on they filed suit in a California state court against the denial of their access to the shopping centre. The case reached the California Supreme Court, which stated that the California Constitution protects free speech and petitioning and the federally protected right of property of the owner of the shopping mall had not been violated. This judgment was also confirmed by the US Supreme Court, which established that a State may "adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution".⁷⁴ The rules enshrined in a state constitution which permit the exercise of free speech and petition rights for individuals on the property of a privately owned shopping centre open to the public does not violate the shop owner's property rights under the Fifth⁷⁵ and Fourteenth Amendments⁷⁶ and free speech rights under the First and Fourteenth Amendment.⁷⁷ A State may impose reasonable restrictions on property rights as long as the restriction does not amount to taking without just compensation or contravene any other federal constitutional provision.

The US Supreme Court held that any restriction on property rights must be reasonable. The effect of the freedom of expression on property rights, however, was not thoroughly analysed by it. The US Supreme Court briefly pointed out that the exercise of the freedom of expression did not cause an interference with normal business operations. Thus, its impact on commerce was marginal. Indeed, property was not taken, but the exercise of business activity might be affected, even by peacefully soliciting for signatures or leafleting: the shop owner has to provide maintenance and security in the building; some customers may be distracted by the demonstrators and

⁷³ US Supreme Court, judgment of 9 June 1980, *Pruneyard Shopping Center v. Robins*.

⁷⁴ *Ibid.*, p. 81.

⁷⁵ US Constitution, Amendment V: "[...] nor shall private property be taken for public use, without just compensation".

⁷⁶ US Constitution, Amendment XIV, s. 1: "[...] nor shall any State deprive any person of life, liberty, or property, without due process of law".

⁷⁷ *Ibid.*: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law".

they may therefore choose another shopping mall.⁷⁸ All these cause loss of the profit for the store owners. In addition, a mall owner may feel it necessary to express that he does not agree with the views of the demonstrators. In any case, these concerns may cause additional risks and costs for the owners of the shopping mall and the stores. Undoubtedly, there could have been several alternatives available to exclude or reduce the impact of the freedom of expression, in particular using other media, such as television, radio or internet.⁷⁹ The use of these media, however, may involve some costs for those exercising the freedom of expression, while the demonstrators in this case could “free ride” the premises of the shopping mall. The US Supreme Court held that a mall owner may adopt regulations on time, manner etc. However, from the judgment it might be inferred that a mall owner has to tolerate even a continuous presence of the same or a different group which intends to express its views.⁸⁰

As we have seen, the Court of Justice does not have jurisdiction to review national acts on human rights grounds if the matter falls outside the scope of application of EU law.⁸¹ Art. 51 of the Charter of Fundamental Rights adds that the measures of the Member States are covered by the Charter “only when they are implementing Union law”. The US Supreme Court can assert jurisdiction regarding federal and state acts even if the act of a state falls within the competence of the state.⁸² Therefore, it could be said that, at first sight, the US Supreme Court established a uniform constitutional order with regard to the protection of human rights and this assertion could be contrasted with EU law.⁸³ However, the impact of the decision of the US Supreme Court in *PruneYard* is that, despite the previous judiciary practice of the US Constitution allowing property owners to exclude protestors from their property, the states may impose a different, higher standard for the freedom of expression limiting property rights.⁸⁴ Thus, the relationship between the freedom of expression and property rights is largely determined by state constitutions, and in this way, the US Supreme Court acknowledged the diversity of the level of protection in state constitutions. The judgment discussed the relationship between the freedom of expression and property rights, but it could be easily accommodated in an EU cross-border context as a restriction of the freedom to

⁷⁸ L.M. COHEN, *Pruneyard Shopping Center v. Robins: Past, Present and Future*, in *Chicago-Kent Law Review*, 1981, p. 390 *et seq.*

⁷⁹ *Ibid.*, p. 395.

⁸⁰ G.C. SISK, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, in *Harvard Journal of Law & Public Policy*, 2009, p. 403 *et seq.*

⁸¹ *ERT-AE*, cit., para. 42. See X. GROUSSOT, L. PECH, G.T. PETURSON, *The Reach of EU Fundamental Rights on Member State Action after Lisbon*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford: Hart, 2013, p. 99 *et seq.*

⁸² US Supreme Court, judgment of 8 June 1925, *Gitlow v. People of the State of New York*.

⁸³ X. GROUSSOT, L. PECH, G.T. PETURSON, *The Reach of EU Fundamental Rights on Member State Action after Lisbon*, cit., p. 101.

⁸⁴ L.M. COHEN, *Pruneyard Shopping Center*, cit., p. 387 *et seq.*

provide services or receive services by the freedom of expression protected by Art. 11 of the Charter of Fundamental Rights. In such a context, the approach of the US Supreme Court may be considered to be parallel to the statements of the Court of Justice in *Omega* or *Sayn-Wittgenstein*, where the Court recognised the constitutional peculiarities of the Member States in protecting their public policy and leaving significant leeway for the Member States. Furthermore, more specifically *Familiapress* and later *Schmidberger* allowed the restriction of the fundamental freedoms on the grounds of the protection of the freedom of expression.

