The sources of EU law and their relationships: Lessons for the field of taxation

Szudoczky, R.

Citation for published version (APA):
Chapter 5

Relationships between general principles of EU law, Treaty provisions and secondary law

5.1. Secondary law and the general principles of EU law

5.1.1. Introduction

As far as the substantive review of the legality of secondary law instruments is concerned, the most frequently invoked norms of primary law on the basis of which such review is sought are the general principles of EU law. As we have emphasised in Section 3.3.1., for this reason the general principles of EU law fulfil an essential constitutional function in the Union’s legal order.

As far as the definition of the general principles of EU law is concerned, a commonly used definition does not exist. De Witte describes them as “unwritten principles, recognized by the European Court of Justice, that have the status of higher law by the fact that they may be invoked as a standard for the review of Community acts”. Thus, they are fundamental principles located at the level of primary law having constitutional status which means that secondary EU law must comply with these principles and is subject to review for its compatibility with the latter. A refinement of the above definition is that general principles can also serve as a standard of review for measures of the Member States. However, this function is limited in view of the vertical distribution of powers between the Union and the Member States. Member State measures are tested for their compliance with the general principles of EU law only when the situation at hand falls within the scope of Union law. This is the case when the Member States implement

Chapter 5 - Relationships between general principles of EU law, Treaty provisions and secondary law

Union law or where they derogate from Union law. As regards the latter case, when a Member State measure restricts the Treaty’s free movement provisions in pursuance of a general interest it has to comply not only with the rule of reason test (i.e. legitimate aim, imperative reason in the public interest, proportionality) but also with the general principles, including fundamental rights, in order to be justifiable. Thus, the general principles of EU law, contrary to their name, do not constitute generally applicable standards which control or limit the Member States’ actions whenever they exercise public authority. Instead, only those acts of the Member States are subject to compliance with the general principles recognized in the Union’s legal order which can be linked to Union law. Dougan explains that there is a constitutional justification for this limited scope of application of the general principles of Union law to Member State measures: “the Union impose[s] upon the Member States its own body of administrative law responsibilities based on the fact that the national authorities are either acting as delegated agents for the executive enforcement of Union law or instead seeking to avoid their ordinary duties under the Treaties”. Obviously, the former scenario refers to ‘implementing Union law’ and the latter to ‘derogating from Union law’.

In academic writing it has been suggested that, in the light of the Court’s jurisprudence, there might be a further category of situations which fall ‘within the scope of Union law’ and thus, capable of triggering the

317. For example, ECJ, 13 July 1989, Case 5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, para. 19 (fundamental rights); ECJ, 25 November 1986, Joined Cases 201/85 and 202/85 Marthe Klensch and others v Secrétariat d’État à l’Agriculture et à la Viticulture (principle of equality); ECJ, 1 April 1993, Joined Cases C-31/91 to C-44/91 SPA Alois Lageder and others v Amministrazione delle Finanze dello Stato (legitimate expectations); ECJ, 24 March 1994, Case C-2/92 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock (fundamental rights); ECJ, 13 April 2000, Case C-292/97 Kjell Karlsson and Others (principle of equality); ECJ, 20 June 2002, Case C-313/99 Gerard Mulligan and Others v Minister for Agriculture and Food, Ireland et Attorney General (legitimate expectations); ECJ, 10 July 2003, Joined Cases C-20/00 and C-64/00 Booker Aquaculture Ltd, trading as Marine Harvest McConnell, Hydro Seafood GSP Ltd v The Scottish Ministers (fundamental rights).

318. ECJ, 18 June 1991, C-260/89 Elliniki Radiofonhia Tiléorassi AE and Panellinia Omospondion Prossopikon v Dimotiki Etairia Pliroforisias kai Sotirios Kouvelas and Nicolaos Avellas and others (ERT), para. 43. See also ECJ, 26 June 1997, Case C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag; ECJ, 11 July 2002, Case C-60/00 Mary Carpenter v Secretary of State for the Home Department; ECJ, 29 April 2004, Joined Cases C-482/01 and C-493/01 Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg.

application of the general principles to Member State measures; namely, the case where a provision of national law falls within the material scope of a substantive measure of secondary Union law. This proposition seems to be underpinned by the Kücükdeveci case where the Court held that a German provision relating to the calculation of the notice period for dismissal from employment fell within the scope of Union law by virtue of the fact that secondary legislation (i.e. Directive 2000/78 laying down a general framework of equal treatment in the field of employment), for which the implementation period had already expired at the time of the case, governed the same broad subject-matter, i.e. conditions of dismissal, as the German provision did. Although the German provision was not a specific implementation of the Directive, the fact that the matter it regulated was touched upon by the Directive was sufficient to trigger the application of general principles. As a result, the German provision could be scrutinized in the light of the general principle of non-discrimination on grounds of age. The case implies that the Member States are bound by the general principles of Union law, whenever the exercise of their own regulatory competences happens to relate to a matter also subject to some form of secondary Union legislation. Such prospect generated stark criticism within academic circles on the ground that it may lead to the expansion of Union competences through the application of Union administrative law standards to situations which are barely related to Union law. As put by Dougan, such prospect “could dramatically expand the reach of the ‘European public law order’” and would have “important implications for the prevailing balance of power within our ‘constitutional order of states’” while lacking any persuasive normative justification. However, in the light of subsequent case law, it seems that it could be too early to draw far-reaching consequences from the Kücükdeveci case. In cases, such as Rossius, Rodríguez Mayor, Vino and Gueye, the Court returned to a narrower interpretation of the purview of the general principles of EU law holding that a mere connection to Union law.

321. Case C-555/07 Kücükdeveci, para. 25.
322. Dougan, supra note 319, p. 239.
323. CJ, 23 May 2011, Joined Cases C-267/10 and C-268/10 André Rossius and Marc Collard v Belgische Staat; CJ, 10 December 2009, Case C-323/08 Ovidio Rodríguez Mayor and Others v Herencia yacente de Rafael de las Heras Dávila and Others; CJ, 11 November 2010 Case C-20/10 and 22 June 2011, C-161/11 Vino Cosimo Damiano v Poste Italiane SpA; CJ, 15 September 2011, Joined Cases C-483/09 and C-1/10 Magatte Gueye and Valentín Salmerón Sánchez.
Chapter 5 - Relationships between general principles of EU law, Treaty provisions and secondary law

law, where the situation at hand is not expressly covered by a Union act existing in relation to a given subject-matter, is not sufficient to consider a Member State measure to fall within the scope of application of Union law.\(^{324}\)

In addition to serving as a standard for legality review, a further important function of the general principles is that they aid the interpretation of Union law, as well as national law falling within the scope of Union law.\(^{325}\) Finally, they enable the Court to fill normative gaps left either by the authors of the Treaty or by the Union legislature to ensure the autonomy and coherence of the Union legal system.\(^{326}\) In summary, normally three functions of the general principles of EU law are distinguished: interpretation, gap filling and correction (i.e. review).\(^{327}\)

As to their process of creation, Tridimas points out that the general principles are derived by the courts either from the specific rules of the legal system in an inductive process or from the legal system as a whole, in particular from the objectives of the law and its underlying values, in a deductive process.\(^{328}\) As far as the general principles acknowledged under Union law are concerned, the former category is drawn from the constitutional tradition common to the Member States (or alternatively, from an international agreement on which the Member States have collaborated or to which they are signatories).\(^{329}\) These general principles are also described as being bottom-up having regard to their origin and inductive creation.\(^{330}\) The latter category consists of what we called earlier systemic principles, such as primacy and direct effect of Union law (see Section 3.3.1.), which are deducted from the objectives of the Union. These can be considered as top-down principles.

---

326. Lenaerts and Gutiérrez-Fons, supra note 325, p. 179.
328. Tridimas, supra note 140, p. 2.
As regards the legal effects of the general principles of Union law, such principles are capable of having direct effect provided that it fulfils the usual criteria requiring it to be clear, precise and unconditional. On the basis of Mangold and Kücükdeveci it is often claimed that the general principles of Union law can even have horizontal direct effect, as in these cases the general principle of prohibition of discrimination on grounds of age was applied between private parties specifically, in employment relationships between a private employer and an employee. However, Dougan points out that this proposition may not be fully correct, as the application of the principle in these cases of horizontal disputes does not in itself mean that the principle is, indeed, capable of having real horizontal direct effect. In particular, a distinction must be drawn between a case where Union law which creates (public) law duties for the Member States can also be invoked collaterally in horizontal proceedings between two individuals and where Union law imposes (private law) obligations directly on individuals which can be enforced before national courts. The situations in Mangold and Kücükdeveci belong to the former category of cases taking into account that the unlawful discrimination at hand did not derive from the exercise by two private parties of their contractual autonomy but from a public law act, i.e. the labour law rules of the Member State concerned, which contravened the Union law standard constituted by the general principle of prohibition of age discrimination. All in all, the general principles of EU law can have vertical direct effect, which – under certain circumstances – have legal implications for horizontal relationships as well. Whether they can also have real horizontal direct effect is a question not yet answered by the Court’s jurisprudence.

The review of secondary Union law in the light of the general principles of EU law could in itself be the subject of a separate thesis; therefore, we do not seek to discuss this with any degree of comprehensiveness here. Instead, we will first describe some general patterns in the case law concerning the control of compatibility of Union acts with the general principles – primarily fundamental rights – and some selected recent cases that indicate potential new directions in the Court’s case law. By outlining the review of secondary Union law in the light of the general principles we aim at demonstrating certain parallels, in terms of judicial methods and approaches, between this area and the review of Union acts in the light of

332. ECJ, 22 November 2005, Case 144/04 Werner Mangold v Rüdiger Helm.
333. Dougan, supra note 19, p. 224.
the Treaty’s free movement provisions. At the end of this Section, we will focus on the principle which is invoked most frequently for the purpose of challenging the legality of secondary legislation; namely, the principle of proportionality. We chose to discuss this principle more in detail because it has an important role to play not only as a self-standing standard of review for secondary law but also as a component of the scrutiny of secondary law in the light of the Treaty’s free movement provisions. Similar to national measures, an obstacle to free movement created by a Union act can only be justified on public interest grounds if such act complies with the requirements of proportionality.

5.1.2. Judicial review of the compatibility of secondary law with the general principles of EU law

5.1.2.1. Relationship of national law, secondary law and the general principles of EU law

The first question that arises when analysing the relationship of national law – secondary Union law – primary Union law is whether national law that is aimed at implementing secondary Union law or, at least, falls within a domain where secondary Union law exists, is to be measured for its compatibility only against the act of secondary law at issue or also any norms of primary law which may be applicable to the case. The answer to this question depends on what type of primary law norm we are looking at and under what conditions such primary Union law norm applies to Member State measures as well as on whether the area under examination is subject to exhaustive or only partial harmonization. Intuitively, having regard to the fact that in the case of complete and exhaustive harmonization, the Member States have no discretion in transposing secondary law into their national law, the implementing national measures only reproduce secondary law. Therefore, such national measures should not be subject to scrutiny under primary law, at least, not on their own without reviewing also the compatibility of the secondary Union law which the national measures implement with primary Union law. The issue of partial harmonization seems to be more complex. An instance of partial harmonization is when an act of secondary legislation lays down only minimum requirements that Member States have to implement into their national laws while allowing them to introduce more stringent or rigorous requirements if that is what fits to their regulatory policies governing the area at issue. This technique is frequently used in the case of the harmonization of safety standards or laws concerning public health or environmental protection. The question in this regard
is whether the more rigorous requirements that Member States may prescribe in their national legislation can be scrutinized by the Court for their conformity to the general principles of EU law. As we have seen, the application of these general principles to Member State measures is subject to the condition that the Member State measures constitute an implementation of Union law or otherwise fall within the scope of Union law. The case of ‘overimplementation’ of secondary law may not qualify as implementation; however, the term ‘within the scope of Union law’ is vague enough to be able to accommodate such a situation. Nevertheless, the Court has not gone down on this lane. The case law seems to be firm on the point that overimplementing national measures in an area subject to minimum harmonization do not fall ‘within the scope of Union law’ and as such, cannot be reviewed in the light of the general principles:  

“Since the legislation at issue is a more stringent measure for the protection of working conditions compatible with the Treaty and results from the exercise by a Member State of the powers it has retained pursuant to Article 118a(3) of the Treaty [now Article 156 TFEU], it is not for the Court to rule on whether such legislation and the penalties imposed therein are compatible with the principle of proportionality.”

This case law represents the opposite direction to that taken by the Court in Kürükdeveci (see Section 5.1.1.). In particular, it is a very cautious interpretation of the scope of application of the general principles to Member State measures and it shows the Court’s endeavour not to stretch too far the domain where Member States must comply with those general principles and thus, preserve the vertical distribution of competences between the Union and the Member States.

It is interesting to note here, although it will be discussed in great detail in Section 7.2., that the relationship of national law – secondary law – primary law is interpreted very differently from the above when the question concerns the field of application of the Treaty’s free movement provisions instead of that of the general principles of EU law. In the case of minimum harmonization, more stringent national measures than those set out in secondary law can only be introduced by the Member States in conformity with the Treaty’s free movement provisions. Thus, the primary law provisions

on free movement do limit the discretionary powers of the Member States when they go beyond the minimum requirements laid down in secondary law.

In cases other than minimum harmonization, where an act of secondary law leaves scope for discretion for the Member States in transposing it to national law, the exercise of such discretion appears to be within the ‘scope of Union law’ and thus, subject to the requirement to comply with the general principles.337

5.1.2.2. Review of legality of secondary law in the light of the general principles of EU law

The most prominent general principles of EU law from the point of view of judicial review of secondary legislation are fundamental rights, the principle of equality or equal treatment (which is also called principle of non-discrimination), legal certainty, legitimate expectations and the principle of proportionality.338 While we will focus on the principle of proportionality in a separate Section below, here we discuss the legality review of secondary legislation under the other principles, specifically fundamental rights.

As regards the protection of fundamental rights within the Union, it has been long-standing case law that:

“[...] fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance...

It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (...) and that measures incompatible with respect for human rights are not acceptable in the Community [...]”

337. See e.g. ECJ, 28 June 2007, Case C-363/05 JP Morgan Fleming Claverhouse Investment Trust plc, The Association of Investment Trust Companies v The Commissioners of HM Revenue and Customs, para. 22.
339. Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, paras. 283-284; see also ECJ, 12 November 1969, Case 29/69 Erich Stauder v City of Ulm, para. 7; Case 11/70 Internationale Handelsgesellschaft, para. 4; Case 473 Nold, para. 13; Case 44/79 Hauer, para. 15.
The fundamental rights agenda of the Union has been symbolically reinforced by the Lisbon Treaty which gave legally binding force to the Charter. As discussed above, the protection of the fundamental rights of individuals vis-à-vis the Union institutions and – in a more limited scope – the authorities of the Member States has become one of the building blocks of the Union’s constitutional construct. More than that, fundamental rights protection has become a precondition for some Member States’ constitutional courts to accept the claim by the Union of its autonomous legal authority and EU law’s supremacy over national law.340 Despite the high value attributed to fundamental rights in the Union’s normative order and constitutional structure, the intensity by which the Court is actually willing to scrutinize Union acts – and especially Union legislative acts – for their compatibility with fundamental rights can be questioned. Academic commentators have pointed out the limited rate of success of claims asserting that Union measures infringe fundamental rights or general principles. 341 Although individual administrative acts of the Commission are not infrequently struck down by the Union Courts on the basis of such claims, general legislative acts are hardly ever invalidated on this ground by the “pusillanimous” Courts.342

The Court’s general reluctance to exercise a substantive review over secondary Union law is particularly evident in cases where secondary law is contested on the ground that it contradicts economic fundamental rights and freedoms, such as the right to property or the freedom to pursue a trade or profession. In a classic line of case law, i.e. Stauder, Internationale

340. The German Constitutional Court’s ‘so lange’ doctrine states that as long as the Court of Justice of the European Union guarantees a sufficient level of protection of fundamental rights, the Constitutional Court will no longer exercise its jurisdiction to review Union acts under the fundamental rights protected by the German constitution (Solange II decision, Judgment of 22 October 1986, 73 BverGE 339), see Maduro, supra note 100, p. 509; Chalmers, Davies and Monti, supra note 17, p. 235.


