

FREEDOMS OR RIGHTS? A COURT DECIDING WHILE COMFORTABLY NUMB

LYDIA KRIKI*

EU was quite a lot valiant back in 1957, when the Treaty of Rome established the dogma of free movement, paving the road for what was considered to be an economic integration. The dogma was founded on the principle of freedom relating to goods; and the subsequent EU Treaties strengthened the freedom of movement for services, persons and capital. However, they were not all the freedoms equally developed. For many years, it seemed that the European Union gave a fairly obvious advantage to the economic significance instead of focalizing on its people and the parameters of their needs. Subsequently, striking a balance between fundamental freedoms and fundamental rights has become a frequent exercise for the CJEU ever since, as well as a difficult puzzle. Bearing in mind that the digital era brings new challenges for both the circulation of commodities and the preservation of rights, the puzzle gets more and more complex: a tug-of-war between the tech-giants and our information privacy. By using the proportionality principle as its most effective weapon, the CJEU has built a convincing case-law, one step at time. However, does it really find the appropriate balance, or the conundrum is more complex than it seems? The present paper attempts to answer this question.

1 COMING TOGETHER: TRYING TO COMBINE EU'S FUNDAMENTALS

The European Union started to be built, as it is often said, 'from the rooftop'; while the rational option for setting the foundations would be concentrating on unifying concepts such as human rights considerations, the Union did not begin quite orthodoxly. The EU founding fathers chose to initiate the integration project focusing on 'a carefully limited set of economic concerns'¹, instead of working on a more human-oriented basis. The Union began to emerge as a constitutional structure after the adoption of the Maastricht Treaty in 1992,² where the institutional shift from the European Economic Community to European Union took place. After that, the Union started to smooth its ordo-liberal origins and to get reshaped into a constitutional entity;³ in other words, this led European Union to become an organization based on an economic constitution. The economic constitution builds upon the idea of a state based on the rule of law (*Rechtsstaat*), where legal rules enforceable by individuals limit both economic and political power.⁴ Within such a state, recourse to legal

* Lydia Kriki (LL.B., LL.M. Athens; LL.M. Université Paris 2 Panthéon-Assas) is an Athens-based lawyer currently working on a project aiming at the integration of European Union family law.

¹ Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law*, 652.

² Consolidated Version of the Treaty of European Union (Treaty of Maastricht) [1992] OJ C191/92.

³ Craig Watson, 'Fundamental freedoms versus fundamental rights – The Folly of the EU's Denial over its Economic Core' (2016) 3 *Edinburgh Student L Rev* 41, 46.

⁴ Julio Baquero Cruz (ed.), *Between competition and free movement: the economic constitutional law of the European Community* (Oxford: Hart, 2002).

procedures serves to resolve conflicts between the political and economic spheres.⁵ In that sense, such a kind of constitution would play the role of restituting the primary schism lying in the heart of the Union. A schism which could be aptly summarized under the headline ‘freedoms or rights’ and which emanates from the clash of two different school of thoughts. The first school advocates for the protection of economic freedoms, while the second for the institutionalization of the human rights.⁶

This clash implies naturally a lack of cohesion for the Union law and creates problems of an *a priori* hierarchy between the opposing principles. And although figuring out a possible hierarchy is a necessary prerequisite, this is not always the question. The real question that torments the European legal order is whether the whole EU structure, from the institutions’ organization, to the European Court of Justice way of deciding, has favored the economic freedoms at the expense of fundamental rights. The fundamental freedoms have acquired the character of a primary rule in the EU legal context; however, they should not be given ‘a higher status than that awarded to other fundamental rights and values in the Community legal order’.⁷