Some civil rights cases in the judiciary practice of the US Supreme Court concerned the conflict between the property right of the owner and the equal protection rights of others under the Civil Rights Act of 1964.⁸⁵ The Civil Rights Act of 1964 was adopted primarily on the basis of the Commerce Clause, but partly as the implementation of Section 5 of the Fourteenth Amendment.⁸⁶ The selection of the Commerce Clause as a legal basis was justified by the *Civil Rights Cases of 1883*.⁸⁷ In the *Civil Rights Cases of 1883*, the US Supreme Court found the Civil Rights Act of 1875⁸⁸ unconstitutional and held that the Congress did not have the power under the Fourteenth Amendment to prohibit racial discrimination by private owners of public accommodation, as opposed to discriminatory state law or action.⁸⁹

The adoption of the Civil Rights Act of 1964 under the Commerce Clause somewhat distracted the attention from any potential conflict between the right to equality protected by the Fourteenth Amendment and other rights, such as property rights which protect economic activity. *The Heart of Atlanta Motel v. United States* brought back the attention to this question. Here, the owner of a large motel claimed that the enforcement of the prohibition of discrimination enshrined in Title II of the Civil Rights Act of 1964 (Injunctive relief against discrimination in places of public accommodation) exceeded the Congress' powers under the Commerce Clause and breached the Fifth Amendment as being deprivation of property or liberty without due process of law, since the owner had been deprived of the right to choose its customers and operate its business as he wished.⁹⁰ The hotel owner also argued that they were subject to involuntary servitude, in violation of the Thirteenth Amendment, when they were required to rent rooms to certain

⁸⁵ US Congress, Civil Rights Act of 1964, 2 July 1964.

⁸⁶ Art. I, section 8, of the US Constitution: "The Congress shall have Power [...] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

⁸⁷ US Supreme Court, judgment of 16 October 1888, *Civil Rights Cases*.

⁸⁸ US Congress, Civil Rights Act of 1875, 27 February 1875.

⁸⁹ R.C. CORTNER, *Civil Rights and Public Accommodations – The Heart of Atlanta Motel and McClung Cases*, Lawrence: University Press of Kansas, 2001, p. 17 *et seq.*

⁹⁰ US Supreme Court, judgment of 14 December 1964, *The Heart of Atlanta Motel v. United States*.

persons against their will.⁹¹ Before the enactment of the Civil Rights Act of 1964, the motel did not rent rooms to black people and it intended to continue this practice. The US Supreme Court held that the Commerce Clause was a proper legal basis to adopt the provisions concerned, since the motel served interstate travellers. The US Supreme Court established that it must be ascertained “(1) whether the Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate”.⁹² The determination of how to eliminate the obstacles to interstate commerce was considered to be a matter of policy which falls within the discretion of the Congress. The method chosen must, however, be “reasonably adapted to the end permitted by the Constitution”.⁹³ The US Supreme Court only briefly addressed and rejected the claims concerning deprivation of property and involuntary servitude, referring to some of its previous opinions. As Justice Black pointed out in his concurring opinion, it would have been ironic to apply the guarantee of due process adopted to prohibit racial discrimination in order to deprive the Congress of power to eliminate such discrimination.⁹⁴ Justice Douglas, while concurring, argued that the decision should have been based on the legislative power contained in section 5 of the Fourteenth Amendment.⁹⁵ In his opinion, the prohibition of racial discrimination must have been applied irrespective of the commercial activity and intra- or interstate nature of the business.

On the same day, the US Supreme Court reached a similar conclusion in *Katzenbach v. McClung*, where the owners of a restaurant claimed that Title II of the Civil Rights Act of 1964 was unconstitutional.⁹⁶ It was held that the prohibition of discrimination concerning restaurants falls within the commerce power of the Congress and, in the given case, the substantial portion of the food served in the restaurant moved in interstate commerce. In this case, however, no reference to the deprivation of property or to involuntary servitude was made by the restaurant owners. Nevertheless, the concurring opinions delivered in *Heart of Atlanta*, which also concerned the Fourteenth Amendment, also applied to *Katzenbach*.

We have seen that, although the Court of Justice applies the proportionality test in all cases, it has still its own variations. Sometimes, the Court has been criticised for its lack of consistency in applying the proportionality test. This is even more so in the US Supreme Court. In solving rights conflicts, it does not use the proportionality test or any

⁹¹ US Constitution, Amendment XIII, s. 1: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”.

⁹² US Supreme Court, *The Heart of Atlanta Motel v. United States*, cit.

⁹³ *Ibid.*, p. 262.

⁹⁴ *Ibid.*, p. 278.

⁹⁵ *Ibid.*, pp. 279-286.

⁹⁶ US Supreme Court, judgment of 14 December 1964, *Katzenbach v. McClung*.

other consistently applied test. The variations are even more palpable than in the Court of Justice case law, and the determination of the applicable test often constitutes a subject of legal dispute before the US Supreme Court. The US Supreme Court had recourse to the rational basis review in *PruneYard*. In *The Heart of Atlanta*, a two-prong test was applied, requiring a rational basis for the legislation and the reasonability and appropriateness of the selected means. This latter requirement seems to be close to the examination of the suitability of the measure under the proportionality test of the Court of Justice. This was, however, applied to the analysis of whether the Commerce Clause was an appropriate legal basis for the Civil Rights Act of 1964 and not regarding the Fourteenth Amendment or the potential conflict between the right to equality and the Fifth and Thirteenth Amendment. The heterogeneity of the judicial reasoning of the US Supreme Court is further confirmed if we examine a particular type of conflict, namely the conflict between fundamental rights and the right to collective action in the following sub-section.

V.3. THE RIGHT TO TAKE COLLECTIVE ACTION AND ECONOMIC ACTIVITY

In the EU, social rights gained recognition progressively. However, it is still debated what is the exact role of social rights in EU integration. We have seen how fervent debates the *Viking* and *Laval* judgments stirred in the EU. The development of social rights in the US has had also its own limits. The International Covenant on Economic, Social and Cultural Rights has been signed, but not ratified by the US.⁹⁷ US law resisted constitutionalising social rights. The US Constitution and its Amendments do not refer to social rights. Although Franklin Delano Roosevelt proposed a second bill of rights containing social rights in 1944, this was not adopted.⁹⁸ Social rights are instead protected by state or federal law and generally miss the “fundamental right” status under the US Constitution.⁹⁹ In the US, the lack of recognition of social rights at federal level was the subject of criticism and the necessity of safeguarding social rights is a recurrent claim made by some legal scholars.¹⁰⁰ Nevertheless, the US Supreme Court also had to address the conflict between fundamental rights protecting economic activity and social rights. A returning question has been the right of workers to take collective action and the rights of the business owners.

