ADDRESSING THE BLURRING PUBLIC/PRIVATE DIVIDE IN THE EU'S DIGITAL SINGLE MARKET

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ABSTRACT: *The EU's Digital Single Market can be distinguished from the «offline», physical internal market in at least two ways, i.e. firstly through the importance of data and information, and the strong interrelationship between the digital market and citizens' fundamental rights and, secondly, through the strength and power of private actors. Private actors appear to constitute not only a source of significant restrictions of trade and competition, but also of non-trade or non-market concerns, including fundamental rights. In this contribution the question will be addressed as to how these non-market and fundamental rights concerns of actions by private actors have been and could be addressed by EU internal market law and more in particular by EU free movement law.*

1. Introduction

Rapid and disruptive technological developments and the growing digitalisation of our societies have a profound impact on how individuals and companies interact, on market dynamics and on how our socie-

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ties are shaped. Digital technologies thus also impact and create challenges for the law, and raise new legal questions as to how technology and the law should interact.

At the level of the European Union, the law of the internal market has long been at the heart of law-based order and has played a vital role in building Europe's economic constitution[1]. EU internal market law is also at the heart of Europe's digital economy. According to the European Commission, the Digital Single Market (hereafter: DSM)

> is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence[2].

Or differently put, the DSM is about allowing the freedoms of Europe's Single Market to enter the digital age.

The DSM can be distinguished, though, from the «offline», physical internal market in at least two ways, i.e. firstly through the importance of data and information, and the strong interrelationship between the digital market and citizens' fundamental rights and, secondly, through the strength and power of private actors, such as platforms like Amazon, Uber, Airbnb, or Booking.Com, or big tech companies, like Meta, Alphabet or Microsoft. There were at first no or hardly national public economic laws that specifically targeted the digital economy, whereas private, non-state actors had almost been given free rein[3].

These specific features of the DSM mean that private actors appear to constitute not only a source of more significant restrictions of trade than those deriving from purely state barriers to trade, but also of non-

[1] Judgment of 5 February 1963, *van Gend & Loos v. Nederlandse Administratie der Belastingen*, C-26/62, EU:C:1963:1. R. BARENTS, *De constitutionele paradox van het Unierecht*, in *SEW*, 2013, afl. 7, p. 302.

[2] See European Commission, available at *https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en* (last accessed on 14 July 2023).

[3] K. HELLINGMAN, K.J.M. MORTELMANS, *Economisch Publiekrecht – rechtswaarborgen en rechtsinstrumenten*, Deventer, 1989.

trade or non-market concerns, including fundamental rights[4]. In this contribution the question will be addressed as to how these non-market and fundamental rights concerns have been and could be addressed[5]. Although competition law is specifically drafted to tackle market concerns of *private actors*[6], here the focus will be on EU free movement law, which is traditionally addressed to state actors. Hereby the following three routes are followed: the application of EU free movement rules in horizontal disputes between private actors and the (limited) horizontal direct effect of EU free movement provisions will be dealt with first, whereafter the question of whether EU fundamental rights and the EU Charter of Fundamental Rights (hereafter: CFR) can be invoked by and vis-à-vis private parties will be looked into; third and last, the role of the EU legislature in regulating the DSM will be discussed.

2. The horizontal application and direct effect of EU free movement law

The fact that non-state, private actors, such as the five big tech companies, play an important (regulatory) role in our societies, is in itself not a new phenomenon. But since the last decades their role in the regulatory domain has grown, partly due to the dilution of the traditional public-private divide. Fourteen years ago Prechal and de Vries wrote that

[4] See also my earlier contribution on Digitalisation and EU internal market law: S.A. DE VRIES, *Chapter 1 – The Resilience of the EU Single Market's Building Blocks in the Face of Digitalization*, in U. BERNITZ, X. GROUSSOT, J. PAJU, S.A. DE VRIES (eds.), *General Principles and the EU Digital Order*, Alphen a/d Rijn, 2020, p. 24.

[5] S.A. DE VRIES, *Securing Private Actors' Respect for Civil Rights Within the EU: Actual and Potential Horizontal Effects of Instruments*, in S.A. DE VRIES, H. DE WAELE, M.-P. GRANGER (eds.), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, 2018, pp. 43-44.

[6] A. GERBRANDY, *Chapter 12 – General Principles of European Competition Law and the 'Modern Bigness' of Digital Power: The Missing Link Between General Principles of Public Economic Law and Competition Law*, in U. BERNITZ, X. GROUSSOT, J. PAJU, S.A. DE VRIES (eds.), *General Principles and the EU Digital Order*, Alphen a/d Rijn, 2020, p. 309-312.

> [t]his holds especially true in areas where semi-private/semi-public entities lay down the rules. Private or semi-private bodies make use of derived or autonomous rule-making powers alongside the government, while public authorities act more and more often as market participants and swap traditional public law regulation for private law instruments. Although the extent to which this occurs, varies from one Member State to another, these processes are symptomatic for a more general evolution in which the internal market rules have to operate[7].

