Protecting Fundamental (Social) Rights through the Lens of the EU Single Market: The Quest for a More 'Holistic Approach'

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In this article, four trajectories will be followed with a view to further developing the linkages that exist between the EU Single Market and fundamental (social) rights and to examining to what extent the EU Single Market, apart from putting constraints on the realization of social rights, offers the chances to enhance and even strengthen the social face of the EU. The question is whether the current approach to EU free movement law by the EU Institutions and most notably the Court of Justice of the European Union (CJEU) could benefit the protection of fundamental social rights. The article also examines the potential impact of the EU Charter and the changes brought about by the Lisbon Treaty, strengthening the social face of the EU.

1 INTRODUCTION

The development of fundamental rights within the European Union (hereinafter: 'EU') is strongly linked with the EU Single Market. Not only has the EU Single Market constituted the source for the development of an EU autonomous fundamental rights regime, but it also raises barriers to the realization of fundamental rights by Member States. This 'Janus-like' relationship between the EU Single Market and fundamental rights has been extensively discussed elsewhere.[1]

In this article, four trajectories will be followed with a view to further developing the linkages that exist between the EU Single Market and fundamental (social) rights and to examining to what extent the EU Single Market, apart from putting constraints on the realization of social rights, offers the chances to enhance and even strengthen the social face of the EU. There is after all a clear social 'rhetoric' in the Treaty of Lisbon. The Treaty includes the

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1 See, e.g., S de Vries, *The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, in *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing* 235–260 (S. de Vries, U. Bernitz & S. Weatherill eds, Hart 2015).

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aim of establishing a social market economy (Article 3 TEU), an integration clause (Article 9 TFEU) requiring the EU to pursue a high level of employment and to guarantee adequate social protection, or through the incorporation of the non-discrimination principle as contained in Article 10 TFEU. In addition, the legally binding nature of the EU Charter upholds the protection of fundamental rights, including social and economic rights, at the level of the European Union.

The question is whether these changes, set in motion by the Lisbon Treaty, mean that the EU institutions, including the CJEU, will be able to genuinely advance the EU's social dimension, particularly in the light of the well-rooted economic values of the EU as represented by the four Treaty freedoms.

2 THE DEVELOPMENT OF AN AUTONOMOUS FUNDAMENTAL RIGHTS REGIME AT EU LEVEL

2.1 Creation of the new legal order

Contrary to other international treaties, the Treaty establishing the European Economic Community (hereinafter: 'EEC') contained 'sovereign' rights, which found their origin in the objectives of the EEC, involving an economic integration process with at its heart the establishment of the common (internal) market.[2] Against this background, the Court in the seminal case *Van Gend & Loos* held that:

> the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[3]

The special nature of the Community legal order allowed the ECJ (as it then was) to postulate the principle of direct effect, thereby considerably extending the rights of EU citizens and, one year later in the case *Costa v. Enel,* the principle of primacy.[4] These principles, in contrast with international law, exclusively follow from the Community legal order and are thus effectuated independently from national or international law.[5]

The creation of the Community's special legal order with the autonomous character of primacy and direct effect entails that the borderline between

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2 R. Barents, *Van Gend & Loos en Costa/ENEL – Kleine dingen en grote gevolgen*, in *Het recht van de Europese Unie in 50 klassieke arresten* 23 (T.W.B. Beukers, H.J. van Harten en S. Prechal eds, Boom 2010).

3 Case 26/62 *Van Gend & Loos* ECLI:EU:C:1963:11963.

4 Case 6/64 *Costa v. Enel* ECLI:EU:C:1964:66.

5 Barents, *supra* n. 2, 23–24.

(sovereign) state and the law has been abandoned.[6] The possibility for private individuals to claim rights against the Member States, ever since *Van Gend & Loos* in an 'increasingly large number of settings'[7] has shaped the EU into a rights-based system.[8] As a result of this 'integration through law', political economic values, such as the furthering of the market economy, the opening up of the national market by anti-discrimination rules and the commitment to a system of undistorted competition, were now supported by the 'economic constitution'. This is a law-based order safeguarding economic freedoms and protecting competition by supranational institutions, which not only is independent from political decisions but also trumps national constitutional law.[9]

The fact that the EEC – the predecessor of the EU – created its own legal order also explains how the Court has assessed general principles of Community law, including fundamental rights, which, due to the autonomous character of the principles of direct effect and primacy, must be interpreted and applied by all Member States in a uniform manner.[10] Or, in other words, the ECJ has made its 'own autonomous assessment in light of the specific demands of the EU legal order' and 'has claimed exclusive authority in interpreting that autonomous EU standard'.[11] Hence, from the autonomous Community's legal order developed within the context of the common market, an autonomous EU fundamental rights regime has emerged. According to the Court in *Hauer*, the assessment of a possible infringement of fundamental rights cannot be carried out in the light of national law, as otherwise the substantive unity and efficacy of Community law would be damaged and the unity of the common market would be destroyed.[12]

The autonomy and primacy of the EU fundamental rights system was famously emphasized by the ECJ in the *Kadi* case law, wherein the Court ruled that EU measures implementing United Nations Security Council resolutions violated EU fundamental rights. The ECJ made clear that it is seriously

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6 *Ibid*., 28. See also B. de Witte, *The Continuous Significance of Van Gend en Loos*, in *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* 9–15 (M. Poiares Maduro & L. Azoulai eds, Hart 2010).

7 E. Muir, *Fundamental Rights: An Unsettling EU Competence,* 15 Hum. Rights Rev. 28 (2014).

8 L. Azoulai, *The European Court of Justice and the Duty to Respect Sensitive National Interests*, in *Judicial Activism at the European Court of Justice* (M. Dawson, E. Muir & B. De Witte eds, Edward Elgar 2013), Ch. 8.

9 A. Veldman & S. de Vries, *Chapter 4 – Regulation and Enforcement of Economic Freedoms and Social Rights: A Thorny Distribution of Sovereignty*, in *Soveignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement* 68 (T. Van den Brink, M. Luchtman & M Scholten eds, Intersentia 2015).

10 Barents, *supra* n. 2, 24.

11 N. De Boer, *Addressing Rights Divergences under the Charter: Melloni*, 50 Com. Mkt. L. Rev. 1083–1103, 1092 (2013).

12 Case 44/79, *Hauer*, ECLI:EU:C:1979:290, para. 14.

committed to fundamental rights protection.[13] Most recently Opinion 2/13 on the accession of the EU to the European Convention on the Protection of Human Rights (hereinafter: ECHR) also contains a 'robust declaration of the autonomy of EU law'.[14] According to the CJEU, as *inter alia*, the draft accession agreement failed to take account of the special characteristics of EU law, it must be held incompatible with EU law. Through its Opinion, the Court reinforced the importance of the 'new autonomous legal order' and emphasized that the EU has created its own constitutional framework.[15] The Court is apparently not ready to take the edge off important principles of its self-construed, autonomous legal order, such as supremacy or effectiveness. The consideration of EU law as an autonomous source of law, the rules of which bind both Member States and citizens, has been of crucial importance for market integration. In addition, the directly effective rules on free movement, which prohibit restrictions imposed by Member States or private parties, have been the driving force of the European integration process. This is generally referred to as the 'normative', functional method of integration.[16]

In recent decades, this method has increased the scope of application of the EU Single Market law dramatically. Hardly any area of economic and social life escapes from the application of the law of the internal market.[17] What matters is whether the national measure has an effect on trade and free movement. The fact that a certain matter is left to the Member States, for instance in the field of social policy such as the rights to take collective action and to strike, is irrelevant for the applicability of the prohibitive rules contained in the Treaty.[18]

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13 G. De Búrca, *The Evolution of EU Human Rights Law*, in *The Evolution of EU Law* 488 (P. Craig & G. de Búrca eds, Oxford University Press 2011). Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* ECLI:EU:C:2008:461; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and UK v. Kadi (Kadi II)* ECLI:EU:C:2013:518; see also: A. Gattini, *Case Note*, Com. Mkt. L. Rev. 213–239 (2009); K. Lenaerts, *Upholdig Union Values in Times of Societal Change: The Role of the Court of Justice of the European Union*, speech of 16 Jan. 2014, at: http://www.forum-dialogue.lu/binaries/hima.Speech/AF7696DEFF31B098F1EE73C8A1878D0B/file_FR/Discours_de_M_Lenaerts_16.01.14.pdf (accessed 31 Mar. 2014).

