**Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights**

1. **Introduction**

Particularly in the wake of its decisions in *Viking* and *Laval*,[[1]](#footnote-1) the Court of Justice has faced persistent criticism in the literature that it prioritises free movement over fundamental rights, in the event of a clash between the two. Specifically, ever since *Schmidberger,*[[2]](#footnote-2) commentators have expressed concern that the Court’s two-stage breach/justification methodology - whereby a *prima facie* breach of free movement is established first, followed by the requirement that fundamental rights ‘defend’ themselves at the justifications stage - places fundamental rights on the procedural ‘back-foot’.[[3]](#footnote-3) At best, commentators have questioned the capacity for the judicial protection of fundamental rights by a Court that views its role as one of ‘promoting and protecting the fundamental principles of [Union] law’,[[4]](#footnote-4) in which fundamental rights must be recognised ‘within the framework of the structure and objectives of the Treaty’.[[5]](#footnote-5) At worst, it has been argued that *Viking, Laval*, and the Court’s subsequent judgments in *Commission v Luxembourg* and *Rüffert*,[[6]](#footnote-6) demonstrate a distinct preference for the (neo-)liberal spirit of free movement over fundamental rights and connected social concerns.[[7]](#footnote-7)

This article accepts that fundamental rights are placed at a clear structural disadvantage as a consequence of the Court’s adjudicative methodology. In particular, assessment at the justification phase, and the resultant application of a one-sided proportionality test, imposes evidentiary hurdles on fundamental rights not faced by free movement, namely questions of legitimacy of aim, appropriateness, and necessity. However, while the article accepts that a preference for free movement over fundamental rights undoubtedly exists, it rejects the argument that this is the consequence of some contestable subjective attitude on the part of the Court. Instead, it seeks to develop the position that the relationship between free movement and fundamental rights is influenced by the former’s historical significance. In particular, it is often simply accepted that the centrality of free movement to the Union project is a strong contributor to the production of the structurally imbalanced breach/justification model. However, what is largely absent from the literature is a deeper analysis of the constitutional drivers that have both reinforced the significance of free movement and carried this over into interactions between free movement and fundamental rights, in order to explain this occurrence. A diagnostic analysis of these underlying causes is vital for future consideration of how to address the inherent imbalance in the current adjudicative framework. The article will demonstrate that the breach/justification model is the result of a complex combination of long-term structural factors and wider-reaching constitutional developments. Consequently, changes to adjudicative methodology, while perhaps welcome, must be carefully considered since the current approach is inextricably linked to fundamentals of the Union’s constitutional system.

In order to unpack this argument, section two will contrast the historical framework for the promotion of the market freedoms against the very different introduction of fundamental rights protection into the Union constitutional order. Crucially, this serves to underline that a structural preference for free movement can be viewed as historically explainable given the core objectives of the European Economic Community [EEC], the originally narrow scope of the free movement provisions, and the consequent limited risk of interaction with fundamental rights. However, as noted above, generally accepted assertions about the centrality of free movement to Union law are not enough to explain fully the current approaches to resolving tensions between free movement and fundamental rights. Therefore, section three will proceed to chart the transformation of free movement law, and juxtapose this with the relatively independent development of EU fundamental rights protection. This will permit important consideration of the constitutional drivers that brought free movement into more frequent and more abrasive contact with fundamental rights, rendering a previously unproblematic adjudicative methodology a cause for concern. The discussion will focus in particular on the expansion of the material scope of the market freedoms, the widening of their personal scope, the extension of their direct effect, and the strengthening of a decentralised system of enforcement. Section four will then explore these constitutional evolutions from the specific perspective of the emergence of a structural preference for free movement over fundamental rights, and examine the concrete impact of this procedural imbalance on fundamental rights protection.

1. **Returning to Rome: the central role of free movement versus the incremental nature of fundamental rights protection in the Union legal order**

An historical analysis, going back to the Rome Treaty, is essential to the central argument of this article that the perceived preference for free movement over fundamental rights, within the Court’s breach/justification methodology, is reflective of a broader constitutional asymmetry between the development of the market freedoms, on the one hand, and EU fundamental rights, on the other. Accordingly, the section will recall the centrality of free movement to economic integration, before contrasting this with the more piecemeal development of EU fundamental rights protection. Finally, the section will accept the logic of a structural preference for free movement when it is placed within its historical context, but argue, nevertheless, that this laid the foundations for an inherently problematic approach to managing future tensions between free movement and fundamental rights.

* 1. ***The fundamental role of free movement in the creation of a common market***

It almost goes without saying that, ever since its inception, economic integration has been a central task of the EU. Thus, Article 2 TR made clear that the establishment of a common market was the principal objective of the EEC,[[8]](#footnote-8) while the free movement of goods, services/establishment, workers, and capital across intra-EU borders has consistently been recognised by the Treaties as critical to the functioning of a common market.[[9]](#footnote-9)

At the judicial level, the CJEU has explicitly and repeatedly referred to the four market freedoms as ‘fundamental principle[s] of the common market’ from its earliest case law.[[10]](#footnote-10) Indeed, their ‘fundamentality’ has often been generalised such that the free movement provisions have been presented as ‘fundamental principles of the Community’.[[11]](#footnote-11) Given the Rome Treaty’s focus on economic integration, this generalisation within the language of the Court is unsurprising. It removes the ‘middle man’: free movement is essential to the achievement of a common market, the central aim of the EEC. Therefore, free movement is fundamental to the EEC as a whole. Nevertheless, this generalisation of free movement’s fundamentality subtly alters its role, reconceptualising it from a means to achieving economic integration to an end in and of itself. Against this backdrop, free movement was increasingly labelled a ‘fundamental freedom’.[[12]](#footnote-12) Within the confines of the EEC’s economic constitutional framework, this linguistic treatment presents free movement as something akin to a fundamental right. Indeed, in *ABDHU*, the free movement of goods was placed on the same normative plain as fundamental rights.[[13]](#footnote-13) In *Grogan*, Advocate General Van Gerven went as far as to define explicitly the conflict between the freedom to provide services and the fundamental right to life as one between two fundamental rights.[[14]](#footnote-14)

The centrality of free movement to the EEC’s primary aims was not only reflected in the Court’s language but also in the structure of its decision-making. Thus, the CJEU’s early case-law contains numerous examples in which it resolves tensions between Union primary free movement law on the one hand and, for instance, national rules pursuing competing public interest endeavours, on the other, through a two-stage breach/justification methodology. The Court asks, first, whether there has been a restriction of the relevant free movement provision(s), and, second, if this can be justified.[[15]](#footnote-15) As a result of being presented as ‘defence’ to a *prima facie* breach of free movement, public interests must overcome significant justificatory hurdles, including: that any discriminatory conduct is not arbitrary;[[16]](#footnote-16) that the measure is necessary to meet a real threat to the public good in question;[[17]](#footnote-17) whether the measure is effective in meeting the aim pursued,[[18]](#footnote-18) and finally whether the measure is suitable as the option least restrictive of free movement.[[19]](#footnote-19) Moreover, as derogations from the ‘fundamental principle’ of freedom of movement, potential justifications must be interpreted ‘strictly’.[[20]](#footnote-20) The very structure of the free movement provisions can be seen as legitimising such an adjudicative approach. Thus, while Article 34 prohibits quantitative restrictions on imports and all measures of equivalent effect between Member States, it is *subsequent* Article 36 that provides the grounds upon which such restrictions may nevertheless be ‘justified’. The provisions concerning the other market freedoms are structured in the same way.[[21]](#footnote-21) As Nic Shuibhne remarks, since the Treaty expresses justifications as derogations from primary rights, standard interpretative canons require the free movement provisions to be interpreted widely and exceptions from them narrowly.[[22]](#footnote-22)

This breach/justification framework is comparable to that adopted by the European Court of Human Rights for determining conflict between Convention rights and public interests. Thus, the Strasbourg Court will establish first, whether there has been an interference with, for instance, an individual’s right to freedom of expression, under Article 10 ECHR, and, second, whether this interference can be justified. Presenting public interests as a ‘defence’ against a *prima facie* wrongful restriction of a fundamental right places the former at a procedural disadvantage, requiring public interests to overcome evidential thresholds such as prescription by law, necessity in a democratic society, and proportionality.[[23]](#footnote-23) Greer argues that this procedural prioritisation is an eventuality inherent to the structure of the ECHR provisions themselves since, for instance, Article 10(1) ECHR bestows the fundamental right to freedom of expression while it is *subsequent* Article 10(2) that provides the public interests that may limit this right. Consequently, Greer concludes that ‘[Convention] rights and public interests are not *prima facie* equal variables to be weighed in a balance. The scales are loaded, but not conclusively, in favour of rights’.[[24]](#footnote-24) These claims are directly transferable, *mutatis mutandis,* into the free movement setting. Free movement and public interests, certainly when pursued at the national level,[[25]](#footnote-25) have never been equal variables before the Court. The scales are loaded in favour of free movement, although this will not always result in the ‘trumping’ of public interests by the free movement provisions.[[26]](#footnote-26) Accordingly, these similarities between the methodologies of the Strasbourg and Luxembourg Courts suggest that, from a structural point of view, free movement is treated as the equivalent of a fundamental right in the Union legal order.

This linguistic and structural promotion of free movement has been reinforced by the recognition of its direct effect. Thus, the very process of conferring direct effect on the market freedoms emphasises their rights status.[[27]](#footnote-27) The statement in *Van Gend* – that Union law ‘not only imposes obligations on individuals but is also intended *to confer upon them rights which become part of their legal heritage* [emphasis added]’[[28]](#footnote-28) – has led some to argue that the line between direct effect status and the existence of individual rights was so blurred in that case as to render them ‘synonymous’.[[29]](#footnote-29) This connection is also evident in the Court’s reasoning when declaring the direct effect status of the market freedoms. While the Rome Treaty adopted rights-language in relation to the free movement of workers and establishment,[[30]](#footnote-30) it only granted a ‘freedom’ to provide services and created no ‘right’ to import or export goods, or effect capital transfers.[[31]](#footnote-31) However, when the Court confirmed in *Salgoil* that Article 31 EEC, relating to the free movement of goods, was directly effective, a clear link between this status and the enjoyment of individual rights was confirmed:

‘The prohibition in Article 31 [EEC] of its very nature lends itself perfectly to producing direct effects… *Thus*, Article 31 *creates rights* which national courts must protect [emphasis added]’.[[32]](#footnote-32)

Similarly, in *Royer*, concerning the free movement of workers, establishment and services, the Court held that those market freedoms ‘have the effect of *conferring rights directly* on all persons’.[[33]](#footnote-33) Moreover, the application of the *Van Gend* criteria – that provisions be *unconditional* and *precise* in order to enjoy direct effect – to the free movement provisions requires that the public interests referred to in the free movement chapters be conceptualised as *derogations* to be *strictly* defined. Thus, in *Salgoil*, rather than imposing conditions on the free movement of goods across intra-Union borders, Article 36 TFEU was interpreted as dealing with ‘exceptional cases, which are clearly defined and which do not lend themselves to wide interpretation’.[[34]](#footnote-34) Moreover, in *van Duyn*, though the CJEU accepted that Article 45(3) TFEU placed limitations on the free movement of workers, this did not preclude Article 45 TFEU from enjoying direct effect status. Those limitations were themselves ‘subject to judicial control’, and accordingly Article 45 was capable of conferring rights upon individuals, which the national courts must protect.[[35]](#footnote-35) These developments not only concretely reinforce the use of a breach/justification methodology but also present as a judicial task the restriction of the operation of public interests in relation to the market freedoms.