The case law in the field of free movement is evidence of the Court's acceptance that clear-cut dividing lines between the public and private domain are fading.

2.1. Extending the personal scope of application of the prohibitive rules on free movement

As is well-known by now, the Court has extended the *personal* scope of application of the EU free movement rules and thereby accepted a (limited) form of horizontal application and direct effect, at least where the Treaty rules on the free movement of persons and services are concerned. The provisions on services (Article 56 TFEU) are, due to the digitalisation and datification of our economy, as well as the emergence of the Internet and the role of information therein, particularly relevant in the Digital Single Market[8]. Where the free movement of persons is concerned, not only the provisions on workers (Article 45 TFEU) but also on establishment (Article 49 TFEU) have (limited) horizontal direct effect. The gig economy, where the «micro-entrepreneurs, on-demand workers, freelancers or contractors are typically self-employed», shows the importance of the freedom of establishment[9].

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[7] S. PRECHAL, S.A. DE VRIES, *Seamless web of judicial protection in the internal market?*, in *ELRev.*, 34, 2009, p. 6.

[8] C.S. RUSU, A. LOOIJESTIJN-CLEARIE, J.M. VEENBRINK, *Digitalisation of Economic Law in the EU: Which Way Forward?*, in *Radboud Eco. L. Blog*, 2018, available at: *https://www.ru.nl/law/research/radboud-economic-law-conference/radboud-economic-law-blog/2018/digitalisation-economic-law-eu-which-way-forward/* (last accessed on 23 August 2019).

[9] V. HATZOPOULOS, *The Collaborative Economy and EU Law*, Oxford, 2018, p. 150.

As explained elsewhere, basically three strands of argumentation are followed by the Court to accept horizontal direct effect of the Treaty provisions on free movement[10]. The first argument is based on the *effet utile* principle or useful effect doctrine, meaning that the useful effect of EU law must be guaranteed and may not be jeopardised, either by the state or private actors[11]. In the *Walrave Koch* and *Bosman* cases on rules laid down by sporting organisations affecting sporters as employees the Court held that

> [T]he abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law[12].

Article 45 TFEU on the free movement of workers thus also applies to rules of private associations aimed at regulating gainful employment in a collective manner[13].

The second argument is based on the fact that certain private actors are dominant. According to the Court in its judgment in *Ferlini* the principle of non-discrimination on grounds of nationality as now laid down in Article 18 TFEU

> also applies in cases where a group or organisation such as the EHL (Entente des Hôpitaux Luxembourgeois - Luxembourg Hospitals

[10] S.A. DE VRIES, R. VAN MASTRIGT, *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 U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU Law and European Private Law*, Alphen a/d Rijn, 2013, pp. 264-265.

[11] The *effet utile* principle implies that the free movement provisions would be prevented from functioning effectively if private organisations were allowed to create or maintain obstacles that governments are not allowed to create or maintain. Judgment of 12 December 1974, *Walrave and Koch*, C-36/74, EU:C:1974:140; Judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463; Judgment of 11 December 2007, *Viking Line*, C-438/05, EU:C:2007:772; Judgment of 18 December 2007, *Laval*, C-341/05, EU:C:2007:809.

[12] CJEU, *Walrave and Koch*; CJEU, *Bosman*, para. 83.

[13] CJEU, *Bosman*, para. 82.

> Group) exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty[14].

The third and last argument relates to the fundamental rights character of the principle of non-discrimination of grounds of nationality (*Angonese*)[15], and the principle of equal pay for men and women (*Defrenne*), which principles apply to private actors acting individually[16]. It means that the prohibition of discrimination applies more generally to contracts between individuals, private parties, and not only contracts that intend to regulate labour collectively.

Hence, private actors have, next to rights under EU free movement law, also duties to respect the principles of non-discrimination and market access under certain conditions. Considering the crucial role of private actors and in particular the dominance of big tech corporations in the digital market place, it could be argued on the basis of the foregoing that they can be held accountable for infringements of EU free movement provisions under the conditions set out in the Court's case law.

2.2. Private actors invoking public or private interest exception grounds

Assuming that the prohibitive Treaty rules on free movement apply to private actors, what possibilities are there for private actors to justify their discriminatory or otherwise restrictive behaviour? As is well known, EU free movement law, as developed and interpreted in a primarily offline, analogue context, has proven to be sufficiently receptive to *public interests*. The Treaty freedoms may be fundamental but have no absolute character[17]. Safety valves are built in the system, through

[14] For example Judgment of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, para. 50. S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, in *Revista de Derecho Comunitario Europeo*, 66, 2020, p. 412.

[15] Judgment of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296.

[16] Judgment of 8 April 1976, *Defrenne II*, *C*-43/75, EU:C:1976:56.