14 S. Douglas Scott, *The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon*, in *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing* 23 (S. de Vries, U. Bernitz & S. Weatherill eds, Hart Publishing 2015).

15 *Opinion 2/13*, 18 Dec. 2014, [2014] ECR 0000. See also T.A.J.A. VanDamme, *Advies 2/13 en de constitutionele identiteit van de EU* (2015) 63 SEW 616–627.

16 K.J.M. Mortelmans, *Ordenend en sturend beleid en economisch publiekrecht* (oratie Utrecht) 9–10 (Kluwer 1985).

17 S. Weatherill, *From Economic Rights to Fundamental Rights*, in *The Protection of Fundamental Rights in the EU After Lisbon* 14 (S. de Vries, U. Bernitz & S. Weatherill (red.) eds, Hart Publishing 2013).

18 S. Prechal & S.A. de Vries, *Viking/Laval en de grondslagen van het internemarktrecht*, *SEW*, afl. 11, 426–427 (2008). Zie o.a. HvJ EG 28 Apr. 1998, C-158/96 (*Kohll*); HvJ EG 4 maart 2004, C-334/02 (*Commissie/Frankrijk*); HvJ EG 13 Dec. 2005, C-446/03 (*Marks & Spencer*); HvJ EG 11 Dec. 2007, C-438/05 (*Viking Line*); HvJ EG 18 Dec. 2007, C-341/05 (*Laval un Partneri*).

2.2 Limits to the (autonomous) EU fundamental rights regime

Where EU law does not apply, because the national measure does not fall within the scope of application of EU law, EU fundamental rights and the EU Charter do not come into the picture. Furthermore, the Court does not always seem to be willing to apply the EU Charter to national measures, which may nevertheless constitute a clear violation of fundamental rights, or to give sufficient attention to fundamental (social) rights, which may nevertheless be relevant, considering the circumstances. In certain, more politically sensitive, cases, the Court even seems to restrict the scope of application of the EU Charter. The point of departure is that the Charter applies to acts of Member States, when they act in the scope of Union law. Even though the text of Article 51 of the EU Charter suggests a narrower interpretation by using the words 'implementing EU law', the Court in the *Åkerberg Fransson* case reconciled this more narrowly formulated text of Article 51 with its earlier case law on general principles.[19]

However, in a number of cases concerning social rights, the Court has denied jurisdiction to apply the Charter because of the lack of a (sufficient) connection with EU law, although the national measures were adopted within the framework of EU legislation.[20] In several cases concerning the reform of national labour laws as a condition for loans or other financial support from the EU, the Member States and the International Monetary Fund (IMF), as agreed upon with the Troika (IMF, European Commission, European Central Bank (ECB)),[21] the Court refused to apply the Charter. In a Portuguese case, for instance, the Portuguese courts asked the ECJ whether the rather draconian measures adopted by the Portuguese government, including the freezing of wages in the governmental sector and a decrease of the aggregate public sector wage bill, were compatible with the Charter. The Portuguese measures were adopted as a consequence of a Council Decision, which expressly referred to the agreement between Portugal and the Troika – the Memorandum of Understanding. Nevertheless the Court considered this as a matter of national and not EU law.[22]

Another case concerned the unemployed Romanian Elisabeta Dano, legally resident in Germany.[23] The German authorities refused her the right to social

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19 Case C-617/10, *Åkerberg Fransson* ECLI:EU:C:2013:105, paras 20–21.

20 Case C-333/13, *Elisebeta Dano* ECLI:EU:C:2014:2358.

21 See also C. Barnard, *The Charter, the Court – and the Crisis* Legal Studies Research Paper Series No. 18/2013, University of Cambridge.

22 Case C-128/12, *Sindicatos dos Bancários do Norte* ECLI:EU:C:2013:149. See also C. Barnard, *The Silence of the Charter: Social Rights and the Court of Justice*, in *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing* 173–188 (S. de Vries, U. Bernitz & S. Weatherill eds, Hart 2015).

23 Case C-333/13, *Elisabeta Dano*, ECLI:EU:C:2014:2358.

assistance. The EU Charter could not help her, as, according to the ECJ, the Member States are competent to determine the conditions for granting social benefits and thus also to establish the level of social protection. The outcome of this case is reasonable in the light of EU legislation, which also seeks to combat 'social tourism'. But the way in which the Court restricts the scope of the Charter seems to be in sharp contrast with other decisions. Germany indeed did not *implement* EU law, but acted within the framework of EU legislation, which should normally suffice to trigger the application of the EU Charter. In these situations, European citizens continue to have to rely on either national or international law, e.g., the European Convention for the Protection of Human Rights (ECHR) for the protection of their fundamental social rights.

2.3 Important consequences, if EU law applies

Once EU law applies, Member States cannot continue to apply their national fundamental rights standards 'just like that'. As stated above, the autonomous legal order together with the principles of supremacy, unity and effectiveness determines the 'bandwidth' for the application of fundamental rights. The EU Charter, and particularly Article 53 thereof, does not change this. According to Article 53, the Charter shall not be interpreted as restricting or adversely affecting the human rights and fundamental rights as recognized by Union law, international law, the ECHR and *the Member States' constitutions*. Article 53 of the Charter resembles Article 53 of the ECHR, which provides for a minimum standard of human rights protection above which the contracting parties are free to set more stringent standards. In that sense, the insertion of Article 53 in the EU Charter has led to some confusion as it could imply that Member States would, similarly to the situation under the ECHR, always be allowed to apply their more stringent national constitutional norms. In the *Melloni* judgment, the Court held that Article 53 cannot be considered as derogation from the principle of primacy. It cannot be seen as a provision 'through which EU law authorises national courts to give priority to their own constitutional law when that law gives more protection to individual rights than EU law'.[24] In *Melloni*, the question was raised as to whether Article 53 would give general authorization to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving

[24] B. De Witte, *Article 53*, in *The EU Charter of Fundamental Rights – A Commentary* 1538 (S. Peers et al., eds, Hart 2014).

from the Charter and, where necessary, to give it priority over the application of provisions of EU law.[25]

Furthermore, the ECJ is bound to give an autonomous and uniform interpretation of EU legislation (see hereafter), which means that, although Member States disagree about important fundamental (social) rights or ethical questions, there is less scope for pluralism and diversity once these values have been (partly) covered by EU legislation.[26]

3 THE EU SINGLE MARKET AS A 'BARRIER' FOR THE PROTECTION OF FUNDAMENTAL SOCIAL RIGHTS AND *VICE VERSA*

Originally, the founding fathers of the EEC believed that, although economic integration should not go without social integration, this would ensue mainly from the functioning of the common market itself. Over time it was accepted that the economic dimension of the EU was furthered by the economic constitution, comprising the four freedoms, and that the social dimension belonged to political legislation remaining at national level.[27] This 'decoupling' of the economic and social spheres at EU level, where the competences of the EU to adopt measures in the social policy field are limited, led to the constitutional asymmetry between economic and social policies, and to tensions and conflicts.[28]