⁹⁷ International Covenant of Economic, Social and Cultural Rights, adopted in New York on 16 December 1966, entered into force on 3 January 1976.

⁹⁸ C.R. SUNSTEIN, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever*, New York: Basic Books, 2004.

⁹⁹ T. ZIMMERMAN, *Prospects for Economic, Social and Cultural Rights under US Law*, in *Whittier Law Review*, 1993, p. 554.

¹⁰⁰ See for example C.R. SUNSTEIN, *The Second Bill of Rights*, cit.; W.E. FORBATH, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in J.M. BALKIN, R.B. SIEFEL (eds), *The Constitution in 2020*, Oxford: Oxford University Press, 2009, p. 55.

The US Supreme Court had to decide in many cases on the rights of trade unions and the rights of the companies concerned, regarding labour disputes. Although we find reference to the “fundamental” nature of the right of employees to self-organisation and to select their representatives for collective bargaining or other mutual protection in the case law of the US Supreme Court, such a right is not mentioned in the US Constitution and its Amendments.¹⁰¹ The right to collective action is a statutory right. The US Supreme Court recognised in these cases that the business as a going concern is protected under property rights. Thus, strikes and boycotts organised by trade unions were many times considered as interfering with the right of property.

In *Gompers v. Bucks Stove & Range Co.*, the officers of a trade union and some staff members of the trade union journal were prohibited by court injunction to continue a boycott organised by them against the Bucks Stove company because of a controversy over working time.¹⁰² In a related contempt procedure, the defendants claimed that the injunction and the contempt proceedings violated the liberty of speech and press. Although the Supreme Court recognised the right of association of workers, it stressed that the court protects individuals against the vast power of trade unions. This was justified by the fact that the campaign pursued by the trade union exceeded “any possible right of speech which a single individual might have”.¹⁰³ In addition, the US Supreme Court noted that “the court’s protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained”.¹⁰⁴ The freedom of speech and press were thus contrasted here with the right of property and the freedom of speech of the private person concerned by the trade union action.

In *Truax v. Corrigan*, a restaurant owner did not accept the terms and conditions of employment demanded by the staff and a trade union of which the cooks and waiters of the restaurant were members.¹⁰⁵ As response, the staff and the trade union began a strike and boycott against the restaurant, discouraging customers to turn in the restaurant. The boycott caused a serious loss in the restaurant’s takings. However, an Arizona statute ruled out granting a restraining order or injunction in the event of a peaceful strike and boycott. The majority of the US Supreme Court established that despite the state statute, the boycott violated the Due Process Clause¹⁰⁶ and the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁷ Here again, the business was considered as a

¹⁰¹ US Supreme Court, judgment of 12 April 1937, *NLRB v. Jones & Laughlin Steel Corp.*

¹⁰² US Supreme Court, judgment of 15 May 1911, *Gompers v. Bucks Stove & Range Co.*

¹⁰³ *Ibid.*, p. 439.

¹⁰⁴ *Ibid.*, p. 438.

¹⁰⁵ US Supreme Court, judgment of 19 December 1921, *Truax v. Corrigan*.

¹⁰⁶ US Constitution, Amendment XIV, s. 1: “[...] nor shall any State deprive any person of life, liberty, or property, without due process of law”.

¹⁰⁷ *Ibid.*: “[...] nor deny to any person within its jurisdiction the equal protection of the laws”.

property right “and free access for employees, owner, and customers to his place of business is incident to such right”.¹⁰⁸

Another case where the US Supreme Court made a ruling on the conflict between the rights of trade unions and business owners was *Dorchy v. State of Kansas*.¹⁰⁹ Dorchy, an officer of a trade union, was prosecuted and sentenced since he called the workers of a mining company to strike because of a claim of payment which was allegedly due to a former employee. The Court of Industrial Relations Act of Kansas, however, forbade conspiring to induce others to strike in mining. The prohibition also covered the officers of labour unions. Justice Brandeis, speaking for the court, confirmed that “the right to carry on business – be it called liberty or property – has value”.¹¹⁰ He found that the strike intended only to compel the employer to effect payment and that Dorchy's stale claim due to a former employee is not a legitimate purpose. Finally, the US Supreme Court established that “neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike”.¹¹¹ The decision did not balance the rights concerned, but simply ascertained the impermissible nature of the strike.

A common feature of these cases is that the US Supreme Court did not undertake a thorough balancing exercise, but simply granted priority to property rights. *Truax v. Corrigan* resembles the *Viking* case, where the national standard of the protection of fundamental rights, namely the right to take collective action, was set aside in order to foster economic activity. It seems that the deference to state standards is weaker concerning the right to take collective action, both in the EU and the US. This may be contrasted by the state-level defence of other fundamental rights in the practice of both courts (in the EU *Omega*, *Familiapress* and *Sayn-Wittgenstein* as well as *PruneYard* in the US). It must be also noted that the rulings in *Viking* and *Laval* are applicable only to cases related to cross-border collective actions. Accordingly, Member States may define the boundaries of the right to collective actions for purely internal situations in accordance with their preferences. As opposed to this, the US practice has been applicable to situations without cross-border element, too.

The above analysis demonstrates that the US Supreme Court also faces the issue of conflict between fundamental rights protecting economic activity and other rights. Some of the difficulties are also similar. It suffices to refer to the variations of the tests applied to measure conflicting rights against each other or the problem of the collision of fundamental rights protecting economic interests and social rights. This proves that EU institutions, and in particular the Court of Justice, is not in an entirely unique situation when it has to address the conflict between various rights. The next section

¹⁰⁸ US Supreme Court, *Truax v. Corrigan*, cit., p. 327.

¹⁰⁹ US Supreme Court, judgment of 25 October 1926, *Dorchy v. State of Kansas*.

