1. Introduction

A privileged prism through which one can analyse the relationship between the Court of Justice of the European Union and national courts is the use of proportionality in order to strike a balance in cases opposing the freedom to provide services to fundamental rights. The freedom to provide services – whose principle is set out in Article 56 TFEU – is, together with the freedom of establishment, one of the two complementary means to lead to liberalisation for trade in services in the European Union. The text of Article 56 explicitly articulates the prohibition of restrictions to the free provision of services. However, the possibility to derogate from it is provided for by Article 52 TFEU, if public policy, public security or public health, are concerned. The question of allowing for restrictions to the freedom to provide services is all the more important that the services sector, which has known a considerable expansion in the past years, represents a substantial economic issue. It thus involves an undeniable deal of political sensitivity. The latter is further increased by the fact that the liberalisation of trade in services sometimes clashes with several fundamental rights.

Since the texts are rather vague, it was the Court of Justice, in particular by the means of preliminary rulings, that has taken on itself the task of clarifying the regime of the free provision of services and of restrictions which States could adopt. Moreover, the Court was
to undertake the delicate work of reconciling European economic freedoms with those fundamental rights which were likely to be touched by the former. The analysis of the experience in this field thus offers a valuable opportunity to examine the relationship between the CJEU and national courts.

The CJEU case-law has gradually evolved. At the beginning, it devoted itself to defining the key concepts. Lately, the Court more frequently adopts an analysis where the proportionality principle has the first place (Chapter 1). It serves to strike a fair balance between economic freedoms and fundamental rights (Chapter 2).

2. THE EVOLUTION OF THE CJEU’S CONTROL OVER THE FREEDOM TO PROVIDE SERVICES. FROM THE DEFINITION OF TERMS TO THE PROPORTIONALITY TEST

The control the CJEU operates in the field of the free provision of services has substantially evolved over the past years. The case-law firstly focused on the definition of restrictions and of their justifications. Nevertheless, difficulties concerning the liberalisation of trade in services appear to have led the CJEU to dwell today on the evaluation of the proportionality of restrictive measures taken by States.

2.1. THE CJEU’S ATTEMPTS TO DEFINE OBSTACLES TO THE FREEDOM TO PROVIDE SERVICES, AND OF THEIR JUSTIFICATIONS

Since the texts did not offer much precision as to the contours of the free provision of services, the CJEU dedicated itself to a gradual definition of its scope of application. As regards the barriers to the freedom to provide services, the Court has identified two categories. The first includes discriminations and the second, restrictions. Discriminations consist of a difference in treatment based on nationality, residence or State of incorporation for service providers or recipients. They can be justified exclusively on “grounds of public policy, public security or public health”, as set out in Art. 52 TFEU (ex Art. 46 TEC).
Restrictions constitute a larger group, which includes “any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services”¹ and even those restrictions which “render less attractive the exercise of such freedoms”². The CJEU’s choice to catch not only discriminations (which are explicitly mentioned in the Treaty), but also restrictions, hugely enlarged the scope of application of EU provisions in the field of the freedom to provide services.

The approach usually followed by the Court of Justice starts with a rather wide qualification of the measure as a restriction. It then focuses on the evaluation of the possibility of a justification. The latter can lie either on one of the three reasons mentioned by Art. 52 TFEU, or on an overriding reason in the public interest, “to the extent that there are no Community harmonising measures providing for measures necessary to ensure those interests are protected”³. In the latter case, a proportionality test has to be performed.

As regards justifications for restrictions, the Court has adopted a restrictive interpretation of the reasons set out in Art. 52 TFEU. Nevertheless, recently the European judge inaugurated an approach more open to States’ demands. An example is the Omega⁴ case. The German government invoked human dignity, protected by Art. 1, 1st paragraph, 1st sentence, of the Fundamental Law. Germany attempted to apply its own conception of dignity at the European level, since it lies at the heart of its legal order. A finding of incompatibility would have probably engendered an extremely serious conflict with a country whose federal constitutional Court had already proved ready to show its concern for independence and for the protection of its national legal system (suffice it to recall the Solange I case of 1974⁵).