3.1 Fundamental freedoms

3.1[a] *Fundamental Status of the Four Freedoms*

At the heart of the EU legal order, we find the economic freedoms, which have acquired a fundamental status, for they represent rights that constitute the basic framework conditions for the making of a single market economy. The fundamental status of the four freedoms appears from a number of developments. The freedoms have played a vital role in building Europe's economic constitution. According to the Ordo-liberal school, which originates from the German town of Freiburg in the 1930s, the constitution should protect the economic freedoms, 'which are as integral to the protection of human dignity, and as indicative of a free society, as political freedoms, which are themselves

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25 Case C-399/11, *Melloni* ECLI:EU:C: 2013:107, para. 56.
26 Case C-34/10, *Oliver Brüstle v. Greenpeace* ECLI:EU:C:2011:669.
27 Veldman & De Vries, *supra* n. 9, 74.
28 F.W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40(4) J. Com. Mkt. Stud. 646–670, 646 (2002).

liberal in nature and which therefore underscore individual economic freedoms'.[29]

The ECJ itself has repeatedly enhanced their fundamental status in its case law. The Court uses terms like fundamental freedom,[30] one of the fundamental principles of the Treaty,[31] or fundamental Community provision.[32]

Furthermore, the economic freedoms can often be defined in terms of the freedom to pursue a trade or profession, which is a fundamental right laid down in the Charter.[33] Interestingly, in a number of cases, the Court has confirmed this view by making clear that the economic Treaty freedoms could also be seen as a specific amplification of the Charter.[34] Certain Charter provisions, i.e., Article 15(2) on the freedom of every EU citizen to exercise the right of establishment and to provide services in any Member State, Article 16 on the freedom to conduct a business and Article 17 on the right to property, may reinforce the free movement rules and thus the market integration process. According to the CJEU in the *Sokoll-Seebacher* case, 'Article 16 of the Charter refers, *inter alia*, to Article 49 TFEU, which guarantees the freedom of establishment.'[35] In *Gardella*, the Court held that 'Article 15(2) of the Charter reiterates *inter alia* the free movement of workers guaranteed by Article 45 TFEU.'[36]

3.1[b] *Broad Scope of Application of the Treaty Freedoms*

The material, personal and substantive scope of the Treaty freedoms is broad, which means there is hardly any area of socio-economic life that escapes from the application of the fundamental freedoms. National measures, seeking to

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29 D. Chalmers, *The Single Market: from Prima Donna to Journeyman,* in *New Legal Dynamics of European Union* 57 (Shaw & More eds, Clarendon 1995).

30 For instance, Case C-122/00, *Schmidberger* (goods) ECLI:EU:C:2003:333; Case C-281/98, *Angonese* (workers); ECLI:EU:C:2000:296; Case C-341/05, *Laval* (services) ECLI:EU:C:2007:809; Case C-36/02, *Omega* (services) ECLI:EU:C:2004:614.

31 Case C-265/95, *Commission v. France* (Spanish Strawberries) ECLI:EU:C:1997:595.

32 See Case C-49/89, *Corsica Ferries France* ECLI:EU:C:1989:649, para. 8: 'As the Court has decided on various occasions, the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited.' See recently the cases which the Commission has started against a couple of Member States regarding the profession of notaries, such as Case C-50/08, *Commission v. France*, ECLI:EU:C:2011:335, para. 67.

33 S. Prechal & S.A. De Vries, *Viking/Laval en de grondslagen van het internemarktrecht SEW* 434 (2008).

34 Case C-233/12, *Simone Gardella v. Istituto Nazionale della Previdenza Sociale* (INPS) (Gardella) ECLI:EU:C:2013:449, para. 39: '[…] Article 12(2) of the Charter reiterates *inter alia* the free movement of workers guaranteed by Article 45 TFEU […]'; case C-367/12, *Susanne Sokoll-Seebacher* (Sokoll-Seebacher) ECLI:EU:C:2014:68, para. 22: '[…] Article 16 of the Charter refers, *inter alia*, to Article 49 TFEU, which guarantees the fundamental freedom of establishment.'

35 Case C-367/12, *Sokoll-Seebacher* ECLI:EU:C:2014:68, para. 22.

36 Case C-233/12, *Gardella* ECLI:EU:C:2013:449, para. 39.

protect fundamental rights that are incorporated in the national constitution and have economic effects, in principle fall within the scope of application of EU Single Market law. Or, as Weatherill puts it, as the outer reaches of EU economic law are ambiguous, exploited by 'ingenious and well-funded litigants' who are helped by the principle of direct effect (and of supremacy),[37] domestic fundamental (social) rights have become easily absorbed by EU economic law.

Regarding the *material* scope of application, due to a comprehensive understanding of the economic connotation of the four freedoms in the case law, the application of the prohibitive rules on the free movement of goods, persons, services and capital is easily triggered. Goods, for example, are defined as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions'.[38]

Services are provided for remuneration and, for the purposes of Article 56 TFEU, even include activities of a particularly sensitive character.[39] The special nature of certain services does not remove them from the ambit of the fundamental principle of free movement. In the same vein, the fact that the Treaty excludes a certain area from the Community's competence is no reason in itself to exclude the application of the free movement rules. After all, the Treaty does not place particular sectors of the economy outside the scope of the fundamental freedoms. According to the ECJ in the *Laval* judgment, where Member States are competent, they must exercise that competence consistently with Community law:

> Therefore, the fact that Article 137 EC (now Article 153 TFEU) does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.[40]

With respect to the *personal* scope of the Treaty freedoms, some provisions have (a limited form of) horizontal direct effect.[41] Although it was thought that

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[37] See S. Weatherill, *From Economic Rights to Fundamental Rights*, in *The Protection of Fundamental Rights in the EU After Lisbon* 12, 16–17 (S. de Vries, U. Bernitz & S. Weatherill eds, Hart 2013).

[38] Case 7/68, *Commission v. Italy (Italian Arts Treasures)* ECLI:EU:C:1968:51; Case C-2/90, *Commission v. Belgium* ECLI:EU:C:1992:310.

[39] Such as lotteries: Case C-275/92, *Schindler* ECLI:EU:C:1994:119, para. 34: The ECJ stated that 'like amateur sport, a lottery may provide entertainment for the players who participate. However, that recreational aspect of the lottery does not take it out of the realm of the provision of services. Not only does it give the players, if not always a win, at least the hope of a win, it also yields a gain for the operator'.

[40] Case C-341/05, *Laval* ECLI:EU:C:2007:809, para. 88.

[41] The *Viking* and *Laval* cases confirm this approach in respect of the freedom of establishment and the free movement of services. It is however not clear how broad the scope of horizontal direct effect is; see also S. Prechal & SA. de Vries, *Seamless Web of Judicial Protection European Law Review* 5–25 (2009).

the EU provisions on free movement were primarily drafted for the Member States, 'the authorities',[42] it is now clear that they may also be directed at private individuals.[43] Regarding the Treaty provisions on the freedom of establishment and the free movement of services, the Court has accepted a form of limited horizontal direct effect.[44] In the area of workers, the Court has recognized a broader form of horizontal direct effect, but only insofar as it concerns the principle of non-discrimination.[45] With respect to the free movement of goods, the situation remains undecided.[46] Interesting in this respect is the Opinion of Advocate-General Maduro in the *Vodafone* case arguing in favour of, more generally, a horizontal application of the free movement rules, as a consequence of which the scope of Article 114 TFEU – the legal basis for internal market legislation – could be extended to the regulation of private behaviour as well.[47]

Finally, as regards the broad *substantive s*cope of application of the Treaty freedoms, its dogmatic foundation is provided for in *Dassonville,* defining measures having equivalent effect to quantitative import restrictions very

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42 For such private individuals, the drafters of the Treaty envisaged the provisions on competition: S. Prechal & S. de Vries, *Ibid*.