2 REACH OUT AND TOUCH FAITH: FROM MOVEMENT OF PERSONS TO MOVEMENT OF RIGHTS

Quite often, the fact that the fundamentals of Europe were always the economic freedoms and not the human rights, finds loyal supporters. What is argued by the defenders of this tactic, is that in the dawn of EU many freedoms were granted and fortified, enhancing the human rights status across all Europe. The EC Treaty provided for economic freedoms which were previously unheard both for natural and legal persons, as it carved the road for the imposition of a general prohibition of discrimination regarding nationality. It also introduced the principle of equal pay for equal work, designating the gender discrimination as unacceptable,⁸ already in 1950s. However, as the aphorism states, ‘hell is full of good meanings, while heaven is full of good works’, meaning that maybe enshrinement of these principles might be nothing but the byproduct of economic calculations. At that time, the *Pays-Bas* and the Rhine province in Germany were flooded by thousands of migrants, coming from the poor South, willing enough to work in the mining sites of Wallonia and Westphalia. Allowing them to freely circulate *intra portas* was of major importance if this workforce was to be exploited. Moreover, equality of sexes was brought in for reasons lying on the side of fair competition: if women’s employment was not described in the law, the avoidance of the unfair dumping of labor costs would be unachievable.⁹ So, how rights-directed was EC in its first steps? The introduction of fundamental principles was not an empowerment framework, but rather a pseudo-legal move serving its own purposes.

⁵ Wolf Sauter, ‘The Economic Constitution of the European Union’ (1998) 4 Colum. J. Eur. L., 27.

⁶ Watson (n 3) 41.

⁷ Miguel Poiares Maduro, *We are the Court. The European Court of Justice and the European Economic Constitution* (OUP 1998) 166-168.

⁸ Federico Fabbrini, ‘Human Rights in the EU: Historical, Comparative and Critical Perspectives’ (2017) II Diritto dell’Unione Europea 72.

⁹ Catherine Barnard, ‘Gender Equality in the EU: A Balance Sheet’ in P. Alston et al. (ed.), *The EU and human rights* (Oxford 1999) 215.

European Union had not a bill of rights for more than 50 years;¹⁰ we cannot say that this was a *pro rights* stance in any case. The ECJ tried to act as the protector of the rights from the very beginning, but at the same time it was remarkably negative to be called a ‘human rights court’. The Court spoke about the human rights gravity for the first time in *Stauder*.¹¹ There, it stated in a very short wording that human rights enjoy the same level of judicial protection as the rest of the general principles of Community.¹² Moreover, in its baby steps towards rights protection the Court accepted much influence from international law, as was made quite clear in the *Nold*¹³ decision. It is not a coincidence that, prior to the Rome Treaty, another signing of a treaty in the region had taken place: an international law human-rights convention, the ECHR.

ECJ’s innate tendency not to abide by ECHR and to fabricate normative hinders to its adoption has always been a problem for the rights protection standards inside EU. This might justify some scholars’ suspiciousness to this turn of ECJ. Some of them supported that the Court reconstructed its case-law because of the competition developed between it and the Federal Courts of the Member States. In its *Solange* decision,¹⁴ the Federal Constitutional Court of Germany seemed to ‘concede’ the close scrutiny of the human rights protection to ECJ; the Federal Court ruled that by then the level of the Union protection had advanced notably so the fundamental rights had not to be protected by national courts – an effective and sufficient protection was guaranteed on the Union layer.¹⁵ The German Federal Court was challenging the European Law’s supremacy for over a decade through the vehicle of human rights scrutiny. This direct contestation pushed the Court, according to some writers, to reinforce the rights framework in the Union, aiming to impose the primacy of EU law. In other words, the human rights initiatives were again side-effects of institutional self-seeking.

During the next years, ECJ through its docket expanded the rights-related case-law; however, this always happened in a way of being ancillary to something else. Many rights were recognized as being valid justifications for the restriction of the freedom of movement¹⁶; others were recognized because they were benefitting in parallel economic principles, as the one of pluralism in competition¹⁷; and a whole category of rights, them of social security, were developed as a motivation for a raise in occupation.¹⁸

¹⁰ EEC was established in 1957; the Charter of Fundamental Rights of the European Union came into direct effect in 2009.

¹¹ Case C-29/69 *Erich Stauder v City of Ulm* [1969] ECR I-00419.

¹² *ibid*, para. 7

¹³ Case C-4/73 *Nold KG v Commission* [1977] ECR 00491.

¹⁴ *Internationale Handelsgesellschaft mbH v Einfuhr- & Vorratsstelle für Getreide & Futtermittel (Solange I)* [1974] 37 BVerfG, 271.

¹⁵ Frank Schimmelfennig, ‘Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union’ (2006) 13 *Journal of European Public Policy*, 1256.

¹⁶ Case C-112/00, *Eugen Schmidberger Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR 2003 I-05659.