342. Chalmers, Davies and Monti, supra note 17, p. 251 who refer as prime examples of the Court’s ineffective protection of fundamental rights to ECJ, 27 June 2006, Case C-540/03 Parliament v Council (Family Reunification) regarding the right to respect for family life and ECJ, 3 May 2007, Case C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad regarding the principle of nullum crimen, nulla poena sine lege. Differently, Lenaerts who states that “as regards the European institutions, the Court has sought to ensure utmost respect for fundamental rights whether it be in relation to their executive or legislative tasks.” see supra note 139, p. 301.
Handelsgesellschaft, Nold and Hauer, the Court laid down that while individual economic rights are protected by the Union legal order, they could be restricted in pursuance of a general interest as long as such restrictions did not constitute a “disproportionate, and intolerable interference with the rights of the owner, impairing the very substance of the rights”. This is a very high threshold which can hardly be proved to be passed by a Union measure unless such measure entails a complete deprivation of property or a complete ban on the exercise of a trade or profession. The Court explained this high deference to the Union legislature by stating that it would be wrong to substitute its own judgment for that of the Union legislature in matters where the latter enjoys broad discretion. It is true that the majority of the Union measures which were claimed to impede fundamental rights of an economic nature had been adopted in the area of Common Union Policies, such as agriculture or transport, where the legislature is acknowledged to have a broad scope of discretion.

Nevertheless, we can find in the case law some notable exceptions to the general pattern of a very light-touch judicial review of secondary Union law. Most importantly, the Court demonstrated prominently in Kadi, which we discussed above in Section 4.3., that it was committed to protect fundamental rights even at the cost of risking the infringement by the Union of its international law obligations. The Court annulled a Union act implementing a UN Security Council resolution for breaching the plaintiffs’ rights of defence, the principle of effective judicial protection and their right to property. The infringement of the right to property was based on the fact that procedural safeguards had not been respected. Albors-Llorens highlights that the recognition of the need for procedural safeguards in cases where the right to property is restricted on general interest grounds is a highly important development in the case law. It opens up the route to a more thorough judicial review of secondary law for its compatibility with economic fundamental rights even if not on a substantive but rather procedural basis.

343. Case 29/69 Stauder; Case 11/70 Internationale Handelsgesellschaft; Case 4/73 Nold; Case 44/79 Hauer.
345. ECJ, 11 July 1989, Case 265/87 Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau; ECJ, 5 October 1994, Case C-280/93 Germany v Council (first Bananas); ECJ, 30 July 1996, Case C-84/95 Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others; CFI, 11 September 2002, Case T-13/99 Pfizer Animal Health SA v Council; ECJ, 9 September 2004, Joined Cases C-184/02 and C-223/02 Spain and Finland v Parliament and Council; ECJ, 10 July 2003, Joined Cases C-20/00 and C-64/00 Booker Aquaculture Ltd v The Scottish Ministers, for an analysis of these cases see Albors-Llorens, supra note 341, pp. 247-256.
basis. She suggests that this approach may expand to the scrutiny of general Union measures other than those imposing sanctions – which have still a strong individual touch due to the listing of specific persons or organizations – and potentially even to areas where the Union legislature – differently from Kadi where it merely transposed a decision of an international organization to EU law – exercises a broad discretion.347

Recently, the Court seems to have intensified the judicial review of Union legislation with regard to other fundamental rights too. For example in Schecke348 the Court declared a provision of a Union regulation prescribing the publication of data on natural persons who were beneficiaries of agricultural aid from EU funds invalid on account of being contrary to the right to the protection of private life and the right to the protection of personal data set out in Articles 7 and 8 of the Charter as well as the principle of proportionality.

Finally, most recently, the Court attracted a great degree of attention by declaring the invalidity of a provision of a Union directive implementing the principle of equal treatment between men and women with regard to private insurance and pensions.349 The directive prescribed that the use of sex as a factor in the calculation of insurance premiums and benefits could not result in differences between men’s and women’s premiums and benefits. However, it contained a derogation from this rule of unisex premiums and benefits which allowed Member States to permit proportionate differences where the use of sex was a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. Member States could make use of that derogation without temporal limitation. The Court held that due to this latter aspect, the provision was incompatible with Articles 21 and 23 of the Charter laying down the principle of equal treatment between men and women.

In summary, it appears from the case law that the Court has recently shown increasing willingness to effectively exercise a substantive legality review over general Union acts in order to ensure their compliance with fundamental rights. However, it seems to us that this trend is still limited to non-economic fundamental rights, e.g. equality and privacy rights. Although Kadi may be considered as a welcome entry by the Court to the domain of

347. Ibid.
348. CJ, 9 November 2010, Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke und Hartmut Eifert v Land Hessen.
5.1.2.3. Consistent interpretation of secondary law with the general principles of EU law

The deference of the judiciary to the Union’s political institutions in defining the content of Union legislation does not always lead to the dismissal of a challenge contesting such legislation on substantive grounds. However, even where the Court is open to the claim that a piece of secondary law is contrary to the general principles, it may apply certain judicial techniques which save it from having to invalidate the act under review. The Court may choose to interpret the Union act in a way which reconciles it with the general principles while maintaining the act’s validity. This technique of reconciliatory or consistent interpretation is regularly employed by the Court in the review of Union measures in the light of the Treaty’s free movement provisions. This will be analysed in detail in the forthcoming parts of the thesis (see Sections 7.3. and 8.3.4.). We can find examples of this technique also in the domain of the general principles, such as Sturgeon.\(^{350}\)

In this case, the Court was faced with the task of interpreting a regulation on the compensation and assistance to be offered to air passengers in the event of flight cancellations or long delays of flights. The Union regulation provided for the right to compensation only for passengers whose flight had been cancelled. However, the Court held that passengers whose flights are delayed by at least three hours as compared to the original time schedule are in a comparable situation to those who are affected by a cancellation having regard to the damage suffered due to the loss of time. Thus, the principle of equality requires that they also be entitled to compensation. The Court stated:

\(^{350}\) ECI, 19 November 2009, Joined Cases C-402/07 and C-432/07 Christopher Sturgeon and Others v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA.
“Next, it must be stated that, according to a general principle of interpretation, a Community act must be interpreted, as far as possible, in such a way as not to affect its validity (see, to that effect, Case C-403/99 Italy v Commission [2001] ECR I-6883, paragraph 37). Likewise, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (see, inter alia, Case 187/87 Land de Sarre and Others [1988] ECR 5013, paragraph 19, and Case C-434/97 Commission v France [2000] ECR -1129, paragraph 21).

In that regard, all Community acts must be interpreted in accordance with primary law as a whole, including the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-210/03 Swedish Match [2004] ECR I-11893, paragraph 70, and Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 95).” 351

The Court expressly referred to the fact that this interpretation does not follow from the wording of the regulation.352 By quoting the principle that Union acts must be interpreted in a way which does not affect their validity, the Court implies that the literal interpretation of the regulation, i.e. the absence of the right to compensation in cases of delay, would necessitate its invalidation on the ground of infringement of the principle of equality. However, the Court by using the technique of consistent interpretation succeeded in avoiding that outcome and preserving the validity of the regulation while at the same time it ensured the right to compensation for passengers whose flights were delayed.

Another example of interpretation of secondary law in a way which reconciles it with the general principles, specifically, with fundamental rights is the Österreichischer Rundfunk case where the Court held that a directive on the processing of personal data had to be interpreted in the light of the right to private life set out in Article 8 of the ECHR:

“[…] the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures […]”

and

*If the national courts conclude that the national legislation at issue is incompatible with Article 8 of the Convention, that legislation is also incapable of*

352. Ibid. para. 41.
satisfying the requirement of proportionality in Articles 6(1)(c) and 7(c) or (e) of Directive 95/46. Nor could it be covered by any of the exceptions referred to in Article 13 of that directive, which likewise requires compliance with the requirement of proportionality with respect to the public interest objective being pursued. In any event, that provision cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life contrary to Article 8 of the Convention.”\textsuperscript{353}

It is interesting to point out that reconciliatory interpretation seems to be not only a judicial technique in the hands of the Union Courts enabling them to avoid the invalidation of Union legislation, but also an obligation on the Member States when they implement an act of secondary law.\textsuperscript{354} In \textit{Lindqvist}, the Court held that the same directive as in \textit{Österreichischer Rundfunk}, i.e. Directive 95/46 laying down rules on the processing of personal data, had to be implemented into national law in a way that it ensured the directive’s and, in turn, the national implementing rules’ compatibility with fundamental rights protected in the Union’s legal order:

“[...] it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.”\textsuperscript{355}

The Court even went further when it required the national authorities to implement the directive in a way which brings about a fair balance between the different conflicting rights; that is, on the one hand, the right to respect for private life in the processing of personal data embodied in the directive, and on the other, the fundamental right to freedom of expression:

“[...] the provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing

\textsuperscript{353} ECJ, 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01 Rechnungshof v Österreichischer Rundfunk and Others, paras. 68, 91.

\textsuperscript{354} Englisch, supra note 201, p. 233; Kokott and Sobotta, supra note 226, p. 9.

\textsuperscript{355} ECJ, 6 November 2003, Case C-101/01 Criminal proceedings against Bodil Lindqvist, para. 87. See also ECJ, 26 June 2007, Case C-305/05 Ordre des barreaux francophones et germanophones and Others v Conseil des ministres, para. 28; ECJ, 29 January 2008, Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU, para. 68.
Secondary law and the general principles of EU law

Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.\(^{356}\)

It has been suggested that this ‘balancing’ approach, which goes further than requiring the interpretation of secondary legislation in the light of fundamental right norms, carries certain risks. In particular, it enables a sort of reverse reconciliatory interpretation, that is, fundamental right norms being interpreted in the light of secondary legislation, which may lead to the downward adjustment of the safeguards of the fundamental right in order to protect the legislation at issue.\(^{357}\) We do not fully agree with this assessment given that in this case, the directive was designed to protect the fundamental right to private life; thus, it did not merely introduce measures restrictive on the freedom of expression in pursuance of a general interest (e.g. free flow of personal data within the Union) but it safeguarded a fundamental right itself. Hence in this case, two fundamental rights of equal value and rank got into a conflict with each other, with the specificity that one of them was expressed in an instrument of secondary law. Under these circumstances the balancing approach seems to be justified.\(^{358}\) Naturally, if the ‘balancing’ approach is extended to other cases – where no specific conflict of two fundamental rights is present but instead the regular conflict of a fundamental right and a general interest – it may entail the danger mentioned above.\(^{359}\)

5.1.2.4. Review of the VAT Directive in the light of the general principles of EU law

The VAT Directive is the most comprehensive harmonization measure in the field of taxation, hence, it presents the most opportunities to challenge

\(^{356}\) Case C-101/01 Lindqvist, para. 90.
\(^{357}\) Chalmers, Davies and Monti, supra note 17, p. 251.
\(^{358}\) This was the situation in Promusicae too, see Case C-275/06, paras. 63-65, 68.
\(^{359}\) Another case which referred to fair balance in the context of Directive 95/46 is ECJ, 7 May 2009, Case C-553/07 College van burgemeester en wethouders van Rotterdam v M.E.E. Rijkeboer, para. 64. This case has to be distinguished from Lindqvist, as it did not concern the balancing between two fundamental rights, i.e. the right to privacy protected by the directive and another right outside the context of the directive. It merely concerned the issue how to ensure effective protection of the right to privacy in the implementation of the directive. The Court held that when introducing time-limits for allowing access by the data subjects to information on the use of their data the Member States must ensure a fair balance between the right to privacy of the data subject and the burden imposed on the data controller that has to keep data for an extended period of time. In this case the balancing approach might actually lead to downgrading the protection of the right to privacy in the interest of conveniency for the data controller therefore, the Court’s controlling whether the Member State found the appropriate balance is essential.
one or other of its rules in the light of primary law, specifically, the general principles of EU law. In this Section, instead of providing a comprehensive analysis of the Court's case law on the review of the compatibility of the VAT Directive with various general principles of EU law, we merely aim at pointing out certain patterns of this case law and determine whether it is in line with the general jurisprudence on the scrutiny of Union measures in the light of the same principles or it shows some specificities compared to the latter.

Generally, to date the Court has never annulled any provisions of the various VAT Directives applicable at different points in time, which is in accordance with its general reluctance to exercise substantive constitutional review over Union legislation. Some of the VAT case law is especially instructive on how the Court fends off sometimes well-founded challenges against secondary law falling short of the requirements of the general principles. One of the most frequently invoked general principles in relation to the VAT Directive is the principle of equality. In the case law we also encounter with the principle of fiscal neutrality, which, according to the Court, is the reflection of principle of equality in the field of VAT. Englisch explains that according to the Court’s interpretation fiscal neutrality has two aspects. First, it requires that similar goods and similar economic transactions, which are in competition with each other, must be treated similarly for VAT purposes. This corresponds to the classic meaning of the principle of equality according to which similar situations are not be treated differently and different situations are not be treated in the same way unless such treatment is objectively justified. The second aspect of fiscal neutrality can be linked to a much lesser extent to this classic meaning of equality insofar as it requires that a taxable person be fully relieved of the VAT burden payable or paid in the course of all his taxable economic activities. The latter rather flows from the nature of VAT as a tax on (expenditure for) consumption to be borne by the final consumer and not the taxable person than from the principle of equality.

Whilst the VAT Directive contains various provisions which appear to infringe upon both of the aspects of the principle of fiscal neutrality, the Court has successfully avoided finding such infringement. In Seeling it acknowledged that the rule, according to which a taxable person may treat a

360. For that, see the extensive study by Englisch, supra note 201.
mixed-used building in its entirety as forming part of his business assets thereby, allowing full deduction of the input VAT incurred at the time of construction and, at the same time, treating the private use of the building by the taxable person as taxable supply, may contravene the principle of neutrality, as such rule may result in untaxed end use. However, the Court accepted this as “a consequence of a deliberate choice on the part of the EU legislature”.363

Englisch severely criticizes this blunt solution on the ground that it clearly contradicts the Court’s later qualification of the principle of fiscal neutrality as a reflection of the principle of equality.364 Such qualification implies that it has the status of primary law and therefore, a mere legislative choice expressed in lower ranking secondary law cannot override its effects.

The Court managed to maintain the validity of the same rule of the VAT Directive in the face of another challenge according to which the possibility of full deduction of input VAT on mixed-used buildings for taxable persons results in an unequal treatment of taxable and non-taxable persons, on the one hand, and taxable persons carrying out taxable supplies and taxable persons carrying out exempt supplies, on the other.365 In this case, the Court reasoned that taxable persons and non-taxable persons are in a different situation and therefore their unequal treatment does not constitute an infringement of the principle of equality. With similar reasoning, it held that taxable persons with taxable supplies and taxable persons with exempt supplies do not have to be treated equally either. The soundness of this approach can also be questioned. The Court seemed to have used not only the wrong comparability criterion – carrying out economic activity – but also in an inconsistent manner – the criterion should have led to the conclusion that taxable persons with exempt supplies and taxable persons with taxable supplies are in a similar situation – in order to arrive at the conclusion that the two respective categories compared were in different situations.366

Some of the anomalies of the case law cited above may be explained in the light of a subsequent VAT case, specifically NNC Construction.367 In this case, the Court basically denied constitutional status of the principle of fiscal neutrality with the following reasoning:

363. ECJ, 8 May 2003, Case C-269/00 Wolfgang Seeling v Finanzamt Starnberg, para. 53.
365. Case C-460/07 Puffer.
366. Englisch, supra note 201, pp. 243-245.
“[…], it should be noted that the principle of fiscal neutrality resulting from the provisions of Article 17(2) of the Sixth Directive implies that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities […].

In that regard, it is necessary to add that, according to settled case-law, the principle of fiscal neutrality, and, in particular, the right to deduct, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT established by the relevant Community legislation […].

That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment […].

However, while that latter principle, like the other general principles of Community law, has constitutional status, the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law […].

The principle of fiscal neutrality may, consequently, be the subject, in such a legislative measure, of detailed rules, such as those, implemented in Danish law, […], according to which a taxable person carrying out both taxable activities and exempt activities of selling real estate cannot deduct fully the VAT on its general costs.

It is also appropriate to point out that the general principle of equal treatment, of which the principle of fiscal neutrality is a particular expression at the level of secondary Community law and in the specific area of taxation, requires similar situations not to be treated differently unless differentiation is objectively justified […]. It requires, in particular, that different types of economic operators in comparable situations be treated in the same way in order to avoid any distortion of competition within the internal market, in accordance with the provisions of Article 3(1)(g) EC.

In implementing the provisions of the Sixth Directive, the Member States were obliged to take into account the principle of equal treatment, like the other general principles of Community law, which, having constitutional status, bind those Member States when they take action in the field of Community law […].

[[…]] with the contested provisions transposing the Sixth Directive the Danish legislature, taking due account of the general principle of equal treatment and in order to avoid distortions of competition in the internal market, wished to put building businesses which, like NCC, carry on, beside their building activity, an exempt activity of selling real estate, on the same footing as building developers who, given the exempt nature of that latter activity, cannot deduct the VAT on supplies relating to construction by third-party businesses to which they have recourse. In those circumstances, the principle of fiscal neutrality cannot properly be relied upon to preclude the application of the provisions thus transposed.”