* 1. ***The incremental development of EU fundamental rights protection***

In stark contrast with the centrality of free movement within the Rome Treaty, students of EU law are well versed in the fact that the relationship between the EU and fundamental rights has been more piecemeal. For example, the Rome Treaty made no provision for fundamental rights, seemingly because reference to them was viewed as unnecessary within a document charged with constituting an economic community.[[36]](#footnote-36) In the specific context of free movement, the Rome Treaty also did not explicitly envisage interaction between free movement and fundamental rights. None of the provisions permitting derogations from the market freedoms have ever presented fundamental rights considerations as justifiable limitations on free movement.

Yet litigants soon began to argue that the formation of an internal market was affecting their fundamental rights and it was accordingly left to the Court to resolve these tensions, despite the absence of fundamental rights protection within the Treaty text. Thus, as is well-known, in *Stauder* and its seminal *Internationale Handelsgesellschaft* decision, the Court held that fundamental rights formed an integral part of the general principles of Union law, were inspired by the constitutional traditions common to the Member States, but operated within the structure and objectives of the Union.[[37]](#footnote-37) This was confirmed in *Nold*, in which the Court also highlighted the significance of international human rights instruments, to which the Member States were signatories, to the EU fundamental rights framework.[[38]](#footnote-38) The ECHR became a ‘special source of inspiration’ in this regard.[[39]](#footnote-39)

However, since EU fundamental rights were introduced as general principles of Union law, their position relative to, and their legal effects upon, primary free movement law was unclear. Though the general principles enjoy primary law status, this assertion does not, in itself, provide a decisive tool for resolving tensions between conflicting primary law norms. Indeed, when tensions between the market freedoms and fundamental rights began to appear before the Court,[[40]](#footnote-40) there was a consequent debate in the literature as to the relative positions of free movement and fundamental rights.[[41]](#footnote-41) As the discussion below will demonstrate, this uncertainty has been resolved, at the judicial-level, by slotting fundamental rights within the pre-existing breach/justification framework, with the consequence that fundamental rights are structurally presented primarily as derogations from free movement rules.

* 1. ***Historically understandable but potentially problematic: contextualising the constitutional asymmetry between free movement and fundamental rights***

With the benefit of hindsight, the constitutional asymmetry between the promotion of free movement and the protection of fundamental rights within the Union legal order appears regrettable. Indeed, the Court has faced diverse, often convincing, and frequently legitimate criticism for the way in which fundamental rights considerations were introduced to the Union legal order. In particular, the Court’s statement that EU fundamental rights must ‘operate within the framework of the structure and objectives of the Treaty’ have left it open to allegations that it considers the advancement of economic integration more important than the safeguarding of fundamental rights.[[42]](#footnote-42) These criticisms have been reignited by the procedural disadvantage faced by fundamental rights as a result of the Court’s two-stage breach/justification methodology.[[43]](#footnote-43)

However, when one sites this constitutional unevenness within its historical setting, and in particular against the specific and focused objective of economic integration, explicitly stated within the Rome Treaty, it is difficult to see how things could have developed any differently. It seems clear that fundamental rights were not foreseen as relevant to an economically-focused project when the Treaty was drafted. When they emerged as, in fact, an increasingly pertinent issue in the completion of an internal market, the CJEU was faced with a Treaty that made no provision for them. Consequently, it is unsurprising that to counter the somewhat audacious introduction of fundamental rights by means of the ‘general principles of EU law’ the Court leaned on common constitutional traditions of the Member States and the international agreements to which they were signatories, but framed these within the ‘structure and objectives’ of the Union.

Crucially, the Court’s development of an adjudicative approach to addressing tensions between the market freedoms and opposing law and policy, which offered a distinct structural advantage to free movement, must be understood against the clear recognition that establishing a common market was the central task of the EEC. At that time, the scope of the market freedoms was limited to protectionist and discriminatory Member State policy, in other words, precisely the kind of conduct that the Member States had agreed to eradicate when the EEC was formed.[[44]](#footnote-44) In this context, an adjudicative methodology that presents law and policy conflicting with free movement as a *prima facie* wrong in need of justification is entirely logical. Though the Treaty itself understood, through its derogating provisions, that discriminatory domestic rules could, at times, pursue endeavours other than protectionism, the Member States’ agreement to work towards economic integration arguably justified the requirement that they defend their public interest approaches. Thus, it was clearly an imperative that domestic public interest legislation was not in fact arbitrarily discriminatory,[[45]](#footnote-45) but also that Member States rethink their public interest approaches where these could be achieved whilst also imposing fewer restrictions on free movement.[[46]](#footnote-46)

Critically, for our purposes, this approach appeared to pose few problems for fundamental rights. As perhaps reflected in the absence of a reference to fundamental rights in the Treaty derogations from the market freedoms, it is difficult to envisage significant tensions between protectionist or blatantly discriminatory public conduct and fundamental rights, at least of a civil and political nature. How would a French decision to distinguish, in its law, between domestic goods and those coming from another Member State better protect the fundamental right to a fair trial or the freedom of association of its citizens? Indeed, interaction between the primary free movement provisions and civil and political fundamental rights is not really visible before the scope of free movement expanded beyond discrimination, in cases such as *Cinéthèque, Familiapress*, and *Schmidberger*.[[47]](#footnote-47) Moreover, when it was first employed, in the very early case-law after the Treaty of Rome, the two-stage breach/justification methodology could not threaten the exercise of fundamental rights by individuals, since none of the market freedoms were immediately recognised as enjoying horizontal direct effect.[[48]](#footnote-48)

Nevertheless, a structural preference for free movement, produced by the two-stage breach/justification methodology, had been laid down, consistently applied, and therefore entrenched. This clearly contained the latent risk that free movement would be prioritised over fundamental rights should interactions between them begin to occur. Indeed, evidence of these dormant problems is visible if a retrospective examination of the case-law is conducted, especially in light of the increasing judicial cognisability of economic, social, and solidarity rights.[[49]](#footnote-49) Thus, the *Walloon Waste* case,[[50]](#footnote-50) which concerned the question of whether a Flemish ban on imported waste was a breach of the free movement of goods, can be interpreted as containing a conflict between the free movement of goods and the fundamental right to a clean environment.[[51]](#footnote-51) In an exercise in legal acrobatics, the CJEU interpreted what is widely considered to have been a directly discriminatory measure[[52]](#footnote-52) as non-discriminatory in order to allow the mandatory requirement of environmental protection to apply.

Thus, there were already warning signs that the Union constitution was under-equipped to deal with tensions between the market freedoms and domestic law and policy that, rather than being targeted at protectionism, was adopted with the aim of protecting fundamental rights. However, it was only with the transformation of free movement law that the full nature and extent of the latent problems laid down in the Union’s early constitutional development came to the fore.

1. **The largely independent transformations of free movement law and EU fundamental rights**

In order to understand how a functioning system for the promotion of the internal market developed into a potentially malfunctioning one with regard to fundamental rights protection, it is necessary to chart the evolution of both the market freedoms and EU fundamental rights from their constitutional beginnings outlined above. This section will demonstrate that while the development of both types of norm has been dramatic, their relatively independent evolutions have left open questions as to how free movement and fundamental rights interact with each other.

* 1. ***Expanding the scope, reach and legal effects of the market freedoms***

Most free movement lawyers would agree that the transformation of free movement has occurred across four main axes, covering the expansion in the material scope of the market freedoms, the widening of their personal scope, the extension of their direct effect, and the strengthening of a decentralised system of enforcement.

The Court’s expansion of the material scope of the free movement provisions beyond instances of protectionism and direct discrimination is well-documented. Thus, indirectly discriminatory rules – which appear on their face to apply equally to domestic and foreign commodities but, in fact, inherently present fewer compliance issues for national economic actors – have been found to trigger the free movement provisions.[[53]](#footnote-53) In its seminal *Cassis* judgment, the Court also extended the material scope of Article 34 TFEU to cover so-called dual regulatory burdens [DRBs].[[54]](#footnote-54) This approach has been adopted for other market freedoms.[[55]](#footnote-55) Moreover, the Court has found that even single burdens to free movement are ‘liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the Treaty’ and thus constitute *prima facie* restrictions to free movement.[[56]](#footnote-56) This approach to material scope is now applied across the majority of the free movement provisions.[[57]](#footnote-57)

There has been a similarly striking extension of the personal scope of the free movement provisions. For instance, the Court’s value-neutral approach to defining a service created the potential for Irish rules on abortion to be brought within the personal scope of Article 56 TFEU.[[58]](#footnote-58) Likewise, the CJEU’s finding that cross-border services do not have to be remunerated directly by the service recipient introduced situations concerning the public funding of healthcare to the personal scope of that provision.[[59]](#footnote-59) Further, the judicial extension of Article 56 TFEU to the service recipient has brought national rules on, *inter alia*, healthcare,[[60]](#footnote-60) criminal injuries compensation,[[61]](#footnote-61) and the language used in criminal trials[[62]](#footnote-62) into previously unanticipated contact with that provision. The notion of the ‘service recipient’ has also reduced the potency of the cross-border requirement. It allows economic actors to challenge rules operating in their Member State of establishment, concerning for example public health regulation, as restrictions on access to that State’s market by service recipients in other Member States.[[63]](#footnote-63) The introduction of Union citizenship has extended the personal scope of the free movement of persons to the economically inactive, leading to a similar broadening and diversification of the type of Member State rules that now trigger EU law. For instance, national rules on job-seekers’ allowance now constitute potential restrictions of Article 45 TFEU, since job-seekers now fall within the personal scope of that provision.[[64]](#footnote-64) More broadly, the availability of a personal right to freedom of movement and residence for Union citizens, pursuant to Article 21 TFEU, has exposed a wide range of Member State social security rules to potential scrutiny as possible breaches of that provision.[[65]](#footnote-65) The personal right of Union citizens to move within the territory of the Union has also been explicitly declared fundamental by the Court.[[66]](#footnote-66)

In the same way that a greater range of situations now trigger the free movement provisions as a direct consequence of their wider material and personal scope, the extension of the direct effect of the market freedoms has expanded their reach to new situations and different actors. Thus, where one private party brings an action against a second for failing to comply with domestic law, the latter actor may, where relevant, argue that those national rules are in breach of free movement, accordingly employing the vertical application of the market freedoms as a shield in the context of a horizontal dispute.[[67]](#footnote-67) The collective-regulator case-law has permitted the application of the free movement provisions to associations incorporated under private law that are nevertheless able to exercise exclusive control over the regulation of certain market sectors. Accordingly, rules formulated by such bodies are capable of being in breach of Union law.[[68]](#footnote-68) Significantly, some of the free movement provisions can now be used as a sword against the conduct of private actors.[[69]](#footnote-69)

These developments have also been accompanied by the evolution of a system of decentralised enforcement, in particular by virtue of the combined force of the doctrines of primacy and effective judicial protection. Thus, the Court held in *Simmenthal* that national courts were tasked with protecting the directly effective rights of individuals conferred by Union law. Critically, it also combined this with the rule in *Costa,* that EU law enjoys primacy over national law however framed,[[70]](#footnote-70) with the effect that domestic provisions are rendered automatically inapplicable to the extent that they conflict with EU law.[[71]](#footnote-71) Despite entertaining some more recent arguments that primacy should be temporarily suspended where the immediate disapplication of domestic law would leave a legal vacuum in relation to important public interests,[[72]](#footnote-72) the Court has, to date, nevertheless held that the primacy of EU law should prevail.[[73]](#footnote-73) More broadly, the principle of effective judicial protection has also made it possible for individuals to bring actions for damages against both the State[[74]](#footnote-74) and private actors for breaches of Union law.[[75]](#footnote-75)

* 1. ***The growing prominence of fundamental rights as a Union objective***

If the expansion of the material and personal scope of the market freedoms, the extension of their direct effect and the accompanying system of judicial enforcement have caused a major transformation of free movement law, it could be argued that the evolution of Union fundamental rights law has been similarly dramatic.