¹¹⁰ *Ibid.*, p. 311.

¹¹¹ *Ibid.*, p. 307.

will outline how some of the concerns related to the judicial practice of the Court of Justice could be surmounted by the refinement of the judicial reasoning of the Court or by legislation. In this account, the above comparison with the case law of the US Supreme Court will be used to mark how the necessary refinement of the practice of the Court of Justice could be achieved.

VI. AN ALTERNATIVE APPROACH IN EU LAW

VI.1. AN ALTERNATIVE JUDICIAL METHOD FOR SOLVING CONFLICTS BETWEEN FUNDAMENTAL FREEDOMS AND FUNDAMENTAL RIGHTS

In US law, fundamental rights protecting economic activity are treated as equal to other fundamental rights without any pre-defined hierarchy. Such an approach could be followed in EU law. As it has been explained, the *a priori* preference for fundamental freedoms is rather a formal one which is counterbalanced by the substantive assessment based on the proportionality test. Indeed, in the cases analysed above, with the exception of *Viking* and *Laval*, the Court of Justice accepted the derogation from fundamental freedoms to protect certain fundamental rights. However, the traces of a more nuanced approach may be discovered in the *Schmidberger* and the *Dynamic Medien* judgments of the Court.¹¹²

a) Schmidberger and Dynamic Medien.

In the *Schmidberger* judgment, the Court of Justice examined the relation between the freedom of expression and assembly and the free movement of goods regarding the closure of a commercially important motorway in the Alps by an environmental organisation.¹¹³ In this case, the Austrian government argued that the freedom of expression and assembly had to be given priority as “fundamental rights are inviolable in a democratic society”.¹¹⁴ The Court of Justice did not make such a definite statement. The protection of the right of expression and the right of assembly were considered by the Court as legitimate interests, which may justify a restriction of the free movement of goods.¹¹⁵ Acknowledging the broad discretion enjoyed by national authorities in this regard, the Court found that the fact that the Austrian authorities did not prohibit the demonstration did not violate the free movement of goods provisions of Treaty establishing the European Community (EC Treaty), read together with Art. 5 of the EC Treaty.¹¹⁶

¹¹² Court of Justice, judgment of 14 February 2008, case C-244/06, *Dynamic Medien*.

¹¹³ See C. BROWN, *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria. Judgment of 12 June 2003, Full Court*, in *Common Market Law Review*, 2003, p. 1499.

¹¹⁴ *UPC*, cit., para. 17.

¹¹⁵ *Schmidberger*, cit., para. 74.

¹¹⁶ *Ibid.*, para. 94.

Schmidberger is seen by several authors as a judgment where the Court of Justice implemented the equality of fundamental rights and economic freedoms and balances them accordingly.¹¹⁷ Others drew the conclusion from the judgment that fundamental rights prevail over fundamental freedoms.¹¹⁸ Indeed, the Court mentions the “need to reconcile” fundamental rights and the free movement of goods¹¹⁹ and the judgment requires balancing the interest in the free movement of goods and the interests of the demonstrators.¹²⁰ A more relaxed attitude may be also traced in the substantive assessment of the Court. Usually, the Court of Justice does not seem to be really interested in the restricting effect of fundamental freedoms on fundamental rights. The single exception is *Schmidberger*. Here, the Court did not simply examine the restrictive effects of the demonstration to the free movement of goods, but it also pointed to the impact of a potential ban of the demonstration on the freedom of expression of the participants.¹²¹

Another important feature of the judgment is the treatment of fundamental rights. In *Schmidberger*, the Court of Justice decided for the first time to tackle the encounter of a fundamental freedom and fundamental rights directly. Here, the Court found an answer to the clash between the free movement of goods and the right of expression and the right of assembly without categorising the latter as the part of public policy or overriding requirements related to the public interest. Interestingly, even in this case, the Court of Justice might have been able to bypass this through referring to the protection of the environment or public health in accordance with the purpose of the demonstrators, as these are exceptions recognised under the current Art. 36 TFEU as well as in the practice of the Court of Justice. The Court rejected this approach since the state measure concerned was the authorisation of the demonstration related to the exercise of the right of expression and assembly, and the aims of the protestors were irrelevant.¹²²

Tridimas points out that, in *Schmidberger*, the Court of Justice did not categorise the freedom of expression and the freedom of assembly either as an express exception under Art. 30 EC Treaty or as a mandatory requirement or overriding reason related to the public interest.¹²³ Semmelmann goes even further and construes fundamental (so-

¹¹⁷ See T. TRIDIMAS, *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 298 *et seq.* and p. 338.

¹¹⁸ M. AVBELJ, *European Court of Justice and the Question of Value Choices Fundamental Human Rights as an Exception to the Freedom of Movement of Goods*, in *New York University School of Law Jean Monnet Working Paper*, no. 6, 2004, jeanmonnetprogram.org, p. 71.

¹¹⁹ *Schmidberger*, cit., para. 74.

¹²⁰ *Ibid.*, para. 90.

¹²¹ *Ibid.*, paras 89-90.

¹²² *Schmidberger*, paras 66-68.

¹²³ T. TRIDIMAS, *The General Principles of EU Law*, cit., p. 338.

cial) rights as giving rise to an “independent justification”.¹²⁴ Indeed, the judgment of the Court of Justice talks about the “legitimate interest” in protecting fundamental rights.¹²⁵

However, the impact of *Schmidberger* has been limited. In my view, balancing was possible without setting up a hierarchy among the rights concerned, since the conflict between the free movement of goods and the freedom of expression and assembly in *Schmidberger* was only partial.¹²⁶ The free movement of goods provisions had to give way to those fundamental rights only for a limited duration and regarding a limited place. This result can be contrasted with cases where there has been a full conflict between fundamental freedoms and fundamental rights.