[17] The Court has emphasised this in a number of cases where fundamental freedoms clashed with fundamental rights, like Judgment of 12 June 2003, *Schmidberger*, C-

Treaty exceptions and the Court's case-law, which guarantee that public values continue to be protected within the context of the freedoms, subject to a proportionality review[18]. And in addition, the EU legislator in regulating the EU internal market is required to take account of public interests. This has worked pretty well, with the exception of some cases which have been criticised for subordinating social values and rights to the requirements of free movement[19]. There is no reason to believe that the scheme developed in the offline world with a view to adjudicate conflicting national, public interests with the EU legal requirements of free movement, should not offer similar possibilities to take account of public interests and fundamental rights in an *online* world.

When it comes to more specifically *private actors* relying on *public* interests, the Court in *Bosman* and *Angonese* provided for an opening in case of violation of one of the fundamental freedoms[20]. In the latter case, the Court accepted that restrictions on the free movement of workers caused by private individuals might be justified if that restriction is based on objective considerations irrespective of the nationality of the persons concerned and proportional to the objective legitimately pursued[21]. And in *Bosman* the Court in a rather sweeping statement held that

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112/00, EU:C:2003:333, para. 78; or CJEU, *Viking Line*; cf. also Opinion of Advocate General Trstenjak of 14 April 2010, *Commission v. Germany*, C-271/08, ECLI:EU:C:2010:183.

[18] S. WEATHERILL, *Protecting the Internal Market from the Charter*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Oxford-Portland, 2015, p. 213.

[19] Most infamous are, of course, the CJEU *Viking Line* and *Laval* cases. C. BARNARD, *The Protection of Fundamental Social Rights in Europe after Lisbon – A Question of Conflicts of Interest*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford-Portland, 2013, p. 37; A. VELDMAN, S.A. DE VRIES, *Chapter 4 – Regulation and Enforcement of Economic Freedoms and Social Rights; A Thorny Distribution of Sovereignty*, in T. VAN DEN BRINK, M. LUCHTMAN, M. SCHOLTEN (eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement*, Cambridge, 2015, p. 83.

[20] CJEU, *Bosman*; CJEU, *Angonese*.

[21] CJEU, *Angonese*, para. 42.

> [t]here is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question[22].

However, with respect to more specifically private, commercial interests, the situation is more complex. The exceptions to free movement can only be invoked for non-economic interests. Economic considerations may play a role, only in as far as the restrictive measure definitively serves a (further) non-economic interest[23]. But this traditional approach to justifications may need to be revised. After all, the commercial interests of private actors in the digital market place may be seriously jeopardised by requirements of EU free movement law and EU fundamental rights. Advocate General Trstenjak in the *Fra.bo* case suggested that a private actor could perhaps rely on «a special ground of private interest, emphasising its own private law nature». This case involved a restriction on the free movement of goods, more specifically copper fittings for water pipelines, imposed by a German private law body[24]. The Court, in its judgment, did not reason along the similar lines of horizontal direct effect as set out by the Advocate General and did not look into the question of justification. The reasoning of the Advocate General is related to the principle of private autonomy, in which the horizontal application of the free movement provisions finds its limits. It is here that the freedom to conduct a business as enshrined in Article 16 CFR may come to the rescue as will be explained hereafter[25].

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[22] CJEU, *Bosman*, para. 86.

[23] Judgment of 10 July 1984, *Campus Oil*, C-72/83, EU:C:1984:256, para. 7; Judgment of 28 March 1995, *Evans Medical*, C-324/93, EU:C:1995:84; Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung eV*, C-148/15, EU:C:2016:776, para. 31.

[24] Opinion of Advocate General Trstenjak of 28 March 2012, *Fra.bo*, C-171/11, ECLI:EU:C:2012:176, para. 56.

[25] S.A. DE VRIES, R. VAN MASTRIGT, *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 U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU law and European Private Law*, Alphen a/d Rijn, 2013, pp. 264-265.

3. The horizontal direct effect of EU fundamental rights

The horizontal direct effect of fundamental rights is, generally, more contentious as the classic approach to fundamental rights relates to the vertical relationship between the state and the citizen. But this rigorous dividing line between the horizontal and vertical dimensions of fundamental rights in most Member States[26] and in respect of the application of European Convention on Human Rights (ECHR) does not mean that fundamental rights may not produce effects in relations governed by private law at all[27]. For example, under the ECHR individuals can indeed only bring an application before the European Court of Human Rights (ECtHR) «regarding an alleged violation of a Convention Right by one of the Convention States» and applications against private actors are declared inadmissible. But the ECtHR does not ignore private actors' infringements of fundamental rights, for instance by imposing positive obligations on states to secure individual rights guaranteed by the Convention in relations between private actors[28].