¹⁷ *See*, for example, Case C-42/84, *Remia BV et autres contre Commission des Communautés européennes* [1985] ECR 1985-02545, where the Court stated that the provision of employment fell under the objectives set by TFEU for the competition, because it improved general conditions of production, especially where market circumstances were unfavorable.

¹⁸ *See*, for example, Case C- 184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193.

Hence, does this push us to the conclusion that the ECJ's case-law was formed as a strictly defensive one? If yes, then the legal and political commitments of the EU institutions to human rights might all be opportunistic. This can be better evaluated if we look up to the status bestowed to fundamental rights inside the EU establishment.

2.1 PROVOKING EU'S SACRED AND HOLY: THE STATUS OF FUNDAMENTAL RIGHTS

The fundamental rights had not a formal recognition as part of EU law, until the adoption of the Maastricht Treaty via what became Article 6 TEU and is now, under the Treaty of Lisbon,¹⁹ enshrined in Articles 2 and 6 TEU. The amendments that the Lisbon Treaty brought marked a new phase in the important expansion of fundamental rights protection in the framework of EU, by inter alia, declaring the Charter to be legally binding. It also vested the Charter the same legal value with the Treaties, making it primary law.

Article 6 TEU under its current form identifies a three-pronged approach to the EU system of fundamental rights: (i) the Charter of Fundamental Rights elevated to the same status as the Treaties, (ii) the article urged for EU accession to the European Convention on Human Rights (ECHR) and, (iii) provided a reaffirmation of the general principles of Union law as a source of fundamental rights, taking into account the ECHR and the constitutional traditions common to the Member States.²⁰

But the changes are not evident only in the legislative field: the case law is also full of examples where fundamental rights considerations have determined (or at least affected) the outcome of the case.

2.1[a] *Freedom and Rights: Should We Attempt an Equation?*

Despite the legal gravity the rights may have to the course of a legal decision, skepticism still exists towards their usefulness in the ranks of EU jurists. In reality, all the factors championing for the fundamental freedoms' promotion think that the same level of social protection could be afforded through the common market's integration,²¹ and that this protection would be more efficient than the one achieved through the fundamental rights use. Fundamental freedoms ensure an inherent respect to the equality principle which, if applied by all Member States, will serve as an appropriate substitute for the rights protection. However, this thought hides a logical fallacy: the supporters of such ideas forget that the fundamental freedoms and the fundamental rights regulate two different fields of the spectrum of the human comportment. While the freedoms are dedicated since their very creation to regulating and liberating the economic, exoteric activities the individual carries out, the rights always serve the purpose of safeguarding an intrinsic value the human being

¹⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

²⁰ Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) *Human Rights Law Review* 650.

²¹ Advocate General Poiares Maduro wrote in his opinion for *Viking* case: 'Free movement rights protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market'. See C-438/05 Opinion AG Maduro ECR [2007] I-10779, para. 33.

bears by the mere fact of being borne as such. These two spheres are not overlapping, but only in a very small scale: where the self-fulfillment implies the exercise of an economic initiative. In any other case, these two categories are clearly distinctive in an Aristotelian sense²²: freedoms head towards potentiality and try to make it effectuated; rights are referred to the actuality of the person and his unique quality he carries naturally, i.e. dignity.

The analogy between the two fundamentals of the European legal order can be seen through the prism of philosophy in a broader sense. In other words, if we want to come to a conclusion about the statement ‘fundamental freedoms can be considered as fundamental rights themselves’ we should examine it according to a philosophical concept serving as the measurement, i.e. the *egalitarian* conception of justice.²³ This conception was expressed by John Rawls and its theory of justice, which set eyes on justice as fairness. According to it, the two principles of justice, summarized in a request for equal rights and one for elimination of social inequality, stand in a lexical hierarchy, where the first one is lexically prior to the second. If someone brings this theory into the EU legal environment, then he would be able to distinguish between the situations in which the Treaty freedoms protect equality of opportunity and the situations where they protect market access in a larger framework.²⁴

In the cases where the Treaty freedoms prohibit national measures which are of discriminatory nature, such as the measures which impose a double regulatory burden,²⁵ they can be considered as fundamental rights promoting the principle of fair equality of opportunity. Accordingly, if we accept Rawls’ lexical hierarchy between the two principles, we come to the conclusion that the hierarchy is rather reversed to the one the ECJ suggests: the fundamental rights associated with the first principle of justice take precedence over the Treaty freedoms and the principle of fair equality of opportunity. Only if we choose to reject this order, we assume that we might accept the Treaty freedom as equivalent to the fundamental rights.