368. Case C-174/08 NCC Construction, paras. 39-46.
There are several important statements in these paragraphs which shed light on the Court’s perception of the status and role of the principle of fiscal neutrality and the principle of equal treatment and their relations vis-à-vis each other in the context of VAT legislation. First of all, the Court confirms the content of the principle of fiscal neutrality, i.e. the right to deduct input VAT on all the goods and services acquired for the purposes of taxable supplies, and it describes it as a fundamental principle underlying the VAT system. Second, the principle of equality is distinguished content-wise from the principle of neutrality, as it is defined as the requirement that different types of economic operators in comparable situations be treated in the same way in order to avoid distortions of competition. In addition, the fact that the principle of neutrality is the reflection of the principle of equality in the specific area of VAT does not exclude the application of the original principle, i.e. equality, to the field of VAT too. Moreover, when the requirements flowing from the two principles conflict with each other the principle of equality enjoys precedence. The reason for this is that the principle of fiscal neutrality does not have a constitutional status contrary to its origin principle and therefore ranks lower in the hierarchy of EU law than the principle of equality. The Court substantiated this by a reasoning similar to that in *Audiolux* 369, namely, that “the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law.” However, in *Audiolux* such finding led the Court to concluding that the alleged requirement of equal treatment of minority shareholders did not constitute a general principle of EU law.370 Differently, in *NCC Construction* the Court – as Hesselink observes – appears to tell us that there are different categories of general principles which are located at different levels of the normative hierarchy of Union law.371 The principle of fiscal neutrality is a particular expression of the principle of equal treatment “at the level of secondary Community law and in the specific area of taxation” meaning that it has the same ranking as secondary law whereas its origin, the principle of equality, remains primary law with a constitutional status. If this interpretation is correct the Court in *NCC Construction* created a new legal category, that is, fundamental principles having the status of secondary law. This would open the floodgate for a whole series of further questions, for example, as regards the effects of these ’secondary principles’. Hesselink suggests that they may have more limited effects than the general principles of EU law which have primary law status. For example, they may only have an interpretative function in relation to secondary law.

369. ECI, 15 October 2009, Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA* (GBL) and Others, *Bertelsmann AG and Others*, para.62.


371. Hesselink, supra note 327, p. 27.
Chapter 5 - Relationships between general principles of EU law, Treaty provisions and secondary law

that is, they cannot serve as a standard of review for scrutinizing the compatibility of secondary law with them and they may not have horizontal direct effect.372

If, indeed, the principle of fiscal neutrality is a fundamental principle underlying the common VAT system having the status of secondary law instead of primary law the statement of the Court in Seeling cited above, according to which the impairment of the principle of fiscal neutrality is acceptable when it is a deliberate choice of the Union legislature, becomes more explicable. A secondary principle, which is not superior to secondary law and which may have only an interpretative function as regards the latter, has to yield to written secondary legislation when it is apparent that the intention of the legislature was not to give full effect to the principle in regulating a certain segment of the VAT system.

Even if the qualification of the principle of fiscal neutrality as a fundamental principle of secondary law may resolve certain potential conflicts between such principle and some concrete provisions of the VAT Directive, there are other provisions in the Directive which potentially contravene the principle of equality itself which is still superior to the VAT Directive. If and when these potential conflicts come before the Court, the latter should engage in a real and effective constitutional review of those conflicting secondary law provisions in order to guarantee the elimination of distortions to the internal market even when they come from the Union legislature.

Although the finding of a new category of general principles of EU law in the VAT case law appears to be a true novelty, Hesselink proposes that there may exist a similar category of principles having the status of secondary law; namely, the general principles of civil law to which the Court has started to refer in a few recent cases373 without, however, clarifying their nature, status and legal effect.374 In any event, this newly discovered category, if reinforced by later case law, may have major implications for the hierarchy of sources of EU law.

372. Ibid.
374. For a comprehensive analysis of this potentially new category of EU law, see Hesselink, supra note 327.
5.1.3. Principle of proportionality

5.1.3.1. Functions

The principle of proportionality has multiple faces and fulfils various functions in different fields of law, which makes it an almost inexhaustible source for academic discussions questioning every aspect of it even its principle or general principle character.\(^{375}\) Generally, the principle of proportionality is primarily concerned with the protection of the individual from the public authority. In this role, it aims at ensuring that regulatory intervention is as such that the individuals’ freedom of action is not limited “beyond the degree necessary in the public interest”.\(^{376}\) As a general principle of EU law, it can be applied as a standard of review both in relation to Union measures and Member State measures. In addition, it can be applied as a self-standing, autonomous standard or a test which helps balance and weigh two conflicting rights or interest and determine which of the two should prevail over the other in the circumstances of a given case.

When the principle of proportionality is applied to Union measures in order to help balance between the interest pursued by a Union measure and an individual right which the Union measure restricts, the latter can be a right that the individual derives from the Treaty’s free movement provision. For example, it can be the right to engage in cross-border trade in the form of importing products from another Member State under no less favourable conditions than those applicable to domestic trade. In this case, the conflict is not only between an individual right and a Union interest but also between two opposing Union interests. One of those is the interest of the internal market which requires unfettered free movement, which, in this context, corresponds to the individual’s right to trade across the border without restrictions. The other is a legitimate objective in the public interest also acknowledged by the Union’s legal order, such as protection of public health and consumer- or environmental protection. Such conflict can occur, for example, when a Union directive prescribes what additives can be used for foodstuffs, prohibiting at the same time the marketing and sale of foodstuffs that contains different additives. Such directive would restrict the free movement of goods with respect to non-conforming foodstuffs in the interest of public health and consumer protection. The function of the principle of proportionality in this situation is to ensure that the measure that

\(^{375}\) See Englisch, supra note 201, p. 237.

\(^{376}\) Tridimas, supra note 140, p. 136 referring to Advocate General’s Opinion in Case 11/70 Internationale Handelgesellschaft.
restricts the individual’s right, and, at the same time, the free movement of goods is suitable and necessary to achieve the objective of public health- and consumer protection. Thus, in this scenario, the principle of proportionality plays a role in reviewing secondary Union law for its compatibility with the free movement provisions. The principle, in effect, has a dual role in this situation; on the one hand, it protects the individual (trader) vis-à-vis the excesses of the Union institutions (public law function), on the other, it ensures that only justified restrictions, by way of suitable and necessary measures, are exerted on the internal market freedoms (market integration function).377

In cases where a Union measure is claimed to infringe upon a fundamental right, e.g. the right to carry on trade or business, the principle of proportionality is used for balancing and weighing the right which accrues on an individual and the Union’s interest pursued by the Union measure, e.g. protecting the environment by banning certain substances or processes. In this role, the principle of proportionality fulfils exclusively its public law function.

Besides the cases where it serves as a balancing test between conflicting rights and interests, the principle of proportionality is also applied as an independent ground for the review of the legality of secondary Union law.378 In such situation, the principle operates as an autonomous general principle and fulfils exclusively its public law function by protecting the autonomy of individuals. This is, in fact, the most customary use of the principle of proportionality with respect to Union acts. In this role, the principle has traditionally been applied (i) in the area of agricultural law;379 (ii) to measures

378. Englisch is critical about the use of the principle of proportionality as a self-standing standard of review in relation to Union acts (or Member State measures) suggesting that the principle should only be applied as a condition for justifying the prima facie infringement of another general principle or the Treaty’s free movement provisions. For this reason he considers it not a principle but rather a rule which prescribes how conflicts between a real general principle, a right or a freedom, on the one hand, and a general interest, on the other, must be resolved in a rational way, see Englisch, supra note 201, pp. 236-237.
379. For example, ECJ, 21 February 1979, Case 138/78 Hans-Markus Stölting v Hauptzollamt Hamburg-Jonas; ECJ, 5 October 1994, Joined Cases C-133/93, C-300/93 and C-362/93 Antonio Crispolini v Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v Donatab Srl; ECJ, 5 October 1994, Case C-280/93 Germany v Council (Bananas).
concerning the external trade of the Union;\textsuperscript{380} (iii) to measures imposing charges and penalties;\textsuperscript{381} and (iv) to health- and consumer protection measures.\textsuperscript{382}

The two functions of the proportionality principle, i.e. public law and market integration, also manifest when the principle is applied to Member State measures. First, in its public law function, the proportionality principle protects the individual from unwarranted interventions from the authorities of its own State. This function, however, is rather limited, as the principle applies as an autonomous standard to Member States measures only when the latter implement Union law or the measure falls otherwise in the scope of Union law (see Section 5.1.1.). Second, in its integration function the principle of proportionality is applied when national measures that hinder free movement are tested against the Treaty’s free movement provisions.

Finally, it has to be noted that the principle of proportionality with its codification in the founding Treaties gained a new dimension compared to the roles that it had played in the Court’s preceding case law. The Maastricht Treaty included the principle of proportionality as an express provision in the EEC Treaty in the Article which also lays down the principle of conferral of powers and the principle of subsidiarity (now Article 5 TFEU). This context indicates that the principle of proportionality in this new dimension is essentially aimed at protecting the Member States’ sphere of powers from unwarranted interference by the Union. Thus, in addition to the public law and market integration roles, the principle was enriched with a ‘competence function’.

Often the assertion that a Union measure is at odds with the principle of proportionality focuses solely on the undue interference with the individual’s private autonomy which the measure at issue entails. At the same time, the claim that the Union act also encroaches upon the Member States’

\footnotesize{\textsuperscript{380} For example, ECJ, 11 February 1988, Case 77/86 \textit{The Queen v H. M. Commissioners of Customs and Excise, ex parte: The National Dried Fruit Trade Association.}}

\footnotesize{\textsuperscript{381} For example, ECJ, 21 January 1993, Case C-308/90 \textit{Advanced Nuclear Fuels GmbH v Commission.}}

\footnotesize{\textsuperscript{382} For example, ECJ, 13 November 1990, Case C-331/88 \textit{The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others; CJ, 12 July 2001, Case C-189/01 H. Jippe, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij.}}
competences remains out of the scope of the proportionality arguments. The latter is often discussed under the aegis of subsidiarity or the reasoning under the two principles is simply blended. In any case, the competence function of the principle of proportionality is generally overshadowed by its public law function.

An exception to this observed trend is the Opinion of Advocate General Maduro in the Vodafone case. The Advocate General clarified that the principle of proportionality has two distinct aspects. After he had analysed the restrictions that the Union act at issue, a regulation setting maximum retail prices for roaming mobile telephone services, imposed on the individual rights of the mobile network operators he added:

"An assessment of proportionality also requires the Court to consider whether the greater ability of the Community to achieve the goals of the relevant legislation is such as to justify the loss of Member State autonomy involved in the approach chosen by the legislature."

In summary, the principle of proportionality serves as a standard of review both for Union acts, including legislative and executive acts, and for measures of the Member States. It can operate as an autonomous standard against which acts of the Union institutions and those of the Member States are directly measured. In this case, it fulfils its public law function, that is, it protects the autonomy of individuals from undue interventions of the public authority. In this function, it balances between the interest of individuals and the interest of the public. This function is limited with respect to Member State measures, as the applicability of the principle of proportionality to the latter – just as to all general principles of EU law – is dependent on the Member State measure falling within the scope of EU law. In addition, the principle of proportionality has further functions. In its market integration function, it forms part of the analysis through which the compatibility of

383. ECJ, 14 December 2004, Case C-210/03 Swedish Match AB, Swedish Match UK Ltd v Secretary of State for Health, paras. 46-58.
384. ECJ, 10 December 2002, Case C-491/01 The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd., paras. 122-141 and para. 184 where the Court simply refers back to the reasoning under proportionality when it examines subsidiarity. See also ECJ, 12 November 1996, Case C-84/94 United Kingdom v Council (Working Time Directive), paras. 54-55. In its competence function, the principle of proportionality is closely intertwined not only with the principle of subsidiarity but also with the issue of the choice of the correct legal basis for a Union act (see Section 5.2, below).
385. CJ, 8 June 2010, Case C-58/08 Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice.
386. Opinion of Advocate General Maduro, 1 October 2009, Case C-58/08 Vodafone, para. 44.
Secondary law and the general principles of EU law

a measure with the Treaty’s free movement provisions is determined. This function too has relevance both with regard to Member State measures and Union measures. This is logical since both types of measures may hinder free movement in the internal market. If it is a Member State measure that is tested for its compatibility with the provisions on free movement, the principle of proportionality is intended to balance between a Union interest, i.e. internal market, and a national interest. If it is a Union act that is measured for its compatibility with the freedom of movement, the principle of proportionality is supposed to balance between two different Union interests. In practice, however, national and Union interest may express different dimensions of the same public interest, such as environmental protection or consumer protection. When either Union acts or national acts are reviewed in the light of the Treaty freedoms, the principle of proportionality safeguards not only the Union interest manifested in the internal market but also the individual rights of economic operators which the latter derive from the Treaty freedoms. Thus, the market integration function and the public law function of the principle of proportionality in these situations overlap. Finally, the principle of proportionality has a competence function that is relevant only with respect to Union acts, as in this function it is aimed at drawing the outer limits of the legitimate scope of Union action. As such, it protects the Member States’ interest vis-à-vis the Union’s interest and it operates as an autonomous standard against which Union measures are tested.

5.1.3.2. Standard of review of Union measures and Member State measures

In the legal doctrine, the most comprehensive definition of the principle of proportionality refers to the principle as consisting of a three-pronged test; namely, (i) suitability, which asks whether the measure is suitable to achieve its purported objectives; (ii) necessity, which asks whether the measure does not go beyond what is necessary to achieve its objectives and in that whether it is the least restrictive means amongst the various equally effective alternatives; and (iii) stricto sensu proportionality, which asks whether the realization of the goals of the measure entails disproportionate disadvantages compared to its benefits.\textsuperscript{387} This three-pronged proportionality test is, however, not universally recognized or applied in EU law.

\textsuperscript{387} G. Davies, Subsidiarity: The wrong idea, in the wrong place, at the wrong time, 43 CMLRev 1 (2006), pp. 63-84, at pp. 81-83; Chalmers, Davies and Monti, supra note 17, p. 367; P. Craig, EU Administrative Law (Oxford University Press 2006), p. 656; Englisch, supra note 201, pp. 235-236; S. Douma, Non-discriminatory Tax Obstacles,
As far as positive law is concerned, Article 5(4) TEU refers only to the second part of the test, i.e. necessity:

“[...] Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

As regards the case law, in many cases the Court distinguishes only the first two parts of the test, that is, suitability and necessity. In *British American Tobacco*, a Union directive was tested in the light of the principle of proportionality as an autonomous standard. Here the Court stated that:

“...the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it [...].”

When the Court analyses the proportionality of Member State measures, which constitute *prima facie* restrictions on the free movement provisions it also uses the two-pronged proportionality test:

“[...] a restriction is permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it [...].”

However, we also find examples for the use of the three-pronged test in the case law, for example, in *Fedesa*:

“The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there


388. Tridimas, supra note 140, p. 139.

389. Case C-491/01 *British American Tobacco*, para. 122; ECJ, 13 May 1997, Case C-233/94 *Germany v Council and Parliament (Deposit guarantee scheme)*, para. 54; Case C-210/03 *Swedish Match*, para. 47.

390. ECJ, 13 December 2005, Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty’s Inspector of Taxes)*, para. 35.
is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”

In this case, the Court relied on the three-pronged test when measuring the compatibility of a Union directive in the field of common agricultural policy with the principle of proportionality. Some commentators maintain that the Court uses the three-pronged test vis-à-vis Union acts particularly in the context of the common agricultural policy whereas in the case of harmonization measures based on Article 114 TFEU, it normally resorts to the two-pronged test. Craig remarks that although the Court does not normally make reference to the third limb of the proportionality test, it would generally consider it when the applicants present arguments which are specifically directed to it. With regard to Member State measures, as we have mentioned above, the Court normally employs the two-pronged test when it assesses their proportionality in the compatibility analysis with the free movement provisions. However, in some of these cases we also find a reference to the requirement of stricto sensu proportionality whereby the Court states that the means chosen to attain a certain objective must be proportional to that objective. Thus, the use of the two- or the three-pronged test does not depend on whether the measure originates from the Union legislature or from the Member States. Differently, Englisch observes that the third step of the test, which involves a balancing between conflicting principles and policies, is especially suspect for the Court when it scrutinizes Union measures, as in such cases it necessarily touches upon the institutional balance within the Union. Thus, he seems to suggest that in the case of the review of Union measures, the Court is more inclined to forget about the third limb of the test than in the case of the scrutiny of Member State measures. To us, however, it seems that irrespective of the origin of the measure in the overwhelming majority of the cases the Court uses a two-pronged proportionality test consisting of ‘suitability’ and ‘necessity’.