3.1. The development of horizontal direct effect of EU Charter provisions

With respect to EU fundamental rights the CJEU has gone a step further by granting horizontal direct effect to some provisions of the EU Charter of Fundamental Rights, which may thus be directly relied upon by an individual vis-à-vis another private actor before a national court. The recognition of horizontal direct effect of EU fundamental rights has its origin in the case law on the Treaty rules on free movement, as dis-

[26] S. WALKILA, *Horizontal Effect of Fundamental Rights in EU Law*, Groningen, 2016. S.A. DE VRIES, *Securing Private Actors' Respect for Civil Rights Within the EU: Actual and Potential Horizontal Effects of Instruments*, in S.A. DE VRIES, H. DE WAELE, M.P. GRANGER (eds.), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, 2018, p. 47.

[27] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 409.

[28] C. LOVEN, *Fundamental Rights Violations by Private Actors and the Procedure before the European Court of Human Rights – A Study of Verticalized Cases*, Cambridge, 2022, p. 4.

cussed above, which are after all according to the CJEU in themselves «fundamental». Furthermore, the Court already decided in several judgments that the principle of non-discrimination on grounds of nationality, the principle of equal pay for male and female workers as laid down in Article 157 TFEU[29] and the principle of non-discrimination on other grounds than nationality, which are fundamental rights, have horizontal direct effect[30].

Whereas the rationale for accepting horizontal direct effect of the Treaty provisions on free movement was originally «integration-driven», this is different for EU fundamental rights. Here relevant factors are the growing importance of the private sector also in the «fundamental rights domain», the blurring public and commercial spheres and the perception of fundamental rights as core EU values which by their very nature both impact public and private law[31].

The recognition of horizontal direct effect of EU Charter provisions was, however, not entirely self-evident. After all, Article 51 of the EU Charter determines the general scope of application of the EU Charter and only refers to EU institutions and the Member States as addressees. But in the *Bauer et al.* and *Max Planck* cases the Court decided that Article 51(1) of the EU Charter could not be interpreted as precluding the possibility that private individuals may be required to comply with the Charter[32]. First, the Court observes that provisions of primary law addressed to Member States, can be relied upon vis-à-vis other individ-

[29] CJEU, *Defrenne II*.

[30] Judgment of the Court of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709.

[31] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., pp. 417-418.

[32] Judgment of 6 November 2018, *Bauer and Broßonn*, Joined Cases C-569/16 and C-570/16, EU:C:2018:871; Judgment of 6 November 2018, *Kreuziger and Max Planck*, Joined Cases C-619/16 and C-684/16, EU:C:2018:872. See also Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257. E. FRANTZIOU, *Joined Cases C-569/16 and C-570/16, Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable*, in *European Law Blog*, 19 November 2018, available at: *http://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/* (last accessed on 6 September 2023).

uals. It hereby mentions its judgment in *Egenberger,* wherein the Court referred to case law on the Treaty rules on free movement and non-discrimination on grounds of nationality, including *Defrenne, Angonese, Ferlini and Viking Line*[33]. In the *Egenberger* case it concerned Ms Egenberger's application for a job with Evangelisches Werk which was rejected because she did not belong to a denomination. Ms Egenberger then relies upon the prohibition of discrimination on grounds of religion, which is included in Article 4(2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation and in Article 21(1) of the EU Charter, to claim compensation. The Court held that Article 21(1) of the EU Charter, which lays down the prohibition of discrimination, can be invoked in a dispute between private actors. It also declared Article 47 of the EU Charter, which lays down the right to effective judicial protection, to be horizontally directly effective. After all, the national court, i.e. the German court, must strike

> a balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of individuals not to be discriminated against on grounds of religion or belief[34].

The *Bauer et al.* and *Max Planck* cases concerned the right of every worker to a limitation of working time and to an annual period of paid leave as laid down in Article 31(2) of the EU Charter and as further elaborated in a directive[35]. As, according to the Court, Article 31(2) is mandatory and unconditional in nature and does not require concrete

[33] CJEU, *Defrenne II*, para. 39; CJEU, *Angonese*, paras. 33 to 36; Case C-411/98, CJEU, *Ferlini*, para. 50; CJEU, *Viking Line*, paras. 57 to 61; CJEU, *Egenberger*, para. 77.

[34] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., pp. 415-416. Sacha Prechal explains why Article 47 EU Charter was relevant in this case considering the more restrained judicial review under German law in these types of cases.

[35] For an extensive analysis of the Court's case-law, see S.A. DE VRIES, *The Bauer et al. and Max Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony*, in *European Equality L. Rev*., 1, 2019, pp. 16-30.

expression by the provisions of EU and national law, it can be relied upon in a procedure before a national court, also in a dispute between private individuals. The Court concludes by stating that the judicial protection for individuals flowing from Article 31(2) of the EU Charter and the guarantee of full effectiveness of this provision require the national court to disapply conflicting national legislation, if needed.