Coming briefly to a second point, the Treaty freedoms when prohibiting national measures which are not discriminatory, but have a limitation effect on the EU market, cannot be seen as fundamental rights. Under this function the Treaty freedoms aim to guarantee the competitiveness of the markets of the Member States: this goal is not an interest justifying the freedoms to be awarded the status of fundamental rights. However, is this broad-market access test really what the Court relies upon? In this aspect, the ECJ case law lacks coherence.²⁶ And despite the fact some contend the Court has abandoned the *Keck* formula relating to the type of rules affecting the trans-national trade, this is not true.²⁷

After the line of thought exposed before, it is evident that whenever the Court relies on a broad market-access test, it should not claim for the Treaty freedoms a status

²² See Aristotle’s *Metaphysics*, Chapter 12: Actuality and Potentiality, Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/aristotle-metaphysics/>>, accessed: 27 February 2020

²³ MIT University, *Rawls’ Theory of Justice II: The Study Guide of MIT* <<http://www.mit.edu/~rdoody/Econ%20Justice%20ER41%202016/RawlsJusticeII.pdf>> accessed 1 March 2020.

²⁴ Nik J. de Boer, ‘Fundamental Rights and the EU Internal Market: Just how fundamental are the EU Treaty Freedoms? A Normative Enquiry based on John Rawls’ Political Philosophy’ (2013) 9 *Utrecht Law Review*, 150.

²⁵ Commission, Report of the Expert Group, Models to reduce the regulatory burden on SMEs, 15.

²⁶ Jukka Snell, ‘The Notion of Market Access: A Concept or Slogan?’ (2010) *Comm. Market L. Rev.*, 467.

²⁷ Eleanor Spaventa, ‘From Gebhard to Carpenter: Towards a (non)- economic European Constitution’ (2004) *Comm. Market L. Rev.*, 10.

hierarchically equal (or superior) to that of fundamental rights. It would be wiser for the Court to apply the Rawls-based differentiation between the two versions of the Treaty freedoms. In consequence, following the abovementioned interpretation, the answer to our initial question is negative: the EU fundamental freedoms cannot serve as fundamental rights themselves. Implementing the concept of ‘primary social goods’ under the Rawlsian social welfare function, it becomes evident that, as the freedoms serve an ‘opportunity-open-to-all’ purpose only under circumstances, they cannot rank as high as the fundamental rights in the value scale of a legal order.

2.1 [b] *Equalizing Means Confusing: Simplistic Approaches*

It is not uncommon for the discussed concepts to be subsumed under a single, undifferentiated status and crushed by a convenient, ‘one-fits-all’ manipulation. Indeed, the Court itself has been trapped many times before in this simplistic schema, as it insists to take a unified normative approach. Unfortunately, this approach undermines structures in every level – national or supranational. ECJ now requires that all state institutions and state law conform to European free movement norms, but also that the particular actions of individual unions do as well – even for particular individuals.²⁸

According to Lasser, there are two ways of conceptualizing the problem created by the ECJ’s unified approach to fundamental rights and freedoms: the first one is to think of it as the ‘microscope problem’.²⁹ The Court chooses to focus on the ‘micro-level’ to search into a particular act of a very specific private actor and its possibility to breach the standards set by the free movement principles. This leads the Court to work in a level of high specialization, but also somehow to exclude the valuable context of any case. Any action brought before ECJ is part of a larger problem and functions as an indicator of an anomaly in a more general relations structure. If the Court chooses to interpret particular sides of these complexities (especially if these are closely linked to any domestic law regulations), it fails to see the bigger picture and ignores intentionally the useful surroundings.