391. ECJ, 13 November 1990, Case C-331/88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others, para. 13.
392. M. Brenncke, Case C-58/08, Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010, 47 CMLRev 6 (2010), pp. 1793-1814, at p. 1811, FN 73.
393. Craig, supra note 387, p. 657.
394. For example, ECJ, 5 March 2009, Case C-88/07 Commission v Spain, para. 88; ECJ, 23 September 2003, Case C-192/01 Commission v Denmark, para. 45; ECJ, 5 February 2004, Case C-24/00 Commission v France, para. 52; ECJ, 29 April 2004, Case C-150/00 Commission v Austria, para. 88; ECJ, 15 November 2007, Case C-319/05 Commission v Germany, para. 87.
395. Englisch, supra note 201, p. 236.
While the definition of proportionality that the Court applies with respect to Member State measures on the one hand, and Union measures on the other, does not seem to differ, the same is not true as regards the intensity of review of these two types of measures. In the case of Member State measures which are restrictive on free movement, the Court verifies whether the measure pursues a legitimate objective that is justified by an imperative reason of public interest and whether it does so by means which are suitable and necessary to achieve the pursued aim. In contrast, where the Court tests Union acts directly in the light of the principle of proportionality as a self-standing standard, it shows a high degree of deference to the Union legislature. Where the Union legislature had been called upon to make political, economic or social choices requiring a complex assessment of the situation and the available regulatory options the Court undertakes only a marginal review of the exercise of discretion by the Union legislature. The Court essentially limits itself to checking whether the Union legislature committed a manifest error in the assessment of the situation; in the words of the Court:

“With regard to judicial review of the conditions of proportionality, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue [...]”

The different standard of review to be applied to Union measures is articulated even more so in Vodafone:

“With regard to judicial review of compliance with the conditions of proportionality the Court has accepted that in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions is seeking to pursue.”

396. Chalmers, Davies and Monti, supra note 17, p. 368.
397. Case C-491/01 British American Tobacco, para. 123. See also ECJ, 5 May 1998, Case C-157/96 The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers’ Union and Others, para. 61; Case C-210/03 Swedish Match, para. 48. See Tridimas, supra note 140, pp. 142-149.
398. Case C-58/08 Vodafone, para. 52
In the absence of a manifest error of assessment, the Court rejects the claim that the Union measure infringes the principle of proportionality. This is a much more lenient test than the one applied to national measures, which involves a detailed appraisal of the suitability of the measure and the question whether it is the least restrictive means available to achieve the desired result and, in certain cases, even a weighing of the disadvantage caused by the infringement of the rule or principle at issue and the interest pursued by the infringing measure (*stricto sensu* proportionality).

While from the above we can draw a general conclusion that the Court applies a much more lenient proportionality test to Union measures than to Member State measures, two remarks must be made to qualify this conclusion.

First, it is important to emphasize that in the cases cited above the Court formulated and used the deferential test in situations where the principle of proportionality served as an independent ground for reviewing the legality of Union acts. In these cases the principle operates in its public law function. On the other hand, the strict test applies to Member State measures in situations where the proportionality analysis follows a prior determination that the Member State measure at issue *prima facie* infringes the Treaty’s free movement provisions.399 Thus, in these cases the scrutiny of proportionality constitutes one of the steps of the compatibility analysis of national measures with the basic premises of the internal market, i.e. the free movement provisions. Hence, here the principle fulfils its market integration function. Therefore, the different intensity of review may be related not only to the question whether it is a Member State- or a Union measure which is tested in the light of the principle of proportionality but also to the different functions that the principle may play in such review. As we have seen above, the proportionality principle has an integration aspect not only in respect of national measures but also in respect of Union acts. This is the case where a Union act which is *prima facie* restrictive on free movement is subjected to a compatibility review under the free movement provisions and, as part of the latter, to a proportionality analysis. This being the central question examined in Section 7.4., we will discuss this aspect of the proportionality principle more in detail there (see Section 7.4.4.2. (iv)). For the moment we will put on ice the question whether or not the Court scrutinizes the

Chapter 5 - Relationships between general principles of EU law, Treaty provisions and secondary law

proportionality of Union measures and Member State measures with the same intensity when the principle of proportionality is applied in its market integration function with respect to both measures.

Second, it must be pointed out that the recent trend, according to which the Court seems to be intensifying the scrutiny of Union legislation in the light of general principles and fundamental rights, affects – first and foremost – the assessment of proportionality. The best illustration of this is the reasoning in Schecke, the case where the Court declared invalid certain provisions of Union regulations prescribing the publication of data of beneficiaries who receive funds from European agricultural funds on the ground of infringement of the beneficiaries’ right to private life and specifically, right to personal data protection:

“It is settled case-law that the principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it [...] It is thus necessary to determine whether the Council of the European Union and the Commission balanced the European Union’s interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular. The Court has held in this respect that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary [...].

There is nothing to show that, when adopting Article 44a of Regulation No 1290/2005 and Regulation No 259/2008, the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries’ right to respect for their private life in general and to protection of their personal data in particular, such as limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received.”

As it appears, the Court conducted a genuine analysis of the necessity of the measure introduced by the Union regulations at hand and held that less intrusive measures may have been available to achieve the public interest objective, i.e. transparency of the use of EU funds, which the Union

400. Joined Cases C-92/09 and C-93/09 Schecke, paras. 74, 77, 81.
legislature has failed to assess in the legislative process. This is a very different approach to proportionality than the one implied by the ‘manifestly inappropriate’ test.

At last, as regards the competence function of the principle of proportionality, the Court has so far applied a light-touch review of Union acts challenged on the basis of interfering with the competences of the Member States using the ‘manifestly inappropriate’ test.\(^{401}\)

5.1.4. Assessment by the academia

The analysis above demonstrates the Court’s general reluctance to exercise an effective constitutional review over secondary legislation and to enforce adequate fundamental right- and other substantive standards vis-à-vis the Union institutions when they exercise public (legislative or executive) powers. Although the Court has recently intensified its review of Union legislation especially in the light of non-economic fundamental rights, the criticism which has been voiced for a long time by many academics, that is, its scrutiny is insufficient, is still well-founded having regard to the wide-ranging and ever expanding areas of Union activities and the still negligible number of cases where secondary legislation has been declared void for substantive reasons. The critiques have traditionally reproached the Court for using the principle of proportionality in a relaxed manner in relation to secondary Union law and, as a consequence, applying a double standard, that is, a stricter review of Member State measures than Union acts.\(^{402}\) They have been demanding a stricter scrutiny of secondary legislation pointing to the fact that the Union’s autonomous legal authority had been recognized by national constitutional courts – notably, the German Constitutional Court – on the condition that the Court effectively protects fundamental rights in the face of Union legislation (See Section 5.1.2.2).\(^{403}\) As regards the argument that the Court uses a double standard, the critiques had normally compared the fundamental rights scrutiny of secondary Union law with the review of Member State measures in the light of the Treaty’s free movement provisions. In defence of the Court, Von Bogdandy points to the differences between the two types of review. In particular, in applying the free movement rules to Member State measures the Court is not acting as a constitutional court that guides the political process.\(^{404}\) The

---

401. See e.g. Case C-84/94 Working Time Directive, paras. 57-58.
403. Ibid.
404. Ibid. 1326.
most important difference, according to Von Bogdandy, between the human rights case law and the free movement case law is that any decision brought by the Court on the interpretation of the free movement provisions can be overturned by later secondary legislation. He draws this conclusion from the fact that the Court applies the free movement rules only when there is no secondary law instrument in place which would govern the matter at issue. Therefore, while the Court’s decision on fundamental rights is the final word on the matter meaning that it takes the matter out of the hands of the political process, the same is not true for a decision which would condemn a national measure on the ground of being incompatible with the free movement rules. The bottom line is that if the Court substantively influences the Union legislative process through its fundamental right jurisprudence the result can only be overruled by formal constitutional reform, i.e. amending the founding Treaties through a cumbersome process. In contrast, the Court’s adjudication on how to balance between conflicting interests when a national measure clashes with the free movement provisions can be subsequently corrected through the normal legislative process; thus, the balancing of interests is left, ultimately, to the political process.405 Besides the fact that the argument is based on an incorrect assumption, i.e. secondary law can overrule the primary law freedoms as interpreted by the Court (see Section 7.2.9. for explanation and criticism), it is difficult to agree with the suggestion that the level of fundamental rights scrutiny that the Court, as a constitutional court, performs in relation to Union legislation should depend on how easy it is to overrule the Court’s adjudication on the matter. The very function of a constitutional court is to exercise control over the legislature; therefore, in accordance with the basic tenet of separation of power – even when it is adjusted to the EU’s context in the form of institutional balance – the Court’s word should be the final word on how to balance between the private interest protected by a fundamental right and a public interest pursued by a Union act. Expediency cannot prevail over fundamental right guarantees. Although we disagree with Von Bogdady’s reasoning, we share his conclusion that the fundamental rights scrutiny of Union acts cannot be compared to the review of Member State measures in the light of the free movement provisions as regards the level of scrutiny. This is so because under the two types of review different interests must be weighed and balanced against each other – in the fundamental rights scrutiny private interest against public interest while in the free movement review national interest against Union interest – which may well require different approaches and

405. Ibid. 1327.
Secondary law and the legal basis provisions of the Treaty

5.2. Secondary law and the legal basis provisions of the Treaty

As we described above in Section 3.3.1., one of the functions of the Court as a constitutional court is to oversee that the EU institutions remain within the limits of the powers assigned to them in the Treaties both *vis-à-vis* one another and the Member States. The Court by safeguarding the institutional balance between the Union institutions guarantees that the system of horizontal distribution of powers is preserved. On the other hand, the Court is also charged with guaranteeing the maintenance of the vertical distribution of powers between the Union and the Member States. Both of these functions are carried out predominantly through the supervision of the legal basis of Union acts.  

The Court has itself recognized the constitutional relevance of this exercise:

“[…] the choice of the appropriate legal basis has constitutional significance, since, having only conferred powers, the Community must tie the contested decision to a Treaty provision which empowers it to approve such a measure”

As regards the horizontal aspect, the Court verifies that the proper legal basis provision prescribing a certain decision-making procedure had been used by the legislative bodies in the enactment of secondary law. After the Single European Act and the Maastricht Treaty, which introduced various legislative procedures involving the European Parliament to varying degrees in the legislative process and authorised qualified majority voting in the Council for certain Union acts, the question of what the correct legal basis is for Union legislation gained outmost importance. First, the choice of legal basis determined the role of the European Parliament in the enactment of legislation; specifically, whether it only had to be consulted or it was effectively entitled to veto the legislation. Second, the content of the legislation was also influenced by the choice of the legal basis. Where the legislation had to be unanimously approved in the Council the Commission might

---

406. Emiliou, supra note 211, p. 491.
407. ECJ, 1 October 2009, Case C-370/07 Commission v Council, para. 47; Opinion of the Court of 6 December 2001, Opinion 2/00 Cartagena Protocol, para. 5.
have had to present a compromise solution when initiating the legislation in order to secure acceptance by all the Member States; whereas in the case of qualified majority voting it may have had more maneouvring room as to the content. These factors led to widespread litigation between the institutions concerning the legal basis of legislative acts. The Court assumed the constitutional task of judicial control of the legal basis of secondary law and it formulated the guiding tenet of the choice of legal basis in the following terms:

“[...] in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution’s conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review”

Another important tenet of the case law concerns the use of dual legal basis for Union measures. In the Titanium dioxide-line of case law, the Court clarified that recourse to a dual legal basis is not allowed where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the European Parliament. Although Advocates General have expressed serious doubts as to whether two legal bases provisions prescribing different decision-making procedures in terms of the Parliament’s involvement and the Council’s voting rules can ever be compatible with each other, the Court has much less difficulty in accepting that proposition. The Court tends to reconcile differing decision-making procedures and thus, approve cumulative legal basis for Union acts by giving preference for the decision-making process which maximises the participation of the European Parliament. On the other hand, when voting rules in the Council differ under the various legal basis provisions at issue, the Court’s solution for reconciling them seems to be to give way to the more rigorous voting rule, that is, which requires

411. ECJ, 26 March 1987, Case 45/86 Commission v Council (Generalized tariff preferences), para. 11.
412. ECJ, 11 June 1991, Case C-300/89 Commission v Council (Titanium dioxide), paras. 17-21; ECJ, 10 January 2006, Case C-178/03 Rotterdam Convention II, para.57; ECJ, 6 November 2008, Case C-155/07 Parliament v Council, para. 37.
413. Opinion of Advocate General Kokott, 26 May 2005, Case C-178/03 Rotterdam Convention II, para. 60; Opinion of Advocate General Maduro, 26 March 2009, Case C-411/06 Basel Convention, para. 6, see Sharpston and De Baere, supra note 205, pp. 138-139.
414. Case C-178/03 Rotterdam Convention II, paras. 57-59.
Secondary law and the legal basis provisions of the Treaty

unanimity instead of a qualified majority.\textsuperscript{415} Both solutions are criticized by commentators on the ground of either upsetting the institutional balance and democratic legitimacy envisaged by the Treaties or defeating the \textit{ratio legis} of the “loser” decision-making procedure.\textsuperscript{416}

The Lisbon Treaty made the former co-decision procedure the main legislative procedure under the name of ‘ordinary legislative procedure’ which is now prescribed by most of the Treaty’s legal basis provisions. However, some exceptions were maintained in the form of special legislative procedures. For example, under the special legislative procedure set forth in Article 115, the role of the European Parliament is reduced into consultation and in the Council unanimous voting is required. Thus, although the Lisbon Treaty strove for unifying the legislative procedure and thereby, it somewhat diminished the relevance of the choice of the correct legal basis of Union acts, it did not completely eliminate the problem. The issue of legal basis is still acute in certain circumstances; hence the Court continues to fulfil its function of ensuring institutional balance by reviewing the legal basis of Union acts.\textsuperscript{417}

As regards the safeguarding of vertical distribution of powers, the Court’s function is to ensure that the balance of powers between the Union and the Member States is maintained in accordance with the principle of conferral and that of subsidiarity and proportionality laid down in Article 5 TEU. Thus, in this constitutional function the Court is normally asked not only to review the legal basis of a Union act but also its compliance with the principle of subsidiarity and proportionality. The most prominent case law in this respect concerns the general legal basis provisions included in Articles 114 and 115 TFEU empowering the Union to enact harmonization measures for the establishment and functioning of the internal market.\textsuperscript{418} In the seminal case of \textit{Tobacco Advertising}, the Court for the first time found a

\textsuperscript{415} ECJ, 3 September 2009, Case C-166/07 \textit{Parliament v Council (International Fund for Ireland)}, para. 69.

\textsuperscript{416} Sharpston and De Baere, supra note 205, pp. 138, 141-142.


\textsuperscript{418} Another group of cases where the question of vertical division of competence is particularly acute concern external relations of the Union. The issue at stake here is who is allowed to act, the Union alone, the Member States alone or the two together, in the international scene, e.g. Opinion of the Court of 7 February 2006, Opinion 1/03 \textit{Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters}, see Sharpston and De Baere, supra note 205, pp. 129-136.
Union directive, which banned all forms of advertising of tobacco products, to be *ultra vires*\(^{419}\) and hence invalid, with the reasoning that it could not have been adopted on the basis of Article 114 TFEU.\(^{420}\)

Article 114(1) provides that:

```
“Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”
```

In *Tobacco Advertising*, the Court reiterated the limits of the competences of the Union by stating that Article 114 TFEU did not give the Union institutions “a general power to regulate the internal market”.\(^{421}\) It emphasised that “a measure adopted on the basis of Article 100a of the Treaty [now Article 114 TFEU] must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market”.\(^{422}\) In this respect, the Court’s task is to verify that the measure at issue in fact pursues the objective stated by the Union legislature. This is necessary in order to prevent harmonization of matters falling within the sphere of competence of the Member States – such as public health, the harmonization of which is expressly excluded by Article 168(5) TFEU – in the disguise of internal market legislation. A mere finding of disparities between national legislations and the abstract risk of obstacles to the exercise of free movement is not sufficient to enable the Union to rely on this provision in order to bring about harmonization in a certain field. Thus, although it is not necessary that the Union instrument eliminates existing obstacles to interstate trade, the emergence of future obstacles that can result from the diverging developments of national laws must be likely and the instrument must be apt to prevent those obstacles.\(^{423}\) As regards the use of Article 114 as a legal basis for measures that intend to eliminate distortions of competition, the Court repeated its previous holding that such distortions must pass a minimum threshold; namely, they must be appreciable.\(^{424}\) Finally, the Court added

---

419. Lenaerts, supra note 139, p. 300.
422. Ibid. para. 84.
423. Ibid. para. 86.
424. See ECJ, 11 June 1991, Case C-300/89 Commission v Council (*Titanium Dioxide*).
that if these conditions are fulfilled the Union legislature is allowed to rely on Article 114 to adopt legislative acts even if public health concerns are a decisive factor in its choices.\(^{425}\) The latter point was an important qualification which has been recalled many times in future case law dealing with harmonization measures affecting public health issues. Hence in the Tobacco Advertising case the Court generally clarified the conditions that must be satisfied for recourse to Article 114 TFEU as a legal basis.\(^{426}\) Most recently, these conditions have been applied in order to determine whether a regulation setting maximum wholesale and retail prices for mobile roaming services could be based on Article 114 TFEU.\(^{427}\) Although consumer protection played a decisive role in the regulatory choices reflected in the regulation, the Court accepted that the objective of the regulation was indeed to improve the conditions for the functioning of the internal market and that it could be adopted on the basis of Article 114 TFEU.