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⁵ German Federal Constitutional Court, Judgment of 29 May 1974, Internationale Handelsgesellschaft/ EVGF, Solange I, BverfGE, 37, p. 271, 279 et ss.
Notwithstanding some critical voices in amongst scholars™, we could remark the balanced solution. It consisted of regarding human dignity as part of the public policy and classifying it as one of the fundamental rights included in the general principles of law whose respect the EU legal order ensures. The European Court took that decision “it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right”™. It thus sidelined the particular configuration of human dignity existing in that Member State. This way, the Court could preserve the primacy of EU law. At the same time, it paid respect to the Member State’s concern, demonstrating a certain degree of openness to demands other than economic.

As regards the justifications based on an overriding reason in the public interest, a rather similar path can be detected. The Court in one of the first relevant cases, affirmed that non-discriminatory restrictions can be justified by “imperative reasons relating to the public interest [if] the public interest is not already protected by the rules of the State of establishment and […] the same result cannot be obtained by less restrictive rules™”. The Court of Justice showed significant openness towards the concerns voiced by Member States. This marks an important difference with respect to the numerus clausus of the reasons mentioned by Art. 52 TFEU™. A very long list can be found in the Preamble of the


Panóptica, Vitória, vol. 7, n. 1 (n. 23), 2012
ISSN 1980-775
“Services Directive”, where the Commission counted “at least” twenty reasons in the case-law of the Court, and noted that the notion “may continue to evolve”.10

Even though this stance does not favour the predictability of CJEU’s decisions, it could be explained fairly easily. Difficulties inherent in the development of the common market are particularly acute with regard to trade in services. Forsaking an exhaustive list of definitions could also be seen as a way to take into account the particular sensitivity of the sector of the free provision of services.

2.2. THE COURT’S HANDLING OF THE SPECIFICITIES OF TRADE IN SERVICES.

The liberalisation of trade in services, even more than that of goods, is a field especially sensitive. It is extremely difficult to reach consensus over it among EU Member States. Indeed, the aim of liberalising trade in services proves to be hard to achieve. The search for solutions to this situation appears to have guided the evolution of the test performed by the Court of Justice.

The uniqueness of the free provision of services originates from the fact that it can take different forms,11 and affects activities of diverse nature. The diversity of activities concerned entails the existence of a great deal of different national rules. They can constitute barriers to the liberalisation of the trade in services. The necessary framework in fact is not the same where an activity affects a sensitive interest of the State concerned, or where it touches on the interests of more or less powerful national lobbies, or where the sector employs a higher or lower level of workforce for the economy of the State involved, etc.

It is interesting to notice that the EU legal order is not the only one to encounter difficulties in the field of the liberalisation of the provision of services. A similar remark can be done with respect to the World Trade Organisation (WTO). The General Agreement on Trade in Services (GATS) was only concluded fifty years later than the General Agreement on Tariffs

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11 The definition adopted by the WTO confirms this: GATS Art. 1 distinguishes four different modes of services provision.
and Trade (GATT). The former differs from the latter on many points because of the specificity of trade in services. A particularly telling difference is the choice of the method followed to achieve liberalisation. Whereas the GATT adopts a top-down approach, according to which the principle is liberalisation, and derogations are exceptions. The GATS takes the opposite, bottom-down logic: the absence of a commitment of the State means that the market is locked. This divergence in method as well as the late drafting of the GATS, are signs of States’ reticence in the field of liberalisation of services.

The European Union is commonly seen as an international organisation with a particularly high level of economic integration. However, it is also confronted with the difficulties posed by the liberalisation of services. A powerful instance is the “Services Directive”. The scope and heat of debates which accompanied its adoption clearly reveal the tense atmosphere surrounding the issue of the liberalisation of trade in services. The drafting of the directive actually ignited a controversy over the ‘country of origin’ principle, initially included. This rule consists in the application to the provider of his national law. This made several politicians worry about the inflow of “Polish plumbers”\(^\text{12}\), and about a competition amongst national legislation, with a poor readability of the applicable law by the consumer.

It seems that it was this context of tension which led the Court to renounce establishing a firm list of definitions of restrictions and of their justifications. It rather focussed on the proportionality test.