Formally, even in *Schmidberger*, the Court of Justice used its usual technique: fundamental freedoms come first and any restriction of them must be justified even if the restriction is due to the protection of fundamental rights.¹²⁷ And more importantly, in its later decisions, the Court changed its approach as described above. Since then, it considers fundamental rights as general interests related to an overriding reason capable of justifying a restriction of fundamental freedoms. The signs of a similar approach may be discovered only in the *Dynamic Medien* judgment, where concerning a requirement on age-limit label for image storage media distributed via mail the Court established that the right of the child to protection is a legitimate interest which can justify a restriction on the fundamental freedoms.¹²⁸

Schmidberger and *Dynamic Medien* indicate a more careful approach by the Court of Justice. Fundamental rights are not taken as part of the public policy or as overriding requirements in the public interest, but they are considered as independent “legitimate interests”. However, after having attributed an independent role to fundamental rights in both cases, the Court applied its usual methodology and treated the freedom of expression and assembly as well as the right of the child to protection as reasons justifying a restriction on the fundamental freedoms. The fact, therefore, remains that fundamental rights were considered as exceptions to the free movement of goods provisions, though atypical ones. To eliminate the concerns discussed above, a more thorough refinement of the approach of the Court of Justice would be necessary.

b) Refinement of the judicial practice of the Court of Justice.

Schmidberger and its assessment by the legal literature provide important lessons as to the refinement of the case law of the Court. Retuning should concern the

¹²⁴ C. SEMMELMANN, *The European Union's Economic Constitution under the Lisbon Treaty*, cit., p. 535.

¹²⁵ *Schmidberger*, cit., para. 74.

¹²⁶ Skouris put somewhat similarly regarding *Schmidberger*: “[...] there was no real conflict between fundamental rights and fundamental freedoms [...]”. V. SKOURIS, *Fundamental Rights and Fundamental Freedoms*, cit., p. 236.

¹²⁷ *Schmidberger*, cit., paras 74 and 78. See also E. SPAVENTA, *Federalisation Versus Centralisation*, cit., p. 356.

¹²⁸ *Dynamic Medien*, cit., para. 42.

predefined hierarchical relationship between fundamental freedoms and fundamental rights, the treatment of fundamental rights as an exception and balancing through the proportionality test.

Several authors support the method of balancing advocated by AG Trstenjak in *Commission v. Germany*.¹²⁹ Indeed, AG Trstenjak's opinion points well to those issues which require refinement. German local authorities awarded service contracts on occupational old-age pensions without a call for tenders at EU level. The German government argued that the contracts were awarded to entities specified by the collective agreement which enabled workers to take part in the designation of the entities in order to take their interests better into account. According to the Commission, the collective agreement violated EU public procurement rules. AG Trstenjak examined the compatibility of the collective agreement with EU public procurement directives, as well as the freedom of establishment and the freedom to provide services. The right to bargain collectively, as a right closely connected to the right to collective action, is a fundamental right in the EU legal order¹³⁰ and the right to negotiate and conclude collective agreements is also protected by the Charter of Fundamental Rights.¹³¹ AG Trstenjak took as a point of departure that fundamental freedoms and fundamental rights are of equal ranking; there is no hierarchical relationship between them.¹³² From this angle, she called into question the idea that fundamental rights may justify a restriction on the fundamental freedoms through written or unwritten grounds of justification.¹³³ Instead, she proposed that fundamental freedoms and fundamental rights constitute similarly legitimate objectives which may permit the restriction of the other.¹³⁴ Any potential conflict between them must be resolved with the help of the proportionality test.¹³⁵ Both restrictions by fundamental rights on fundamental freedoms and by fundamental freedoms on fundamental rights are to be examined.¹³⁶ A similar "double proportionality" test was favoured by de Vries.¹³⁷ However appealing this approach is, the Court of Justice did not follow its AG in *Commission v. Germany*. The Court held that the fact that the right of collective bargaining is a fundamental right cannot exclude the application of the EU public procurement directives and the provisions on the freedom of estab-

¹²⁹ Opinion of AG Trstenjak delivered on 14 April 2010, case C-271/08, *Commission v. Germany*.

¹³⁰ *Ibid.*, para 78, see also footnote 31 of the opinion.

¹³¹ Art. 28 of the Charter.

¹³² Opinion of AG Trstenjak, *Commission v. Germany*, cit., para. 81.

¹³³ *Ibid.*, para. 184.

¹³⁴ *Ibid.*, para. 188. See also *ibid.*, para. 81 and para. 84.

¹³⁵ *Ibid.*, paras 189-192.

¹³⁶ L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, cit., p. 24. See also D. SCHIEK, L. OLIVER, *EU Social and Labour Rights and EU Internal Market Law, Study for the EMPL Committee*, 2015, www.europarl.europa.eu, p. 87 and p. 89.

¹³⁷ S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon*, cit., p. 92 *et seq.*

ishment and the freedom to provide services. Although the Court referred to the reconciliation of the right to collective bargaining and fundamental freedoms, as implemented by secondary law, it concentrated on the compatibility of the collective agreement with secondary legislation and found against Germany.¹³⁸

As several authors suggest, the Court of Justice should give fundamental rights the status of a free-standing exception to the fundamental freedoms in addition to the explicit exceptions set out in the TFEU and the justifications elaborated in the case law of the Court.¹³⁹ I have already pointed out that the *a priori* hierarchy in favour of the fundamental freedoms is rather a formal rhetorical device, counterbalanced by the substantive assessment through the proportionality test, and therefore it is not necessary. Some authors suggest that the examination of the fundamental human rights in the light of the economic freedoms is a necessary step, since the Court of Justice can assert jurisdiction only if the economic freedoms apply.¹⁴⁰ Of course, to assert jurisdiction, the Court has to examine first whether the case falls within the ambit of EU law. However, after having ascertained that the case falls under the scope of application of EU law, the Court could treat fundamental freedoms and fundamental rights as equal. Furthermore, concepts like public policy and general interest are used usually in human rights adjudication to justify a restriction of human rights.¹⁴¹ This is turned round in the case law of the Court of Justice: fundamental rights are themselves considered as public policy or overriding reason in the general interest.