43 Case 36/74 *BNO Walrave and LJN Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo (Walrave)* ECLI:EU:C:1974:140, paras 28 and 17.

44 In one way, this seems close to a mere extension of vertical direct effect to non-governmental regulatory bodies. See for the resemblance with the broad interpretation of a 'measure' within the meaning of Art. 34 TFEU: J. Snell, *And Then There Were Two: Products and Citizens in Community Law,* in *EU Law for the Twenty-First Century: Rethinking the New Legal Order* vol. II, 57 (T. Tridimas & P. Nebbia eds, Hart 2004). Noteworthy, is the similar reluctance of the Court to acknowledge horizontal direct effect explicitly in the Court's case law on directives: e.g., Case C-188/89 *A Foster et al v.* British Gas plc *(Foster)* ECLI:EU:C:1990:313; Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA (Marleasing)* ECLI:EU:C:1990:395; Case C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co KG (Kücükdeveci)* ECLI:EU:C:2010:212010. Interesting in this respect is the Opinion of Advocate-General Maduro in the *Vodafone* case arguing in favour of, more generally, a horizontal application of the free movement rules, as a consequence of which the scope of Art. 114 TFEU – the legal basis for internal market legislation – could be extended to the regulation of private behaviour as well: Opinion of AG Maduro of 1 Oct. 2009 in Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform* ECLI:EU:C:2009:596.

45 A. Dashwood, *Viking and Laval: Issues of 'Horizontal Direct Effect',* 10 Cambridge Y.B. Eur. Leg. Stud. 525, 525 (2008); Prechal & De Vries, *supra* n. 33, 16.

46 Case C-171/11 *Fra.bo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein* (*Fra.Bo*) ECLI:EU:C:2012:453; S. de Vries & R. van Mastrigt, *Chapter 11 – The Horizontal Direct Effect of the Four Freedoms – From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market?,* in *General Principles of EU Law and European Private Law* 263 (U. Bernitz, X. Groussot & F. Schulyok eds, Kluwer Law International 2013).

47 Opinion of AG Maduro, *supra* n. 44 paras 19–22. In this case, the validity of a Regulation regulating roaming prices in the telecom sector was at issue. The Court, though, did not follow the Advocate General's Opinion on the extensive scope of Art. 114 TFEU but took another and more cautious approach, Case C-58/08, *Vodafone and others*, ECLI:EU:C:2010:321, para. 46.

broadly.[48] The very fact that an indirect and potential effect on trade or free movement suffices for the national measure to fall within the scope of Articles 34, 49 or 56 TFEU, means that EU citizens have a far-reaching right to challenge national legislation which they find in their way and which restricts their (economic) rights.[49] Article 34 TFEU has sometimes been described as a 'fundamental political right', or as 'subjective public rights'.[50]

The broad scope of application of the Treaty rules on free movement entails that the four freedoms constitute the normative framework for the assessment of (national) fundamental rights, which has given rise to considerable criticism amongst legal scholars, who argue that the EU Institutions and the Court of Justice, by inclination, have a market-oriented and instrumental vision.[51] The question that may arise in this context is whether the four freedoms – and the economic rights contained in the Charter – have gained more importance at the expense of other fundamental rights enshrined in the Charter (see hereinafter).

3.2 FUNDAMENTAL SOCIAL RIGHTS

Social policy, or social protection, generally stands for values such as solidarity, equality and social justice. Even though legislative powers were lacking, (work-related) social policy goals were recognized as part of the economic integration process at an early stage. In the *Defrenne* case, the Court held that Article 119 EEC on equal pay for men and women (now Article 157 TFEU) 'forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples'.[52] Now, with the concept of social market economy and the aims of social justice and protection, social rights and interest have been placed more centrally in the Treaty.

As stated above, the Court came to recognize fundamental rights first as general principles protected of Community law. These principles included the

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48 See S.A. de Vries, *Dassonville,* in *Het recht van de Europese unie* 90 (TWB Beukers, H.J. Van Harten & S. Prechal eds, Boom Juridische uitgevers 2010).

49 C. Barnard, *The Substantive Law of the EU: The Four Freedoms* 73–74 (Oxford University Press 2010).

50 M.P. Maduro, *We the Court. The European Court of Justice and the European Economic Constitution* 81 (Hart 1998); T. Kingreen, *Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts* 15 (Duncker & Humblot 1999); See also P. Oliver & W-H Roth, *The Internal Market and the Four Freedoms,* 41 Com. Mkt. L. Rev. 410 (2004).

51 See, e.g., D. Kochenov, *The 'Citizenship Paradigm',* Cambridge Y.B. 197–225 (2013).

52 Case C-43/75, *Defrenne* ECLI:EU:C:1976:56, para. 10. The phrase has been reiterated in a long line of case law rulings, more recently also in the *Viking* and *Laval* cases. See also Veldman & De Vries, *supra* n. 9.

rights of association, collective bargaining and to strike,[53] now all inserted in the EU Charter.[54] The EU Charter contains a 'modern' mix of civil, political, economic and social rights, which are sometimes phrased from an autonomous Union law perspective. The right to work under Article 15, for example,[55] reinstates in section 2 for EU citizens the economic (cross-border) freedoms of workers, services and establishment, whilst the same right recognized in ILO, Council of Europe and UN instruments tend to emphasize the freedom of coercion, the state's duties to maintain a high and stable level of employment, and the right to decent work and fair working conditions.[56]

Another important feature of the EU Charter is the distinction laid down in Article 52(5) between rights and principles, which perhaps seeks to distinguish between 'negatively-oriented civil and political rights and positively-oriented economic and social rights, with a view to rendering the latter largely non-justiciable'.[57] The classification of certain social (and economic) 'rights' as principles reflects the Member States' fear that 'the recognition of particular economic and social rights would result in the judicialization of public policy, particularly in areas of significant budgetary importance'.[58] Eventually, it amounts to the question of whether certain provisions are capable of having direct effect or not. This also seems to be the message of the Court in its judgment in *Association de Mediation Sociale*.[59] In this case, the question arose as to whether Article 27 of the EU Charter, which lays down the workers' right to information and consultation within an undertaking, by itself or as implemented by Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, could be relied upon in a horizontal dispute between an employee and an employer so as to set aside a national law implementing the Directive. One of the questions was whether Article 27 should be qualified as a principle or a right within the meaning of Article 52(5) of the Charter. The ECJ did not refer to Article 52(5) of the Charter at all, but simply held that 'It is […] clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in

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53 Case C-415/93, *Bosman* ECLI:EU:C:1995:463; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, ECLI:EU:C:2007:772; Case C-341/05, *Laval* ECLI:EU:C:2007:809.

54 Resp. Arts 12 and 28.

55 'Freedom to choose an occupation and right to engage in work'.

56 D. Ashiagbor, *Article 15*, in *The EU Charter of Fundamental Rights: A Commentary* 425–431 (S. Peers et al., eds, Hart 2014).