The decades since Rome have seen ever-increasing focus on fundamental rights protection from a polity whose founding text contained no reference to them. Thus, in 1977 the Union’s political institutions released a joint declaration stressing the prime importance they attached to the protection of fundamental rights.[[76]](#footnote-76) This commitment was endorsed by the Member States in the preamble to the Single European Act in 1986. With the Maastricht Treaty, entering into force in 1993, respect for the fundamental rights contained in the ECHR and resulting from common constitutional traditions of the Member States entered the main Treaty text, via Article 6 TEU. The possibility of suspending the voting rights, within the European Council, of those Member States that seriously and persistently breached fundamental rights was introduced by the Amsterdam Treaty, which became effective in 1999.[[77]](#footnote-77) With this Treaty, Article 6 TEU also declared that the Union was *founded on*, *inter alia*, respect for fundamental rights. In 2000, the EU’s own Charter of Fundamental Rights was solemnly proclaimed and it was granted primary law status when the Lisbon Treaty came into effect in 2009.[[78]](#footnote-78) This Treaty also imposed an obligation on the Union to accede to the ECHR.[[79]](#footnote-79)

However, these developments in EU fundamental rights protection do not make a definitive contribution to our understanding of their relationship with free movement. The free movement chapters still make no reference to fundamental rights. Moreover, though the EU’s commitment to fundamental rights is emphasised in a variety of ways – for instance, through the general principles, the Charter, and the obligation to accede to the Convention – the content of Article 6 TEU does not offer fundamental rights the same compelling structure and format as the market freedoms. In particular, following the failure of the Constitutional Treaty, the Charter is not contained within the main Treaty text. Further, the Charter’s differentiation between rights and principles would appear to be an attempt to reduce the direct effect of some of its fundamental rights provisions.[[80]](#footnote-80)

Of course, Article 52(1) CFR requires that any limitation of Charter rights be provided for in law, respect the essence of the relevant right, and meet the requirements of proportionality. This suggests a procedural preference for fundamental rights in their interactions with public interests similar to the breach/justification methodology used in relation to free movement. Indeed, such an adjudicative approach, especially in the post-Lisbon era, is frequently visible in the Court’s case-law on the validity or interpretation of secondary legislation.[[81]](#footnote-81) However, Article 52 CFR is less useful in respect of the relationship between free movement and fundamental rights, first, because the Charter’s preamble itself reiterates the Union’s commitment to ensuring the free movement of goods, services, persons, establishment and capital. Moreover, it explicitly presents the free movement of services and establishment,[[82]](#footnote-82) and the freedom to move and reside freely within the territory of the Member States[[83]](#footnote-83) as Charter rights for Union citizens. Secondly, Art.51 CFR unambiguously re-emphasises the principle of attributed powers in the specific context of fundamental rights, laid down more generally in Article 4 TEU. Accordingly, since the Union still has no general fundamental rights competence, the principle of attributed powers still requires a ‘hook’ to Union law to trigger EU fundamental rights competence. In the context of the market freedoms, this hook remains a *prima facie* breach of a free movement provision. Consequently, fundamental rights fall within the existing, historically entrenched, structures of the internal market. They must find their place within the transformed environment of free movement law, in which there is still no specific legislative provision to deal with this kind of interaction. This leads to the obvious question of what place fundamental rights have eventually found.

1. **The emergence of the structural prioritisation of free movement over fundamental rights**

When taken together, the historical evolutions of both free movement and Union fundamental rights law evolve into a more problematic set of legal relationships when these two types of norm collide. This section presents the developments outlined above – such as the expansion in the scope of free movement and the extension of its reach through the twin forces of direct effect and effective judicial protection - as constitutional drivers of an uneven approach to the adjudication of conflicts between free movement and fundamental rights. Though these constitutional drivers are clearly central to the achievement of a common market and to the wider constitutional development of the Union, their impact on the free movement/fundamental rights dynamic is no less relevant for that.

Specifically, the section will outline the outcome of these evolutions, first, in terms of the quantitative increase in the frequency with which free movement and fundamental rights will collide. More importantly, it will also demonstrate that the qualitative nature of interactions between the free movement provisions and domestic rules have changed beyond recognition. Crucially, however, this qualitative change has not been matched by the alteration of the Court’s adjudicative approach to resolving tensions between the market freedoms and opposing law, policy and activity, with the result that it is much easier to establish a breach of free movement than it is to demonstrate the justified protection or exercise of fundamental rights. This can lead to a number of potentially serious consequences for the safeguarding of fundamental rights when they come into conflict with free movement.

* 1. ***A quantitative explosion in the level of contact between free movement and fundamental rights***

The expansion of the scope and reach of the free movement provisions, described in section three, has resulted in a quantitative explosion in the volume of clashes between free movement and fundamental rights. Thus, the conflict between the free movement of goods and the fundamental right to freedom of expression, in *Familiapress*,[[84]](#footnote-84) or the free provision of services and the fundamental right to human dignity, in *Omega*,[[85]](#footnote-85) would not have been possible without the introduction of the dual regulatory burden test in *Cassis*. Similarly, the clash between the freedoms of establishment and services and the fundamental right to strike, in *Viking* and *Laval* respectively,[[86]](#footnote-86) would not have occurred but for the extension of the material scope of Articles 49 and 56 TFEU to include restrictions to market access.[[87]](#footnote-87) The Austrian decision to permit environmental protestors to demonstrate on the Brenner motorway would not have engaged Article 34 TFEU on goods, in *Schmidberger*, if it were not for the obligation that Member States take positive steps to promote free movement, as opposed to being under only a negative obligation not to impose restrictions on cross-border trade.[[88]](#footnote-88) Finally, the tensions between free movement and fundamental rights would not have arisen in *Familiapress* and *Dynamic Medien[[89]](#footnote-89)* if the vertical effect of the market freedoms had not been expanded to horizontal disputes, while the conflict between Articles 49 and 56 TFEU and the fundamental right to strike, in *Viking* and *Laval* required the extension of the direct effect of those provisions horizontally to certain private parties.

* 1. ***The fundamentally changed quality of free movement’s interactions with domestic rules***

The quantitative fact of increased conflict between free movement and fundamental rights is an outcome of the broader, and arguably more significant, issue that, as a result of free movement’s expansion, it now interacts with qualitatively different law, policy and activity. Thus, when the scope of the free movement provisions was limited to protectionist or patently discriminatory Member State law and policy, it would largely be triggered by domestic activity that deliberately stuck at the heart of the achievement of the common market, a goal that the Member States had agreed to work towards when the EEC was conceived.[[90]](#footnote-90) As noted already, though the Treaty recognised that even discriminatory conduct might serve objectives other than protectionism at times, the centrality of economic integration to the EEC required the Member States, where possible, to rethink their approaches to securing these public interests.[[91]](#footnote-91)

However, with the extension of the material scope of the free movement provisions to cover indistinctly applicable measures, including indirectly discriminatory measures and DRBs, it became increasingly possible for Member State activity, which did not exist to protect domestic commodities but instead to pursue other legitimate objectives, to constitute a *prima facie* breach of the market freedoms.[[92]](#footnote-92) For instance, where each Member State has independently enacted rules to protect consumers in light of their generally weaker position in the market place, these measures do not constitute a deliberate attack on foreign goods. Rather, the disadvantage they create for importers lies in the fact that the Member State of production implements the policy goal of consumer protection differently from the importing Member State.[[93]](#footnote-93) Further, as Spaventa points out, in her discussion of the combined effects of the market access test with a general relaxation of the cross-border requirement in *Gourmet*,[[94]](#footnote-94) if free movement is triggered by rules that simply make economic activity less attractive to actors (whether providers or recipients), ‘it becomes difficult to identify which, if any, national rules fall outside the scope of the Treaty and therefore need not be justified’.[[95]](#footnote-95)

Indeed, rather than imposing a *prima facie* prohibition on rules that reveal a protectionist intent or are protectionist in effect (as indistinctly applicable measures arguably are) in order to facilitate an economically integrated Europe, a test based on reduction in economic attractiveness instead works more generally towards deregulation and the creation of a ‘market without rules’.[[96]](#footnote-96) This risks prioritising a transformed concept of free movement over almost every single other legitimate endeavour or responsibility of the State, including not only valuable public interests but individual and collective fundamental rights. Thus, the inclusion of indistinctly applicable measures and rules restricting market access within the material scope of (most of) the market freedoms led to tensions between them and Member State efforts to protect the fundamental right to freedom of expression,[[97]](#footnote-97) the fundamental right to human dignity,[[98]](#footnote-98) the fundamental rights of the child,[[99]](#footnote-99) and the fundamental right to freedom of association.[[100]](#footnote-100) Moreover, the expansion of the material scope of free movement has also given rise to conflict between the market freedoms and Member State programmes for the implementation of fundamental social rights including but not limited to, the fundamental right to social and housing assistance,[[101]](#footnote-101) the right to access to healthcare,[[102]](#footnote-102) the fundamental right to education,[[103]](#footnote-103) and the fundamental right to fair and just working conditions.[[104]](#footnote-104) Critically, the horizontal direct effect of (some of) the market freedoms means that the private exercise of fundamental rights, such as the right to strike, can constitute a *prima facie* breach of free movement.[[105]](#footnote-105)

Interestingly, the contemporary Union Treaties purport to respect many of these endeavours as fundamental rights under the Charter[[106]](#footnote-106) and/or as specific Union goals.[[107]](#footnote-107) However, the Treaty takes an uneven approach to the implementation of many of these objectives, dividing labour between the Union and the Member States. Thus, in some areas, such as social, environmental and consumer protection, the Union shares competence with the Member States. In areas such as education and health, the EU may only support, coordinate or supplement the actions of the Member States.[[108]](#footnote-108) As already noted, the EU has no general competence in the field of fundamental rights. Thus, in relation to many of its contemporary objectives, the EU relies on the Member States to meet its goals. For instance, Article 28 CFR protects the right to strike. However, Article 153(5) TFEU explicitly excludes EU legislative competence in this regard, while Article 153(1) explains that the Union will ‘support and complement’ the activities of the Member States in relation, *inter alia*, to the social protection of workers.

Accordingly, against this background, we might expect to see an adjustment to the Court’s adjudicative methodology in recognition of the fact that free movement has evolved so as to interact not only with deliberately protectionist Member State law and policy, but also the public protection and private exercise of individual and collective fundamental rights. Even if viewed only from a Union constitutional perspective, an adaptation of the CJEU’s approach to adjudication might be anticipated in light of the fact that the division of labour within the Treaty effectively tasks the Member States with the attainment of many of the Union’s more socially-oriented goals.

* 1. ***The maintenance of the breach/justification methodology***

However, though the Court has recognised the qualitatively different nature of interactions between free movement and domestic rules through its substantive introduction of the mandatory requirements,[[109]](#footnote-109) this has not been echoed by a change in its adjudicative methodology. In all of the new free movement situations outlined in the previous subsection, the Court has retained the two-stage model it developed in the context of conflicts between the market freedoms and protectionist Member State conduct.[[110]](#footnote-110) The problem with the maintenance of the breach/justification approach is that it provides no mechanism, at its first stage, for examining the nature of the obstacle to free movement. Under this framework, all types of obstacle are simply presented as a barrier, with no differentiation between protectionist Member State policy and domestic public or private activity targeted at protecting or exercising fundamental rights, and having only indirect effects on free movement. Accordingly, fundamental rights fall to be assessed at the justifications stage and must overcome the same evidential hurdles imposed by the principle of proportionality that were originally introduced to tackle protectionism, despite their qualitatively different nature.