To recall Jean-Pierre Marguenaud’s words: “Pour François Ost et Françoise Tulkens, la proportionnalité « conduit à réfléchir à la transformation possible de la fonction de juger : de déontique vouée à la mise en œuvre de règles préétablies, elle deviendrait téléologique « consequentialiste », modulant les solutions au regard de leurs conséquences politico-sociales... ”\(^\text{13}\). The proportionality test is thus a means the Court can employ to ensure Member States pursue the liberalisation of trade in services. At the same time, it does not ignore the reality of the issues countries must face. The advantage of proportionality is thus to allow the CJEU to keep the list of legitimate interests open. The Court can then take into account concerns which, albeit not as essential as public security or public health, might

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nevertheless become extremely sensitive in a particular cultural, legal or political context in a certain State.

This choice can be linked to an issue of legitimacy. Member States do not succeed in agreeing on overriding reasons in the public interest shared by all. This is apparent in the “Services Directive”, where they leave this definition to the Court. Confronted with this lacking consensus, the CJEU might have come up with its own definitions and determined a clear and comprehensive list. It did not do so. Some might be puzzled by this reticence, for the Court has been very active in expanding the free provision of services in the EU, especially with its wide definition of restrictions. Yet, the two situations are not identical. The Court’s legitimacy to interpret what constitutes an obstacle to the realisation of the internal market is not the same when it has to interpret what constitutes a legitimate interest for a State to preserve. In the former case, it has to reason from the EU’s perspective, whereas in the latter it ought to take the national authorities’ point of view. If as one of the EU institutions, the Court has a certain margin as regards the first type of reasoning, this margin is much narrower in the second one. Without consensus on what represents a legitimate interest, the CJEU could not completely substitute Member States. The Court then had to choose. It could draft a list of overriding reasons in the public interest shared by all 27 countries, which would have likely limited them to the three categories set out in the Treaty. Or it could take into account States’ concerns when they looked credible, and shift its control to the reasonable character of the restriction to the free provision of services.

Secondly, this case-by-case approach could also be explained by the Court’s will to deal carefully with Member States. The CJEU’s action could thus follow the evolution of the freedom to provide services in the EU. A strict appreciation was applied when the free provision of services was not yet developed. Afterwards, the Court of Justice resorted to a more lenient assessment, once the application of this freedom no longer needed such an activist defence. This hypothesis is corroborated by several recent aspects of the CJEU’s case law. Its openness to States’ concerns is marked on the one hand by a less stringent appreciation of the notion of restriction. For instance, the Court stated that “rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by

\[\text{Recital No. 40 of the Preamble to the Directive: “The concept of “overriding reasons relating to the public interest” [...] has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve”} \]
virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory”\(^\text{15}\). On the other hand, this trend is confirmed by the Court’s permitting a certain margin of appreciation to the State as to the choice of the appropriate measure\(^\text{16}\). The CJEU thus considered that States must have the leeway to implement their objectives “by the introduction of general rules which are easily managed and supervised by the national authorities”\(^\text{17}\). This led to the conclusion that the prohibition to non-Maastricht residents to enter into coffee shops could not be replaced by a less restrictive measure consisting in authorising them to enter without being allowed to make use of drugs. This is because the latter rule would have been much more difficult to apply than the former.

However, this apparent openness by the Court to States’ concerns is not beyond criticism. On the one hand, the case-by-case approach lowers predictability and legal certainty. On the other hand, the lack of a pre-defined list might let national authorities instrumentalise EU law when they wish to derogate from a national right they deem inappropriate\(^\text{18}\). The risk would thus consist of governments’ blaming the EU for political choices which were actually not imposed by the liberalisation of trade in services.

It would be wrong to think that the Court’s large appreciation of overriding reasons in the public interest, with an open list for grounds put forward by States, would mean that any restriction whatsoever taken by a Member State would be admitted. The Court’s control has now shifted. It centres on the appreciation of the proportionality of the measures in question.

\(^{15}\) Judgment of the Court of 29 March 2011, \textit{European Commission v Italian Republic}. Case C-565/08, not yet published, § 49.


\(^{17}\) Judgment of the Court of 16 December 2011, \textit{Marc Michel Josemans v Burgemeester van Maastricht}. Case C-137/09, § 82.

\(^{18}\) Bergé, J.-S, “Le droit communautaire dévoyé - Le cas Blood Note », \textit{La Semaine Juridique Edition Générale} n° 7, 16 February 2000, I 206. It was the case of a British judge who disregarded national law on assisted reproduction in the name of the freedom to provide services, whereas it would have been possible (in the author's view) to justify the restriction in force.
2.3. The Growing Place of the Proportionality Principle in the Court’s Control over Restrictions to the Free Provision of Services.