57 P. Craig & G. De Búrca, *EU Law. Text, Cases, and Materials* 398 (Oxford University Press 2011).

58 Opinion of AG Cruz Villalón in Case C-176/12, *AMS* ECLI:EU:C:2013:491, para. 49.

59 Case C-176/12, *AMS* ECLI:EU:C:2014:2.

European Union or national law.'[60] Contrary to the Court, Advocate-General Cruz Villalon extensively embroidered upon the concept of principles and the meaning of Article 52(5).[61]

Whatever approach is taken, the legal effects of the seemingly more programmatic 'social' provisions of the Charter that have no direct effect, remain limited. It follows from this that the question as to whether a particular provision of the Charter provides a 'right' or a 'principle' could be decisive for its legal effectiveness. According to Advocate-General Cruz Villalon, it is 'clear' that the authors of the Charter referred to social and employment rights.[62] In the same vein, the Advocate-General considered that there is 'a strong presumption' that the group of rights included under the title 'Solidarity' belong to the category of 'principles'.[63]

A final important issue relates to the question of whether EU Charter provisions could, similarly to the economic freedoms, have horizontal direct effect. This would specifically be relevant in the case of work-related social rights that see to the relationships between workers (or their representatives) and employers.

It is interesting that Advocate-General Cruz Villalon argued in his opinion in the *AMS* case that Article 27 on workers' rights to information and consultation within an undertaking, in principle, may be relied upon in a dispute between individuals.[64] In his view, there is nothing in the wording of Article 51(1) 'which suggests that there was any intention, through the language of that article, to address the (...) effectiveness of fundamental rights in relations between individuals'.[65] Here EU Single Market law and the doctrine developed within the context of the free movement rules could be used to enhance the horizontal direct effect of (some) Charter provisions.

4 THE EU SINGLE MARKET AS A MORE INCLUSIVE, HOLISTIC CONCEPT (?)

Although the EU Charter reaffirms the general public interests of the Union and is innovative in that it places social rights and economic freedoms on an equal footing, it is questionable whether it rebalances social and economic values compared to the way they are handled in the free movement jurisprudence. Due

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60 *Ibid*., para. 45.
61 Opinion of AG Cruz Villalón in Case C-176/12, *AMS*, ECLI:EU:C:2013:491, paras 50–80.
62 *Ibid*., para. 49.
63 *Ibid*., para. 55.
64 *Ibid*., paras 38–41.
65 *Ibid*., para. 31.

to the fact that at EU level economic and social policies still do not have the same constitutional status, conflicts between economic rights in the form of the fundamental freedoms on the one hand, and social values and rights vested in national policies on the other, are left to the ECJ. But that does not necessarily mean that fundamental social rights are subsumed under EU free movement law. In the case law of the ECJ, we see that EU free movement law is receptive to considerations of a non-economic nature and to fundamental rights.[66] Since the *Dassonville* and *Cassis de Dijon* judgments, the Court has accepted that Member States may rely on mandatory requirements – next to the Treaty exceptions – to justify national measures that restrict trade and free movement.[67] The four freedoms are not absolute, which is essential as this underlines their *relative* importance in the Treaty.[68]

4.1 Reconciling conflicting treaty freedoms and fundamental rights in general

Fundamental rights can, like mandatory requirements, be taken into account by the Court under the scheme of free movement. In addition, fundamental rights contained in the EU Charter are not absolute and can be restricted, as reiterated in *Pfleger*:

> [A]n unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter. It follows that […] an examination of the restriction represented by the national legislation at issue […] from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.[69]

In cases like *Schmidberger* or *Omega*, the Court has shown its willingness to take fundamental rights seriously and put them on an equal footing with the EU rules on free movement.[70] Member States may have recourse to national

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66 Weatherill, *supra* n. 37, 12, 16–17; S.A. de Vries, *Tensions within the Internal Market – The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing 2006). L. Azoulai, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization,* 45 Com. Mkt. L. Rev. 1335–1356 (2008).

67 Case 8/74 *Procureur du Roi v. Benoît and Gustave Dassonville (Dassonville)* ECLI:EU:C:1974:82; Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* ECLI:EU:C:1979:42.

68 Oliver & Roth, *supra* n. 50, 410.

69 Case C-390/12 *Robert Pfleger (Pfleger)* ECLI:EU:C:2014:281, paras 59 and 60.

70 Case C-122/00, *Schmidberger* ECLI:EU:C:2003:333; Case C-36/02, *Omega* (services) ECLI:EU:C:2004:614.

constitutional provisions as long as sufficient account has been taken of the constitutional position of the four internal market freedoms.[71] The proportionality test is used to balance fundamental rights with fundamental freedoms.

In *Schmidberger*, the authorization for the demonstration on the Brenner motorway was considered to restrict the free movement of goods but justifiable in the light of the protection of the freedom of expression and assembly.

The *Omega* case concerned a restriction on the free movement of services by means of a German measure prohibiting laser games since these games were considered to constitute a danger to public order. The Court held that the free movement of services was affected but could be justified. According to the Court, it was clear that the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the German Constitution, namely human dignity. The Court held that the 'Community legal order undeniably strives to ensure respect for human dignity as a general principle of law', and that it is immaterial that in Germany respect for human dignity has a particular status as an independent fundamental right. The Court adopted a rather state-centric approach, accepting a German particularity of human dignity. In the United Kingdom and many other states, these laser games are lawful.

It has been argued after *Omega* that this decision of the Court is illustrative of the judicial deference in sensitive areas of national constitutional law, which lie outside a nucleus of shared values and where the Court should respect constitutional pluralism.[72] Hence, the ECJ did not wish to impose a common legal conception of human dignity on the Member States. The 'soft' application of the proportionality test employed by the Court allowed the national court to protect a national constitutional standard vis-à-vis the EU interest of free movement.[73]

Hence, irrespective of the fact that fundamental rights are at a 'disadvantage', since they can only be taken into consideration as exceptions to the EU rules on free movement, the traditional framework of review that the Court employs under EU free movement law leaves ample room for guaranteeing the equal position between fundamental freedoms and fundamental rights. This is after all the point of departure of the EU Charter and of the Treaty, which has

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71 D. Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe,* 50 Com. Mkt. L. Rev. 1267, 1297 (2013).

72 K. Lenaerts & J.A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law,* 47 Com. Mkt. L. Rev. 1629–1669 (2010).

73 T. Tridimas, *General Principles of EU Law* 341 (Oxford University Press 2006).

incorporated constitutional pluralism and the respect for national identity as important values.

4.2 Reconciling treaty freedoms and fundamental social rights

In spite of the foregoing, it can be seen that some judgments give the impression that economic rights and the fundamental freedoms may take precedence over other fundamental rights without any clear explanation given by the Court. This is particularly so where social rights are concerned. In the well-known *Viking* and *Laval* decisions,[74] the Court, although acknowledging the freedom of collective bargaining and the right to strike as fundamental rights, seriously questioned the social policy objectives pursued by collective bargaining. While the improvement of working conditions has been one of the Treaty's objectives since 1957, the Court required 'a serious threat' to employment in order to justify an infringement of economic freedoms by exercising the right to collective bargaining, strengthened by collective action.[75] In *Viking*, this was doubted because the Finnish seamen in question had not yet been dismissed in order to be (gradually) replaced by a cheaper Estonian crew. The Finnish company Viking wished to reflag its vessel the *Rosella* under the Estonian flag. The reason was a plan to man the ship with an Estonian crew that could be paid considerably less than the Finnish crew.

The Court's approach also reveals that the exercise or protection of the fundamental right as such does not qualify as a self-standing justification ground, but needs to pursue a wider legitimate aim. In this, trade unions appear to have less leeway compared to public authorities.

With regard to the applicability of the free movement provisions, the Court, on the one hand, puts them on the same plane because trade unions are deemed to be 'capable of regulating the provision of services collectively'.[76] But on the other hand, they are considered private persons 'that cannot avail themselves of public policy'[77] and, thus, of a margin of discretion. As a result, the proportionality test applied does not constitute a true balancing of fundamental principles but amounts to a strict test. The national court must take into account that the right to collective action should serve to protect workers, that jobs and

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74 Case C-341/05, *Laval* ECLI:EU:C:2007:809, para. 98; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, ECLI:EU:C:2007:772.