In other words, an adjudicative methodology designed to offer a structural preference to free movement, as a self-evident good within the constitutional parameters of the Rome Treaty, over protectionist activity that, within those the same constitutional boundaries, is a self-evident wrong was largely logical. The problem in the contemporary free movement environment is that such a juxtaposition is now far from obvious. Now, free movement often interacts with other ‘goods’ or arguably, in the context of fundamental rights, with endeavours of greater importance than economic integration. Yet, these new free movement dynamics have been slotted into the pre-existing breach/justification methodology, resulting in the presentation of fundamental rights as *prima facie* ‘wrongs’ in need of defence and justification. More broadly, there is no real mechanism for recognising that many national measures that conflict with free movement rights nevertheless accord with the wider aims of the contemporary Union or the fact that the Treaty explicitly reasserts the competence of the Member States in relation to some of these policy goals.[[111]](#footnote-111) Indeed, as a result of the breach/justification methodology, in the free movement context, Member State measures pursuing many of these objectives risk being reconceptualised as *prima facie* breaches of Union law.

If anything, what has occurred is a reinforcement of this adjudicative imbalance, through the widening of the evidentiary gap between the breach and the justification stages as free movement law has evolved. For instance, the language surrounding the substantive expansion of potential justifications to non-discriminatory restrictions nonetheless connotes the procedural subjugation of national rules: they must be ‘mandatory’, ‘imperative’ or ‘overriding’.[[112]](#footnote-112) Further, in *Gebhard*, the Court directly transferred the proportionality test used for directly discriminatory measures into the assessment of whether non-discriminatory obstacles to free movement can be justified in practice.[[113]](#footnote-113) This case also confirms that necessity is generally determined by reference to whether measures less restrictive of free movement are available.[[114]](#footnote-114) The *Gebhard* formula was subsequently applied in fundamental rights cases such as *Familiapress, Omega, Viking, Laval, Rüffert*, *Commission v Luxembourg,* and *Dynamic Medien*.

At the same time as introducing the same proportionality questions that applied to protectionist and discriminatory law and policy to qualitatively different restrictions of free movement, the extension of the material scope of the market freedoms also lowered the evidentiary burden operating at the breach stage. Indeed, the evidential threshold placed on applicants wishing to establish a breach of free movement is necessarily lowered when the concept of a restriction is broadened. For instance, it will no longer be necessary for a foreign Member State trader to demonstrate that a receiving Member State is *directly* discriminating against her/him. In the wake of the market access test, she/he will not even have to display the differential impact of host State rules on her/him as compared with domestic traders. The breadth of evidential opportunities is, moreover, also accompanied by shallow evidential thresholds.

The low evidential burden for establishing a breach of free movement is visible in the fact that potential and indirect impediments, rather than simply actual or direct obstacles, to cross-border movement will suffice.[[115]](#footnote-115) Indeed, many free movement cases involve applicants who are already operating in a host State, regardless of that State’s rules, though they might not always do so under their preferred market conditions.[[116]](#footnote-116) Similarly, the concept of ‘*per se*’ restrictions necessarily reduces the evidential burden for establishing obstacles. For instance, the presumption that product requirements constitute DRBs removes any need to examine the actual extent of limitations on the free movement of goods before a restriction is found. This is potentially problematic where DRBs reflect Member States efforts to protect fundamental rights since the one-sidedness of the proportionality assessment at the justification stage reduces the opportunity to compare the size of the impediment to free movement against the effect of free movement on the protection of fundamental rights. Though *Keck* could arguably be viewed as raising the evidential bar in this context,[[117]](#footnote-117) cases such as *Gourmet*, suggest that the threshold for demonstrating differential treatment, in law or fact, will not always be particularly high. In that case, the Court considered it unnecessary to conduct a ‘precise analysis’ in order to conclude that a prohibition of alcohol advertising was liable to impede access to the market for imported goods more than domestic products.[[118]](#footnote-118) This relatively burden-free establishment of a free movement restriction consequently exposed Swedish efforts to protect the right to health to the more onerous questions of suitability and necessity at the justification stage.[[119]](#footnote-119)

Of course, the Court has frequently made plain that it does not apply a *de minimis* threshold in relation to restrictions on free movement.[[120]](#footnote-120) Further, some commentators have argued convincingly against the introduction of quantitative empirical thresholds at the restrictions stage.[[121]](#footnote-121) Yet, by contrast, the Court has been willing to impose empirical obstacles at the justification stage, at times requiring Member States or private individuals to provide in-depth statistical data to support their fundamental rights justifications.[[122]](#footnote-122)

It is well-established in the case-law that, as derogations from a ‘fundamental principle’ of the Union, measures restricting free movement should be interpreted narrowly.[[123]](#footnote-123) As free movement has come into greater contact with fundamental rights, this approach has been transferred into these conflicts. Thus, in *Omega*, the Court stated that the safeguarding of the fundamental right to human dignity, ‘particularly as a justification for a derogation from the fundamental principle to provide services, must be interpreted strictly’.[[124]](#footnote-124) This introduces to the justification stage, evidentiary bars not (usually) faced by free movement.[[125]](#footnote-125) For instance, in *Omega* itself, the Court declared that ‘public policy may be relied on only if there is a *genuine and sufficiently serious threat* to a fundamental interest of society’ [emphasis added].[[126]](#footnote-126) This requirement was developed in *Commission v Luxembourg* in which public order legislation, conflicting with free movement and aimed at protecting the fundamental social rights of workers, had to be ‘so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the territory…’.[[127]](#footnote-127) Similarly, in *Viking*, exercise of the fundamental right to strike was only permissible if jobs or employment conditions were ‘jeopardised or under serious threat’.[[128]](#footnote-128)

Although the stringency of the application of these qualitative thresholds has been variable,[[129]](#footnote-129) the Court has also required Member States to provide statistical data, on several occasions, to support their claims that fundamental rights are under ‘serious threat’. Thus, in *Commission v Luxembourg*, the CJEU stated that potential justifications ‘must be accompanied by appropriate evidence’, for which, ‘merely cit[ing] in a general manner’ the objective of worker protection was insufficient.[[130]](#footnote-130) Similarly, in *Commission v Austria*,[[131]](#footnote-131) that Member State was required to show that, ‘in each individual case…their rules are necessary and proportionate…accompanied by specific evidence substantiating its arguments’.[[132]](#footnote-132) Though Austria had demonstrated that the number of students registering for medical courses on its territory could be five times higher than the places available, it had no figures in relation to other courses. Consequently, its derogation from free movement, in order to prevent risk to the financial equilibrium if its education system, a practical consideration for Member States designing programmes for the provision of the fundamental right to education,[[133]](#footnote-133) could not be justified.[[134]](#footnote-134)

The Union’s economic origins have also rendered the Court reluctant to accept justificatory arguments of a ‘purely economic nature’.[[135]](#footnote-135) However, in the context of programmatic fundamental social rights, the planning of public budgets can be a genuine consideration in relation to free movement derogations. The CJEU has, more recently, demonstrated a willingness to examine the risk posed to ‘the financial balance of social security systems’,[[136]](#footnote-136) but this has arguably been undermined by the accompanying evidential burdens placed on the Member States. As Nic Shuibhne and Maci point out, assessment of the proportionality of national measures is often assessed by reference to whether social security systems will be undermined by removing the barriers to free movement at the level of the individual.[[137]](#footnote-137) This leads them to ask, ‘how can States demonstrate – or more likely project – to a sufficiently rigorous degree the knock-on systematic effects [for such programmes]?’[[138]](#footnote-138)

In other fundamental rights areas, where furnishing statistical evidence might be easier, this will not necessarily lead to the conclusion that a Member State measure is justified in practice in any case. For example, in *Pétillant de Raisin*, Germany tried to justify its restrictions on the use of champagne-style bottles for other drinks by presenting a survey in which 75% of participants, having been shown a photograph of the bottle, believed it contained champagne or sparkling wine. Even where the bottle featured a clear label, stating that it contained fruit juice, 50% of people still thought the picture was of champagne. Nevertheless, the Court held that clear labelling would secure consumer protection in a way less restrictive of free movement.[[139]](#footnote-139)

Extending the direct effect of (some of) the market freedoms to private parties has also impacted upon the evidential burdens operating at the justifications phase. First, it can require private actors to play the dual role of combatant and referee. Thus, whilst in *Schmidberger* the question was whether a public authority had appropriately managed the conflicting relationship between two rights-holders, in *Viking* and *Laval*, the question becomes whether a private party, in exercising its *own* fundamental rights, has ensured that it has not unduly restricted the free movement rights of others. Further, as a result of the breach/justification methodology, there is no reciprocal obligation on the holders of free movement rights to consider the proportionality of free movement on the fundamental rights of the other private party. This seems particularly problematic in the context of collective action, since its purpose is to drive the undertaking to the point where it is willing to negotiate further.[[140]](#footnote-140)

Second, in *Viking* and *Laval*, the Court examined the legitimacy of the aim behind the exercise of the fundamental right to strike, where it had held in *Schmidberger* that the objective behind the exercise of fundamental rights was not relevant to justification. This is seemingly a direct consequence of the application of the market freedoms to private parties as opposed to the State. Advocate General Mengozzi in *Laval* explicitly distinguished *Schmidberger* on the basis that ‘the aims pursued by the collective action taken by the defendant in the main proceedings are…decisive in the context of a dispute in which only private persons are parties’.[[141]](#footnote-141) This approach has the effect of doubling the evidential requirements operating at the justifications phase.

Finally, the Treaty free movement provisions are not necessarily designed with private parties in mind, putting them at a disadvantage when individuals come to rely on Treaty derogations to justify their restrictions on free movement. In *Viking*, the Court explicitly recognised that ‘certain provisions of the Treaty are formally addressed to the Member States’.[[142]](#footnote-142) This has caused De Witte to ask, why private parties should be exposed to free movement obligations ‘when the legitimate reasons that can justify restrictions to trade…are entirely framed in terms of *public* interest, [leaving] private parties empty-handed in trying to justify their behaviour’.[[143]](#footnote-143)

Of course, reliance on public interest derogations is only relevant to the generally limited instances of discriminatory activity. In the context of non-discriminatory conduct, private actors may draw on the non-exhaustive mandatory requirements, which would seem less open to criticism for being ill-suited to the justificatory needs of private actors. In *Laval*, a problem nevertheless arose because Union secondary legislation existed – in the form of the Posted Workers’ Directive[[144]](#footnote-144) – that contained a ‘core nucleus’ of terms and conditions of employment,[[145]](#footnote-145) which Member States were able to impose on service providers posting workers to their territory. Article 3(10) PWD allows the application of terms and conditions going beyond those to which the core nucleus refers for reasons of public policy. However, as private actors, the trade unions in *Laval* were not able to rely on this provision to justify collective action aimed at securing the overriding interest of worker protection going beyond the core nucleus of protection contained in the PWD.[[146]](#footnote-146)

* 1. ***The impact of the breach/justification methodology on the protection and exercise of fundamental rights***

As well as simply making it harder for fundamental rights to prevail over the market provisions, the breach/justification methodology, and the consequent one-sided application of the proportionality principle, has certain concrete consequences for the protection of fundamental rights.