Article 115 TFEU is formulated in similar terms to Article 114 with the difference, which we mentioned above, that it prescribes a special legislative procedure which requires unanimous voting in the Council:

\[
\begin{quote}
\textit{Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.}
\end{quote}
\]

Due to the reservation included in Article 114(2) TFEU, only Article 115 can be used as a legal basis for the harmonization of fiscal provisions, at least, as far as direct tax provisions are concerned. As regards the indirect taxes of the Member States, Article 113 TFEU expressly authorizes their harmonization maintaining, however, the requirement of unanimity:

\[
\begin{quote}
\textit{The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.}
\end{quote}
\]

426. For the evaluation of the case law on Article 114 TFEU from a positive and a cautious perspective, see Craig, supra note 221, p. 410-411.
427. Case C-58/08 Vodafone.
Articles 113, 114 and 115 TFEU all refer to the harmonization of those provisions which are “necessary to ensure” or “which have as their object” or “directly affect” the establishment or functioning of the internal market. What the Court emphasised in Tobacco Advertising, i.e. measures based on Article 114 must have the genuine purpose of improving the conditions for the establishment and functioning of the internal market, is equally true for Article 115 (and most probably, also for Article 113, although the latter as a specific legal basis provision relating to indirect taxes does not pose any risk of being used as a general authorization for Union regulation). These provisions can only be used for the purposes of facilitating the internal market and consequently, for the promotion of the four freedoms which are the pillars of the internal market. It is true that harmonization measures which fully prohibit the manufacture and sale of certain products or the provision of services, e.g. products or services advertising tobacco, can hardly be seen as promoting intra-Union movement of goods or services. Rather, the contrary could be argued, that is, such secondary law measures are actually in breach of the free movement provisions. This shows that the issue of the correct legal basis for a Union measure is intertwined with the review of legality of Union acts in the light of the free movement provisions. With regard to legal basis, the Court seems to have accepted the reasoning of the Union legislature to the effect that measures which ban the circulation or marketing of certain products or services may still “improve the conditions for the establishment and functioning of the internal market” insofar as it is better having no trade at all in these products or services than tolerating trade which is hindered by diverging national legislations and which risks creating distortions of competition. As the Court expressed it:

“[…] where there are obstacles to trade or it is likely that such obstacles will emerge in future because the Member States have taken or are about to take divergent measures with respect to a product or a class of products such as to ensure different levels of protection and thereby prevent the product or products concerned from moving freely within the Community, Article 95 EC [now Article 114 TFEU] authorises the Community legislature to intervene by adopting appropriate measures […]”

Depending on the circumstances, those appropriate measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products […]”

429. Case C-210/03 Swedish Match, paras. 33-34.
The issues of legal basis of secondary law and the compatibility of secondary law with the free movement provisions are linked together not only when Article 114 or 115 TFEU form the legal basis of a Union act but also when one of the specific legal basis provisions set out under the Chapters of the TFEU dealing with the four freedoms is used for such purpose.\textsuperscript{430} In the German \textit{Deposit Guarantee}\textsuperscript{431} case, this was more than apparent. The legal basis of the directive at issue in this case was Article 53(1) TFEU (ex Article 47(2) EC, at the time of the case Article 57(2) EC), which provided that the Council shall “issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons”. The provision is within the Chapter on freedom of establishment, thus, it is supposed to be used for the adoption of legislation that promotes the freedom of establishment. This aim was emphasised by the recital of the Union directive at issue which stated that it was aimed at “promoting the harmonious development of the activities of credit institutions throughout the Community by eliminating any restrictions on the freedom of establishment and the freedom to provide services.” The directive provided for compulsory participation of all credit institutions in deposit guarantee schemes which covered also depositors of branches of credit institutions that had their head offices in other Member States. The directive, however, contained a provision according to which the cover enjoyed by depositors in branches set up by credit institutions of other Member States may not exceed the cover offered by the corresponding guarantee scheme of the host Member State. This so called ‘export prohibition’ was introduced by the Union legislature on the reasoning that the level and scope of cover offered by guarantee schemes should not become an instrument of competition. In addition, it was necessary to prevent the disturbance of the market in the host Member State which could result from the fact that branches of foreign credit institutions offer higher cover than the home institutions. This ‘export prohibition’, in fact, directly contradicted the objective of facilitating the freedom of credit institutions to establish themselves in other Member States. The argument of the German government, which challenged the validity of the directive,

\textsuperscript{430} Links between the legal bases for harmonization and the freedoms can be showns in the following scheme (the freedom – the Treaty-based exceptions to it – the corresponding legal basis provisions): (i) Article 34 (goods) – Article 36 and the mandatory requirements – Articles 114, 115, 116; (ii) Article 45 (workers)- Article 45(3) and mandatory requirements – Article 46; (iii) Article 49 (establishment) – Articles 51, 52(1) and mandatory requirements – Articles 50, 52(2), 53(1); (iv) Article 56 (services) – Article 62 pointing to Articles 51, 52(1) and the mandatory requirements – Article 59; (v) Article 63 (capital) – Article 65 – Articles 113, 114, 115, see P. J. Slot, \textit{Harmonization}, 21 European Law Review 5 (1996), pp. 378-387, at p. 381.

\textsuperscript{431} Case C-233/94 \textit{Deposit Guarantee Scheme}.
was that a directive, or a provision thereof, which restricts the freedom of establishment, cannot be based on Article 53(1) TFEU which is designed to be the legal basis for measures facilitating that freedom.\textsuperscript{432} This claim is very close to the assertion that the directive, specifically its ‘export prohibition’ provision, is in breach of the freedom of establishment. The latter was, in fact, claimed by Germany but neither the Advocate General nor the Court addressed that argument in its reasoning.

5.3. Secondary law and the Treaty’s free movement provisions

5.3.1. Basics in terminology

Amongst the various primary law provisions which can serve as a standard for reviewing the legality of acts of secondary EU law, in this thesis, we focus on the free movement provisions of the TFEU. These free movement provisions are (i) the right of Union citizens to move and reside freely within the EU (Article 21(1)); (ii) the free movement of goods comprising the prohibition of customs duties and charges having equivalent effect (Article 30), the prohibition of quantitative restrictions and measures having equivalent effect on imports (Article 34) and exports (Article 35); and (iii) the free movement of persons comprising the free movement of workers (Article 45) and the freedom of establishment (Article 49); (iv) the freedom to provide services (Article 56) and (v) the free movement of capital and payments (Article 63). These provisions altogether are also called the four freedoms although, as it appears, they are five or even six rather than four. The ‘four freedoms’ expression refers to the original freedoms, i.e. goods, persons, services, capital, which have been included in the EEC Treaty since the time of its conclusion.\textsuperscript{433} All four are of an economic nature. As the free movement of persons consists of the freedom of movement for workers and the freedom of establishment, the original freedoms are actually five. They were complemented by the sixth freedom, the right for Union citizens to free movement and residence within the Union, to which all Union citizens are entitled irrespective of their being engaged in an economic activity. It was included in the EEC Treaty by the Maastricht Treaty and with it the


\textsuperscript{433} Though, the free movement of capital was liberalized much later and only gradually.
European integration process surpassed the stage of purely economic integration. In spite of the numerical imprecision, we shall keep referring to the ‘four freedoms’ in accordance with the habitual use of the term.

The four freedoms are frequently referred to by the generic name of ‘fundamental freedoms’. Commentators point out that this term is rooted in the German concept of ‘Grundfreiheiten’. The creation of this concept is linked to the endeavour in German legal doctrine – starting from the beginning of the 90’s after the Court’s seminal judgment in Keck – to develop a new approach to the free movement provisions by deducting their common theoretical and methodological features and attempting to devise a general theory on them. The founding Treaties do not include the term ‘fundamental freedoms’ and the interpretation which perceives the free movement provisions as comprised by the generic concept of the ‘fundamental freedoms’ can hardly be based on the text of the relevant Treaty provisions.

As regards the Court’s vocabulary, some academic writers maintain that the Court uses the term ‘fundamental freedoms’ only occasionally. As far as
the area of direct taxation is concerned, this assertion is certainly not true; we encounter the term in almost each and every Court decision concerning direct taxes.\footnote{To mention a few: ECJ, 16 October 2008, C-527/06 R.H.H.Renneberg v Staatssecretaris van Financiën, para. 81; ECJ, 7 September 2006 C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo, paras. 49, 51; ECJ, 18 January 2007 C-104/06, Commission v. Sweden, para. 26; ECJ, 4 December 2008, Case C-330/07 Jobra Vermögensverwaltungs-Gesellschaft mbH v Finanzamt Amstetten Melk Scheibbs, paras. 18, 20; ECJ, 1 October 2009, C-247/08 Gaz. de France, para. 47.; CJ, 29 March 2007 C-347/04 Reeve Zentralfinanz v Finanzamt Köln-Mitte eG, para. 62.; ECJ, 16 July 1998, C-264/96 Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes), para. 29; ECJ, 7 September 2004, C-319/02 Petri Manninen, para. 42; ECJ, 15 May 1997 C-250/95 Futura Participations SA, Singer v Administration des Contributions, para. 31; ECJ, 28 January 1992, C-204/90 Hans-Martin Bachmann v Belgian State, para. 34.} Similarly, in academic literature on EU direct tax law, the use of the expression ‘fundamental freedoms’ is commonplace in English as much as it is in German. Although it is arguable whether the term ‘fundamental freedoms’ as used in English-language academic writing on direct taxation carries the same meaning as the concept of ‘Grundfreiheiten’ in the German legal doctrine,\footnote{See supra note 437.} we shall keep using the term ‘fundamental freedoms’ which is customary in the area of taxation. Accordingly, in the forthcoming part of this thesis we will use the terms ‘the Treaty’s free movement provisions’, ‘the four freedoms’, ‘Treaty freedoms’ and ‘the fundamental freedoms’ interchangeably as synonyms.

5.3.2. Nature of the fundamental freedoms

5.3.2.1. Fundamental freedoms and fundamental rights

With the assistance of direct effect, the internal market freedoms set out in the Treaty have been transformed to individual rights.\footnote{Jacobs, supra note 11, p. 308.} They can be invoked by individuals in front of national courts which must ensure their effective protection. At the same time, fundamental rights of an economic nature are recognized within the Union’s legal order as general principles of EU law and they are included in the, now binding, Charter. As to their contents, there are significant overlaps between the fundamental freedoms and these economic fundamental rights. This raises questions regarding the relationship of fundamental freedoms and fundamental rights. Are the fundamental freedoms fundamental rights themselves? If not what distinguishes them from the latter?
Secondary law and the Treaty’s free movement provisions

In academic literature it is pointed out that amongst the fundamental freedoms the free movement of workers (Article 45 TFEU) and the free movement and residence rights of Union citizens (Article 21(1) TFEU) have the closest equivalents in the European Convention on Human Rights (‘ECHR’) or the Charter. These two fundamental freedoms guarantee the right for natural persons to live, work, study or retire in the Member State of their choice. Article 45 of the Charter, which stipulates that Union citizens have the right to move and reside freely in the territory of the Member States, can be paired with Article 21(1) TFEU. The difference between the two provisions is that Article 21(1) TFEU specifies that this right is subject to the limitations and conditions laid down in the Treaty and other EU measures, whereas Article 45 of the Charter seems to be unconditional. However, the Charter also specifies in Article 52(2) that “[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties”. Therefore, the Charter aligns the scope of the rights set out therein to that of the freedoms. Further, even the freedom of establishment and the freedom to provide services have a fundamental right aspect in the cases where they are applied to individuals. The connection of these freedoms, as well as that of the free movement of workers, with fundamental rights is confirmed by the Charter, which in Article 15(2) stipulates that “[e]very citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”. The free movement of workers encompasses certain rights for the family members of the migrating worker even where they are non-EU nationals consonant with the worker’s fundamental right to family and private life laid down in Article 7 of the Charter and Article 8 of the ECHR. The Court itself in some cases referred to the freedom of movement and residence of Union citizens and the free movement of workers as fundamental rights, which

---

442. Oliver and Roth, supra note 438, p. 408.
443. The Explanation on Article 52 (Scope and interpretation of rights and principles) sets out that: “Paragraph 2 refers to rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in the Treaties (notably the rights derived from Union citizenship). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties.”, see Explanations to the Charter (OJ C303, 14.12.2007), p. 33.
444. Oliver and Roth, supra note 438, p. 408.
445. Case C-200/02 Chen, para. 33.
446. ECJ, 13 July 1983, Case 152/82 Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées; para. 11; ECJ, 15 October 1987, Case 222/86 Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others, para. 14;
description has been used only once with respect to the free movement of goods\textsuperscript{447}, as Oliver and Roth mention.\textsuperscript{448} Indeed, the free movement of goods and capital are the freedoms which apparently have lesser connotations with fundamental rights. However, even these freedoms can be linked to the right to conduct a business recognized in Article 16 of the Charter and the right to property guaranteed in Article 17 of the Charter and Article 1 of Protocol 1 to the ECHR.\textsuperscript{449}

Despite all the similarities between the content of the fundamental freedoms and certain fundamental rights, there is a major difference between the two norms, namely, their functions. As emphasized by Kingreen, the fundamental freedoms have been a key instrument in “transnational integration”, whereas the fundamental rights ensure “supranational legitimation” for the Union.\textsuperscript{450} The fundamental freedoms played a paramount role in the creation of an internal market by removing obstacles to it and thus, complementing and sometimes substituting for the process of harmonization in periods when the latter was blocked by Union politics.\textsuperscript{451} In contrast, the acknowledgment and evolving protection of the fundamental rights under EU law had the function of legitimizing the exercise of public authority and sovereign powers at the level of the Union. In the history of integration fundamental rights protection gained relevance after the fundamental freedoms had become “the fuel of the internal market”.\textsuperscript{452} Operating the internal market required more and more competences to be transferred to the Union. The exercise of increasing public authority by the Union had to comply with the rule of law in order to gain legitimation. This is where the fundamental rights had a role to play. With the words of Kingreen “[t]he fundamental freedoms were a prerequisite for the establishment of the Common Market – and the fundamental rights were its result. In short, what the fundamental freedoms created the fundamental rights must now seek to legitimate”.\textsuperscript{453}

\textsuperscript{447} ECJ, 15 December 1995, Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, para. 129.
\textsuperscript{448} ECJ, 3 February 2000, Case C-228/98 Charalampos Dounias v Ypourgio Oikonomikon, para.64.
\textsuperscript{449} Oliver and Roth, supra note 438, p. 407.
\textsuperscript{450} Ibid. p. 409.
\textsuperscript{451} Kingreen, supra note 1, pp. 530-532.
\textsuperscript{452} Ibid. pp. 519-522.
\textsuperscript{453} Ibid. p. 522.
Another important difference between the fundamental freedoms and fundamental rights is their respective scope of application with regard to Member State measures. The fundamental freedoms can only be applied to cross-border situations to the exclusion of situations wholly internal to a Member State. The fundamental rights, on the other hand, can apply in purely domestic situations as long as the condition for applying them to Member State measures is satisfied. As fundamental rights constitute general principles of EU law, the conditions under which they apply to Member State measures should be the same as the ones which we have seen above in the context of the general principles (see Section 5.1.1.). To recall, the Court’s case law laid down, that Member States must comply with the requirements of the general principles recognized by EU law when they ‘implement Union law’ or the situation under scrutiny otherwise ‘falls within the scope of Union law’. The only well-defined example of a situation ‘falling within the scope of Union law’ is the ERT-situation where a Member State measure derogates from the Treaty freedoms. More than this, the case law has been rather unhelpful in giving guidance as to how to interpret the inherently open formulation of ‘falling within the scope of Union law’.