The *Liga Portuguesa de Futebol Profissional and Bwin International* judgment of 8 September 2009\(^9\) aptly shows the Court’s trend to focus its control on the proportionality of the measure with respect to the interests invoked. The Court recalled that “the restrictive measures that [States] impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality”\(^20\). It briefly noted the existence of an overriding reason in the public interest\(^21\) before performing a proportionality test, the real centre of its analysis.

It is important to define the proportionality principle better. A good image is “to avoid shooting a sparrow with a cannon”\(^22\). It is generally traced back to the German legal tradition. More precisely, it is described as a test divided into three phases. Firstly, it checks the adequacy of the measure (the measure’s contribution to the State’s objective). Secondly, a control of its necessity, i.e. the measure must not go beyond what is necessary. Thirdly, a proportionality test *stricto sensu*, i.e. a balancing of the interests involved\(^23\).

However, the conceptualisation of the proportionality test into a three-pronged process is but a scheme. On the one hand, the terms which define the three different steps vary. For instance, the second phase usually called the “necessity test” is also know as the “minimum restriction”, “interchangeable measure” or “substitutability” test. Furthermore, the Court sometimes assesses the indispensable character of the measure in terms which rather evoke the necessity test\(^24\). On the other hand, the three-pronged nature of the abovementioned test

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\(^20\) Ibid. § 59.

\(^21\) Ibid. § 63: “it should be noted that the fight against crime may constitute an overriding reason in the public interest that is capable of justifying restrictions in respect of operators authorised to offer services in the games-of-chance sector. Games of chance involve a high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers”.


\(^23\) Ibid.

\(^24\) Thus, the Court for instance considered that “the requirement of an establishment, which represented the very negation of the freedom to provide services, exceeded what was necessary to attain the objective pursued”, Judgment of the Court of 4 December 1986 - Case 252/83, *Commission of the European Communities v Kingdom of Denmark*, § 20. This idea seems to evoke that of necessity, as expressed in other decisions by the Court: “those
is not always apparent in the Court’s judgments. With regard to the liberalisation of trade in services, the CJEU first verifies that the objective pursued is legitimate, by qualifying it as an overriding reason in the public interest. It then evaluates whether the measure is “suitable for achieving the objective which they pursue”\textsuperscript{25}. Finally, it assesses whether the action does not go beyond what is objectively necessary to this end and whether this result cannot be achieved by less restrictive rules\textsuperscript{26}. Moreover, it is interesting to note that the “Services Directive” of 2006 gives a definition of necessity and of proportionality which does not correspond to the usual reasoning followed by the Court. Thus, more confusion is brought about\textsuperscript{27}. Necessity is defined as the fact that “the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment” (Art. 16(1)b) and proportionality as that “the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective” (Art. 16(1)c). The definition of necessity is therefore intertwined with the Court’s identification of the legitimate character of the objective pursued. The definition of proportionality, on the other hand, includes both the issue of the existence of a causal link between the measure and the objective (which pertains to the adequacy test), and that of the necessity strictly speaking. Consequently, one must bear in mind that the control performed by the Court can slightly vary in the terms used and in the steps of the reasoning followed.

It is useful to observe that the use of proportionality by the CJEU has nothing shocking in itself. The idea according to which institutions’ as well as Member States’ action must be proportionate, has been an important principle in the Community history. True, founding treaties did not contain provisions explicitly focussing on the proportionality principle. Yet, the Court considered it a “general principle of Community law”\textsuperscript{28} to be applied even by national authorities when they “have to apply Community law”\textsuperscript{29}.

\textsuperscript{25} Judgment of the Court of 25 July 1991 - Case C-76/90, Manfred Säger v Dennemeyer & Co. Ltd., § 15.

\textsuperscript{26} A similar wording can be found in: Judgment of the Court of 25 July 1991, Manfred Säger v Dennemeyer & Co. Ltd., Case C-76/90, § 15 or Judgment of the Court of 16 December 2010, Marc Michel Josemans v Burgemeester van Maastricht, Case C-137/09, § 69.