To begin with, the processing of disputes between free movement and fundamental rights through two stages results in the examination of the necessity of a fundamental rights measure through a free movement lens. Accordingly, questions of necessity are usually determined by reference to whether measures less restrictive of free movement are available. This can lead to a lowering of fundamental rights standards in real terms. This is exemplified by the case-law on consumer protection, now recognised as a fundamental right by Art.38 CFR.[[147]](#footnote-147) The Court has frequently held that consumers can be protected from potential confusion, when purchasing goods, by product labelling.[[148]](#footnote-148) Since Member State consumer protection measures have included, for instance, compositional requirements,[[149]](#footnote-149) new product designations,[[150]](#footnote-150) or entirely altered packaging,[[151]](#footnote-151) labelling is clearly less restrictive of free movement. However, it is submitted that this does not automatically render Member State rules ‘unnecessary’ from a fundamental rights perspective. Specifically, this approach neglects to consider the realities of consumer behaviour or arguably legitimate Member State desire to protect vulnerable consumers. Thus, we have already seen that the Court rejected evidence in the *Pétillant de Raisin* case that many consumers simply do not read labels.[[152]](#footnote-152) This reduces the effectiveness and the equivalence of labelling as an alternative method of consumer protection and has led Weatherill to ask whether the Court requires ‘the relaxation of the grip of national laws [regarding] a consumer more gullible than the European Court is prepared to acknowledge as deserving of protection’.[[153]](#footnote-153) More broadly, the case-law suggests that this approach can risk a consequent underappreciation of the idiosyncratic fundamental rights needs of Member States based on the peculiarities of language,[[154]](#footnote-154) or, beyond the field of consumer protection, the need to address a particular paucity of press diversity.[[155]](#footnote-155)

Measures less restrictive of free movement might also not be as effective in securing certain fundamental rights. For instance, in *Viking*, the CJEU required the referring court to consider, even if jobs were under serious threat, whether measures less restrictive of free movement than the proposed collective were available. However, since the trade union in *Viking* was exercising its fundamental right to strike in order to persuade an employer not to exercise free movement rights, any collective action less restrictive of free movement would also inevitably reduce the effectiveness of exercising that right.[[156]](#footnote-156)

In the context of programmatic fundamental rights, determining necessity according to whether measures less restrictive of free movement are available reduces the legal space for much-needed consideration of the logistical, budgetary, administrative and other practicalities of designing and implementing systems of social protection. For instance, the Court held in *Libert* that a Flemish measure, targeted at ensuring access to housing, which required the existence of a ‘sufficient connection’ between potential purchasers of land and certain geographical areas, was unnecessary because subsidies for purchase could meet this objective with fewer restrictions on free movement. It is clear that subsidy provision would address well the programmatic aim of enabling access to housing, and in a way less restrictive of free movement. What is less clear is whether such an approach would be feasible in light of the constraints it places on broader national budgets, which must balance competing social and economic demands.[[157]](#footnote-157)

Of course, it might be argued that what is at issue in cases such as *Libert* is not a tension between a free movement provision and a fundamental right *per se* but a national policy choice that claims to protect a fundamental right in some way. However, it is submitted that this is inherent to the programmatic nature of newer generations of fundamental economic, social and solidarity rights. As explained above, many of these rights are included in the Charter or explicitly incorporated into the Union’s goals, while the meeting of these objectives can nevertheless fall primarily within Member State competence. Consequently, while Member States might legitimately be required to re-examine whether their programmes of social protection can be pursued as effectively with fewer restrictions on free movement, given their commitment to economic integration, the reciprocal impact of free movement on the attainment of programmatic fundamental rights must also be considered. It is submitted that there is currently insufficient space for these considerations under the one-sided proportionality test that results from the breach/justification model.

The transformation of free movement law can also have concrete consequences for the private exercise of fundamental rights. First, in the wake of *Viking*, in which the Court required, *inter alia*, that ‘current jobs be jeopardised or under serious threat’ for strike action to be justified,[[158]](#footnote-158) Weatherill has remarked that this excludes the possibility of ‘more long-term strategic action by unions and even the ‘political strike’ insofar as it impedes cross-border movement. That constitutes a dramatic incursion into the permitted scope of collective labour rights’.[[159]](#footnote-159) Second, the combination of the horizontal direct effect of Article 56 TFEU with the principle of effective judicial protection led to the Swedish Labour Court allowing an action for damages against the trade unions involved in the *Laval* case, resulting in total liabilities of EUR 290 000.[[160]](#footnote-160) Further, Apps has speculated that domestic caps, in relation to trade union liabilities, might not apply in the context of ‘*Viking* actions’, as a result of the application of the principle of effective judicial protection. Specifically, caps would arguably undermine the effectiveness of damages as a judicial remedy, as they would not fully compensate an employer for the considerable costs of industrial actions. Moreover, capped damages might not provide equivalent protection in this context, since damages would not necessarily be capped in relation to other (non-trade union) private parties and actions against the State.[[161]](#footnote-161) The chilling effect that the prospect of unlimited damages has on the exercise of fundamental rights by private actors is clearly visible in the *BALPA* saga, in which a trade union withdrew its plans for strike action and from related legal proceedings regarding the setting up of a British Airlines subsidiary in another Member State, after British Airlines stated that it would seek unlimited damages, relying on *Viking*.[[162]](#footnote-162) This was despite the fact that the trade union in that case considered it likely that its activities would fall within the *Viking* criterion for justification, since less restrictive forms of collective action had been exhausted. Ewing and Hendy have consequently argued that the spectre of unlimited damages ‘imperils the very existence of trade unions for taking what is no more than trade union action’.[[163]](#footnote-163)

1. **Conclusion**

It is clear that an architectural imbalance exists in the adjudication of conflicts between free movement and fundamental rights. The former evidently enjoys a procedural advantage over the latter by virtue of the Court’s two-stage breach/justification methodology. However, this article has demonstrated that this is not because the Court simply prefers free movement over fundamental rights in any given case, or as a matter of general judicial positioning. The reasons, it has been argued, are simultaneously simpler and more complex than that. On the one hand, the discussion has confirmed the generally accepted belief that the historical significance of free movement within Union law has been influential in the creation of a structural preference for free movement. On the other hand, the analysis has offered a deeper understanding of these historical underpinnings, outlining the specific constitutional drivers of procedural imbalance and assessing their impact on fundamental rights protection.

Specifically, the Rome Treaty presented free movement as a principal tool for the attainment of its primary goal of economic integration. Crucially, it made no provision for the protection of fundamental rights. The centrality of the market freedoms to core EEC objectives, as well as the textual structure of the free movement provisions, naturally invited a judicial approach to resolving tensions between free movement and opposing law and policy that prioritised the former. A breach/justification model was indeed appropriate given that the scope and reach of the free movement provisions was limited to protectionist and discriminatory conduct by public actors. In other words, the market freedoms would be triggered by exactly the sort of conduct that the Member States had agreed to eliminate when they formed the EEC.

It is the subsequent expansion of free movement law, causing it to interact with an infinite variety of non-protectionist obstacles and to apply to private actors, as well as an accompanying system of decentralised enforcement, that has rendered the breach/justification model problematic. Critically, though EU fundamental rights have evolved beyond what could have been envisaged at Rome, the Treaty still offers no guidance as to the position of fundamental rights relative to contemporary free movement law. This has resulted in the slotting of fundamental rights issues into the existing breach/justification methodology and their subsequent presentation as *prima facie* ‘wrongs’, in need of defence and justification. Further, the widening evidentiary gap between the breach and justification phases has made it progressively harder for both public and private actors to overcome an initial finding that their conduct has wrongfully restricted the market freedoms.

This has certain practical consequences for the protection and exercise of fundamental rights, including the possibility that fundamental rights standards will be lowered in real terms; an underappreciation of the idiosyncratic fundamental rights needs of particular Member States; and the reduction of the legal space to consider the effectiveness of alternative fundamental rights approaches, or the administrative or budgetary constraints that inevitably accompany programmatic fundamental rights. Significantly, the Court’s strict approach to interpreting derogations and the potential imposition of extensive liabilities where fundamental rights restrict free movement, present a potentially major disincentive to the private exercise of fundamental rights.

These consequences raise questions about how the current uneven approach to the relationship between free movement and fundamental rights should be overcome. Though there are convincing arguments in the commentary about tempering the operation of the market access test[[164]](#footnote-164) or that question the horizontal application of the market freedoms to private actors,[[165]](#footnote-165) few seriously propose scaling back the scope of free movement law to its old protectionist core. Indeed, it is clear that the expansion of free movement law has been pivotal in the completion of the internal market.[[166]](#footnote-166) Moreover, especially in light of the current political climate, there is little prospect of Treaty reform to instigate formally a new relationship between free movement and fundamental rights. Indeed, in the process of negotiating Lisbon after the failure of the Constitutional Treaty, there was obvious concern, from certain Member States, that greater Union fundamental rights protection would inhibit, rather than promote, Member State freedom.[[167]](#footnote-167)

However, other potential avenues exist, not least a change in adjudicative methodology from the Court. Indeed, in the context of Union secondary legislation, the CJEU has proven itself able to adapt to the broader Union objectives of the post-Lisbon era through its use of a balancing model to resolve tensions between competing Treaty aims.[[168]](#footnote-168) Significantly, there is increasing recognition amongst the Advocates General, in particular Advocate General Trstenjak, that the post-Lisbon environment necessitates a new approach to the relationship between free movement and fundamental rights.[[169]](#footnote-169) She has proposed balancing as an appropriate model for managing tensions between these norms in light of the contemporary constitutional framework.[[170]](#footnote-170) This has been welcomed by a number of commentators.[[171]](#footnote-171) In the context of primary law, balancing nevertheless raises its own interesting issues including the constitutional challenge of how a balancing model would respect the principle of conferral, the conceptual question of whether free movement should be treated as the equivalent of a fundamental right, and the practical consideration of how a model that presents two norms as equal can nevertheless offer concrete outcomes in a given case. Overcoming these obstacles is arguably within the Court’s interpretative jurisdiction, it just remains to be seen if and how it will rise to the challenge.

1. Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elekrikerförbundet* [2007] EU:C:2007:809 [↑](#footnote-ref-1)
2. Case C-112/00 *Eugen Schmidberger, International Transporte und Planzüge v Republik Österreich* [2003] EU:C:2003:333 [↑](#footnote-ref-2)
3. C. Brown, ‘Case C-112/00, *Eugen Schmidberger, International Transporte und Planzüge v Republik Österreich*, Judgment of 12th June 2003, Full Court’ (2003) 40 CMLRev 1499, 1508; C. Barnard, ‘Social Dumping or Dumping Socialism?’ (2008) 67 CLJ 262; A. Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’, (2008) 37(2) ILJ 126, 139; P. Sypris, T. Novitz, ‘Economic and Social Rights in Conflict: political and judicial approaches to their reconciliation’ (2008) 33(3) ELRev 411. For the application of the breach/justification methodology beyond these three cases, see, for instance, Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bonn* [2004] EU:C:2004:614; Case C-244/06 *Dynamic Medien* *v Avides Media* [2008] EU:C:2008:85; Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag* [1997] EU:C:1997:325 [↑](#footnote-ref-3)
4. Davies, ibid, 138-139 [↑](#footnote-ref-4)
5. Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] EU:C:1970:114. This concern is arguably reinforced by the Court’s re-emphasis of this rule in *Opinion 2/13* [2014] EU:C:2014:2454, para.172 [↑](#footnote-ref-5)
6. Case C-319/06 *Commission v Luxembourg* [2008] EU:C:2008:350; Case C-346/06 *Rüffert* [2008] EU:C:2008:189 [↑](#footnote-ref-6)
7. N. Reich, ‘Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ’, (2008) GLJ 125, 159; Barnard, n.3, 262, 264; S. Picard, ‘Collective Action versus Free Movement: The *Viking* and *Laval* Cases’, (2008) 14(1) European Review of Labour and Research 160 [↑](#footnote-ref-7)
8. See the maintenance of the goal of economic integration, alongside new objectives, in Art.3(3) TEU [↑](#footnote-ref-8)
9. Part Two, Rome Treaty, entitled ‘Foundations of the Community’ was concerned, *inter alia*, with the elimination of obstacles to these four freedoms. This commitment is now reiterated in Art.26 TFEU [↑](#footnote-ref-9)
10. Case 15/74 *Centrafram BV a.o. v Sterling Drug* [1974] EU:C:1974:114, para.8 (goods); Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] EU:C:1974:13, para.4, Case 41/74 *Van Duyn v Home Office* [1974] EU:C:1974:133, para.13 (workers); Case 2/74 *Reyners v Belgium* [1974] EU:C:1974:68, para.43, (establishment); Case 36/74 *Walrave and Koch* [1974] EU:C:1974:140, para.18 (services); Case 7/78 *R v Thompson a.o.* [1978] EU:C:1978:209, para.22 (capital) [↑](#footnote-ref-10)
11. Case 216/84 *Commission v France* [1988] EU:C:1988:81, para.19; Case C-265/95 *Commission v France (Spanish Strawberries)* [1997] EU:C:1997:595, paras.24 and 32; Case C-319/06 *Commission v Luxembourg*, n.6, para.43 [↑](#footnote-ref-11)
12. Case C-379/92 *Matteo Peralta* [1994] EU:C:1994:296, para.7; Case C-112/00 *Schmidberger*, n.2, para.62 [↑](#footnote-ref-12)
13. Case 240/83 *Procureur de la République v ADBHU* [1985] EU:C:1985:59, para.9 [↑](#footnote-ref-13)
14. Via the freedom of expression. Case C-159/90 *SPUC v Grogan a.o.* [1991] EU:C:1991:378, para.34 [↑](#footnote-ref-14)
15. Case 4/75 *Rewe Zentralefinanz v Landwirtschaftskammer* [1975] EU:C:1975:98; Case 5/77 *Tedeschi v Denkavit* [1977] EU:C:1977:144; Case 95/81 *Commission v Italy* [1982] EU:C:1982:216 [↑](#footnote-ref-15)
16. Case 4/75 *Rewezentralefinanz*, n.15; Case C-324/93 *R v SSHD, ex p Evans Medical and Macfarlan Smith* [1995] EU:C:1995:84 [↑](#footnote-ref-16)
17. Joined Cases 115/81 *Adoui and Cornuaille v Belgium* [1982] EU:C:1982:183; Case C-192/01 *Commission v Denmark* [2003] EU:C:2003:492 [↑](#footnote-ref-17)
18. Case C-217/99 *Commission v Belgium* [2000] EU:C:2000:638; Case C-55/99 *Commission v France* [2000] EU:C:2000:693 [↑](#footnote-ref-18)
19. Case 104/75 *De Peijper* [1976] EU:C:1976:67; Case C-67/97 *Bluhme* [1998] EU:C:1998:584 [↑](#footnote-ref-19)
20. Case C-141/07 *Commission v Germany* [2008] EU:C:2008:492; Case 13/68 *Salgoil* [1968] EU:C:1968:54 [↑](#footnote-ref-20)
21. Art.45 and 45(3) TFEU (workers); Arts.49 and 52 TFEU (establishment); Arts.56 and 62 TFEU (services); Art.63 and 65(1)(b) (capital) [↑](#footnote-ref-21)
22. N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice,* (OUP, 2013) 26 [↑](#footnote-ref-22)
23. See e.g. *Kudla v Poland* App.no: 30210/96, concerning Art.5 ECHR; *Rowe and Daniels v UK* App.no: 28901/95, concerning Art.6 ECHR. See also S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects,* (CUP, 2006) 208 [↑](#footnote-ref-23)
24. Ibid [↑](#footnote-ref-24)
25. The CJEU arguably offers more latitude to the Union legislature in relation to the political, social and economic choices it makes than it does in relation to national law-making. See e.g. Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising)* [2006] ECR I-11573, para.145. [↑](#footnote-ref-25)
26. E.g. Case 5/77 *Tedeschi*, n.15 [↑](#footnote-ref-26)
27. There is a wider debate about whether direct effect confers rights status or whether it is a provision’s rights status that triggers direct effect, see T. Downes, C. Hilson, ‘Making Sense of Rights: Community Rights in EC Law’, (1999) 24(2) ELRev 121, 131; S. Prechal, ‘Does Direct Effect Still Matter?’ (2000) 37 CMLRev 1047 and Cases C-194/94 *CIA Security International v Signalson and Securitel* [1996] EU:C:1996:172 and C-72/95 *Kraaijveld a.o.* [1996] EU:C:1996:404. However, this is less relevant to our discussion of the market freedoms, which have been found to encompass individual rights in the course of decisions recognising their direct effect status. [↑](#footnote-ref-27)
28. Case 26/62 *Van Gend en Loos* *v Adminstratie der Belgastingen* [1963] EU:C:1963:1, p.12 [↑](#footnote-ref-28)
29. Downes, Hilson, n.27, 124, though they proceed to argue that this is no longer the case in the contemporary direct effect context. This does not undermine the argument made here, however, in relation to the historical strengthening of free movement through linking it to the conferral of individual rights. [↑](#footnote-ref-29)
30. Arts.48(3) and 52 EEC [↑](#footnote-ref-30)
31. Arts.59, 30, 34 and 67 EEC, respectively [↑](#footnote-ref-31)
32. Case 13/68 *Salgoil*, n.20; see also Case 222/82 *Apple and Pear Development Council* [1983] EU:C:1983:370, para.37 [↑](#footnote-ref-32)
33. Case 48/75 *Royer* [1976] EU:C:1976:57. See also Case 41/74 *van Duyn v Home Office* n.10para.7 (workers); Case 36/74 *Walrave*, n.10, para.34 (services); Case C-438/05 *Viking*, n.1, paras.58 and 66 (establishment). See in relation to capital Joined Cases C-163/94, C-165/94 and C-250/95 *Sanz de Lera a.o.* [1995] EU:C:1995:451 [↑](#footnote-ref-33)
34. Case 13/68 *Salgoil*, n.20, p.463. See also Case 48/75 *Royer*, ibid, para.29 [↑](#footnote-ref-34)
35. Case 41/74 *van Duyn*, n.10, para.7 [↑](#footnote-ref-35)
36. The European Political Community Treaty would have integrated the ECHR within its laws but this mechanism was absent when attention turned to economic integration. For discussion of this history, see M. Dauses, ‘The Protection of Fundamental Rights in the Community Legal Order’ (1985) 10 ELRev 398. Though the Rome Treaty can be said to incorporate goals beyond purely economic integration, Art.2 EEC presents aims such as social progression as achievable through the medium of the common market. [↑](#footnote-ref-36)
37. Case 29/69 *Stauder v Ulm* [1969] EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft*, n.5 [↑](#footnote-ref-37)
38. Case 4/73 *Nold v Commission* [1974] EU:C:1974:51, para.13 [↑](#footnote-ref-38)
39. Case C-260/89 *ERT v DEP* [1991] EU:C:1991:254; Case C-299/95 *Kremzow v Austria* [1997] EU:C:1997:254 [↑](#footnote-ref-39)
40. See e.g. Case C-112/00 *Schmidberger*, n.2; Case C-368/95 *Familiapress*, n.3; Case C-36/02 *Omega*, n.3; Case C-244/06 *Dynamic Medien*, n.3 [↑](#footnote-ref-40)
41. See Brown, n.3 and T. Perišin, ‘Interaction of Fundamental (human) Rights and Fundamental (market) Freedoms in the EU’ (2006) 2 CYELP 85, who both consider fundamental rights to constitute a ‘floating justification’, though Brown accepts that they face the same justificatory questions as ordinary public interests; C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, (OUP, 2004), 109, who argues that fundamental rights are free-standing justification or mandatory requirement but of higher status than the others; G. Gonzales, ‘EC Fundamental Freedoms v Human Rights in the Case C-112/00 *Schmidberger…*’ (2004) 31(3) LIEI 219, 223, who posits that fundamental rights have primacy over free movement; and E. Spaventa, ‘Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU’ in S. Currie, M. Dougan (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Hart, 2009), who asserts that fundamental rights have been reduced to the level of a public interest by the Court’s adjudicative methodology. [↑](#footnote-ref-41)
42. A. Veldman, ‘The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession to the ECHR’, (2013) 9 ULRev 104, 116-117; J. Coppel, A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously’, (1992) 29 CMLRev 669, 683, citing Case 5/88 *Wachauf* [1989] EU:C:1989:321; c.f. M. Koskenniemi, ‘The Effects of Rights on Political Culture’, in P. Alston et al (eds), *The EU and Human Rights*, (OUP, 1999), ch.3, 111. Others have asked whether EU fundamental rights reflect the existence but not the substance of the fundamental rights contained in international instruments and within the constitutions of the Member States - A. Williams, *EU Human Rights Policies: A Study in Irony*, (OUP, 2004) 159-160; E. Drywood, ‘Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Directive’, (2007) 32(3) ELRev 396, 397; Davies, n.3, 139. Others still have postulated that EU fundamental rights exist only as a useful means of avoiding the derailment of the principle of primacy or improving the legitimacy of Union activity – Coppel and O’Neill; S. Greer, A. Williams, ‘Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?, (2009) 15(4) ELJ 462. Some of these claims are, themselves, hotly contested - See the response to Coppel and O’Neill of J. Weiler, N. Lockhart, ‘‘Taking Rights Seriously’ Seriously: The European Court and its Fundamental Rights Jurisprudence – Part I’, (1995) 32(1) CMLRev 51, and ‘Part II’ (1995) 32(2) CMLRev 579; G de Búrca, ‘Fundamental Rights and the Reach of EC Law’, (1993) 13(3) OJLS 283; [↑](#footnote-ref-42)
43. Brown; Barnard; Sypris, Novitz, n.3 [↑](#footnote-ref-43)
44. Case 152/78 *Commission v France* [1980] EU:C:1980:187; Case 113/80 *Commission v Ireland* [1981] EU:C:1981:139 [↑](#footnote-ref-44)
45. Case 152/78 *Commission v France*, ibid [↑](#footnote-ref-45)
46. Consider e.g. Case 2/74 *Reyners*, n.10 in which the Court found it was possible to separate aspects of the role of *avocat* linked to the exercise of official authority, which might be limited to Belgian nationals, from the other general tasks arising in that post. [↑](#footnote-ref-46)