Now the EU Charter does not apply in a vacuum but only when, according to Article 51(1) EU Charter, Member States are implementing EU law, or, as clarified in the case law, when a situation falls within the scope of application of EU law[36]. In the cases *Egenberger* and *Bauer et al.*, Directive 2000/78 on equal treatment in employment and occupation and Directive 2003/88/EC on the organisation of working time «pulled the Member State action into the scope of EU law and rendered the Charter applicable»[37]. As the subject matter was covered by EU legislation, the Charter provisions could be invoked, although independently from the directives in horizontal disputes.

3.2. Which provisions of the EU Charter?

Following the reasoning of the Court in *inter alia Bauer et al.* and *Egenberger* the question is: which other Charter provisions than Articles 21, 47 and 31(2) EU Charter may have horizontal direct effect? Prechal suggests that, for instance, the «rights such as respect for private and family life, freedom of expression and information and freedom to conduct a business, which includes freedom of contract» may impose obligations on private parties, as well *inter alia* the right to the integrity of the person[38].

These rights are particularly relevant in the DSM and have already been subject to the Court's case law where the interpretation of EU legislation was concerned. In the well-known *Google Spain* case, for instance, the rights of the data subject under the EU Charter and the for-

[36] Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105.

[37] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 422.

[38] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 419.

mer Data Protection Directive conflicted with the economic rights of Google and the right of the general public to information. The central question related to Mr Consteja González's request to order Google Spain SL and Google Inc to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future. In particular, he wanted links to pages of a newspaper, which included an announcement mentioning his name in connection with a real-estate auction and social security debts, to be removed. The Court held that

> the data subject may […] request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held … that those rights override, as a rule, not only the economic interests 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[39].

Although this case was decided against the backdrop of the Data Protection Directive, which is the predecessor of the General Data Protection Regulation and which the Court was asked to interpret, the Court was rather explicit on the potentially horizontal direct effect of Articles 7 (privacy) and 8 (data protection) of the EU Charter.

In a similar vein the horizontal dispute between Eva Glawischnig-Piesczek and Facebook Ireland concerning the publication on Facebook by a user of messages containing statements that are harmful to the reputation of Ms Glawischnig-Piesczek, in fact involved the right to the integrity of the person (reputation and dignity right)[40], the right to privacy and personality, the freedom of expression and information, and the freedom to conduct a business. Without mentioning these fundamental rights or the Charter provisions explicitly, contrary to the Advocate General in his opinion, the CJEU limited itself to an interpretation of the E-Commerce Directive[41].

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[39] Judgment of 13 May 2014, *Google Spain*, C-131/12, EU:C:2014:317, para. 97.

[40] D. KELLER, *Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig-Piesczek Ruling*, in *GRUR International*, 69(6), 2020, p. 622.

[41] Judgment of 3 October 2019, *Glawischnig-Piesczek v. Facebook Ireland Ltd*, C-18/18, EU:C:2019:821; see also the Opinion of Advocate General Szpunar of 4 June

The E-Commerce Directive also played a role in the *Scarlet Extended* case, wherein the CJEU had to decide on the compatibility of the requirement for an Internet Service Provider, Scarlet Extended, to install a filtering system in response to infringements of intellectual property rights of authors, composers and editors of musical works, and to combat privacy with other fundamental rights. Although the Court in interpreting the E-Commerce Directive put the freedom to conduct a business at the heart of its judgment, other fundamental rights, i.e. the protection of personal data and the freedom to receive information, were mentioned as well[42].

3.3. Conflicting fundamental rights: a difficult balancing exercise

Where different fundamental rights are at issue and where they clash with each other, the courts will have to engage in a balancing exercise. In legal doctrine, the question has been raised how in general conflicting fundamental rights should be balanced with a view to prevent courts to issue value judgments but rather reach reasonable and well-motivated judgements[43]. When the CJEU is called upon to balance conflicting fundamental rights, Article 52(1) of the EU Charter of Fundamental Rights is relevant:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet

2019, *Glawischnig-Piesczek v. Facebook Ireland Ltd*, C-18/18, ECLI:EU:C:2019:458, paras. 63-65.

[42] Judgment of 24 November 2011, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM/Scarlet Extended)*, C-70/10, EU:C:2011:771. See also S.A. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Oxford, 2015, p. 242.

[43] S.A. DE VRIES, *3 - The Protection of Fundamental Rights within Europe's Internal Market – An Endeavour for More Harmony*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford, 2013, p. 76.

> objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The proportionality principle plays a crucial role here, emphasising the need for the Court to strike a fair balance between conflicting fundamental rights. In the above-mentioned *Scarlet Extended* case the Court held that the intellectual property right as enshrined in Article 17(2) of the EU Charter is not inviolable or must be absolutely protected. Rather, «national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures». In this particular case a fair balance should be struck between «the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the Charter»[44].

There are several notable aspects to the Court's case law. Firstly, the applicable EU legislative framework informs the balancing exercise of the Court. In fact the Court should seek legislative guidance from the applicable directive where conflicting fundamental rights have to be balanced, also in horizontal disputes[45]. Hence, even though the Directive itself, contrary to the directly effective EU Charter provision, cannot be *invoked* before the national court to impose obligations on private parties, the Directive may include criteria as to how fundamental rights have to be balanced. *Egenberger* provides a good example, as Directive 2000/78 determines how ought to be balanced[46]

> the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers not to be discriminated against on grounds of religion or belief.

