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# Free Movement and Fundamental Rights



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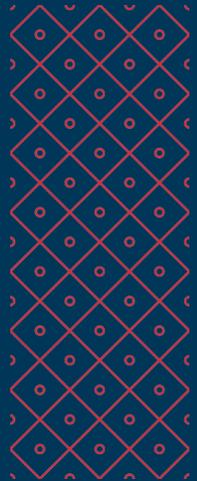


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# Content

1. Introduction
2. Key cases
3. Conclusion



## Chapter 1

# Introduction



# Programme of the Lecture

- 1) Protection of the fundamental rights within the EU and its development
- 2) The proportionality principle
- 3) Fundamental rights and economic freedoms in the case law of the CJEU



# Protection of Fundamental Rights within the EU and free movement

Fundamental rights x freedoms.

**Neither fundamental rights, nor fundamental freedoms are absolute** (see article 52 of the Charter).

There is **no *a priori* hierarchy** between fundamental freedoms and fundamental rights (see opinion of GA Trstenjak in case C-271/08).



**Maastricht Treaty** (1992) – formal recognition to human rights as part of EU law.

**Lisbon Treaty** (2009) – a new phase in the protection of fundamental rights at the EU level (*inter alia* declaring the Charter to be legally binding).

However fundamental rights used to be part of *acquis communautaire* as **general principles of EU law** even before Lisbon Treaty (see cases 29/69 Stauder and 4/73 Nold).



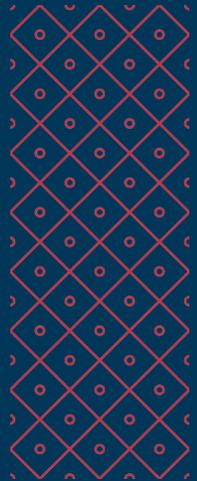
**Article 6 TEU** underlines the important status of fundamental rights by stating:

- (i) The Charter of Fundamental rights of the EU shall have the same legal value as the Treaties.**
- (ii) Union shall accede to the European Convention for the Protection of Human rights and Fundamental Freedoms (see opinion 2/13);**
- (iii) Fundamental rights [...] shall constitute general principles of the Union's law.**



Three (four) elements of the **proportionality principle**:

- (i) (Does the national measure fall within the freedom of movement?)
- (ii) There must be a **casual connection** between the national measure and the aim pursued; the measure is relevant or pertinent;
- (iii) There is **no alternative measure available**, which is **less restrictive** concerning trade or free movement generally;
- (iv) And there must be a **relationship of proportionality between the obstacle introduced**, on the one hand, and, on the other, **the objective thereby pursued and its actual attainment** (proportionality *stricto sensu*).



## Chapter 2

# Key cases



## Key cases:

- (i) C-112/00 Schmidberger
- (ii) C-36/02 Omega
- (iii) C-208/09 Sayn Wittgenstein
- (iv) C-438/05 Viking and C-341/05 Laval



C-112/00 Schmidberger:

- ⇒ A **demonstration** by environmentalists on the Brenner motorway in Austria;
- ⇒ **Closing the motorway** to traffic for nearly 30 hours;
- ⇒ Permission granted by the Austrian authorities.



C-112/00 Schmidberger:

- **These restrictions were justifiable by the protection of fundamental rights.**
- Should the free movement of goods prevail over the fundamental rights?

In that regard, the CJEU held that: “whilst the **free movement of goods** constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be **subject to restrictions** for the reasons laid down in Article 36 of that Treaty or **for overriding requirements relating to the public interest**, in accordance with the Court’s consistent case-law“.



C-112/00 Schmidberger:

- The CJEU summed up a **number of factors which makes restrictions on the free movement of goods proportionate** in the light of the protection of fundamental rights:
  - (i) The demonstration took place following a request for authorization from the national authorities.
  - (ii) The demonstration took place on a single route, on a single occasion and during a limited period.
  - (iii) The purpose of the demonstration was not to restrict trade in goods of a particular type or from a particular source.
  - (iv) Supportive administrative measures were taken to limit the implications of the demonstration.
  - (v) And finally, an outright ban on the demonstration would lead to unjustifiable interference with the fundamental rights of the demonstrators.