47. Joined Cases 60 and 61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] EU:C:1985:329; Case C-368/95 *Familiapress*, n.3; Case C-112/00 *Schmidberger*, n.2 [↑](#footnote-ref-47)
48. Thus, for instance, the alleged undermining of fundamental rights in *Viking* and *Laval* would not have occurred. [↑](#footnote-ref-48)
49. For instance, the civil and political rights in the ECHR have commonly enjoyed stronger legal force than the economic and social rights in the European Social Charter. However, provisions of the ECHR have been interpreted to incorporate rights of an economic and social nature, increasing their legal force. See e.g. the right to collective bargaining in *Demir and Baykara v Turkey* App no.34503/97 and *Enerji Yapi-Yol Sen v Turkey* App no.68959/01. Consider also the wide range of fundamental rights contained in the EU’s Charter of Fundamental Rights, though this is arguably undermined by the distinction made between ‘rights’ and ‘principles’ in Art.52(5) CFR [↑](#footnote-ref-49)
50. Case C-2/90 *Commission v Belgium* [1992] EU:C:1992:310 [↑](#footnote-ref-50)
51. Art.37 CFR [↑](#footnote-ref-51)
52. See e.g. N. Bernard, ‘Discrimination and Free Movement in EC Law’ (1996) 45(1) ICLQ 82 [↑](#footnote-ref-52)
53. Case C-281/98 *Angonese v Cassa di Riparmio di Bolzano SpA* [2000] EU:C:2000:296 (workers). See also Case C-19/92 *Kraus* [1993] EU:C:1993:125 (workers and establishment). [↑](#footnote-ref-53)
54. Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42 [↑](#footnote-ref-54)
55. Commonly in relation to services, see Joined Cases C-369/96 and C-376/96 *Arblade* [1999] EU:C:1999:575; Case C-36/02 *Omega*, n.3 [↑](#footnote-ref-55)
56. Case C-55/94 *Gebhard* [1995] EU:C:1995:411 [↑](#footnote-ref-56)
57. Case C-438/05 *Viking*, n.1 (establishment); Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] EU:C:1995:126, Case C-405/98 *Gourmet* [2001] EU:C:2001:135 (services); Case C-415/93 *Bosman* [1995] EU:C:1995:463 (workers); Case C-171/08 *Commission v Portugal* (capital). Though Joined Cases C-267 and C-268/91 *Keck and Mithouard* [1993] EU:C:1993:905 arguably re-emphasised the need for differential treatment in the context of goods, market access questions are visible in the context of domestic rules on product use. See Case C-110/05 *Commission v Italy (mopeds)* [2009] EU:C:2009:66; Case C-142/05 *Åklagaren v Mickelsson and Roos* [2009] EU:C:2009:336 [↑](#footnote-ref-57)
58. See Case C-159/90 *Grogan*, n.14, though the lack of remuneration for the provision of information in Ireland about abortion services in the UK meant the issue still felt outwith the scope of Article 56. [↑](#footnote-ref-58)
59. Case C-157/99 *Geraets-Smits and Peerbooms* [2001] EU:C:2001:404; Case C-372/04 *Watts* [2006] EU:C:2006;325 [↑](#footnote-ref-59)
60. Ibid [↑](#footnote-ref-60)
61. Case 186/87 *Cowan* [1989] EU:C:1989:47 [↑](#footnote-ref-61)
62. Case C-274/96 *Bickel and Franz* [1998] EU:C:1998:563 [↑](#footnote-ref-62)
63. Case C-405/98 *Gourmet* n.57 [↑](#footnote-ref-63)
64. Case C-138/02 *Collins* [2004] EU:C:2004:172 [↑](#footnote-ref-64)
65. Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] EU:C:1998:217; Case C-184/99 *Grzelczyk v CPAS* [2001] EU:C:2001:458; Case C-203/09 *Bidar v London Borough of Ealing and Secretary of State for Education* [2005] EU:C:2005:715. The boundaries of the personal scope of Article 21 TFEU remain the subject of debate, particularly after the Court’s recent judgment in Case C-333/13 *Dano v Jobcentre Leipzig* [2014] EU:C:2014:2358. See D. Thym, ‘The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens’, (2015) 52(1) CMLRev 17 [↑](#footnote-ref-65)
66. Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] EU:C:2004:639, para.33 [↑](#footnote-ref-66)
67. Case C-33/97 *Colim NV v Bigg’s Continent* [1999] EU:C:1999:274; Case 74/76 *Iannelli v Meroni* [1977] EU:C:1977:51; Case C-159/00 *Sapod Audic v Eco Emballages* [2002] EU:C:2002:343 [↑](#footnote-ref-67)
68. Case 36/74 *Walrave*, n.10 (services/workers) Case C-415/93 *Bosman* n.57, Case C-176/96 *Lehtonen and Castors Braines* [2000] EU:C:2000:201 (workers); Joined Cases 266 and 267/87 *Royal Pharmaceutical Society of Great Britain* [1989] EU:C:1989:205, Case C-171/11 *Fra.Bo v DVGW* [2012] EU:C:2012:453 (goods) [↑](#footnote-ref-68)
69. Case C-281/98 *Angonese*, n.53 (workers); Case C-438/05 *Viking*, n.1 (establishment) Case C-341/05 *Laval*, n.1 (services). The extent to which *Viking* and *Laval* can be interpreted as the purely horizontal application of Articles 49 and 56 TFEU is subject to debate since the Court relied heavily on its collective-regulator authority in those cases. However, in *Viking*, at para.62, the Court cited Case C-112/00 *Schmidberger*, n.2 and Case C-265/95 *Commission v France (Spanish Strawberries)*, n.11 to state that the free movement provisions should be extended to private parties simply because they are capable of restricting free movement, rejecting the notion that the application of Article 49 TFEU is restricted to bodies exercising a quasi-public function. [↑](#footnote-ref-69)
70. Case 6/64 *Costa v ENEL* [1964] EU:C:1964:66, p.594 [↑](#footnote-ref-70)
71. Case 106/77 *Simmenthal* [1978] EU:C:1978:49, paras.14-17 [↑](#footnote-ref-71)
72. Case C-409/06 *Winner Wetten v Bürgermeisterin der Stadt Bergheim* [2010] EU:C:2010:503 [↑](#footnote-ref-72)
73. Ibid; Case C-606/10 *ANAFE* [2012] EU:C:2012:348, para.73; Case C-416/10 *Križan a.o.* [2013] EU:C:2013:8, para.70 [↑](#footnote-ref-73)
74. Case C-6/90 *Francovich and Bonifaci v Italy* [1991] EU:C:1991:428 [↑](#footnote-ref-74)
75. Case C-453/99 *Courage v Crehan* [2001] EU:C:2001:465 (in relation to competition law) [↑](#footnote-ref-75)
76. Joint Declaration by the European Parliament, Council and the Commission concerning the protection of fundamental rights and the ECHR, 05/04/77 OJ C103 [↑](#footnote-ref-76)
77. Art.7 TEU [↑](#footnote-ref-77)
78. Art.6(1) TEU [↑](#footnote-ref-78)
79. Art.6(2) TEU, though the apparent consequence of the Court’s *Opinion 2/13* (n.5) is that formal accession will not occur for some time. [↑](#footnote-ref-79)
80. Art.52(5) CFR [↑](#footnote-ref-80)
81. Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014] EU:C:2014:238; Case C-131/12 *Google Spain* [2014] EU:C:2014:317 [↑](#footnote-ref-81)
82. Art.15 CFR [↑](#footnote-ref-82)
83. Art.45 CFR [↑](#footnote-ref-83)
84. Case C-368/95 *Familiapress*, n.3; see also Case C-244/06 *Dynamic Medien*, n.3 [↑](#footnote-ref-84)
85. Case C-36/02 *Omega*, n.3 [↑](#footnote-ref-85)
86. Case 438/05 *Viking*, n.1; Case C-341/05 *Laval*, n.1 [↑](#footnote-ref-86)
87. Though *Laval* case also concerned directly discriminatory law as a separate issue, paras.112-120 [↑](#footnote-ref-87)
88. Case C-112/00 *Schmidberger*, n.2 [↑](#footnote-ref-88)
89. Case C-244/06 *Dynamic Medien*, n.3 [↑](#footnote-ref-89)
90. Case 152/78 *Commission v France*, n.44; Case 113/80 *Commission v Ireland*, n.44 [↑](#footnote-ref-90)
91. Case 2/74 *Reyners*, n.10; Case 261/85 *Commission v UK (pasteurised milk)* [1988] EU:C:1988:57; Case 35/76 *Simmenthal (sanitary inspections)* [1976] EU:C:1976:180 [↑](#footnote-ref-91)
92. Though there remains some debate in the literature as to whether a final finding of a breach of free movement confirms the existence of protectionist intent or simply protectionist effects. See Bernard, n.52 and C. Hilson, ‘Discrimination in Community Free Movement Law’, (1999) 24(5) ELRev 445 [↑](#footnote-ref-92)
93. See e.g. Case 120/78 *Cassis,* n. 54; Case 261/81 *Rau* [1982] EU:C:1982:382; Case C-179/85 *Commission v Germany* (*Pétillant de Raisin)* [1986] EU:C:1986:466 [↑](#footnote-ref-93)
94. Case C-405/98 *Gourmet* n.57 [↑](#footnote-ref-94)
95. E. Spaventa, ‘Leaving *Keck* Behind? The Free Movement of Goods After the Rulings in *Commission v Italy* and *Mickelsson and Roos*’, (2009) 34(6) ELRev 914, 923 [↑](#footnote-ref-95)
96. Opinion of AG Tizzano, Case C-442/02 *CaixaBank France* [2004] EU:C:2004:586; para.63 [↑](#footnote-ref-96)
97. Case C-368/95 *Familiapress*, n.3 [↑](#footnote-ref-97)
98. Case C-36/02 *Omega*, n.3 [↑](#footnote-ref-98)
99. Case C-244/06 *Dynamic Medien*, n.3 [↑](#footnote-ref-99)
100. Case C-112/00 *Schmidberger*, n.2 [↑](#footnote-ref-100)
101. Joined Cases C-197/11 and C-203/11 *Libert a.o. v Gouvernement flamand* [2013] EU:C:2013:288 [↑](#footnote-ref-101)
102. Case C-372/04 *Watts* n.59 [↑](#footnote-ref-102)
103. Case C-147/03 *Commission v Austria* [2005] EU:C:2005:427, para.63 [↑](#footnote-ref-103)
104. Case C-319/06 *Commission v Luxembourg*, n.6; Case C-346/06 *Rüffert*, n.6 [↑](#footnote-ref-104)
105. Case C-438/05 *Viking*, n.1; Case C-341/05 *Laval* n.1 [↑](#footnote-ref-105)
106. The Charter enjoys primary law status pursuant to Art. 6 TEU. See e.g. Art.11 CFR (freedom of expression); Art.1 CFR (right to human dignity); Art.24 CFR (rights of the child); Art.34(3) CFR (right to housing assistance); Art.35 CFR (right to access to healthcare; Art.14 CFR (right to education); Art.31 CFR (right to fair and just working conditions). Though some of these Charter provisions might relate to ‘principles’ as opposed to ‘rights’, by virtue of Art.52(5) CFR, they can be viewed as fundamental rights for the purpose of this analysis since, as an institution of the Union, pursuant to Art.13 TEU and Art.52(5) CFR, the Court must take these rights into account in its interpretation of EU law. Indeed, see the Court’s incorporation of the right to health in its interpretation of EU secondary law in Case C-544/10 *Deutsches Weintor* [2012] EU:C:2012:526 [↑](#footnote-ref-106)
107. For instance, Art.3(3) TEU states that the Union’s aims include, *inter alia*, the attainment of a highly competitive social market economy, social progress and a high level of environmental protection, the combatting of social exclusion and discrimination and the promotion of social justice, equality between men and women and protection of the rights of child. Art.12 TEU requires that consumer protection be taken into account in defining and implementing Union policies. Art.11 TEU makes similar provision in relation to environmental protection. Art.151 TEU makes the promotion of employment, improved working conditions, and the maintenance of dialogue between management and labour an objective of the Union and its Member States. [↑](#footnote-ref-107)
108. Arts.3, 4, and 6 TEU [↑](#footnote-ref-108)
109. Case 120/78 *Cassis*, n.54 [↑](#footnote-ref-109)
110. See e.g. Case 112/00 *Schmidberger*, n.2; Case C-368/95 *Familiapress*, n.3; Case C-244/06 *Dynamic Medien*, n.3; Case C-438/05 *Viking*, n.1; Case C-341/05 *Laval* n.1; Case C-319/06 *Commission v Luxembourg*, n.6; Case C-346/06 *Rüffert*, n.6; Joined Cases C-197/11 and C-203/11 *Libert*, n.101 [↑](#footnote-ref-110)