In my view, it is not free from concerns that the Court of Justice favours a vision of human rights in which they are considered preponderantly as an instrument to promote public interest. In most cases, the reference to a public interest criterion could be explained by the facts of the case. It is clear that human rights do not serve individual interests exclusively. However, it is equally true that human rights do not exclusively protect the public interest. If we look through the above cases decided by the Court of Justice and the US Supreme Court, we have to affirm that sometimes the extent to which fundamental rights served a general public good is questionable. In *Omega*, public policy might have defended human dignity, but did not contribute to the interests of service providers and those wishing to take part in the game. The same holds for those obsessed with riddles in *Familiapress*. Although the importance of environmental protection cannot be denied, the action of the environmental organisation in *Schmidberger* breached not only the interests of transport companies, but probably confused the weekend plans of thousands of weekend passengers. In *PruneYard*,

¹³⁸ *Commission v. Germany* [GC], cit., para. 44.

¹³⁹ J. MORIJN, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, in *European Law Journal*, 2006, p. 39.

¹⁴⁰ V. SKOURIS, *Fundamental Rights and Fundamental Freedoms*, cit., p. 237.

¹⁴¹ J. MORIJN, *Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?*, cit., p. 613.

where the US Supreme Court recalled that property rights may be restricted by regulation in the common interest,¹⁴² the use of the property by the demonstrators served neither the interests of the mall owner nor those of retailers and customers.¹⁴³ If the latter opt to move to another shopping centre in another State, this causes a loss to state revenues which could have been used for public services.¹⁴⁴ It is not easy to outline the contours of “public interest”. Undoubtedly, public interest may not be defined as “everyone’s interest”, but sometimes it seems questionable whether fundamental rights always fit into the public interest concept of the courts. In addition, the restriction of fundamental rights based on economic considerations is not necessarily limited to a better enforcement of public interest. In *Viking* and *Laval*, the right to collective action was restricted in favour of the economic interests of companies which intended to rely on the freedom of establishment and the free movement of services. The interests of employers were favoured against those of the group of local workers.

Fundamental rights are not necessarily linked to the protection of public interest and could have been stripped off this “public interest vesture”. This would confirm that fundamental rights could be treated as independent, self-standing reasons and should be balanced in such a quality against the fundamental freedoms. The Court of Justice acknowledged that private persons may rely on the exceptions of public policy, public security and public health that are open to the Member States. However, individuals pursue their self-interest, and not the sometimes quite abstract public interest. This holds also for fundamental rights. They are in principle linked to individuals. Human rights equally serve the self-realisation of the individuals or groups and the pursuit of their interests. The protection of public policy and the overriding reasons usually serve the protection of some collective interests instead of individual ones which are in the primary focus of human rights protection.¹⁴⁵ In *Schmidberger*, AG Jacobs contrasted restrictions on the fundamental freedoms on the grounds of broader general interest objectives and restrictions based on the protection of the fundamental rights of individuals. This would imply an “individualised” human rights concept.¹⁴⁶ Yet, later in the same opinion, AG Jacobs considered the protection of fundamental rights as a legitimate public interest objective.¹⁴⁷ In *Schmidberger* and *Dynamic Medien*, the Court of Justice referred to fundamental rights as a “legitimate interest” which may reflect an individualised view of fundamental rights. However, as we have seen, these references were juxtaposed with contrary statements where fundamental rights were considered

¹⁴² US Supreme Court, *PruneYard Shopping Center v. Robins*, cit., p. 85.

¹⁴³ R.A. EPSTEIN, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, in *University of Chicago Law Review*, 1997, p. 34.

¹⁴⁴ *Ibid.*, p. 44.

¹⁴⁵ J. MORIJN, *Balancing Fundamental Rights and Common Market Freedoms in Union Law*, cit., p. 39.

¹⁴⁶ Opinion of AG Jacobs delivered on 11 July 2002, case C-112/00, *Schmidberger*, para. 89.

¹⁴⁷ *Ibid.*, para. 103.

purely as public interest. As both fundamental freedoms and fundamental rights aim at promoting individual interests and private autonomy, the former on the market, while the latter more broadly, they could be treated on the same footing.

The consequent enforcement of the equality of fundamental freedoms and fundamental rights also implies that the balancing between the two should take respective restrictions into account, as was examined by the Court of Justice in *Schmidberger* and proposed by AG Trstenjak in *Commission v. Germany*. Both fundamental rights and fundamental freedoms constitute mutual exceptions. Fundamental rights may justify a restriction to the fundamental freedoms as fundamental freedoms may be a reason for justifying a restriction to a fundamental right. The economic orientation of the integration or the ascertainment of whether the case falls under the scope of EU law does not foreclose the examination of the restrictions on the fundamental rights caused by the exercise of economic freedoms beyond the impact exercised of the fundamental freedoms on the fundamental rights.

Such a refinement is not without practical implications, although most often the outcome of the cases would not differ from the current practice. This is because the Court of Justice would continue to apply the open-textured proportionality test, though in a modified form. The focus of the Court should be, however, changed. This would require the examination of the proportionality of restrictions not only to the fundamental freedoms, but also to the fundamental rights. A further practical consequence concerns the burden of proof. The burden of proof that any restriction to a fundamental freedom is proportionate falls at the present on the party relying on the fundamental right. By the change in the approach of the Court of Justice, the burden of proof would be shared between the parties: one demonstrating the proportionality of the restriction to the fundamental freedom, while the other that of the restriction to the fundamental right.