C-36/02 *Omega*:

- ⇒ A **German company operating the laserdome** in Germany;
- ⇒ The German police ordered a prohibition of these games as **they constitute a danger to public order.**



## C-36/02 Omega:

- **Free movement of services was affected** but could be justified.
- According to the CJEU the commercial exploitation of games infringed **human dignity** (a fundamental value enshrined in the national constitution).
- The Court then held that: “EU legal order undeniably strives to ensure respect for **human dignity as a general principle** of law and there can therefore be no doubt that the objective of protecting human dignity is compatible with Community law.”



## C-36/02 Omega:

- **Assessment of proportionality** of the German order in the light of the protection of human dignity:
  - (i) The need for and the adoption of provisions such as the German prohibition on laser games are not excluded merely because one Member State has chosen a different system of protection than another.
  - (ii) Consequently, the German measure correspond to the level of protection of human dignity, which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany.



C-208/09 *Sayn Wittgenstein*:

- ⇒ A refusal by the Austrian authorities to register the name *Fürstin* von Sayn-Wittgenstein;
- ⇒ The abolition of the nobility, which has a constitutional status.



C-208/09 *Sayn Wittgenstein*:

- **Such legislation is a restriction** on the freedoms conferred by Article 21 TFEU.
- For a **justification** of this restriction the Austrian authorities referred to the objective of **public policy**.
- The CJEU held: “The concept of **public policy** as justification for a derogation from a fundamental freedom **must be interpreted strictly**, so that its scope cannot be determined unilaterally by each Member State without any control of EU institutions (...). Thus, public policy may be relied on only if there is a **genuine and sufficiently serious threat to fundamental interest of society** (...). The specific circumstances which may justify recourse to the concept of public policy **may vary from one Member State to another and from one era to another**. The Competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.”



C-438/05 *Viking* and C-341/05 *Laval*:

- ⇒ **A Finnish company** that wished to **reflag its vessel** “the Rosella” under the Estonian flag;
- ⇒ The International Transport Workers’ Federation order its affiliates to boycott the Rosella and to take other solidarity industrial actions.



C-438/05 *Viking* and C-341/05 *Laval*:

- ⇒ **A Latvian company which won a contract to refurbish a school near Stockholm;**
- ⇒ The Swedish Labour Union wanted Laval to apply the collective agreement, but it refused, which led to a blockade of the building site by Swedish construction workers.



C-438/05 *Viking* and C-341/05 *Laval*:

- In both cases the question raised were **whether the actions by the trade unions constituted a restriction on the economic freedoms.**
- According to the CJEU the **right to take collective action and the right to strike is a fundamental right** forming an integral part of the general principles of EU law.
- Furthermore, **the right to take collective action for the protection of workers is a legitimate interest** which in principle justifies a restriction of one of the fundamentals freedoms.

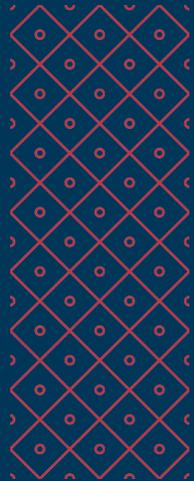


C-438/05 *Viking* and C-341/05 *Laval*:

The Court stated that **the EU has not only an economic, but also a social purpose** and that social policy interests must be balanced with the free movement rules.

**The national court must take into account that:**

- (i) The right to collective action must serve the protection of workers.
- (ii) Jobs and labour conditions are indeed under serious threat by reflagging the Rosella.
- (iii) that collective action is one of the ways that may serve members' interests.
- (iv) Account should be taken of less restrictive means before initiating a strike.



## Chapter 3

# Conclusion



## Conclusions:

According to the CJEU the **fundamental rights proponents will have to justify their **action**** and establish that restriction on free movement is justified on the basis of protecting fundamental rights.



# Literature

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