The second way to conceptualize this more general problem is to draw an analogy with administrative management. If someone chooses to see each district as a distinct unity isolated from the rest of the population, he might succeed a high grade of individualized solutions, achieving efficiency and productivity. However, the problem remains: the courts fail to face up the disputes as systemic difficulties, and they prefer to parcel out the different kinds of conflicts, ending up to a ‘piecemeal’ consideration of the legal order. After all, the commentators themselves admit that the Court’s consistent position is a *case-by-case* approach, implying that this choice entails more efficacious answers. What they overlook, however, is that this approach may lead to arbitrary results. Taking into consideration that the majority of the EU Member States are Civil law legal orders, where the whole legal system appears to be a mosaic of many different elements (private, public, criminal, international or civil law are seen as discernible fields),³⁰ the ECJ’s practice is proved to be in conflict with this mentality: the EU Court continues to zoom into each individual fragment of the mosaic,

²⁸ See Case C- 281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

²⁹ Mitchel Lasser, ‘Fundamentally Flawed: The CJEU’s Jurisprudence on Fundamental Rights and Fundamental Freedoms’ (2014) 15 *Theoretical Inq L* 229, 253.

³⁰ *ibid*, 254.

insisting that it conforms independently to a given rule. Such a short-sighted point of view damages the main advantage of the mosaic, i.e. its normative richness, which offers a panorama of solutions, generated by its heterogeneity.

Viking and Laval cases

One of the judgments where this was aptly depicted, is the *Viking* case.³¹ In this case, the two concepts clashing were the fundamental freedom of establishment, enshrined in Union law, and the fundamental right to collective action, under the Finnish national law. The judgment focused on whether the workers' union fundamental rights on collective action infringed the company's fundamental freedom to move its registered seat within the EU, and on what lengths this was justified or not. The result was admittedly disappointing: the Court saw with suspicion the collective action and proceeded to draw a picture of the social rights as the ones being instrumental, without carrying value on their own terms.³² That was a quite alarming outcome from a fundamental rights perspective: implementation of the horizontal effect of Treaty provisions on trade unions would facilitate their potential liability which was extended to the free movement of services and establishment field.

On the other hand, this analysis has never been conducted so far in the opposite direction: there is no example in the ECJ's case-law where the judiciary investigates the possibility of a firm's fundamental freedom of establishment to entail an infringement on the unions' right to strike – justified or not. This absence strongly indicates a 'hidden' hierarchical structure in the EU legal system, since the Court systematically treats rights as the derogation to the rule, not as an equivalent rule opposing another. If we combine this mindset with the strict scrutiny of the fundamental rights exceptions the Court imposes, then no 'fundamental' status characterizes fundamental rights. The situation grows more problematic if one takes into consideration that the Court does not explain this option and it never address the question of why it applies the proportionality analysis asymmetrically.³³ The result of this condition is a 'protective shield' to be created for the liberal market freedoms, since they have not to face the normative obstacles and the preconditions to their application the rights have to supersede from their part. The status emerging is that the one type of rule enjoys a kind of immunity, as the second type of rule plays the role of its supplement. The *Viking* case exemplifies this practice: the Court is not even bothered to expose in its reasoning the incentives for its choice to promote the freedom of establishment instead of the right to strike.

A similar line of argument was followed in another decision regarding collective workers' rights in the EU: the *Laval* case.³⁴ There, the Court stated as follows:

The fundamental nature of the rights to take collective action is *not such as to render Community law inapplicable to such action*, taken against an undertaking established in

³¹ Case C-438/05 *Transport Workers' Federation and Finnish Seamen's Union v. Viking Line and OÜ Viking Line Eesti* [2007] ECR I-10779.

³² Tonia Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments (2008) Cambridge Yearbook of European Legal Studies, 561.

³³ Lasser (n 29) 247.

³⁴ C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

another Member State which posts workers in the framework of the transnational provision of services.³⁵

Accordingly, it concluded that the fact that industrial action aimed at obtaining terms and conditions which went beyond the minimum established by law made it less attractive for undertakings to carry out its business in the Member State: therefore, it constituted a restriction on the freedom to provide services, guaranteed under the Treaty. Consequently, industrial action to impose terms in the absence of legally enforceable national provisions, could not be justified under EU law. This decision also drew heavy criticism, as *Viking* did: for many, these decisions' verdict meant a significant opportunity was given to social dumping and unfair competition, respectively.³⁶

And even for those stating that the level of protection offered by the freedoms would sometimes be considered to serve in social justice's favour, the answer came directly from the EU institutions themselves: after the two judgments of *Viking* and *Laval* came to the light, a resolution was adopted by the European Parliament in 2008,³⁷ emphasizing that

The freedom to provide services is one of the cornerstones of the European project; however, this should be balanced [...] against fundamental rights and the social objectives set out in the Treaties, and [...] against the right of the public and social partners to ensure [...] the improvement of working conditions.