75 Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, ECLI:EU:C:2007:772, para. 81.

76 Case C-341/05, *Laval* ECLI:EU:C:2007:809, para. 98; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, ECLI:EU:C:2007:772, para. 33.

77 Case C-341/05, *Laval* ECLI:EU:C:2007:809, para. 84.

labour conditions would indeed be under serious threat by reflagging the *Rosella*, that collective action is one of the ways that may serve members' interests, and that account should be taken of less restrictive means before initiating a strike.

In *Viking* and *Laval*, the Court appears to put the fundamental economic freedoms and thereby political economic values as its first point on the agenda, notwithstanding the sensitivity of the area and the fact that the national policy interest at stake (workers' protection) coincides with the Union's objectives. It may even appear that the 'shared' social value of workers' protection – contrary to the singular, national policy interests in *Omega* or *Sayn-Wittgenstein* – represented a drawback for a more lenient proportionality test.[78]

The fact that the Court in *Viking* subsumed the fundamental right to collective action under a rule of reason exception ground, without examining whether the fundamental right *as such* may justify a restriction on free movement has been criticized. Advocate-General Trstenjak in the *Commission v. Germany* case on public procurement and social rights made clear that this approach 'sit uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms'.[79]

Are there no alternatives for the Court to do more justice to the idea of equal ranking of fundamental rights and fundamental freedoms, and to contribute to a more 'holistic' approach to the EU Single Market? According to Advocate-General Trstenjak in *Commission v. Germany*, the balancing approach of the Court in *Schmidberger* would contribute to an optimum effectiveness of fundamental rights and fundamental freedoms. Such an analysis is not confined to an assessment of the appropriateness and necessity of a restriction of a fundamental freedom for the benefit of fundamental rights' protection: it must also include an assessment of whether the restriction on a *fundamental right* is appropriate and necessary in the light of the fundamental freedom.[80] Or, as *Barnard* put it, it is essential to add an element to the proportionality test, which is whether the application of the first two elements of proportionality results in undermining the essence of the social rights being protected.[81] Hence, a type of 'double proportionality review', which can already be detected in *Schmidberger,* should be applied also in the context of fundamental social rights.

An alternative approach concerns the imposition of procedural requirements on Member States or trade unions to comply with EU fundamental freedoms. In

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78 D. Ashiagbor, *Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration,* 19(3) Eur. L.J. 315–316 (2013).

79 Opinion of AG Trstenjak in Case C-271/08 *Commission v. Germany* ECLI:EU:C:2010:183, para. 183.

80 *Ibid*., paras 181–191.

81 C. Barnard, *The Protection of Fundamental Rights in Europe after Lisbon: A Question of Conflicts of Interests*, in *The Protection of Fundamental Rights in the EU after Lisbon* 51 (S. de Vries, U. Bernitz & S. Weatherill eds, Hart 2013).

a number of cases, also outside the field of fundamental rights, the Court does not always question the choice of the instrument by the state to attain its goals,but instead requires the state to include certain procedural guarantees in its legislation, such as the possibility of judicial review, transparency requirements, procedures which are readily accessible and concluded within a reasonable period of time.[82] According to *Barnard* as proportionality does not work in some social contexts, notably strike action – 'the more successful the strike action, the less likely it is to be proportionate' –, one could focus on the procedural rather the substantive dimension of proportionality.[83]

Lastly, in the fields of competition law and social rights, the Court has avoided a delicate and intrusive balancing exercise altogether by granting 'immunity' from European competition law to collective labour agreements pursuing the improvement of employment conditions, and as a consequence of this also to the mechanism to extend the applicability of the agreement to non-signatories by state decision. In the *Albany* case, the Court did not refer to the fundamental right's character of autonomous collective bargaining.[84] Interestingly, it was considered 'beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers', but the Court added that:

> the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to (the Treaty provisions on competition law) when seeking jointly to adopt measures to improve conditions of work and employment.[85]

The justification given boils down to the inherent incompatibility of a (national) market-correcting mechanism as collective bargaining with (European) market-making policy, since it is one of the express purposes of collective agreements, and the extension of its scope by state decision, to curtail competition on employment conditions. The Court derived in its conclusion 'from an interpretation of the provisions of the Treaty as a whole'.[86] By referring to the objectives of the Treaty in the social sphere and the European social

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[82] See, for instance, on the protection of the right of the child (Art. 24 EU Charter), Case C-244/06, Dynamic Medien, ECLI:EU:C:2008:85. See also S. Prechal, *Topic One: National Applications of the Proportionality Principle – Free Movement and Procedural Requirements: Proportionality Reconsidered,* 35 Leg. Issues Econ. Integration 203 (2008).

[83] C. Barnard, *The Protection of Fundamental Rights in Europe after Lisbon: A Question of Conflicts of Interests*, in *The Protection of Fundamental Rights in the EU after Lisbon* 50–51 (S. de Vries, U. Bernitz & S. Weatherill eds, Hart 2013).

[84] Case C-67/96, *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* ECLI: EU:C:1999:430.

[85] *Ibid*., para. 59.

[86] *Ibid*., para. 60.

dialogue in the social policy agreement, the right to collective bargaining is raised to a legitimate European social value, which trumps the application of EU competition rules. As seen above, though, due to the functional breadth of the Treaty freedoms, the Court could not adopt a similar approach in *Viking* and *Laval*.

4.3 Taking fundamental rights seriously in interpreting and assessing EU legislation

Secondary EU legislation will have to be *interpreted* in conformity with EU fundamental rights and will have to *comply* with EU fundamental rights. The Court will (again) conduct a balancing approach in case of conflicting rights. Some of the Court's cases reveal that where social rights and economic values conflict with each other within the context of EU legislation, the balance seems to be tilted to economic rights and values. In the case of *Laval*, for instance, EU legislation posed an obstacle for furthering the social value of collective bargaining. In respect of posted workers, the Swedish tradition of collective bargaining, as well as the content of the prospective collective agreement, were not considered to be in conformity with the Posting of Workers Directive.[87] However, this Directive is without prejudice to national collective action.[88] Relying on the freedom of services, the ECJ sidelined the minimum character of the Directive, which lays down minimum requirements of protection and expressly allows for employment conditions that are more favourable to workers.[89]

However, there is also a clear tendency in the case law, particularly since the binding EU Charter, that the Court is particularly strict in interpreting and reviewing EU legislation when EU fundamental rights are at stake. The question is whether this is also good news for the social rights and principles contained in the Charter.

4.3[a] *Interpretation in the Light of the EU Charter*

The fact that fundamental rights may constitute an important counterweight to market or other values appears from a number of cases. In the *Sky Österreich* case,

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87 Directive 96/71/EC of 16 Dec. 1996 concerning the posting of workers in the framework of the provision of services, [1996] OJ L 018, 21.01.1997.

88 Consideration no. 22 of the preamble to Directive 96/71 concerning the posting of workers in the framework of the provision of services.