It only complicates the matter that the Charter lays down that the fundamental rights contained in it are addressed to the Member States only when they are implementing Union law. As is apparent, this wording only partially corresponds to the case law on the scope of application of the general principles to Member State measures. It refers only to Member States ‘implementing Union law’ while it is silent about the other scenario, that is, a situation falling ‘within the scope of Union law’. ‘Implementation’ connotes to a scenario where a Member State acts in order to give effect to secondary Union law (e.g. Wachauf). The term ‘acting in the scope of Union law’ seems to be broader than this. From this it would be logical to infer that the Charter defines the scope of application of the fundamental rights set out therein narrower than did the case law with regard to fundamental rights which had already been recognized as general principles. However, the Explanation attached to Article 51 of the Charter seems to suggest that there is no conflict between the case law and the Charter, as the two tests are one and the same:

“As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they

454. Case C-260/89 ERT.
455. Article 51(1) of the Charter.
While the Wachauf case cited above uses the expression ‘implementation of Community rules’,\textsuperscript{458} ERT and Annibaldi refers to national rules which ‘fall within the scope of Community law’.\textsuperscript{459} The Explanation blurs the difference between them by bringing all of them under the notion of ‘acting in the scope of Union law’ and suggesting that the latter is synonymous with ‘implementing Community rules’ as used in Karlsson, the last case mentioned above.\textsuperscript{460}

Although the Explanations to the Charter have to be taken into consideration, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, when interpreting it, the Explanations cannot be considered as authoritative interpretation of the latter. Therefore, they cannot substitute for the Court’s interpretation. An occasion for the Court to clarify the issue of the scope of application of fundamental rights included in the Charter to Member State measures has been provided by the Åkerberg case.\textsuperscript{461} The case concerned the interpretation of the principle of \textit{ne bis in idem} set out in Article 50 of the Charter with regard to Swedish legislation which allows the accumulation of administrative and criminal penalties in respect of the same tax offence. As the Advocate General and the Court came to opposite conclusions as regards the question whether such national legislation can be reviewed in the light of the EU fundamental rights, it is worth discussing the reasoning of both.

\textsuperscript{457} Explanation on Article 51 – Field of application, Explanations to the Charter, supra note 443, p. 32.
\textsuperscript{458} Case 5/88 Wachauf, para. 19.
\textsuperscript{459} Case C-260/89 ERT, para. 42; ECJ, 18 December 1997, Case C-309/96 Annibaldi, para. 13-14.
\textsuperscript{460} ECJ, 13 April 2000, Case C-292/97 Kjell Karlsson and Others, para. 37.
\textsuperscript{461} CJ, 26 February 2013, Case C-617/10 Åklagaren v Hans Åkerberg Fransson, see Åkerberg Fransson, \textit{Ne bis in idem principle. Combination of tax penalties and criminal penalties}. Court of Justice (comments by Brokelind), H&I 2013/4.1. and C. Brokelind, \textit{Case Note on Åkerberg Fransson (Case C-617/10)}, 53 European Taxation 6 (2013), pp. 281-285.
First, both the Advocate General and the Court addressed the issue how to reconcile the differing definitions under the Charter and under the case law of the field of application of fundamental rights guaranteed in the Union’s legal order with respect to Member State measures. Advocate General Cruz Villalón proposed that the different expressions in the case law and the Charter should not be viewed as being qualitatively different but rather as expressing the common requirement that Union law must have a presence at the origin of the exercise of public authority by the Member State in order for the Member State action to be reviewable under the fundamental rights protected under Union law. The Court did not attribute relevance either to the differing formulations inasmuch as it held that Article 50 of the Charter “confirms the Court’s case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union”.

In an attempt to shed light on the meaning of the case law, the Court referred to a long line of cases which all used various terms, such as ‘situations governed by European Union law’ and national legislation that falls within or outside ‘the scope of European Union law’, showing that the apparent differences in formulations are irrelevant. The Court also relied on the Explanations to Article 51 cited above and concluded with a statement which is hardly more specific or definite as any other formulation that have been used in previous cases:

“[...] the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”

This clarifies that the field of application of fundamental rights under the Charter is not different from that of the general principles of which the fundamental rights form part. Next, the question had to be answered whether the national legislation at issue could be considered as ‘implementing’ Union law. The Swedish legislation at issue provides for a general system of penalties which allows the simultaneous application of administrative and criminal sanctions and which is applicable to infringements of all sorts of tax obligations and all types of taxes. In the case at hand the defendant was charged in criminal proceedings after he had been subject to administrative penalties for the same act of false declaration of information concerning, inter alia, VAT.

462. Opinion of Advocate General Cruz Villalón, 12 June 2012, Case C-617/10 Åklagaren v Hans Åkerberg Fransson, para. 33.
463. Case C-617/10 Åkerberg, para. 18.
464. Ibid. para. 21.
The Advocate General set out to identify a principled approach which could be used to determine in which cases the actions of the Member States should be subject to “centralized” review for their compliance with fundamental rights guaranteed by Union law. He considered that in the context of the constitutional structure of the Union it is, as a rule, for the Member States to control the acts of their public authorities in the light of their constitutional order and their international obligations. It occurs only as an exception to that main rule that the Union assumes responsibility for enforcing fundamental rights vis-à-vis national authorities. In order for the Union to have such a competence, it is not sufficient for Union law to be at the origin of the exercise of public authority but the Union must have a specific interest in guaranteeing the respect for fundamental rights itself in the case concerned.\footnote{465}{Opinion of Advocate General Cruz Villalón, Case C-617/10 Åkerberg, para. 40.}

Although in the case at hand, penalties were imposed for the breach of, inter alia, VAT obligations which ultimately derive from the VAT Directive, according to the Advocate General, the mere finding that the exercise of the power of the State to impose penalties in a particular case is ultimately based on a provision of Union law is not, of itself, sufficient for shifting the fundamental rights review of national law from the Member States to the Union.\footnote{466}{Ibid. para. 54.} The specific circumstances of the case do not reinforce the conclusion that such a shift is justified. This is so due to the fact that the main issue in the case, i.e. whether the conception of the scope of the ne bis in idem principle in Swedish law is legitimate, concerns the structure of the Swedish law on penalties in general and as such it is completely independent from the collection of VAT.\footnote{467}{Ibid. para. 61.} Therefore, Advocate General concluded that the degree of connection between Union law (i.e. the VAT Directive) and the exercise of public authority of the State is too weak to form a sufficient basis for a clearly identifiable interest on the part of the Union that could justify the assumption of the responsibility by the latter of guaranteeing respect for the ne bis in idem principle.\footnote{468}{Ibid. para. 57.} Hence, the Advocate General proposed that the case at hand not be considered as involving the ‘implementation of Union law’. In contrast, the Court held that the imposition of administrative penalties and the initiation of criminal proceedings by the Swedish authorities against a taxpayer who declared false information regarding VAT constituted ‘implementation of Union law’. The Court reasoned that from the provisions of the VAT Directive it follows that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring
collection of all the VAT due on its territory and for preventing evasion.\textsuperscript{469} In addition, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the EU through effective deterrent measures. The EU’s own resources include revenue from VAT collected by the Member State. The CJ considered that there is a direct link between the collection of VAT revenue and the availability to the EU budget of the corresponding VAT resources.\textsuperscript{470} Hence the Court held that the tax penalties and criminal proceedings to which the taxpayer was subject constituted implementation of Articles 2, 250(1) and 273 of the VAT Directive and of Article 325 TFEU. Furthermore, the Court added that:

\textit{"The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union."}\textsuperscript{471}

The outcome of the case shows how broad the term ‘implementation’ can be and how far the scope of application of the fundamental rights set out in the Charter can be stretched despite the express guarantees in Article 6(1) TEU and Article 51(2) of the Charter according to which the provisions of the Charter are not to extend in any way the competences of the Union as defined in the Treaties or establish new powers or task for the Union.

Returning to the question of comparison between the fundamental freedoms and the fundamental rights, we can conclude that the condition for their application to national measures is different. However, \textit{ERT}, which laid down that the fundamental rights bind the Member States when they restrict free movement created a link between the two regimes and their field of application. As a result of \textit{ERT}, the applicability of the fundamental rights in some cases depends on the applicability of the fundamental freedoms. Thus, the ‘cross-border situation’ condition, which pertains to the fundamental freedoms, can be indirectly relevant for the application of fundamental rights as well. Due to this connection, the scope of the fundamental freedoms is sometimes stretched by the Court by ignoring or interpreting very leniently the ‘cross-border element’ requirement in order to lay the basis for claims that are concerned with fundamental rights protection.\textsuperscript{472}

\textsuperscript{469} Case C-617/10 Åkerberg, para. 25.  
\textsuperscript{470} Ibid. para. 26.  
\textsuperscript{471} Ibid. para. 28.  
\textsuperscript{472} For example, Case C-60/00 Carpenter.
Finally, comparing the two regimes from a dogmatic perspective, the question is whether or not the fundamental freedoms have a character similar to that of the fundamental rights in the sense that they constitute ‘rights to freedom’. ‘Rights to freedom’ can be contrasted with ‘rights to equality’. While the former protect against all undue constraints or interferences by the sovereign in the exercise of a subjective right, the latter merely guarantee that two situations which are objectively similar are treated equally by the sovereign. The fundamental rights that we matched up with the fundamental freedoms above are set out in Title II of the Charter entitled ‘Freedoms’ (Articles 7, 15, 16 and 17) which shows that they are in the nature of ‘rights to freedom’. The term ‘fundamental freedoms’ points to the direction that they are of a similar character. Understanding the fundamental freedoms along this line would mean that they guarantee the right of the individual to economic liberty, i.e. to contract, to exploit his or her property, to work, to produce, to sell and buy and to invest anywhere in the Union where the economic conditions are the most favourable without his or her choices being distorted by public interference. ‘The question whether the fundamental freedoms are of this nature is basically a question relating to the scope of the fundamental freedoms. Do they only prohibit obstacles which discriminate between cross-border and comparable domestic situations or do they also preclude impediments to cross-border trade which equally burden domestic trade? It is commonplace that the Court started to interpret the fundamental freedoms long ago as prohibiting not only discriminatory measures but also non-discriminatory restrictions burdening cross-border trade. The starting point was Dassonville and Cassis de Dijon in the area of the free movement of goods followed by similar developments with regard to all the other freedoms. On the basis of this expansion of the scope of the freedoms it could be concluded with regard to the nature of the fundamental freedoms that they constitute ‘rights to freedom’ similar to fundamental rights. However, some qualifications to this statement need to be made. First, in Keck the Court made an essential modification to the scope of the free movement of goods excluding from its scope indistinctly applicable selling arrangements. This was the Court’s response to an “increasing tendency of traders to invoke Article 30 [now Article 34 TFEU] of the Treaty as a means of challenging any rules whose effect is

473. Kingreen, supra note 1, pp. 531-532.
475. ECJ, 11 July 1974, Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville*.
476. ECJ, 20 February 1979, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.
477. Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*.
to limit their commercial freedom even where such rules are not aimed at products from other Member States".478 Thus, the Court’s intention was to limit the recourse to this freedom so that its use corresponds to its original character as a ‘right to equality’. With the *Keck* ruling the Court reinstated the differences between the free movement of goods and the fundamental right to conduct business or trade.479 Nonetheless, criticism has been voiced against the Court that even after *Keck* it often employs the fundamental freedoms as fundamental rights by using the all-encompassing *Dassonville* formula and bringing within the scope of the freedoms obstacles to trade which has nothing to do with ‘transnational integration’.480 The question what sort of obstacles to free movement the fundamental freedoms prohibit will be discussed more in detail in Sections 7.4.3. and 8.2.2.

In summary, the fundamental freedoms and fundamental rights have common features which are reinforced by the Court that attributes a scope and nature to the fundamental freedoms which are similar to those of the fundamental rights. Nevertheless, their distinct functions and the fact that the fundamental freedoms’ ‘transnational integration’ function excludes their application in a purely internal situation and, in some cases, excludes non-discriminatory obstacles from their scope are sufficient reasons for treating them as different types of norms. This is reaffirmed by the Preamble to the Charter which keeps the fundamental freedoms apart from fundamental rights. The second and third recitals imply – in line with Article 2 TEU – that respect for fundamental rights is a common value, whereas the promotion of the fundamental freedoms is an objective of the Union indicated by the statement that the Union seeks to “ensure free movement of persons, services, goods and capital, and the freedom of establishment”.

478. Joined Cases C-267/91 and C-268/91 *Keck*, para. 14, see Oliver and Roth, supra note 438, p. 409.
479. The different nature of the two norms is well explained by Advocate General Tesauro: “I consider that the purpose of Article 30 [now Article 34 TFEU] is to ensure the free movement of goods in order to establish a single integrated market, eliminating therefore those national measures which in any way create an obstacle to or even mere difficulties for the movement of goods; its purpose is not to strike down the most widely differing measures in order, essentially, to ensure the greatest possible expansion of trade”, Opinion of Advocate General Tesauro, 27 October 1993, C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg*, para. 28.
480. Kingreen, supra note 1, p. 533 et seq.
481. Von Bogdandy, supra note 203, p. 1327 FN 98.
5.3.2.2. Fundamental freedoms and fundamental principles

The Court in its case law has also referred to one or other of the freedoms as ‘fundamental principle’, as well as ‘one of the fundamental principles of the common market’ or ‘one of the fundamental principles in the scheme of the Treaty’. This raises the question whether the Treaty provisions on the freedom of movement qualify as principles or perhaps general principles of EU law.

To start with the Treaties, the TFEU does not treat the four freedoms as principles, as it does not include them in Part One which is entitled “Principles”. However, it is highly unlikely that the structure of the TFEU reflects a systematic qualification from which conclusions can be drawn as to the nature of the freedoms.

Semantically, the term ‘principle’ is normally associated with two meanings: on the one hand, it is a basis, source or origin of something, and on the other, it is something abstract, a departure point or basic idea on which other more concrete ideas are built. In legal theory, principles are normally distinguished from rules. According to Tridimas, a “principle is a general proposition of law of some importance from which concrete rules derive”. He emphasises that the two constituent elements of this definition is ‘general’ and ‘of some importance’. ‘General’ may refer to a certain level of abstraction represented by the norm and its degree of acceptance by those who are subjected to it and who apply it. The ‘importance’ element refers to the substance of the norm; namely to the fact that it embodies a certain value.

482. ECJ, 9 December 1997, Case C-265/95 Commission v France, para. 27 in relation to the free movement of goods; Case C-200/02 Chen, para. 31 in relation to freedom of movement and residence of Union citizens.
483. ECJ, 19 March 1991, Case C-205/89 Commission v Greece, para. 9 also in relation to goods.
484. Case C-112/00 Schmidberger, para. 78 also in relation to goods. Oliver and Roth refer to other terms used by the Court in reference to the freedoms, such as ‘fundamental Community provision’ (ECJ, 13 December 1989, C-49/89 Corsica Ferries France v Direction générale des douanes françaises, para. 8 in relation to all four freedoms) and ‘one of the foundations of the Community’ (ECJ, 30 April 1996, Case C-194/94 CIA Security International SA v Signalson SA and Securitel SPRL, para. 40; ECJ, 26 September 2000, Case C-443/98 Unilever Italia SpA v Central Food SpA, para. 40 in relation to goods), see Oliver and Roth, supra note 438, p. 407.
486. Tridimas, supra note 140, p. 1.
that underlies the system made up of the concrete rules which are derived from the principle. The term ‘principle’ also has connotations to ‘reason’ or ‘rationality’. A principle from which specific rules are derived gives the reason and the underlying rational for those rules.\textsuperscript{487} According to Dworkin, the main difference between rules and principles is that rules are sets of standards that point to a concrete decision about legal obligations, rights or permissions while principles only point to a certain direction.\textsuperscript{488} Rules apply to a concrete set of facts, their scope of application is specifically determined and they give a concrete, all-or-nothing answer to the case at hand. The well-observed and circumscribed set of facts can be subsumed under the specific scope of the rule mostly by way of literal interpretation.\textsuperscript{489} In contrast, principles are legal arguments that guide to a certain outcome but do not dictate or necessitate one. They often clash with other principles (or rules or policies) and must be weighed and balanced against those.\textsuperscript{490} Principles do not have any specific scope of application thus, a general consideration about the factual basis is sufficient in order to apply them. Systemic or teleological interpretation methods are applied frequently to make a link between the general consideration of the facts and the vaguely defined scope of a principle.\textsuperscript{491} Van Gerven sums up the difference between rules and principles in the following terms: (i) rules are laid down in a written legal source whilst principles not always have a basis in a written text; (ii) rules are normally precisely formulated while principles are not necessarily set out as a well-defined standards; (iii) principles are flexible and they only provide a guideline as to the direction of the solution; and (iv) principles can be used to contradict another principle or to support a rule.\textsuperscript{492}

According to Alexy’s theory of principles, principles are optimization requirements, that is, “norms which require that something be realised to the

\begin{thebibliography}{99}
\bibitem{487} Ibid. p. 2; Bengoetxea, supra note 485, p. 6.
\bibitem{490} Dworkin, supra note 488, p. 26-27.
\bibitem{491} Raitio, supra note 489, p. 64-65.
\end{thebibliography}
greatest extent possible given the legal and factual possibilities”. This entails that principles can be satisfied to varying degrees. In contrast, rules are norms which are always either fulfilled or not. The most important consequence of the distinction between rules and principles appears when we try to resolve collisions between these two types of norms. Alexy calls the collision in the case of rules ‘conflict of rules’ while in the case of principles he uses the term ‘competing principles’. A conflict between two rules can only be resolved by either reading an exception to the rule or by declaring one of the rules invalid. If the application of two rules would lead to mutually incompatible results and an appropriate exception cannot be made to the rule, one of the rules must be invalid. In contrast, in the case of competing principles the way of resolving the collision is weighing and balancing. If under the concrete circumstances of a case one principle is outweighed by another, this does not mean that the outweighed principle is invalid or that it has to accommodate an exception. The question of which principle outweighs the other depends on the facts of the case. No relation of absolute precedence exists between two principles. The precedence of one principle over the other is relative and conditional on the circumstances of the case. The difference between rules and principles in Alexy’s words is that “conflicts of rules are played out at the level of validity; [...] competitions between principles are played out in the dimension of weight instead”.