The resolution made a reference to the Charter of Fundamental Rights, too, since collective bargaining and collective action are expressly enshrined in it.³⁸ To many States' disappointment, the Council and the European Commission felt no need to react in an analogous way to the Court's developments, but since the Parliament, the organ which is the epicenter of democratic control in the Union³⁹ did so, it held more gravity.

2.2 THE BALANCE EXERCISE IN THE NEW CONTEXT: PROPORTIONALITY AFTER THE CHARTER

Since the aforementioned case-law was produced before the Charter of Fundamental Rights of EU come into force, it is also necessary to examine if the adoption of the Lisbon Treaty made any crucial difference for the way the fundamental rights were treated in the EU legal context. As already said, a new impetus was given by the Article 6 TEU, which signifies the Charter's binding force and declares that the latter codifies the ECJ case law, referring to fundamental rights as general principles of Union law. Subsequently, the real question emerging after that is whether the Charter is nothing but a simply codifying document, a

³⁵ *ibid*, para. 95 (emphasis added).

³⁶ Catherine Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 *The Cambridge Law Journal* 262.

³⁷ European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).

³⁸ *ibid*, para. 1.

³⁹ Katrin Auel and Berthold Rittberger, 'Fluctuant nec Merguntur. The European Parliament, National Parliaments and European Integration' in J. Richardson (ed.), *European Union, Power and Policy-making* (Routledge, 3rd ed., 2006)125-129.

synopsis of already known general principles, or if it is a self-standing source of law, bearing its own added value.⁴⁰

2.2[a] ECJ: *The Girl with Kaleidoscope Eyes*

In general, the Charter could be described as a more expanded collection of the rights already contained in the various European and international conventions and the Members' national constitutions. The novelty compared to other similar texts is that the Charter introduces a division between 'principles' and 'rights.' More specifically, Article 52 of the Charter reads as follows:

The provisions [...] which contain *principles* may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States.... They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.⁴¹

The provision proved to be much contentious and vague, some of the commentators proposing that it was implying some of the provisions to be 'only programmatic principles and not judicially enforceable rights.'⁴² The Court has not yet bring in its view on this rivalry in any of its fundamental rights judgments: it had the opportunity to address this question in the *Yoshida Iida* case,⁴³ however no link with EU law could be established within the meaning of Article 51 and the Court dropped the case.

Similarly, in the *Ruiz Zambrano*⁴⁴ case the Court did not deal with the applicability of the fundamental rights. And despite the fact that Advocate General Sharpston opined for the extension of the application of fundamental rights to situations in which the EU is competent to act,⁴⁵ irrespective of the type of competence or its actual exercise, no answer was given regarding this subject.

What did not happen for the fundamental rights, however, happened for a freedom 'disguised' as right: the freedom to conduct business. This freedom is enshrined in the Charter itself,⁴⁶ therefore being vested a more constitutional attire comparing to the other economic freedoms of the Union law. Nevertheless, and despite the fact that it is named as a freedom, it 'bears the signs of a principle in the sense of Article 52(5)'.⁴⁷ This being the situation, the Court did not abstain from the interpretation of an economic principle, while

⁴⁰ See European Parliament, Conclusions of the Cologne European Council (June 1999). There, it becomes clear that the European Council gave the mandate for a Charter which would consolidate what was existing, not for creating anything new.

⁴¹ Article 52(5) of the Charter of Fundamental Rights of the European Union.

⁴² Francesca Ferraro and Jesus Carmona, 'Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty' (2015) European Parliament Research Service, https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA%282015%29554168_EN.pdf (emphasis added).

⁴³ Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012] EU:C:2012:691.

⁴⁴ Case C- 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] ECR I-01177.

⁴⁵ Opinion of AG Eleanor Sharpston, Case C- 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] ECR I-01177, para 163.

⁴⁶ Article 16 of the Charter of Fundamental Rights of the European Union.