[44] CJEU, *Scarlet Extended*, paras. 45-46.

[45] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 423-424.

[46] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 423.

Furthermore, next to the fact that the EU legal framework is, as stated above, relevant for deciding upon the applicability of the EU Charter, it may also determine the extent to which certain fundamental rights are given weight or may even take priority over other fundamental rights. In the *Google Spain* case the problem of removing search results from the Internet was (almost) exclusively viewed through the lens of the Data Protection Directive. In other words, whereas the Directive allowed to Court to offer a far-reaching right to protect personal data, this may possibly be at the cost of other fundamental rights, like the freedom of expression or the freedom to receive information, which are not covered by the Directive[47]. In a similar vein, in the case of *Scarlet Extended* the e-commerce Directive (Directive 2000/31) allowed the Court to focus on the freedom to conduct a business, thereby outflanking other fundamental rights, such as the rights of Internet users to privacy and to the protection of personal data. The freedom to conduct a business as contained in Article 16 of the Charter in fact strengthened Article 15(1) of the e-commerce Directive, prohibiting too severe a measure such as the requirement to install a filtering system[48].

Lastly, Article 52(1) EU Charter does not mention whether certain Charter rights may prevail in a specific case. The extent to which the Court will pursue a differentiated approach in the context of the proportionality test as contained in Article 52(1) thus remains unclear. It will ultimately depend on the area concerned, the nature of the Charter right at issue, the nature and seriousness of the interference and the objective pursued in determining how restrictions on fundamental rights are assessed[49].

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[47] S. KULK, F.J. ZUIDERVEEN BORGESIUS, *Google Spain v. González: Did the Court Forget About Freedom of Expression?*, in *European Journal of Risk Regulation*, 2, 2014, pp. 389-398; S.A. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, cit., p. 258.

[48] S.A. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, cit., p. 258.

[49] Judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others (Digital Rights Ireland)*, Joined cases C-293/12 and C-594/12, EU:C:2014:238, para. 47.

3.4. The role of Article 16 EU Charter to protect private interests

What role could Article 16 EU Charter which contains the freedom to conduct a business play in defending the interests of private actors[50]? Advocate-General Trstenjak suggested in her Opinion in the above-mentioned *Fra.Bo* case, a private party could refer to its private-law nature and rely on the freedom to conduct a business[51]. The *Scarlet Extended* case shows the potential of Article 16 EU Charter for tech firms in defending themselves vis-à-vis other private actors claiming an infringement of their fundamental right(s) and wishing to impose a corresponding obligation on the other party.

But in *Sky Österreich* the Court made clear that

> [o]n the basis of that case-law and in the light of the wording of Article 16 of the Charter […] 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. That circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented[52].

Yet, this case concerned a *public authority*, the EU legislature, restricting the freedom to conduct a business of broadcasting corporations in *the public interest.* The CJEU was asked to rule on the compatibility of the Audiovisual Media Services Directive (AMSD) with the EU Charter[53], in particular the freedom to conduct a business and the right

[50] See in general P. OLIVER, *Chapter 12 – What Purpose Does Article 16 of the Charter Serve?*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU law and European Private Law*, Alphen a/d Rijn, 2013, pp. 281-300.

[51] Opinion AG Trstenjak, *Fra.bo*, para. 56.

[52] Judgment of 22 January 2013, *Sky Österreich GmbH v Österreichischer Rundfunk (Sky Österreich)*, C-283/11, EU:C:2013:28, paras. 46-47. See in particular S. PEERS, S. PRECHAL, *Article 52*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Oxford, 2014, pp. 1484-1485.

[53] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or

to property as contained in Articles 16 and 17 of the EU Charter[54]. The question was whether Article 15(6) of the AMSD, which requires the holder of exclusive broadcasting rights to authorise 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 CJEU the Directive had been adopted in accordance with the EU Charter and thereby 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[55].

Now would it be different where a *private actor* rather than a public authority restricts the freedom to conduct a business of another private party whilst relying on the protection of (other) fundamental rights? It may well be. In *Scarlet Extended* the Court seems to give more weight to the freedom to conduct a business where horizontal disputes between private parties are concerned, however here, of course, backed by the E-Commerce Directive. In any event, a fair balance would have to be struck in application of the proportionality principle under Article 52(1) EU Charter.

4. Addressing fundamental rights' concerns through legislative harmonisation

The Treaty does not confer upon the EU legislature a general legislative competence to regulate fundamental rights at EU level. Only for certain fundamental rights, often more closely connected to the internal market, including the principle of non-discrimination and the right to data protection, the Treaty contains specific legal bases for the adoption

administrative action in Member States concerning the provision of audiovisual media services (2010) OJ L95/1 (Audiovisual Media Services Directive).