\textsuperscript{29} Judgment of the Court of 27 October 1993. Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health. Case C-127/92, p. I-5535, § 27.
Therefore, what is worth noticing is not that the CJEU resorts to the proportionality test when it assesses States’ restrictions to the freedom to provide services. Rather, it is the paramount place proportionality has acquired in the Court’s reasoning. Firstly, it allows the CJEU to try and overcome the lack of consensus amongst States over legitimate justifications for restrictions to this freedom. Furthermore, it seems an important tool to strike a balance between Union’s economic freedoms and fundamental rights.

3. PROPORTIONALITY BEFORE CONSTITUTIONAL COURTS AND BEFORE THE CJEU

Legal scholarship regards proportionality as one of the defining characteristics of constitutional courts’ current activity throughout the globe. Thus, it is arguable that the Court’s employment of the proportionality test in the field of the free provision of services, allows to liken it to constitutional courts. This is particularly evident in its case-law related to fundamental rights and freedoms.

3.1. PROPORTIONALITY AS A CHARACTERISTIC OF CONSTITUTIONAL COURTS

The proportionality principle is currently considered as a trait that marks the reasoning of most constitutional courts after the Second World War. This post-war paradigm has been defined by three components: A penetrating form of judicial control, a rights-protecting clause, and proportionality as the standard principle to solve conflicts between rights.

To attempt to understand the reasons for judges’ resort to the proportionality control, it is useful to bear in mind the context wherein they are generally called upon to act. Firstly, the constitutional court is usually an organ which is not democratically elected. It has the task of

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30 And of supreme courts having a role functionally equivalent to that of constitutional courts, such as the US and UK supreme courts.
examining the compatibility of legislation with the fundamental charter. The issue is then the “countermajoritarian dilemma”: “the central function … is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like”\(^{33}\). The possibility of popular opposition as well as of scholarly criticisms of the Court of Justice’s action led it to a legitimacy quest. It was thus particularly keen on motivating its decisions.

Secondly, a potential answer to this dilemma might a priori be given by the hierarchy of norms. Constitutional norms prevail over statute ones, and the latter take precedence over case-law norms. Once the norms’ origin has been determined, the Court’s leeway would be rather limited. However, such a distinction proves to be far less clear in practice. For instance, the distinction between constitutional law and case-law can be easily called into question, since it is the judges themselves who establish it. Therefore, the alleged hierarchy of norms does not actually constitute a limit on the judicial power.

Since a formalist approach was not feasible, courts turned to a practice focussing on the content of norms. Judges examine provisions and ensure the protection of interests they consider inherently worth it. Thus, most courts in the world resort to proportionality as a criterion of judicial control. This is labelled as “the ultimate rule of law” upon which we will see the convergence of constitutional interpretation at the global level\(^{34}\).

The principle of proportionality has therefore a direct link with legitimacy as “unanimous acceptance”, ie “the justification of the exercise of public power and coercion in terms of reasons acceptable by all those who are subject to it”\(^{35}\). This is because a decision “which does not satisfy the proportionality criterion cannot result from an impartial deliberation”\(^{36}\). Such a view on the proportionality test can be interpreted as one of the factors which led the CJEU to adopt it. The aim is to avoid any contrast with other EU institutions and above all with Member States, to the maximum extent possible.


The principle is thus applied in Europe, Canada, New Zealand, Australia, South Africa, Israel, central and southern America. It is so widespread that it can be argued that “virtually every effective system of constitutional justice in the world” is inspired by it and that it represents nowadays “one of the defining features of global constitutionalism”\(^{37}\).

We might now examine which are the consequences for the Court of Justice of resorting to this principle, typical of constitutional courts.

3.2. **Proportionality as a Tool to Reconcile the Freedom to Provide Services with Fundamental Rights.**

Although the CJEU “from a formal standpoint, […] appears to have no legitimate constitutional review function and does not engage in constitutional interpretation”\(^{38}\), it applies to restrictions to the free provision of services, a proportionality test strictly tied to global constitutionalism. In the Court’s case-law on the proportionality principle, it is extremely hard to detect a consistent approach, as scholars have noticed\(^{39}\). It has been affirmed that “the CJEU appears to be rather ambiguous as regards their application. In fact there is no single formula the Court systematically and consistently uses in its proportionality review”\(^{40}\). The Court’s case-by-case use of the proportionality principle has led several observers to concluding in the sense of a strong political overtone of this principle in the European context\(^{41}\).