⁴⁷ Xavier Groussot, Gunnar Thor Petursson, Justin Pierce, 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' in S. Douglas – Scott and N. Hatzis (eds.), *Research Handbook on EU Human Rights Law* (Edward Elgar, 2019) 6.

it did not do the same for a right. Consequently, in *Scarlet Extended*, it did not hesitate to rule on the application of Article 52(1) of the Charter and the limitations imposed on the freedom to conduct business.⁴⁸ The Court concluded that the latter was violated by an injunction aiming at protecting the intellectual property rights enjoyed by copyright holders.⁴⁹ In such a way, the Court reached another method for horizontality to be achieved. By virtue of Article 16 of the Charter, private actors are able to enjoy more explicitly the protection of their autonomy, as public regulation is seen as a restriction and the private parties are relied on the freedom to conduct business in order to develop their economic initiatives.⁵⁰ This might lead one to think that Article 16 is a Trojan horse for the fundamental rights: the freedom to conduct business becomes a constitutionalized liberal concept, attaining an upgrade of the economic principles to fundamental rights. The case of Article 16 adds a new element to the relationship between the two fundamentals. It is the vivid example of the freedoms not only suffocating rights, but also substituting them. This change alters the balance between freedoms and the social rights, as the principles, vague to their concept, are most of the times colored with liberal contours and they do not remain ideologically neutral.⁵¹ This further supports the conclusion that the Court resorts to odd techniques in order to serve EU's financial – driven purposes. Except from having a corrosive effect on the fundamental rights status, this also raises questions for the usefulness of the introduction of the Charter itself.

According to the author's view, in EU we were witnesses of a legal paradox: the enactment of the Union's bill of rights had, in fact, a chilling effect on the application of the fundamental rights. And the example of the freedom to conduct business is not the only indicator; since Article 51 demands for its application only in case the Member States act implementing EU law, this means an extremely restrictive interpretation for the fundamental rights access to the EU legal order. Respectively, the Court has adopted a varied approach to the application of the Charter to national rules: when the internal market connection seems to be stronger, the Court is more willing to assert its jurisdiction and apply Charter fundamental rights to national rules, using them as a tool to strengthen internal market rights.⁵² Again the balance between the EU's fundamentals is disrupted and the rights are instrumentalized for freedoms' sake. On the contrary, when the internal market connection is weaker (even when there is a clear connection to EU law, such as in citizenship cases), the Court is far more reluctant to impose fundamental rights standards on national rules. Both the case law on coordinating legislation and the case law on Article 51 of the Charter seem to depict a subservience of EU rights to the interest of EU integration – at least in relation to the application of the Charter to national rules.⁵³

⁴⁸ Case C-40/11 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR 2011 I-11959.

⁴⁹ *ibid*, paras. 47-49.

⁵⁰ Dorota Leczykiewicz 'Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U. Bernitz et al. (eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013).

⁵¹ Joxerramon Bengoetxea 'Principia and Teloi', in Samantha Besson and Pascal Pichonnaz (eds.) in collaboration with M.-L. Gächter-Alge, *Principles in European Law – Les principes en droit européen* (L.G.D.J., 2011) 83.

⁵² Directorate-General for Internal Policies, Policy Department C (Citizens' Rights and Constitutional Affairs), *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures*, Study for the PETI Committee (2016) 32.

⁵³ See Case C- 399/11, *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107.

Moreover, from a procedural standpoint, the Court recognized the command to conciliate rights with freedoms, by imposing a shift in the burden of proof. This was translated into that, unlike to what the ECHR asks for, they are the rights defenders who have to justify their actions and prove that the restriction due to the rights exercise is justified. If the situation was reversed and they were the freedoms advocates who should prove that any restriction of human rights is acceptable, we would be justified to think that the rights are the rule and the freedoms the exception. But the Court once more, chooses to cast a vote for the opposite, as we contended in the previous sections.

The Court has many times reiterated the phrase which summarizes its steadfast position: ‘we are not a human rights court’.⁵⁴ Its reluctance to admit itself as a human rights jurisdiction has been going on even after the inauguration of the Charter in the EU territory: the Court confirmed this stance in the Opinion 2/13,⁵⁵ and follows constantly a frustrating interpretation of the Charter’s horizontal provisions.