In summary, I find that the protection of fundamental rights should be given an equal rank with fundamental freedoms, even formally, and this should be treated as an independent, legitimate objective. In my opinion, this would not impede the Court of Justice from first ascertaining that the case falls under the scope of application of EU law. After this first preliminary step, fundamental freedoms and fundamental rights could be balanced as equal with the help of the proportionality test. In applying the proportionality test, restrictions on both fundamental freedoms and fundamental rights should be examined. The same approach could be used in the event of the conflict between fundamental freedoms and social rights. Moreover, we will see below that, in addition to the judicial method, the American example offers another path, namely the legislative balance of fundamental rights and the right to collective action.

VI.2. LEGISLATION FOR SOLVING CONFLICTS OF RIGHTS

The judicial way is the most common solution for deciding conflicts between rights protecting economic activity and fundamental rights. Law and legal techniques, such as

the tiered balancing or proportionality, serve as a formal framework for legal reasoning as well as a means of justifying a decision and make it more convincing for the parties concerned and the public. In my view, the proportionality test applied by the Court of Justice is an open-ended test which rarely predetermines the outcome of the case in conflict of rights issues. The substantive assessment of the case and the balancing through the proportionality test is decisive, but the court enjoys a large room to manoeuvre in deciding the outcome of the case.

Nevertheless, there is also another path, namely the legislative intervention in settling such conflicts. Judicial decisions give guidance in a given case, but usually they leave certain room for divergent interpretations in future. Therefore, it seems that legislation can provide more predictability for any potential dispute on clash of rights. The US experience on solving rights conflicts by legislation may provide lessons for the EU.

Divergent interpretations by state courts after *PruneYard*¹⁴⁸ raised the idea of the need for legislation to better accommodate the right of access of those who wish to express their political views in a shopping mall and the mall owners.¹⁴⁹ No legislation has been, however, adopted in this field.

Another instance is balancing the rights of labour force and business owners. Here, the Congress intervened by the adoption of the National Labor Relations Act of 1935 (NLRA), also known as the Wagner Act.¹⁵⁰ The NLRA recognises, among others, the workers' right "to self-organisation, to form, join, or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". In addition, the NLRA set up the National Labor Relations Board to address industrial disputes concerning industrial actions. Thus, federal legislation substituted to a large extent the judicial assessment of workers' rights and the freedom of market action. Litigation concerning social rights gave rise to legislation also in several other fields in the US.¹⁵¹ However, the adoption of the NLRA has not even exempted the judiciary from addressing cases where the workers' and employers' rights got into conflict.¹⁵²

¹⁴⁸ W. BURNETT HARVEY, *Private Restraint of Expressive Freedom: A Post-PruneYard Assessment*, in *Boston University Law Review*, 1989, p. 929.

¹⁴⁹ Supreme Court of Connecticut, judgment of 17 January 1984, *Cologne v. Westfarms Associates*; C.J. BERGER, *PruneYard Revisited: Political Activity on Private Lands*, in *New York University Law Review*, 1991, p. 670 *et seq.*

¹⁵⁰ US Congress, National Labor Relations Act of 1935, 5 July 1935, paras 151–169.

¹⁵¹ J. KING, *American Exceptionalism over Social Rights*, in L. LAZARUS, C. MCCRUDDEN, N. BOWLES (eds), *Reasoning Rights*, Oxford: Hart, 2014, p. 368.

¹⁵² See in particular US Supreme Court: judgment of 27 February 1939, *National Labor Relations Board v. Fansteel Metallurgical Corp.*; judgment of 30 April 1956, *Labor Board v. Babcock & Wilcox Co.*; judgment of 20 April 1988, *Edward J. DeBartolo Corp., v. Florida Gulf Coast Building and Construction Trades Council and National Labor Relations Board*; judgment of 27 January 1992, *Lechmere, Inc. v. National Labor Relations Board*.

Even the application of the NLRA has required judicial interpretation and the same holds for issues falling outside of the scope of application of the NLRA.

The conflict between fundamental freedoms and fundamental rights could be settled in principle by the way of legislation in the EU following the American example. In certain fields, the EU adopted some provisions in order to solve conflicts between various rights, but these legal sources do not concern specifically the conflict between the fundamental freedoms and fundamental rights.¹⁵³ Legislation could, to a certain extent, refine the relationship between the right to collective action and the rights of business owners in the US. Fabbrini proposed that a similar path should be followed by the EU.¹⁵⁴ However, as the failure of the Monti II Regulation shows, there is little chance to find a politically acceptable solution.¹⁵⁵ The Proposal for the Monti II Regulation laid down the mutual respect for the freedom of establishment, the freedom to provide services and the right to collective action based on the proportionality principle. Nevertheless, some of the Member States blocked the legislative procedure under the subsidiarity control mechanism.¹⁵⁶ The reaction of the Member States clearly indicated the lack of support for the legislative solution.¹⁵⁷ Moreover, it is highly questionable whether such conflicts could be resolved in a pre-defined abstract framework. Even in the event of adopting such a legislative act, the Court of Justice and national courts would preserve its balancing function between the fundamental freedoms and fundamental rights.

Nevertheless, it is noteworthy that the Monti II Regulation did not treat fundamental freedoms and social rights in a hierarchical relationship: they were considered as equal.¹⁵⁸ This implies that the freedom of establishment and freedom to provide services may be restricted in the interest of the protection of fundamental rights and, conversely, the exercise of the fundamental freedoms may be restricted on

¹⁵³ Art. 4, para. 2, of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, cit., p. 22; E. BRIBOSIA, I. RORIVE, *In Search of a Balance between the Right to Equality and other Fundamental Rights*, Luxembourg: Publication Office of the European Union, 2010; C. LADENBURGER, *European Union Institutional Report*, cit., p. 192 *et seq.*

¹⁵⁴ F. FABBRINI, *Fundamental Rights*, cit., p. 185.