An apt example of the flexible manner the CJEU applies the proportionality test is found in its case-law involving fundamental rights. The focus here will be on cases where these rights

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were invoked against the free provision of services. Under such circumstances, the Court applied the proportionality test to balance these conflicting principles. It thus took on a position traditionally held by constitutional courts.

The first case pertaining to the freedom to provide services where the CJEU adopted this approach is the abovementioned Omega. More recently, the Laval case led again the Court to balance the free provision of services with several fundamental rights. In Omega, whose facts are well known today, the issue was whether German public authorities could prohibit a game in the name of human dignity. The game consisted in shooting human targets with a laser. The Laval case involved a Latvian enterprise which posted its Latvian workers to a Swedish subsidiary so that they could provide services. The negotiations with Swedish trade unions to have the provider adhere to the ship collective agreed wage rates, failed. Consequently, trade unions organised a blockade to stop all the provider’s activities on the Swedish territory. The provider sued in order to have the blockade declared illegal. The Swedish court asked the CJEU to intervene by the means of a preliminary reference. The Court of Justice had to decide whether the trade unions’ action was lawful with respect to the freedom to provide services and to Directive 96/71 of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

Therefore, the two cases concerned the incompatibility between the free provision of services and a right seen as fundamental: human dignity in the former, and the right to collective action so as to protect workers in the latter. At the same time, they represented instances of a dialogue between national courts and the Court of Justice on these thorny issues.

According to settled case-law, “Respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice” 43. These fundamental rights are traditionally found by the CJEU either in “the constitutional traditions common to the Member States” 44 or in indications supplied by “[t]he international treaties on the protection

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42 Judgment of the Court of 18 December 2007. aval un Partneri Ltd v Svenska Byggmålaravtalsförbundet, Svenska Byggnadsarbetsförbundets avdelning 1, Byggteknik and Svenska Elektrikerförbundet. Case C-341/05, I-11767.
44 Judgment of the Court of 28 October 1992, Criminal proceedings against Johannes Stephanus Wilhelms Ter Voort, Case C-219/91, § 34.
of human rights in which the member-States have co-operated or to which they have adhered".45

In Omega and Laval, the CJEU qualified the rights invoked as general principles the observance of which the Court ensures.46 It also recalled the Treaty provisions aiming at a policy in the social sphere as well as the objectives of the promotion of a harmonious and balanced development.47 Therefore, in one case, it affirmed that “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law”48. In the other decision, the CJEU wrote that “the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures”49.

The Court thus held that the invoked rights could be invoked to justify a barrier to EU freedoms. It stated in Omega that human dignity represents “a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services”.50 In Laval, the CJEU found that the right to take collective action to protect workers constitutes “a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law”.51 Two remarks can be made. Firstly, by characterising them as general principles of Community law, the Court’s approach prima facie seems to protect the rights invoked. Secondly, with such a qualification, the Luxembourg Court shaped the question so as to make it a debate internal to the EU system. By resorting to the notion of the general principles of Community law, the CJEU actually ensured a “hierarchical parity”52 within the Union legal order between fundamental rights and economic freedoms.

Therefore, the issue of their balance arises. First of all, it must be highlighted that all fundamental rights are not prone to be balanced with other rights or freedoms. The CJEU

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46 Laval judgment §91.
47 Laval judgment §104.
48 Omega judgment § 34.
49 Laval judgment §91.
50 Omega judgment § 35.
51 Laval judgment §93.
took this distinction from the European Convention for the Protection of Human Rights and Fundamental Freedoms. On the one hand, there are rights such as “the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction”. On the other, rights such as the freedom of expression and the freedom of assembly, can be subjected to restrictions to the extent that their very substance is not impaired, as held in the Schmidberger decision. The latter was “the first time that the Court [recognised] with such vigour and clarity that internal market demands can be balanced” with a fundamental right. With such a distinction, a conflict between an absolute fundamental right and a fundamental freedom such as the free provision of services, would be solved in favour of the primacy of the former. Nevertheless, where the fundamental right admits of restrictions, we have to apply the proportionality test to determine which principle will take precedence.

In the two cases, the Court considered that the exercise of the two fundamental rights invoked – human dignity and the right to collective action, respectively – can be restricted. It then performed a proportionality assessment of those restrictions.