[54] CJEU, *Sky Österreich GmbH v Österreichischer Rundfunk (Sky Österreich)*.

[55] CJEU, *Sky Österreich GmbH v Österreichischer Rundfunk (Sky Österreich)*, para. 66.

of binding harmonisation measures. But more importantly, the role of the general internal market legal basis, i.e. Article 114 TFEU, has been reinforced in the Digital Single Market, not only to give effect to the digital transition of Europe's economy but also to safeguard fundamental rights. Furthermore, Article 114 TFEU can also be used to deal with future disparities between national laws and future obstacles to trade[56]. As will be briefly discussed hereafter, the EU legislature thereby favours the legal instrument of regulation to create a level playing field for businesses in the DSM and does not shred away from including provisions on fundamental rights, even though an explicit competence in this regard is lacking.

4.1. The strong preference for regulations

The importance of the private sector and the role of private actors in the digital society at least in part explain the EU legislature's strong preference for the use of regulations rather than directives as instruments for legislative harmonisation. After all, regulations have direct and general application, and its provisions can be invoked in horizontal disputes. Furthermore, the instrument of regulation has particularly been adopted in areas where Member States had not yet enacted rules[57]. As stated above, this has been the situation in the digital marketplace, where national, specific regulatory standards – a public economic law infrastructure – have been lacking for a long time and the role of private actors has been imminent[58]. Regulations can thereby provide a coherent

[56] 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)*, in *CML Rev.*, 47, 2010, pp. 1802-1807.

[57] P. SLOT, *Harmonisation*, in *EL Rev.*, 21(5), 1996, pp. 378, 382.

[58] S.A. DE VRIES, *The Resilience of the EU Single Market's Building Blocks in the face of Digitalization*, in U. BERNITZ, X. GROUSSOT, J. PAJU, S.A. DE VRIES (eds.), *General Principles of EU Law and the EU Digital Order*, Alphen a/d Rijn, 2020, p. 5; see also Opinion of Advocate General Poiares Maduro of 1 October 2009 in *Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-58/08, ECLI:EU:C:2009:596: the Roaming Regulation addressed private behaviour that impacted cross-border trade – the behaviour of telecom operators charging roaming prices – which the EU legislator, by analogy with the EU free movement rules having

legal framework for citizens, wherein market, and non-market interests and fundamental rights are balanced.

The increased use of regulations fits into a trend that had been observed by Keleman already more than a decade ago, which he described as Eurolegalism and which entailed more compelling and detailed EU legislation directed at enforceable rights and obligations[59]. Regulations, like the Geo-Blocking Regulation, the Digital Services Act (DSA), the Digital Markets Act (SMA) or the proposed Artificial Intelligence Act (AI Act) can indeed be seen as rather compelling with extensive obligations for – mostly – private actors[60]. The Geo-blocking Regulation, for example, seeks to address discriminatory practices of business in the offline and online environment. The proposed AI Act contains mandatory requirements for designing and developing specific AI systems prior to their placement on the EU internal market and applies to public and private providers of AI[61]. It thereby seeks to create a level playing field for an internal market in lawful, safe and trustworthy AI systems.

(limited) horizontal application, should be able to address on the basis of Article 114 TFEU. Whether the EU is competent on the basis of Article 114 TFEU to directly regulate actions of private parties was not wholly uncontested; Brenncke (n 56) p. 1808: «The decisive argument against the Advocate General's proposal relates to the alleged parallelism between Article 95 EC and the free movement provisions with regard to their application to certain actions of private parties. The express wording of Article 95(1) EC unambiguously requires provisions laid down by a public law body. It would be irreconcilable with and in fact abolish this requirement if genuinely private behaviour were covered by the internal market competence».

[59] R.D. KELEMEN, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Vol. 10, Cambridge (MA), 2011, p. 30.

[60] Commission, Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act) COM (2020) 767 final; Council Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1; Draft AI Act COM (2021) 206 final.

[61] Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts COM (2021) 206 final (Draft AI Act).

4.2. Protecting fundamental rights through internal market legislation

Although the draft AI-Act uses a typically internal market harmonisation technique to regulate the field of AI, it introduces a risk-based approach, applying different legal regimes to AI systems with varying risks for fundamental rights and other core values. Some other legislative initiatives which have been launched on the basis of the internal market legal basis of Article 114 TFEU may even go further where the protection of fundamental rights is concerned. The proposed regulation on political advertising[62] and the so-called European Media Freedom Act[63] are good examples of this and seem quite far from the «original» idea of the internal market, which focused on the abolition of trade barriers. The use of Article 114 TFEU for the domain of political advertising, for example, illustrates

> how difficult the concept of Internal Market as a strictly economic project is to maintain in the digital environment. In the digital environment and data-driven services in particular, the economic aspects of the internal market are often two sides of the same coin. The actors, means and mechanism for political and commercial advertising are increasingly difficult to separate, and often identical[64].