Another central element of Alexy’s theory is the role of the principle of proportionality. As he explains, the definition that he gives to ‘principles’ and his argument about competing principles implies the principle of proportionality: “... there is a connection between the theory of principles and the principle of proportionality. This connection is as close as it could possibly be. The nature of principles implies the principle of proportionality and vice versa. That the nature of principles implies the principle of proportionality means that the principle of proportionality with its three sub-principles of suitability, necessity (use of the least intrusive means), and proportionality in its narrow sense (that is, the balancing requirement) logically follows from the nature of principles; it can be deduced from them”.

On the basis of the above definitions and distinctions, the question can be asked whether the four freedoms can, indeed, be called fundamental ‘principles’. The four freedoms are the pillars of the internal market, while the

494. Ibid. pp. 48- 54.
495. Ibid. p. 50.
496. Ibid. p. 68.
internal market itself has been the central aim and policy of the European Union – and its predecessor, the European Community – since its inception. In this sense, the freedoms certainly have a greater weight and a higher importance than most of the other norms of primary or secondary EU law. In addition, with respect to their language, they are general, that is, they are not detailed, specific rules but abstract, generally-formulated normative standards. They also qualify as basic standards from which concrete rules are derived if we take into account all the secondary legislation which is based on either the specific legal basis provisions under the Chapters setting out the freedoms or the general legal basis provisions of Article 114 and 115 TFEU. The purpose of secondary law which is based on the latter provisions is harmonization of national rules in the interest of the internal market and consequently, the facilitation of the four freedoms. In this sense, they also constitute the reason and underlying justification for this body of secondary law. Thus, in the light of Tridimas definition of ‘principle’, the fundamental freedoms may very well qualify as such. However, they do not exactly fit Dworkin’s definition. First of all, Dworkin’s definition seems to be designed for behavioural norms, that is, rules and principles which are to be applied directly to the actions of the subjects who are subordinated to the norms and who derive rights and obligations therefrom. The fundamental freedoms embody prohibitions which are predominantly addressed to the Member State (and, as we will argue below, the Union institutions) but it is the nationals of the Member States, i.e. Union citizens and businesses, who derive rights from them. The freedoms constitute standards in the light of which other legal norms – namely, the laws of the Member States which have to comply with the requirements of the freedoms – are reviewed. Therefore, Dworkin’s definition of ‘principle’ is rather difficult to be applied to the fundamental freedoms. Even if we try to adapt that definition to the special nature of the fundamental freedoms, they do not unambiguously qualify as principles. In the way the Court applies them, they certainly do more than pointing to a direction as regards the question whether or not a provision of national law is compatible with their prerogatives. They have specific scopes of application and they dictate specific and concrete consequences as regards the status of the national norms falling within their scope. The fact that long ago, the Court declared the four freedoms (as well as the freedom of movement and residence of Union citizens) as having direct effect indicates better than anything that in the eyes of the Court, they are ‘clear, precise and unconditional’ rule-like norms rather than just principles which guide its decisions.

On the other hand, setting out from Alexy’s definition, the fundamental freedoms undoubtedly show certain characteristics of principles. The analysis
of the compatibility of national laws with the fundamental freedoms involves a crucial element of weighing and balancing of the freedoms against a legitimate public interest purported to be protected by the national measure at issue. This weighing and balancing is part of the justification stage of the analysis, specifically, the proportionality test. As we emphasized above, in Alexy’s theory there is an inextricable connection between ‘principles’ and the proportionality test. If a national measure restricts the fundamental freedoms on the ground of protecting a public interest and it does so in a proportionate manner, the restriction will be found justified. In this case the interest protected by the national measure takes precedence over the freedom at issue, in other words, it outweighs the freedom. The perception of the fundamental freedoms as principles seems to be consistent with the fact that the realization of certain public interest may prevail over the realization of the freedom under certain circumstances and with the key role that the proportionality analysis plays in deciding whether such should be the case.

A very illustrative example of the principle-like application of the fundamental freedoms is the Schmidberger case analysed in Section 3.3.3. where the Court measured the free movement of goods against the fundamental rights of freedom of expression and assembly and gave precedence to the latter. The speciality of this case is that here, the Court specifically referred to the free movement of goods as ‘principle’, meaning that it considered the fundamental freedom at issue being of the same nature as fundamental rights.

If we compare the analysis in Schmidberger with a case where the Court tests a national measure in the light of the fundamental freedoms, we see certain differences. In the latter case, the Court admits a restriction on the fundamental freedoms if the national measure pursues one of the public interest objectives set out in the Treaty (Articles 36, 45(3), 52, 62, 65 TFEU) or recognized by the Court’s case law as imperative (or overriding or mandatory) requirement in the public interest. The analysis aims at weighing two interests against each other; one is the interest of the internal market that is expressed by the requirement of free movement and the other is an important public interest, such public health, public security, environmental protection etc. In Schmidberger, the Court – since it had defined the free movement of goods as a “fundamental principle in the scheme of the Treaty” – faced a situation of competition of two principles, i.e. the free movement of goods as a fundamental freedom, on the one hand, and the

497. Case C-112/00 Schmidberger.
498. Ibid. paras. 51, 54, 70, 78.
freedom of expression and assembly as fundamental rights, on the other. In our view, the Court’s approach was different from the one that it applies when it tests the compatibility of national measures with the free movement of goods on the basis of Article 36 TFEU or the imperative requirements case law. In Schmidberger, the Court emphasised that neither the principle of free movement of goods nor the freedom of expression and assembly are absolute and under certain conditions they both admit restrictions. It then defined the core issue of the case in the following way:

“The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.”

The words ‘reconcile’ and ‘scope’ suggest that the issue is, indeed, the extent to which we allow one of the principles to have effect at the cost of the other under the concrete circumstances of the case. Thus here, both the fundamental freedom and the fundamental rights behave as ‘optimization requirements’. This approach shows more flexibility in the weighing and balancing than the compatibility analysis of a national measure under the fundamental freedoms. In addition, the result of balancing is more open-ended when two principles are competing, as in Schmidberger, than when public interest reasons protected by a national measure are weighed against the interest represented by the fundamental freedoms. In our opinion, Schmidberger was a unique case where the Court expressly recognized the free movement of goods as having the same status as fundamental rights, that is, both being ‘principles’. In contrast, when the Court applies the fundamental freedoms as a standard to measure the compatibility of national laws, it applies the freedoms as ‘rules’ rather than ‘principles’. When it allows the free movement to be restricted on the ground of legitimate public interest it defines an exception to the main rule rather than decides a competition between two principles. Hence, in our view, the Court applies the fundamental freedoms as ‘rule-like’ norms in relation to national measures. In such a case the Court decides the conflict, in effect, on the basis of the supremacy of the EU fundamental freedom over the national provision,

499. Ibid. para. 77.
thus on the basis of a hierarchy, which implies that both norms are ‘rules’ because between two ‘principles’ or a ‘rule’ and a ‘principle’ there is no hierarchy.\textsuperscript{500}

Irrespective of the above, it appears safe to assume that the Court’s labelling of the four freedoms as ‘fundamental principles’ is mostly rhetoric, which is intended to emphasise the fundamental importance and basic character of these rules within the Union’s legal system rather than to properly qualify them according to concepts of legal theory. Thus, this terminology suggests that the four freedoms, as fundamental principles, belong to those provisions of the founding Treaties which are of a higher rank compared to other provisions, which would mean – according to Tridimas – that they can play a role in interpreting those other non-fundamental provisions (see Section 3.3.3.).

5.3.3. Do the fundamental freedoms bind the Union legislature?

The significance of the above discussion on the nature of the fundamental freedoms to our topic is with respect to the question whether the Court applies the fundamental freedoms as rules or as principles when it tests the compatibility of Union acts with the latter.

Before examining this, it is necessary to raise a prior question. Specifically, do the four freedoms at all, whether in the nature of rules or in the nature of principles, bind the Union legislature?

Although in the previous Sections we have drawn the conclusion that secondary EU law is generally subject to a constitutional-type review of legality in the light of primary law, including the founding Treaties and the general principles of EU law, asking the question whether secondary law has to actually comply with the specific Treaty provisions on free movement is still not redundant. On the one hand, some of the provisions of the founding Treaties lay down obligations only for the Member States and not

\textsuperscript{500} Differently, Douma whose main thesis is that free movement under the Treaty should be considered a ‘principle’ within the meaning of Alexy’s theory of principles. He proposes that, in a conflict between the freedoms and a national measure, both free movement and the sovereignty of the Member States should be regarded as principles the scope and extent of which can only be determined in relation to each other through an optimization process. On this basis, he devises a theoretical optimization model for direct tax cases (Douma, supra note 387, Chapters 5, 6, 7).
Secondary law and the Treaty’s free movement provisions

for the Union.  

Starting with positive law, the text of the TFEU is not very instructive with regard to the question of who is bound by the free movement provisions. The provisions are drafted in a general manner not specifying to whom they are addressed. Articles 30, 34 and 35 TFEU merely state that customs duties and quantitative restrictions on imports and exports and measures having equivalent effect to the former “shall be prohibited between Member States”. Article 45 provides that “freedom of movement for workers shall be secured within the Community”. Articles 49, 56 and 63 are also drafted in a general way, saying that restrictions on the freedom of establishment, on the freedom to provide services and on the movement of capital between Member States “shall be prohibited”.

As far as the academia is concerned, the majority of commentators agree that the freedoms, which constitute the foundation stones of the internal market, can be infringed neither by acts enacted by the Member States nor by those adopted by the Union institutions.  

501. Sørensen, supra note 214, p. 146.
503. Following the classification of Scheffer, normally three main schools of thought are distinguished i) the Union legislature is bound by the free movement rules in the same way as the Member States; ii) the Union legislature is not bound by those rules; and iii) the Union legislature is bound, but not to the same extent. According to Scheffer, Barents is the main advocate of the view that the Union is not bound by the freedoms,
freedoms are not clear in this respect, other provisions of the founding Treaties support the view that the Union legislature is also bound to respect the fundamental freedoms.\footnote{Snell, supra note 428, p. 160.}

Specifically, Article 3 TEU stipulates that “[t]he Union shall establish an internal market”. Part Three of the TFEU entitled “Union Policies and Internal Actions” contains a separate Title on the internal market (Title I) within which Article 26 provides that:

“The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”

The Court defined this concept in \textit{Gaston Schul} in the following terms:

“[...] The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market [...]”\footnote{ECJ, 5 May 1982, Case 15/81 Gaston SchulDouane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal, para. 33. The Court used the term ‘common market’, which was the original term used in the EEC Treaty. The Single European Act introduced the term ‘internal market’ into the EEC Treaty. The newly introduced legal basis provision which allowed qualified majority voting in the Council (Article 100a EC, later Article 95 TFEU) referred to ‘internal market’ while the other general legal basis provision which maintained unanimity voting (Article 100 EC, later Article 94 EC, now Article 115 TFEU) referred to ‘common market’. In addition, a third expression, ‘single market’, has also been in use. In academic writing there have been different views regarding the question whether the terms ‘common market’, ‘internal market’ and ‘single market’ were synonymous or they carried different meanings. It was suggested that the ‘common market’ may encompass policies, such as competition policy, commercial policy, non-discrimination policy etc., which the ‘internal market’ may not cover. See on this, K. Mortelmans, \textit{The common market, the internal market, and the single market: what’s in a market?}, 35 CMLRev 1 (1998), pp. 101-136; L.W. Gormley, \textit{Competition and Free Movement: Is the Internal Market the Same as a Common Market?}, 13 European Business Law Review 6 (2002), pp. 517-522. The Court, however, had always been using these terms as synonyms as showed by the above citation from \textit{Gaston Schul}, see also Gormley, at p. 519 and E.C.C.M. Kemmeren, \textit{Sources of EU Law for European Tax Integration: Well-Known and Alternative Legal Instruments}, in: Traditional and Alternative Routes to European Tax Integration (D. Weber ed., IBFD 2010), pp. 29-50, at p. 30 FN 3. The...}”

\textit{Gaston Schul} Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal, para. 33. The Court used the term ‘common market’, which was the original term used in the EEC Treaty. The Single European Act introduced the term ‘internal market’ into the EEC Treaty. The newly introduced legal basis provision which allowed qualified majority voting in the Council (Article 100a EC, later Article 95 TFEU) referred to ‘internal market’ while the other general legal basis provision which maintained unanimity voting (Article 100 EC, later Article 94 EC, now Article 115 TFEU) referred to ‘common market’. In addition, a third expression, ‘single market’, has also been in use. In academic writing there have been different views regarding the question whether the terms ‘common market’, ‘internal market’ and ‘single market’ were synonymous or they carried different meanings. It was suggested that the ‘common market’ may encompass policies, such as competition policy, commercial policy, non-discrimination policy etc., which the ‘internal market’ may not cover. See on this, K. Mortelmans, \textit{The common market, the internal market, and the single market: what’s in a market?}, 35 CMLRev 1 (1998), pp. 101-136; L.W. Gormley, \textit{Competition and Free Movement: Is the Internal Market the Same as a Common Market?}, 13 European Business Law Review 6 (2002), pp. 517-522. The Court, however, had always been using these terms as synonyms as showed by the above citation from \textit{Gaston Schul}, see also Gormley, at p. 519 and E.C.C.M. Kemmeren, \textit{Sources of EU Law for European Tax Integration: Well-Known and Alternative Legal Instruments}, in: Traditional and Alternative Routes to European Tax Integration (D. Weber ed., IBFD 2010), pp. 29-50, at p. 30 FN 3. The..."
Secondary law and the Treaty's free movement provisions

If, in terms of Article 26 TFEU, Union measures are aimed at the establishment or the facilitation of the functioning of the internal market and the main characteristic of such internal market is the free movement of goods, persons, services and capital, it is evident that Union measures may not obstruct or hinder these movements.

The position of Article 26 within the scheme of the TFEU shows that the internal market is one of the policies of the Union. As regards the EC Treaty, the provisions on the internal/common market were included in Articles 2, 3 and 14 thereof. Article 2 provided that the objectives of the Community were to be achieved through the means of, inter alia, the establishment of a common market. Article 3 provided that the activities of the Community included an internal market. However, as the case law shows, the internal market was – and still is – not only a means, or activity or policy but also an aim or objective of the Union in itself. In Gaston Schul the Court observed:

“[...] Such an interpretation accords with the need to take account of the objectives of the Treaty which are laid down in Articles 2 and 3 among which appears, in the first place, the establishment of a common market [...]” (emphasis added)

And in further cases:

“Again, it is to be borne in mind that in 1986 the Single European Act added to the EEC Treaty Article 8a (then Article 7a of the EC Treaty, and now, after amendment, Article 14 EC), which set as an aim the establishment of an internal market before 31 December 1992.” (emphasis added)

On the basis of the above, Kemmeren concludes that the “establishment of an internal market was, is and will be one of the most important aims of the European Community and the European Union, since this aim is one of the fundamentals of European law”. If it is so, it is evident that the Union cannot go against one of its principal aims by enacting measures which would be in breach of the fundamental freedoms that form the foundations of the internal market.

discussion has lost its relevance under the TFEU as the Lisbon Treaty replaced the term ‘common market’ with that of ‘internal market’ everywhere in the TFEU, see Article 2 g) Lisbon Treaty.

506. Kemmeren, supra note 505, pp. 31-32.
507. Case 15/81 Gaston Schul, para. 33.
508. ECJ, 9 September 2004, Case C-72/03 Carbonati Apuani Srl v Comune di Carrara, para. 23.
509. Kemmeren, supra note 505, p. 32.
In addition to Article 3 TEU and Article 26 TFEU, Snell also refers to Articles 114 and 115 TFEU when he argues that the Union legislature cannot escape the obligation to respect the fundamental freedoms.\textsuperscript{510} As pointed out in Section 5.2., these general legal basis provisions presuppose that Union legislation based on them promote the internal market, which excludes the possibility for such legislation to infringe upon the fundamental freedoms. Indeed, Article 114 specifically refers to Article 26, the provision which defines the internal market with reference to the fundamental freedoms.