In the Omega decision, the CJEU affirmed that “However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.” Nevertheless, it then added that the State measure does not have “to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected”. It specified that it did not wish to “formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity”. Thus, “the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State”. The CJEU evaluated the
proportionality of the measure and made a reference to the “the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany”\(^{59}\). After briefly noticing that the action does not go beyond what is necessary\(^{60}\), the Court held in favour of the justified nature of the measure\(^{61}\).

As regards the \textit{Laval} decision, the CJEU stated that the action must be “suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it”\(^{62}\). It then found that the trade union’s action was not justified with respect to the objective pursued. It did not give further details on its proportionality test and did not explicitly show which requirement was not fulfilled. Rather, it stated two reasons for its decision. First, the collective action aimed at ensuring posted workers the Swedish collective agreed wages whereas those workers already benefited from “a nucleus of mandatory rules for minimum protection in the host Member State”\(^{63}\) stemming from Directive 96/71. Secondly, the Swedish legal environment was “characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay”\(^{64}\). The CJEU thus considered that the examined measures were unlawful with regard to the freedom to provide services.

The \textit{Omega} judgment reflects a certain degree of deference to the German point of view on human dignity. However, the \textit{Laval} decision bespeaks an approach not very sympathetic to Swedish social rights, centred on collective negotiations. Alberto Alemanno wrote as regards \textit{Omega} that “Il n’est pas difficile de voir en filigrane dans cette prise de position de la Cour une attention particulière, justifiée par la jurisprudence toujours menaçante (et potentiellement explosive) \textit{Solange/Maastricht}, visant à ne pas imposer de façon brutale la primauté du droit communautaire sur les constitutions nationales. Il n’aurait pu en être autrement, le respect de la dignité humaine étant la valeur fondamentale sur laquelle est bâtie la Constitution de l’Etat allemand”\(^{65}\). On the contrary, \textit{Laval} roused a host of concerns as to the real level of protection of fundamental social rights in Europe. It must be recalled that

\(^{59}\) Ibid. § 39

\(^{60}\) Ibidem.

\(^{61}\) Ibid. §40

\(^{62}\) \textit{Laval} judgment §101

\(^{63}\) \textit{Laval} judgment §108.

\(^{64}\) Ibid. §110.

\(^{65}\) Alemanno, A. op.cit. p. 740.
after the CJEU’s decision, the Swedish court ordered the trade unions to pay 2,5 million Swedish crowns and legal fees even though it was a movement originally lawful according to Swedish law. Furthermore, at the same time as *Laval*, the CJEU made the *Viking* judgment. In this case, the right to take collective action was invoked against the freedom of establishment. The Court adopted the same reasoning, but left a wider margin of appreciation to the national judge.

4. **Conclusão**

These decisions all demonstrate “the difficulty of balancing the protection of workers’ rights with the demands of free movement”. The sensitive character of these conflicts is especially acute in the field of services. This is because services are tightly linked to the person providing them, and they thus have strong social implications.

Furthermore, the interests with which economic freedoms might need be balanced in the future, might include fundamental rights more and more frequently. This is due to the Lisbon Treaty: with it, the Charter of fundamental rights of the European Union acquired binding force. It has been predicted that “[t]he CJEU’s use of proportionality review in human rights cases is likely to be reinforced by article 52 of the new Charter of Fundamental Rights of the European Union, which expressly ties the meaning and scope of rights in the Charter to that of corresponding rights in the European Convention on Human Rights”. Since the Strasbourg Court employs a proportionality test in a much more regular and standardised fashion in its case-law, it will likely influence the Luxembourg Court.

Thanks to the proportionality test, the Court of Justice has a very powerful tool, which it uses on a case-by-case basis, with certain flexibility. This tool allows the CJEU to keep in its

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70 « Proportionality […] constitutes a doctrinal means to expand judicial power with direct implications for policy-making and its administration. » Sindbjerg Martinsen, Dorte. “Judicial policy-making and
hands the search for solutions to conflicts between fundamental interests, much as constitutional courts do. With preliminary references, the Court of Justice maintains the control of the balance to be struck in each case, and leaves national courts a very narrow margin of action. Nevertheless, if one considers the sensitive political context of its relations with Member States, the Court will have to handle the proportionality principle with care.

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[Recebido em 02-11-2012]
[Aprovado em 13-11-2012]

Artigo submetido a double blind peer review.