Regarding the European Media Freedom Act, media plurality and the internal market, the EU Commissioner for the Internal Market, Thierry Breton, stated that

> [t]he EU is the world's largest democratic single market. Media companies play a vital role but are confronted with falling revenues, threats

[62] Commission, Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising COM (2021) 731 final.

[63] Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) COM (2022) 457 final.

[64] M.Z. VAN DRUNEN, N. HELBERGER, R.Ó FATHAIGH, *The beginning of EU political advertising law: unifying democratic visions through the internal market*, in *International Journal of Law and Information Technology*, 30, 2022, p. 194.

> to media freedom and pluralism, the emergence of very large online platforms and a patchwork of different rules[65].

Hence, Article 114 TFEU appears to be a powerful legal basis for regulations which address not only market but also non-market and fundamental rights concerns in the DSM, particularly including the concerns that arise out of the strong role of private actors. The DSA which recently entered into force and contains rules primarily for intermediaries and online platforms, also seeks to balance and integrate (opposing) fundamental rights, including the freedom of information, the freedom of expression, the right to non-discrimination, human dignity and the freedom to conduct a business. The DSA also includes a provision, albeit limited in scope and quite vaguely formulated, directed at very large platforms on misinformation or disinformation. Hence, next to the market integration rationale of the DSA which is reinforced by the freedom to conduct a business and is implemented through the adoption of less onerous rules that apply to smaller platforms, the protection of other fundamental rights more specifically connects to its regulatory function[66].

5. Conclusion

The notion of horizontal direct effect has really gained traction in the Court's case law, first in the field of EU free movement law, and later in the field of EU fundamental rights, including provisions of the EU Charter of Fundamental Rights. The EU legislator in a way picked up on this by issuing regulations as preferred legislative harmonisation instrument, particularly on the basis of Article 114 TFEU with a view

[65] European Commission, European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU (16 September 2022), *www.ec.europa.eu/commission/presscorner/detail/en/ip_22_5504*, last accessed on 18 March 2023.

[66] Blogpost by S.A. DE VRIES, available at *https://www.uu.nl/en/opinion/the-potential-of-shaping-a-comprehensive-digital-single-market-with-the-long-awaited-digital-single* (last accessed on 15 July 2023).

to regulate the (Digital) Single Market and to safeguard fundamental rights; a logical consequence of the strong role of private parties impacting not only cross-border economic activities but also non-market interests and fundamental rights.

Of course, accepting horizontal direct effect should not lead to a permanent risk for the exercise of contractual freedom of private parties[67]. A balanced approach is needed. And contractual autonomy has be exercised within the limits of the law, hence private actors cannot be prevented from duties that derive from EU primary or secondary law. This was - in a way - already recognised in ancient Rome in private law with respect to the protection of privacy in horizontal disputes: «the protection provided was the result of the existence of certain actions, mainly the *actio iniuriarum*, as the means to protect individual personality»[68].

The rationale for granting horizontal direct effect to protect Roman citizens' personality emerged from «the development of the classical legal system […] and the social requirement of protection of individuality as a legal value»[69]. This is not so different from the rationale underlying the horizontal direct effect to EU fundamental rights, which are after all regarded as «essential values permeating the entire EU legal order»[70].

To conclude I would like to quote my publication on the *Bauer* and *Max Planck* cases, in which I referred by analogy to Piet Mondriaan's painting «Composition with Yellow, Blue and Red» to describe the development of the Court's case law on horizontal direct effect of EU fundamental rights:

> During the first stage the Court, similarly to the painter who draws horizontal and vertical lines defines and demarcates the conditions under which EU law has vertical and horizontal direct effect; during the sec-

[67] S. PRECHAL, S.A. DE VRIES, *Seamless web of judicial protection in the internal market?*, in *ELRev.*, 34, 2009, p. 18.

[68] See B. PERNINAN, *The Origin of Privacy as a Legal Value: A Reflection on Roman and English Law*, in *American Journal of Legal History*, 52, 2012, p. 183.

[69] B. PERNINAN, *op. cit.*, p. 199.

[70] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., pp. 417-418.

ond stage, the painter uses colours to fill in blank spaces. The different colours may well reflect the different status of fundamental rights, the extent to which they have been subject to secondary legislation, have been given shape and meaning in the case law and have (horizontal) direct effect. During the third and final stage, whereas the painter illustrates a lookout for harmony, the Court is working towards a harmonious and seamless web of judicial protection[71] of citizens within the EU […][72].

[71] S. PRECHAL, S.A. DE VRIES, *Seamless Web of Judicial Protection in the Internal Market?*, in *ELRev.*, 34, 2009, p. 5.

[72] S.A. DE VRIES, *The Bauer et al. and Max Planck judgments and EU citizens' fundamental rights: An outlook for harmony*, in *European Equality Law Review*, Issue 1, 2019, p. 17.