Having concluded that the obligation to respect the internal market and its foundations, the fundamental freedoms, does, in general terms, apply to the Union, the question remains whether the freedoms bind the Union legislature as hard and fast ‘rules’ or rather as ‘principles’ which only require optimization. With regard to Member State measures, we concluded that the fundamental freedoms basically behave as ‘rules’ in the way the Court applies them. The question in the case of Union measures arose in somewhat different terms. In particular, the question that the Court faced in its early case law was whether when it tests the compatibility of secondary Union law with the fundamental freedoms it should apply the concrete legal provisions of the four freedoms set out in the TFEU or merely the principles of free movement. This question presupposes that there are two separate norms regarding free movement: on the one hand, the rules laid down in the TFEU, and on the other, principles, which embody the requirements of free movement as general principles of EU law.

The early case law shows that the Court followed this view; that is, it applied the rules of the TFEU to Member States’ measures whereas the principle of free movement to Union measures. For example, in \textit{Rewe Zentral} it did not test the Union directive whose validity was at issue against the provisions of the TFEU on the free movement of goods (Article 34-36). Instead, it measured the directive against the ‘principle of freedom of trade within the Community’. The Court specifically observed that the TFEU provisions setting out the prohibition of quantitative restrictions were addressed to the Member States:

\begin{quote}
although it is true, ..., that articles 30 to 36 [now Articles 34 to 36 TFEU] of the Treaty apply primarily to unilateral measures adopted by the Member
\end{quote}

\textsuperscript{510.} Snell, supra note 428, p. 160.
States, the Community institutions themselves must also have due regard to freedom of trade within the Community, which is a fundamental principle of the common market.”

When finding that the directive did not infringe the principle of freedom of trade, the Court relied on the aim of the directive, which was the protection of agricultural products against harmful organisms. Although the public interest exceptions under Article 36 TFEU do include the protection of health of plants, the Court did not refer to this provision in order to justify any potential restriction on the freedom of trade entailed by the directive. This confirms that the Court was of the opinion that the provisions of the Treaty on the prohibition of quantitative restrictions did not apply to a Union measure.

In *ADBHU* the Court scrutinized a directive in the light of the free movement of goods, characterising the latter as a general principle of Union law similar to that of freedom of competition. In particular, the Court stated that:

> “the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.”

The consequence of applying the principle of freedom of movement to the acts of the Union legislature instead of the concrete norms laid down in the Treaty is that it enables the Court to use them as wholly principle-like norms; that is, as guiding standards which point to a certain direction or optimization requirements which allow the balancing of various different interests – and not only those expressed in the Treaty-based justifications or in the mandatory requirements – against the interest of ensuring free movement. Most importantly, however, by applying the principle of free movement to Union acts while the free movement provisions of the Treaty to national measures the Court purports to justify the use of different tests for each of the two measures. If Union acts are subjected to the exact same Treaty provisions as national measures, it is more difficult to explain the application of different tests for the two. In fact, as we will see later,

511. ECI, 29 February 1984, Case 37/83 *Rewe Zentral AG v Direktor der Landwirtschaftskammer Rheinla*, para. 18.

512. ECI, 7 February 1985, Case 240/83 *Procureur de la République v Association de défense des brûleurs d’huiles usages (ADBHU)*, para. 9.

the Court both in *Rewe Zentral* and *ADBHU* maintained the validity of the Union measures at issue by using a different test than the one it normally applies to national measures.

Some authors in academia are also of the opinion that the freedoms as laid down in the Treaty in the form of legal provisions do not apply to the Union institutions. This view was first advanced by Matthies.\(^{514}\) In particular, based on *Rewe Zentral*, he concluded that the Treaty-based exceptions to the free movement of goods included in Article 36 are specifically designed to settle conflicts between national and Union interests. Thus, this Treaty provision is not apt to decide conflicts between two Union interests; in particular, where the interest of the internal market protected by one of the freedoms clashes with another interest, e.g. public health protected by a secondary Union act. Therefore, he advocates that when the Union legislature occupies a certain field it ousts Article 36 TFEU. This is due to the fact that it may have to balance the requirements of the internal market and public health in another manner as that dictated by Article 36. According to Matthies, the dilemma that such balancing involves is not that of on what grounds should derogations be allowed from the free movement – that being the main question which underlies Article 36, as well as the mandatory requirements – but rather the administrative law question of what forms of legislative solutions are permissible and what are not. Therefore, such balancing cannot be carried out on the basis of Article 36. Consequently, in Matthies’ theory the rational of not applying the free movement provisions of the Treaty to Union acts is to allow more flexibility for the Union legislature in the balancing between conflicting interests. Hence, it is about allowing the fundamental freedoms to be applied as genuine principles in terms of Alexy’s definition. Similarly, Mortelmans suggests that it is not the free movement provisions but the principle of free movement which should bind the Union legislature.\(^{515}\) In fact, Mortelmans’ core proposal, i.e. a concordance rule to be inserted in the founding Treaties for the purpose of giving parameters to the Court as regards how to review Union acts on their compatibility with the fundamental freedoms, is based on a constitutional interpretative tool applied by the German Constitutional Court for the solution of conflicts between fundamental rights. As such, the concordance rule embodies the essence of resolving competition of principles. This means that none of the principles that simultaneously govern a certain situation enjoys a

\(^{514}\) The description of Matthies’s views here is based on the account given by Currall and Mortelmans, see Currall, supra note 513, p. 194 and Mortelmans, supra note 434, p. 1338 who refer to Matthies, *Die Verfassung des Gemeinsamen Marktes*, in: Gedächtnisschrift für Chr. Sasse, Band I (Baden-Baden 1981).

\(^{515}\) Mortelmans, supra note 434, p. 1336 et seq.
predetermined precedence over the other; rather the prevalence of one or the other depends on the concrete circumstances of the case. Mortelmans suggests that the legality of Union acts which protect a legitimate interest acknowledged in the Treaties and which conflicts with the interest represented by the fundamental freedoms should be judged by the help of such concordance rule. We will discuss the details of this proposition in Section 7.4.4.2. (iv).

In contrast to these academic views, it appears that the Court no longer makes a difference between Union measures and Member State measures with regard to the question whether it is the principle of free movement or the free movement provisions of the Treaty which serve as a standard for compatibility review. In essence, the Court applies the Treaty’s free movement provisions both to Member State measures and to Union measures, which entails that those free movement provisions behave as rules not only vis-à-vis national measures but also towards Union acts. We will return to this issue in more detail in Section 7.4.2.

5.4. Overview

In this Chapter, we examined various aspects of the relationships between primary and secondary Union law discussing three scenarios: the general principles of EU law and secondary law, the legal basis provisions of the Treaty and secondary law, the free movement provisions of the Treaty and secondary law. Pursuant to the hierarchy of norms of EU law, in all these scenarios secondary law must comply with higher ranking norms of primary law. Beyond this basic tenet, the relationships of these various norms of EU law are rather varied and multifaceted.

On the basis of the analysis above, we can observe some general tendencies as to how the Court approaches the interaction of these various norms of Union law. First, it is apparent that the intensity of the scrutiny of secondary law differs when the Court reviews secondary law on substantive grounds, on the one hand, and procedural grounds, on the other. The Court is much more willing to engage in the review of secondary law on procedural grounds than on substantive grounds. This is proven simply by the volume of the case law concerning the two types of review. Cases dealing with challenges to the legal basis of Union legislation considerably outweigh the cases where secondary law has been challenged on its compatibility with the general principles of EU law, fundamental rights or the Treaty freedoms. If we also take into account the number of successful challenges in the latter
cases, the suspicion that the Court refrains from exercising effective sub-
stantive scrutiny over Union legislation inevitably arises. Second, the scruta-
tiny of general (legislative) acts and individual (administrative) acts of the
Union institutions seem to differ, as administrative acts are more frequently
annulled by the Court on the ground of infringing substantive standards than
legislative acts. However, more recently, the Court seems to have intensified
the substantive review of legislative Union acts (Joined Cases C-92/09 and
C-93/09 Schecke, Case C-236/09 Test Achats). This may have to do with
the Charter’s gaining binding force with the Lisbon Treaty, which not only
increased the visibility of human rights under EU law but may have also
reinforced the Court in its role as a constitutional court entrusted to ensure
respect for human rights by Union legislation. Despite this recent trend, the
Court’s track record as a constitutional court supposed to counterbalance
the Union’s political institutions can certainly be improved. For example,
when scrutinizing secondary legislation, the Court still seems to be hesitant
to effectively enforce primary law norms of an economic nature. As a result,
currently the discretion of the Union legislature seems to be more limited
by classic fundamental rights (i.e. political, civil or due process rights) and
general principles than fundamental rights of an economic nature or, for
that matter, the Treaty freedoms. Furthermore, even if the Court has become
more active in enforcing substantive standards vis-à-vis secondary law, it
still seeks to avoid, as far as possible, the need for declaring non-conforming
secondary law invalid. Instead of invalidation, it applies various techniques
– predominantly consistent interpretation of secondary law with primary
law (Joined Cases C-402/07 and C-432/07 Sturgeon) – to ensure the pre-
valence of the higher ranking primary law norm while, at the same time,
maintaining the validity of secondary law. Admittedly, with this technique
the Court can successfully avoid the impression of interfering with the insti-
tutional balance within the Union, however, the excessive use of it may lead
to unpredictability in the application of positive law.

The general principles of EU law are primary law norms of a constitutional
status in the Union’s legal order, which entails that secondary Union law
must comply with them failing which such secondary law can be declared
invalid. In fact, the main function of the general principles of EU law,
besides being interpretative and gap filling tools, is to serve as substantive
standards for a constitutional-type review of secondary law. Apart from
the direct review of secondary law in the light of the general principles,
including fundamental rights, we discussed other aspects of the relationship
between these norms. As regards the relationship of national law – sec-
dary Union law – general principles of EU law, we have seen that in cases
where an act of secondary law brings about minimum harmonization the
implementation by a Member State of more rigorous standards than those laid down in secondary law is considered by the Court as not falling within the scope of Union law. As the condition for applying the general principles of EU law to Member State measures is not met, the stricter standards under national law cannot be tested against those general principles. Furthermore, we described some techniques through which the Court sidesteps the invalidation of Union legislation which is suspect of contravening the general principles of EU law. Besides consistent interpretation, the Court employed a highly innovative approach in its VAT case law whereby it relegated the principle of fiscal neutrality to the rank of secondary law. As a consequence, the provisions of the VAT Directive may deviate from such principle without infringing a higher ranking norm thus, retrospectively justifying the Court’s prior statements according to which the deliberate choice of the Union legislature may prevail over the requirements which would flow from the principle of fiscal neutrality. This case law may have implications which go far beyond the fact that the principle of fiscal neutrality became a mere guiding tool in relation to the common system of VAT instead of a higher ranking standard with which the provisions of the VAT Directive must comply. Specifically, the Court seems to have created a new legal category, that is, fundamental principles having the status of secondary law, the exact status, nature and effects of which will all need to be clarified by future case law.

We dealt with the principle of proportionality in more detail than with other general principles. We pointed out that this principle has multiple functions with regard to the review of legality of secondary Union law. When secondary Union law is tested directly against the principle of proportionality as an autonomous ground for review, the principle protects the individual from undue interferences from the public authority exercised by the Union institutions. In other cases, it is intended to protect the Member States from encroachments upon their competences by the Union. The principle of proportionality may also play a role as a non-independent standard when other norms of primary law granting individual rights – such as other general principles of EU law, fundamental rights or the Treaty’s fundamental freedoms – are claimed to be infringed by a Union measure and proportionality arises as part of the question whether such infringement can be justified. Member State measures may also be subject to scrutiny in the light of the principle of proportionality both as a self-standing general principle of EU law and as a standard which helps balance and weight two conflicting rights or interests. Comparing the standard of proportionality review applied by the Court to Member State measures, on the one hand, and Union measures, on the other, we concluded that the Court scrutinizes the proportionality of Union measures much more leniently than Member State measures. Basically, instead of
examining in detail the suitability and necessity (and potentially the \textit{stricto sensu} proportionality) of the measure in relation to the objective it pursues – as it does in the case of Member State measures – the Court applies the ‘manifestly inappropriate’ test to Union measures. According to this test, the broad discretion that the Union legislature enjoys in areas which entail political, economic or social choices of a complex nature cannot be overridden by the Court unless the Union legislature committed a manifest error of assessment in making those choices. On the basis of the case law, it appears that any and all policy area can be considered as ‘involving political, economic or social choices of a complex nature’. We hinted at the possibility that the difference in the proportionality standard as applied to Member State measures and Union measures may be due to the different functions that the principle of proportionality fulfils in the situations that we examined in Section 5.1.3.2. above. Namely, the principle of proportionality fulfils a public law function when Union measures are tested against it as a self-standing standard whereas it primarily performs a market integration function when Member State measures which \textit{prima facie} infringe the Treaty’s free movement provisions are tested against it as part of the analysis of their justifiability. In this Chapter, we did not investigate the case where Union acts are measured for their compatibility with the fundamental freedoms and the examination of proportionality forms part of such scrutiny. In such case, the principle performs a balancing and weighing exercise between two Union interests, i.e. the internal market and a public interest pursued by the Union act, for example, consumer protection, environmental protection or public health protection. This scenario resembles to the review of national measures in the light of the fundamental freedoms having regard to the fact that the principle of proportionality plays the same function in both cases, i.e. market integration. This would suggest that the proportionality of Member State measures and Union measures should be measured by the same standard in these cases. We did not, however, analyse the case law as regards this issue in this Chapter. Hence, we have left open the question whether or not the standard of proportionality applied by the Court when assessing the conformity of Union measures with the fundamental freedoms is the same as the one applied to national measures in a similar review. This question will be answered in Chapter 7.

Finally, we have observed that the Court in recent cases on the review of Union measures in the light of fundamental rights has considerably enhanced the level of proportionality analysis. Thus, the ‘manifestly inappropriate’ test seems to have been left behind at least, as far as the fundamental rights scrutiny of Union legislation is concerned.
The legal basis provisions set out in the TFEU constitute norms of primary law from which the various acts of secondary law derive their existence. The control by the Court of the legal basis of secondary Union law plays a crucial role in maintaining the system of horizontal and vertical distribution of powers within the Union. By verifying that secondary legislation is adopted on the correct legal basis prescribing a certain legislative procedure the Court ensures the maintenance of institutional balance. On the other hand, by clarifying the conditions under which the Union legislature can use Article 114 and 115 TFEU as a legal basis for harmonization in order to promote the internal market, the Court guarantees that the Union does not unduly expand its competences to the detriment of the Member States. The latter case law shows that the review of the legal basis of secondary law is interrelated with the question of compatibility of secondary law with the fundamental freedoms.

In this Chapter we only gave an introduction to the free movement provisions of the Treaty or – as they are called in legal doctrine – the fundamental freedoms by discussing their nature, status and distinguishing features from other primary law norms while leaving the in-depth analysis of their relationship with secondary law to subsequent Chapters. The fundamental freedoms are the cornerstones of the internal market forming the basis of the Union’s economic constitution. Due to their direct effect they are the source of individual rights. Insofar as they grant individual rights they resemble to fundamental rights. In fact, some of the (economic) fundamental rights overlap considerably as to their content with the fundamental freedoms. In spite of this, there are a few important differences between these two types of norms. First, their respective functions: the fundamental freedoms have an integrationist function in that they had played a pivotal role in the establishment and functioning of the internal market whereas the fundamental rights have a legitimizing role in relation to the public authority exercised by the Union institutions. Second, their scope of application vis-à-vis Member State measures: the fundamental freedoms apply only to cross-border (intra-EU) situations whereas the fundamental rights may also apply to purely domestic situations as long as the Member State action under review falls within the scope of Union law. Third, the type of right they guarantee: the fundamental freedoms guarantee – basically and initially – equal treatment of cross-border and domestic situations and – potentially and ancillary (depending on the freedom at issue, the type of measure under scrutiny and the policy field) – a general freedom of action to economic agents whereas the economic fundamental rights entail – by their nature – a general freedom of action for individuals. In other words, the fundamental freedoms protect individuals engaged in intra-Union trade or business, primarily, from
discrimination and, potentially, from non-discriminatory restrictions whilst the (economic) fundamental rights protect individuals from disproportionate regulatory interferences (into their economic sphere) by the sovereign.

As regards the nature of the fundamental freedoms, we concluded that they have the characteristics of ‘rules’ rather than ‘principles’, at least, when they are applied as a standard of review for measuring the compatibility of Member State measures. Then we raised the question whether there are two different norms of free movement – the Treaty provisions on free movement, which apply like ‘rules’ to national measures, on the one hand, and the general principle of free movement, which applies as a ‘principle’ to Union measures, on the other. Although the Court’s early case law suggests that the fundamental freedoms have such dual nature and the view also found support in academic quarters, on the basis of more recent case law, we concluded that the free movement provisions of the Treaty apply as ‘rules’ not only to national measures but also to Union acts. However, the fundamental freedoms can behave as ‘principles’, specifically, when they collide with fundamental rights.