¹⁵⁵ Commission Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final; A. VELDMAN, *The Protection of the Fundamental Rights to Strike within the Context of the European Internal Market*, cit., p. 117; S. WEATHERHILL, *From Economic Rights to Fundamental Rights*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERHILL (eds), *The Protection of Fundamental Rights*, cit., p. 34 *et seq.*

¹⁵⁶ F. FABBRINI, K. GRANAT, "Yellow Card, but No Foul": *The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, in *Common Market Law Review*, 2013, p. 115.

¹⁵⁷ F. FABBRINI, *Fundamental Rights in Europe*, cit., p. 189.

¹⁵⁸ Communication COM(2012) 130 final of 21 March 2013 from the Commission, *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, p. 12.

the grounds of the fundamental rights. According to Art. 2 of the Proposal, “the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms”. The application of this principle would have rested with national courts, which should decide along the proportionality test on a case-by-case basis. The right to strike did not gain recognition because it serves an overriding reason in the public interests, but in itself. From this perspective, it corresponds to the approach of the NLRA. The Proposal puts forward the double proportionality test recommended by AG Trstenjak in *Commission v. Germany*: any restriction by a fundamental right to a fundamental freedom must comply with the proportionality test and *vice versa*.¹⁵⁹

Legislation may demonstrate a commitment to solve the problem of collisions and it may promote legal certainty. Legislation can mark the boundaries of the permitted exercise of rights and sanction non-compliance. However, legislation cannot be considered as an omnipotent panacea. What legislation can do is to lay down certain guiding principles, but courts will continue to have the final word in settling conflict of rights cases. Legislation such as the NLRA can cover only a specific type of conflicts (for example, between employers and employees) without being a solution for other types of collisions between rights. The reconciliation of rights through the proportionality or any other test rests with the courts in any concrete case. The failure of the legislative proposal concerning the right to take collective action and the fundamental freedoms in the EU indicates the lack of political consensus and the delegation of settling conflicts between the two to the Court of Justice and national courts. Such a delegation also means that judicial reasoning should apply the proportionality test in a convincing and predictable way in order to ensure the legitimacy of the judicial balancing and the Court of Justice itself.

VII. CONCLUSIONS

The above analysis proves that the challenges faced by the Court of Justice in the case of conflicts between fundamental freedoms and fundamental rights are not peculiar. The practice of the US Supreme Court shows up also similar features. Most of the concerns could be alleviated by two ways: first, the judicial reasoning of the Court of Justice could be refined and, second, legislation may increase predictability.

Regarding the judicial reasoning of the Court of Justice, as Gerards notes, the meaning and position of fundamental rights in the Court case law is far from clear.¹⁶⁰ The relation between fundamental freedoms and fundamental rights and in particular

¹⁵⁹ *Ibid.*, p. 13.

¹⁶⁰ J.H. GERARDS, *Fundamental Rights and Other Interests: Should It Really Make a Difference?*, in E. BREMS (ed.), *Conflicts between Fundamental Rights*, cit., p. 671 *et seq.*

between fundamental freedoms and social rights is vague. The EU has traditionally followed an economic objective and fundamental rights have been interpreted under the lens of economic integration. More recently, the inclusion of objectives other than economic ones in the Treaties (such as social policy objectives) might change this attitude. Although EU integration may be driven, even now, predominantly by economic purposes, EU law also has to accommodate non-economic values. This requires retuning the treatment of fundamental freedoms and fundamental rights in the judicial reasoning of the Court of Justice.

Neither primary nor secondary EU law stipulates a hierarchy between fundamental freedoms and fundamental rights. The case law of the Court of Justice, however, gives an *a priori* hierarchical priority to fundamental freedoms. Nonetheless, this seems a formal rhetorical device in order to enable the application of the traditional scheme of examination of the Court used in internal market law cases. One could attribute a symbolic value to this, showing that the EU keeps its traditional economic orientation. This does not change the fact, however, that the balancing between the two in the judicial practice of the Court through the proportionality test allows both to prevail in a given case. This is not different from the case law of the US Supreme Court on the collision between fundamental rights protecting economic activity and other rights. The Court of Justice should give even formally equal rank to fundamental freedoms and fundamental rights. There is no need to treat fundamental rights as part of the public policy exception or an overriding reason in the public interest. Fundamental rights should be granted an independent status in EU internal market law.

In solving conflicts by judicial reasoning, the Court of Justice and the US Supreme Court often faced similar situations and the outcome of the cases was also similar. This might seem surprising, since they apply different methods to settle conflicts between various rights: the proportionality test and tiered scrutiny respectively. The Court of Justice applies the proportionality principle in some variations. In the practice of the US Supreme Court, no uniform test is applied to assess a restriction of a right protected by the Amendments of the US Constitution or by statutes. Instead, the US Supreme Court developed several tests. In the cases concerning conflicts between fundamental rights protecting economic activity and other rights we do not see the consequent application of any of the tests. This seems a pragmatic approach which sometimes cares less about the justificatory force of the decisions. Both the EU and the US constitutional adjudication are based on general and very flexible tests which are appropriate to justify almost any decision. This leads us to establish that the adjudication of both the Court of Justice and the US Supreme Court are characterised by vacillating choices between fundamental rights protecting economic activity (using the EU law terminology “fundamental freedoms”) and other rights.

Resolving conflicts between fundamental freedoms and fundamental rights in the EU takes place by the Court of Justice. The US example offers an additional means for

solving conflicts of rights: the legislative way. For the conflict between rights protecting economic activity and the right to collective action, the NLRA was enacted in the US. In the EU, an attempt was made to provide a general framework of the exercise of the right to collective action and the freedom of establishment and the freedom to provide services, but this has failed. Although legislation promotes predictability in solving conflict between various rights, the legislator cannot provide a pre-prepared solution for all future cases; therefore judicial decisions are not dispensable even in the case of legislative conflict solving. This underlines the significance of the necessity of the refinement of the approach of the Court of Justice.