89 A. Bücker & W. Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (2011).

the ECJ was asked to rule on the compatibility of the Audiovisual Media Services Directive (AMSD) with the EU Charter,[90] in particular the freedom to conduct a business and the right to property as contained in Articles 16 and 17 of the EU Charter.[91] The question was whether Article 15(6) of the AMSD, which requires the holder of exclusive broadcasting rights to authorize any other broadcaster to make short news reports without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal, infringes the fundamental rights of the holder of exclusive broadcasting rights. According to the ECJ, the Directive had been adopted in accordance with the EU Charter. In the light of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the EU legislature was entitled to adopt rules which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.[92]

In a similar vein, in *Google Spain* the Court in interpreting the Data Protection Directive held that the rights to privacy and protection of personal data do, 'as a rule, not only [override] the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name.'[93]

But interpreting EU legislation in the light of the Charter may also be to the detriment of other fundamental (social) rights, as can be shown by the Court's decision in the *Alemo Herron* case that took a different approach in respect of social rights. In this case relying on the (economic) freedom to conduct a business, protected by Article 16 of the Charter, the Court ruled that so-called dynamic clauses of collective agreements were not enforceable against the transferee in case of the transfer of an undertaking, notwithstanding the fact that also the Transfer of Undertaking Directive allows Member States to enact laws or to promote/permit collective agreements which are more favourable to

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[90] Directive 2010/13/EU of the European Parliament and of the Council of 10 Mar. 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (2010) OJ L95/1 (Audiovisual Media Services Directive).

[91] Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk (Sky Österreich)* ECLI:EU:C:2013:28.

[92] Case C-283/11 *Sky Österreich GmbH v. Österreichischer Rundfunk (Sky Österreich)* ECLI:EU:C:2013:28, para. 66.

[93] Case C-131/12 *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (Google Spain)* ECLI:EU:C:2014:217, para. 97.

employees.[94] The Court thus ruled that Article 16 precluded a national law without considering that fundamental social rights of the Charter, in this case Article 30 on the protection of workers' rights, could serve as a counterweight.

4.3[b] *Assessment of EU Legislation in the Light of the EU Charter*

If the EU legislator has not (sufficiently) taken into account fundamental rights, the Court will declare the legislation invalid. Where in *Volker and Schecke*, the ECJ declared only a provision of a Regulation invalid as being contrary to the rights to privacy and protection of personal data, which are laid down in Articles 7 and 8 of the EU Charter, in *Digital Rights Ireland* the entire Data Retention Directive was held incompatible with the Charter. The Data Retention Directive required Member States to incorporate in their national laws provisions for the storage of personal data in the electronic communications sector for a certain period of time.

According to the ECJ the Directive, 'affects in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions'.[95] The Court concluded that the Directive 'does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter'. It 'entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary'.[96]

Furthermore, the Court stated that in cases where fundamental rights like the right to the protection of personal data and privacy are seriously impaired, the EU legislature's discretion is reduced and the review of that discretion should be strict.[97] Hence, the margin of discretion for the EU legislature in the field of fundamental rights has become (much) more limited compared to other policy fields, where the ECJ normally exercises only limited appraisal of EU harmonization measures – also with a view to prevent putting itself in the place

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[94] Article 8 of Directive 77/187/EEC of 14 Feb. 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings.

[95] Joined cases C-92/09 and C-93/09 *Volker and Markus Schecke GbR and Hartmut Eifert v. Land Hessen (Volker and Schecke)* ECLI:EU:C:2010:662, para. 58.

[96] Joined cases C-92/09 and C-93/09 *Volker and Markus Schecke GbR and Hartmut Eifert v. Land Hessen (Volker and Schecke)* ECLI:EU:C:2010:662, para. 65.

[97] Joined cases C-92/09 and C-93/09 *Volker and Markus Schecke GbR and Hartmut Eifert v. Land Hessen (Volker and Schecke)* ECLI:EU:C:2010:662, para. 48.

of the legislature.[98] The effects of the Charter for the EU legislature are thus clearly visible.

This strict test, which the ECJ employs for EU legislation, also appears from the more recent *Schrems* or *Facebook* case.[99] In his complaint, to the Irish Data Protection Commissioner by which he asked to prohibit Facebook Ireland from transferring his personal data to the United States, the Austrian student Schrems contended that the law and practice in the United States did not ensure adequate data protection against the surveillance activities that were engaged in there by the public authorities. He referred to the revelations made by Edward Snowden concerning the activities of the United States intelligence services, in particular those of the National Security Agency ('the NSA'). After the Irish High Court had referred the case to the European Court of Justice (hereinafter: 'ECJ') for a preliminary ruling, the Court annulled the decision of the Commission of 2000, which was based on the Data Protection Directive. This Decision considered that, under the 'safe harbour' scheme, the United States ensures an adequate level of protection of the personal data transferred (the Safe Harbour Decision). But the ECJ did not regard the United States as a safe harbour and declared the decision invalid. According to the Court, the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter, was compromised.

Furthermore, the Court underlined the import role that the supervisory authorities in the Member States play in examining, irrespective of a decision by the Commission based on the Data Protection Directive, claims by citizens concerning the protection of their rights when data have been transferred from a Member State to a third country.[100]

The question is, of course, whether a similarly strict approach would be adopted in respect of fundamental *social* rights. In any event, and despite the sometimes-blurred picture, market integration is not pursued in isolation but must and can be counterbalanced by social considerations and public interests, which is *inter alia* confirmed by the concept of social market economy introduced by the Lisbon Treaty.[101] The Charter requires the Court to strictly interpret and review EU legislation in the light of EU fundamental rights. It also reinforces the already existing potential of the Court's free movement case law

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98 S.A. de Vries, *Tensions within the Internal Market – The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* 388 (Groningen, Europa Law Publishing 2006).

99 Case C-362/14, *Maximillian Schrems,* ECLI:EU:C:2015:650.

100 *Ibid*.

101 This developed over time, see: P. Craig, *The Evolution of the Single Market,* in *The Law of the Single European Market – Unpacking the Premises* 32 (C. Barnard & J. Scott eds, Hart 2002).

that a one-sided market integration process could be counterbalanced by an increased margin of discretion for Member States to pursue differentiated, market-correcting policies, at least for as long as the 'political union' cannot fully live up to its own commitment to a 'social market economy'. At the same time, the miscellaneous set of rights contained in the Charter, including the economic freedoms and rights, offers the Court the possibility to selectively rely on the Charter, when interpreting European or national social policy regulation that disagrees with economic values, as in the case of *Alemo Herron*.[102]

5 THE EU SINGLE MARKET AS CATALYST FOR THE PROTECTION OF FUNDAMENTAL RIGHTS AT EU LEVEL

The EU Single Market may even offer opportunities to further enhance the protection of fundamental rights, particularly by using the potentially very wide legal basis of Article 114 TFEU. Article 114 TFEU allows for the harmonization of national laws, which are designed to protect public interests or fundamental rights, but constitute an obstacle to free movement, even when the Treaty limits or excludes legislative powers in certain policy fields. This follows from the *Tobacco Advertising* case law, which concerned the challenge to Article 114 TFEU as a proper legal basis for the Directive on advertising and sponsorship of tobacco products.[103] According to the Court, a directive can be adopted on the basis of these provisions only if measures have as their object either the objective of removal of obstacles to the exercise of fundamental freedoms, or alternatively the removal of appreciable distortions of competition. The Court's judgment implies that once the threshold requirements have been met, the EU legislature has the power to intervene in practically any policy field regulated by Member States.[104] This is particularly relevant in areas where the EU does not dispose of specific harmonization powers, like in the field of fundamental (social) rights. Fundamental rights can then be regulated at EU level exploiting 'the broad and

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[102] A. Veldman & S. de Vries, *Chapter 4 – Regulation and Enforcement of Economic Freedoms and Social Rights: A Thorny Distribution of Sovereignty*, in *Soveignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement* (T. Van den Brink, M. Luchtman & M. Scholten eds, Intersentia 2015).

[103] Case C-376/98 *Federal Republic of Germany v. European Parliament and Council Germany (Tobacco Advertising)* ECLI:EU:C:2000:544; European Parliament and Council Directive 98/43/EC of 6 Jul. 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L213/9.