111. E.g. Art.28 CFR protects the right to strike in the EU but Art.153(5) TFEU excludes Union competence in relation to that right. [↑](#footnote-ref-111)
112. Case 120/78 *Cassis*, n.54;Case C-55/94 Gebhard, n.56; Case C-438/05 *Viking*, n.1 [↑](#footnote-ref-112)
113. Case C-55/94 *Gebhard*, n.56. Of course with the exception that they also be non-discriminatory. See also Case 120/78 *Cassis*, n.54, which also reiterated the necessity requirement in relation to DRBs. [↑](#footnote-ref-113)
114. See also Joined Cases C-197/11 and C-203/11 *Libert*, n.101 [↑](#footnote-ref-114)
115. See famously, in relation to MEQRs, Case 8/74 *Procureur du Roi v Dassonville* [1974] EU:C:1974:82 [↑](#footnote-ref-115)
116. Beyond the goods case-law, consider, for instance Case 186/87 *Cowan*, n.61 or Case C-274/96 *Bickel and Franz*, n.62 in which, incidentally, a tangential restriction on the free receipt of services triggered a conflict with the fundamental rights of minority groups and respect for their cultural and linguistic identity (Arts.21 and 22 CFR). More broadly, in the context of citizenship, see Case C-148/02 *Garcia Avello* [2003] EU:C:2003:539 [↑](#footnote-ref-116)
117. See e.g. C. Barnard, ‘Fitting the Remaining Pieces into the Goods and Persons Jigsaw’ (2001) 26(1) ELRev 35, 45 [↑](#footnote-ref-117)
118. Case C-405/98 *Gourmet*, n.57, para.21; see also Joined Cases C-34-36/95 *Konsumentombudsmannen v De Agostini and TV-Shop De Agostini* [1997] EU:C:1997:344, though the CJEU left the final application of the facts to the national court [↑](#footnote-ref-118)
119. See also D. Wilsher, who argues that findings of discrimination based on ‘judicial hunches’ are inappropriate especially since non-product rules often ‘pursue broad policy goals that are largely non-justiciable’ - ‘Does *Keck* Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle within the European Single Market’, (2008) 33(1) ELRev 3 [↑](#footnote-ref-119)
120. Joined Cases 177-178/82 *Van de Haar* [1984] EU:C:1984:144; Case 269/83 *Commission v France* [1985] EU:C:1985:115; Case C-67/97 *Bluhme*, n.19 [↑](#footnote-ref-120)
121. G. Davies, ‘The Court’s jurisprudence on free movement of goods: pragmatic presumptions, not philosophical principles’ (2012) European Journal of Consumer Law’, 25, 31; P. Oliver, ‘Some further reflections on the scope of Articles 28-30 (ex 30-36) EC,’ (1999) 36(4) CMLRev 783, 799 [↑](#footnote-ref-121)
122. Case C-319/06 *Commission v Luxembourg*, n.6; see also Case C-543/08 *Commission v Portugal* [2010] EU:C:2010669, para.87; Case C-147/03 *Commission v Austria*, n.103 [↑](#footnote-ref-122)
123. N.20 [↑](#footnote-ref-123)
124. Case C-36/02 *Omega*, n.3, para.30; Case C-319/06 *Commission v Luxembourg*, n.6, para.30 [↑](#footnote-ref-124)
125. There is evidence of the infrequent application of obliquely operative, and inconsistently applied, qualitative thresholds at the restrictions stage. See, for instance, Case C-110/05 *Commission v Italy,* n.57, para.56; Case C-142/05 *Mickelsson and Roos*, n.57, para.27; Case C-443/10 *Bonnarde* [2011] EU:C:2011:641; Case C-148/02 *Garcia Avello*, n.116, para.36. [↑](#footnote-ref-125)
126. Case C-36/02 *Omega*, n.3, Para.30 [↑](#footnote-ref-126)
127. Case C-319/06 *Commission v Luxembourg*, n.6, paras.50 and 29 [↑](#footnote-ref-127)
128. Case C-438/05 *Viking,* n.1, para.81 [↑](#footnote-ref-128)
129. Compare the CJEU’s application of the proportionality principle in Case C-36/02 *Omega* with its proportionality assessment in Case C-341/05 *Laval*, n.1. For consideration (and criticism) of the reasons behind the Court’s light touch proportionality assessments in certain cases, see N. Nic Shuibhne and M. Maci, ‘Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law’, (2013) 50(4) CMLRev 965, 995 [↑](#footnote-ref-129)
130. Case C-319/06 *Commission v Luxembourg*, n.6; see also Case C-543/08 *Commission v Portugal* [2010] EU:C:2010669, para.87 [↑](#footnote-ref-130)
131. Case C-147/03 *Commission v Austria*, n.103 [↑](#footnote-ref-131)
132. Para.63 [↑](#footnote-ref-132)
133. Art.14 CFR [↑](#footnote-ref-133)
134. Paras.64-65 [↑](#footnote-ref-134)
135. Case C-398/95 *SETTEG* [1997] EU:C:1997:282, para.23; Case 238/82 *Duphar* [1984] EU:C:1984:45, para.23 [↑](#footnote-ref-135)
136. Case C-147/03 *Commission v Austria*, n.103; Case C-368/98 *Vanbraekel* [2001] EU:C:2001:400 [↑](#footnote-ref-136)
137. N. Nic Shuibhne and M. Maci, n.129, citing C. Newdick, ‘Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity’, (2006) 43 CMLRev 1645 [↑](#footnote-ref-137)
138. Ibid. Though, in the context of Union citizenship, consider the Court’s more recent approach to the ‘cumulative impact’ of individual claims on a Member State’s social security system as a whole. See Case C-67/14 *Alimanovic* [2015] EU:C:2015:597. [↑](#footnote-ref-138)
139. Case 179/85 *Pétillant de raisin)*, n.93. Germany’s survey detailed in H-C von Jeydebrand u.d. Lasa, ‘Free Movement of Foodstuffs, Consumer Protection, and Food Standards in the European Community: has the Court of Justice got it wrong?’ (1991) 16(5) CMLRev 391, 408 [↑](#footnote-ref-139)
140. Of course there are instances in which citizens will be expected to keep the exercise of their own fundamental rights in check. For instance, journalists are required to ensure that their exercise of the freedom of expression does not unduly interfere with the right to privacy. However, since fundamental rights are not generally horizontally effective, this is achieved by reference to rules developed in the process of law-making or through the measures of collective-regulators. Thus in a situation factually similar to Case C-265/95 *Spanish Strawberries*, n.11, the demonstrators could have regulated their behaviour according to the criminal law. [↑](#footnote-ref-140)
141. Case C-341/05 *Laval* [2007] EU:C:2007:291, para.44 [↑](#footnote-ref-141)
142. Case C-438/05 *Viking*, n.1, para.58 [↑](#footnote-ref-142)
143. B. De Witte, ‘Direct Effect and the Nature of the Legal Order’, in G. de Búrca, P. Craig (eds), *The Evolution of EU Law*’ (OUP, 2011), 323, 329 [↑](#footnote-ref-143)
144. Directive 96/71/EC of the European Parliament and Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L18/1) [↑](#footnote-ref-144)
145. Art.3(1)(a)-(g) [↑](#footnote-ref-145)
146. Case C-341/05 *Laval,* n.1,para.84 [↑](#footnote-ref-146)
147. It is accepted that the requirement that the Union ensures a high level of consumer protection, contained in Art. 38 CFR, might only amount to a ‘principle’, rather than a ‘right’ under the Charter. However, this distinction does not alter the analysis here, since, as an institution of the Union under Art.13 TEU, the CJEU is obliged, pursuant to Art.52(2) CFR, to take consumer protection into account in its interpretation of free movement. [↑](#footnote-ref-147)
148. Case 261/81 *Rau*, n.93; Case 179/85 *Pétillant de Raisin*, n.93 [↑](#footnote-ref-148)
149. Case C-120/78 *Cassis*, n.54 [↑](#footnote-ref-149)
150. Case 178/84 *Commission v Germany* [1987] EU:C:1987:126 [↑](#footnote-ref-150)
151. Case 261/81 *Rau*, n.93 [↑](#footnote-ref-151)
152. Case 179/85 *Pétillant de Raisin*, n.93; Case C-470/93 *Mars* [1995] EU:C:1995:224 [↑](#footnote-ref-152)
153. S. Weatherill, ‘Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation’, (1999) 36 CMLRev 51, 57 [↑](#footnote-ref-153)
154. Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder* [1994] EU:C:1994:34 [↑](#footnote-ref-154)
155. Case C-368/95 *Familiapress*, n.3 [↑](#footnote-ref-155)
156. See also Davies, n.3; T. Novitz, ‘A Human Rights Analysis of the *Viking* and *Laval* Judgments’ (2007-2008) 10 CYELS 541, 560-561 [↑](#footnote-ref-156)
157. For a fuller discussion see S. Reynolds, ‘Housing Policy as a Restriction of Free Movement and Member States’ Discretion to Design Programmes of Social Protection: *Libert*’, (2015) 52(1) CMLRev 259. See also Case C-372/04 *Watts*, n.59; Nic Shuibhne, Maci, n.129, 1003 [↑](#footnote-ref-157)
158. Case C-438/05 *Viking*, n.1, para.81 [↑](#footnote-ref-158)
159. S. Weatherill, ‘*Whose* internal market? Companies’ or Workers’ or Judges’ or Politicians’’ (2011) 24(1) EUSA Review 2, 3 [↑](#footnote-ref-159)
160. U. Bernitz, N. Reich, ‘Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No.89/09 of 2 December 2009, *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet et al* (2011) 48 CMLRev 603, 613-614 [↑](#footnote-ref-160)
161. K. Apps, ‘Damages against trade unions after *Viking* and *Laval*’ (2009) 34(1) ELRev 141, 151, discussing particularly the caps on trade union liability in the UK context, imposed by s.22 Trade Union and Labour Relations (Consolidation) Act 1992. Apps reasons by analogy with the removal of caps in relation to sexual discrimination in Case C-271/91 *Marshall v Southampton and South West Hampshire AHA* [1993] EU:C:1993:335 [↑](#footnote-ref-161)
162. See Apps, ibid; K. Ewing and J. Hendy, ‘The Dramatic Implications of *Demir* and *Baykara*, (2010) ILJ 2, 44-47 [↑](#footnote-ref-162)
163. Ibid. The existence of *Francovich* liability also made it possible, in *Schmidberger*, for an action for damages to be brought against the State for not taking positive steps to restrict the fundamental rights of freedom of association and expression. [↑](#footnote-ref-163)
164. For instance Nic Shuibhne proposes the introduction of a qualitative ‘appreciability’ threshold, n.22, 254 [↑](#footnote-ref-164)
165. De Witte, n.143; A. Dashwood, ‘*Viking* and *Laval*: Issues of Horizontal Direct Effect,’ (2007-2008) CYELS 525, 529 [↑](#footnote-ref-165)
166. Consider the Commission Communication ‘Technical Harmonisation and Standardisation: A New Approach, COM(1985)19 [↑](#footnote-ref-166)
167. This is most visible in Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [↑](#footnote-ref-167)
168. Case C-544/10 *Deutsches Weintor*, n.106; Case C-70/10 *Scarlett v SABAM* [2011] EU:C:2011:771; Case C-12/11 *McDonagh v Ryan Air* [2013] EU:C:2013:43; Case C-283/11 *Sky Österreich* [2013] EU:C:2013:28; Case C-34/10 *Brüstle* [2011] EU:C:2011:669 [↑](#footnote-ref-168)
169. Opinion of AG Trstenjak, Case C-271/08 *Commission v Germany* [2010] EU:C:2010:183; Opinion of AG Trstenjak, Case C-81/09 *Typou* [2010] EU:C:2010:304; Opinion of AG Wahl, Case C-113/13 *Spezzino a.o.* [2014] EU:C:2014:291; Opinion of AG Cruz Villalón, Case C-515/08 *Santos Palhota* [2010] EU:C:2010:245 [↑](#footnote-ref-169)
170. Case C-271/08 *Commission v Germany*, ibid, paras.177-191 [↑](#footnote-ref-170)
171. C. Barnard, S. Deakin, ‘European Labour Law After *Laval*’ in M. Moreau (ed), *Before and After the Economic Crisis: What Implications for the ‘European Social Model’?’* (Edward Elgar, 2011), ch.16; S de Vries. ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’, (2013) 9(1) ULRev 169; V. Trestenjak, E. Beysen, ‘The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU’, (2013) ELRev 293 [↑](#footnote-ref-171)