[104] This also follows from the follow-up case law on tobacco advertising: Case C-491/01 *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd. (BAT/Imperial Tobacco)* ECLI:EU:C:2002:741; Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health (Swedish Match)* ECLI:EU:C:2004:802.

fuzzy contours of Article 114 TFEU' and bypassing Articles 6(1) TEU and 51(2) of the EU Charter.[105]

With respect to the rights to privacy and data protection, an area outside the field of fundamental social rights, it has been argued that the broad legislative powers in the field of the Internal Market and the requirement by the Court in, for instance, *Digital Rights Ireland*, to comply with these fundamental rights in rather close detail may provide an *incentive* for the EU legislature to pursue and protect fundamental rights at EU level more actively. According to Advocate-General Cruz Villalon in his Opinion in *Digital Rights Ireland:*

> there was nothing to prevent the European Union legislature, in defining the obligation to collect and retain data, from accompanying that obligation with a series of guarantees at least in the form of principles, to be developed by the Member States, that were intended to regulate use of the data and, thereby, to define the exact extent and complete profile of the interference which that obligation entails.[106]

He admitted, though, that at the time it may have been difficult to incorporate specific guarantees regarding access to the data retained in an internal market Directive. For the field of data protection, the Treaty now contains a specific legal basis, i.e., Article 16 TFEU.

In a similar vein, it could be argued that Article 114 TFEU, or other internal market legal bases, could be used to regulate fundamental social rights at EU level more actively. The problem is, however, that Article 114(2) TFEU – the legal basis for internal market legislation – explicitly excludes harmonization in relation to the rights and interests of employed persons. Recourse should thus be taken to other legal bases, for instance, Article 115 TFEU, which, however, has not been used since the 1980s, or Article 62 TFEU in conjunction with Articles 53 and 59 TFEU the field of services. Another option would be the use of the flexibility clause or the legal basis for unforeseen cases, i.e., Article 352 TFEU. The proposed but eventually rejected Monti-II regulation was based on this provision.[107] The proposal by the Commission intended to codify and clarify the *Viking* and *Laval* decisions, thereby containing a link to the fundamental right to strike and to the ECHR, should have complemented another regulation, i.e.,

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105 S. Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a Drafting Guide,* 12 Ger. L.J. 848 (2011). S.A. de Vries, *Tensions within the Internal Market: The Functioning of The Internal Market and the Development of Horizontal and Flanking Policies* 339 (Europa Law Publishing 2006).

106 Joined cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others (Digital Rights Ireland)* ECLI:EU:C:2014:238, Opinion of AG Cruz Villalón, ECLI:EU:C:2014:238, para. 124.

107 Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.

Monti-I, which excludes industrial actions from its scope of application, and included the conditions under which collective action would be proportionate in the light of free movement, next to certain procedural provisions. The Monti-I regulation was adopted as a direct consequence of the *Spanish Strawberries* case,[108] whereby pressure is put on the Member States to remove obstacles to the free movement of goods, including those caused by private individuals.[109] In *Spanish Strawberries*, the ECJ applied Article 4(3) TEU in conjunction with Article 34 TFEU to hold the French state responsible for not taking sufficient action against private actions by angry French farmers, which in itself constituted an obstacle to the free movement goods.

The fact that fundamental rights, including fundamental social rights like the right to strike and take collective action, are brought within the ambit of the Treaty freedoms, through an extensive interpretation of the free movement of goods and services, and the freedom of establishment, a legal basis for EU action within the context of the EU Single Market is activated. Considering the broad scope of the internal market legal bases as follows from the *Tobacco Advertising* case law, it is questionable whether either the EU Charter or Article 153(5) TFEU, which excludes the right to strike from EU legislation, could withhold the EU legislature from taking legislative action in the field of social rights.[110] After all the competence to adopt measures in the field of social rights is, considering the Court's case law, not preserved anymore to the Member States.[111]

6 CONCLUSION

The case law of the ECJ shows that EU fundamental rights and the EU Charter have played an increasingly important role in the context of the EU Single Market. There are, however, decisions, wherein the Court has adopted a restrictive approach to the Charter, especially where fundamental social rights were at issue. And the judgments of the Court in *Viking, Laval* and *Alemo Herron* give the impression that there is an inherent danger that economic freedoms and rights are overstretched, sometimes with the help of the EU Charter.

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108 Case C-265/95, *Commission v. France* ECLI:EU:C:1997:595.

109 Regulation (EC) 2679/98 of the Council of 7 Dec. 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ 1998, L 337/8 CHECK.

110 F. Fabbrini & K. Granat, '*Yellow Card, But No Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike,* 50 Com. Mkt. L. Rev. 135 (2013).

111 S.A. de Vries, *Het ex-Monti II-voorstel: 'Paard van Troje' of zege voor sociale grondrechten?,* 4 NTER 126 (2013).

However, these decisions are not typical examples of how the Court normally deals with fundamental rights under the scheme of free movement, as shown by cases like *Schmidberger*, *Omega* or *Dynamic Medien*.[112] The free movement scheme applied by the Court in this respect potentially allows for the consideration of social policy objectives and social rights – similar to other fundamental rights and public interests. It is often the proportionality test applied that plays a key role. In spite of 'the language of prima facie breach of economic rights' that comes with the free movement scheme, the Court developed marginal or procedural forms of proportionality that in fact can put conflicting human rights' protection and fundamental freedoms on an equal footing. A procedural review as suggested by Barnard or a true balancing approach as suggested by AG Trstenjak in *Commission v. Germany* could be in order.[113] After all the Charter makes clear that there is no hierarchy of norms and, therefore, also social fundamental rights should be assessed on their merits and not subsumed under other objectives.

Furthermore, when it comes to interpreting and assessing EU legislation in *Sky Österreich*, the Court held that the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities, which may limit the exercise of economic activity in the public interest.[114] Where the EU Institutions do not sufficiently respect the fundamental rights contained in the EU Charter, the Court will not recoil in declaring EU legislation invalid. EU Single Market law even offers opportunities to further enhance and elaborate fundamental rights at EU level, which may help to secure 'the rights of EU citizens to free movement'[115] on the one hand and fundamental rights contained in the EU Charter on the other.

But the relationship between the fundamental freedoms and fundamental social rights continues to be tense and conflicts do arise. Even though EU Single Market law offers opportunities, a rebalancing at EU level between the economic and social dimension can hardly be attained by means of political agreement. The possibilities to pursue market-correcting policies at EU level remain limited as

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112 Weatherill, *supra* n. 37, 213–234.

113 C. Barnard, *The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflicts of Interests*, in *The Protection of Fundamental Rights in the EU after Lisbon* 50–51 (S. de Vries et al., eds, Hart 2013); Opinion of AG Trstenjak in Case C-271/08, *European Commission v. Germany*, ECLI:EU:C:2010:183.

114 Case C-283/11 *Sky Österreich GmbH v. Österreichischer Rundfunk (Sky Österreich)* ECLI:EU:C:2013:28, paras 46–47. See in particular S. Peers & S. Prechal, *Article 52,* in *The EU Charter of Fundamental Rights – A Commentary* 1484–1485 (S. Peers et al., eds, Hart, Oxford and Portland 2014).

115 U. Bernitz & N. Reich, *Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No. 89/09 of 2 December 2009, Laval un Partneri Ltd. v. Svenska Byggnads- arbetareförbundet et al,* 48 Com. Mkt. L. Rev. 622 (2011).

long as substantive EU competences in this field are lacking. The political reality, together with the institutional impediments of the EU's constitutional architecture in the social policy field, deals the ECJ a pivotal card, which may lead – as argued in this article – to acceptable but suboptimal solutions.[116]

[116] Veldman & De Vries, *supra* n. 9, 91.