As Brown has said: ‘the language of breach of economic rights suggests that it remains something which is at the heart wrong, but tolerated, which sits rather uneasily with the State’s paramount constitutional obligation to protect human rights.’⁵⁶ After this observation, it is not a surprise that there are academic voices⁵⁷ noting that ‘viewed from this perspective the EU may indeed not yet have been fully transformed into a Human Rights Organization’.⁵⁸ The only thing the EU has achieved so far is to merely incorporate fundamental rights in its free movement theory and build a human rights ‘dimension’ of the internal market. The fundamental freedoms were always the core;⁵⁹ the rest ingredients of the EU legal order were developed as their necessary concomitants. Even citizenship was always the *addendum* of the four freedoms: anti-Brexit rhetoric in the dawn of Britain’s leave from EU echoed the mentality that, away from Europe and its economic integration, no Europeanness is conceived.⁶⁰ European Union is an economic union; if the economic benefits are lifted, there is no such thing as European citizenship.

These developments lead us to deduce the conclusion that the Charter of Fundamental Rights aims at highlighting the fundamental rights mainly in relation to acts of the Union institutions: the application of the Charter in relation to the acts of the Member States is meant to be a simple codification of existing case law. Member States when exercising discretion in a field occupied by EU law are bound by their national guarantees, so the domestic fundamental rights should be the main source of protection against acts of the

⁵⁴ Daniel Sarmiento, ‘A Court that Dare Not Speak its Name: Human Rights at the Court of Justice’, *EJIL TALK* (2018) <<https://www.ejiltalk.org/a-court-that-dare-not-speak-its-name-human-rights-at-the-court-of-justice/>> accessed 16 December 2020.

⁵⁵ Opinion 2/13 pursuant to Article 218(11) TFEU [2014] EU:C:2014:2454.

⁵⁶ Christopher Brown, ‘Case C-112/00, Eugen Schmidberger, Internationale Transport und Planzilge v. Austria, Judgment of 12 June 2003, Full Court’ [2003] 40 *Comm. Market L. Rev.*, 1508.

⁵⁷ See, for example, Sybe A. de Vries, ‘Tensions within the internal market: The functioning of the internal market and the development of horizontal and flanking policies’ (2006) 9 *Utrecht L Rev*, 187.

⁵⁸ John Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’ (2006) 12 *European Law Journal*, 38-39.

⁵⁹ Wolfgang Münchau, ‘Europe’s four freedoms are its very essence’ *Financial Times* (12 Nov 2017) <<https://www.ft.com/content/49dc02dc-c637-11e7-a1d2-6786f39ef675>> accessed 11 October 2020.

⁶⁰ Paul Taylor, ‘How Brexit made me a citizen of nowhere’ (20 May 2018) <<https://www.politico.eu/article/how-britain-made-me-a-citizen-of-nowhere/>> accessed 11 October 2020.

Member States. The Charter should function as the main tool for the EU institutions; for the national authorities it would serve only as a safety net.

2.2[b] *National Identity Factor: Endless Rain into a Paper Cup*

There is an actual danger in case of a broad application of the Charter to national measures for an important loss of national autonomy and sovereignty, and also of the constitutional diversity, which forms part of the national identity of each State.⁶¹ The Court does want to avert this danger and this is the reason it keeps having a more prudent stance. It is true that it is not always receptive to fundamental rights discourse – it rather advantages the integration goals instead. The *Viking* case, as mentioned before, is an example of this Court practice: in this case, applying the combined effect of the application of the Treaty free movement rights and the substitution of the EU standard of fundamental rights for the domestic one, had the effect to weaken rather than strengthen the protection of non-economic rights in the national level.

In total, this conservative, self-confined approach by the Court seems to annul all the efforts set forth through the consolidation of the Charter text as primary law in the EU legal context. If this continues, then the fact that the Charter is strictly binding along with the founding treaties will be void letter and the text will be stripped down to a declaratory instrument. A broader application of the Charter should be promoted: the EU citizens (i.e. the Union's *demos*)⁶² do have the expectation from the European Union to afford them not only economically-oriented rights, like the ones linked to free movement; a common standard of protection along the Union is also desirable.⁶³ Also, the Charter can be seen as the 'constitutional glue' in a Union with obvious signs of fatigue originating from a mechanistic integration, driven by mere fiscal goals; the recent financial crisis proved this.⁶⁴ If the Charter takes part in such a kind of effectiveness, it will play a wrong role weakening instead of strengthening the protection of the individuals.

Not so many things have changed in relation to the Court's methodology applying its famous 'proportionality test', after the Charter's enactment. The main tendency is a soft implementation, allowing the national court to protect a national constitutional standard against the European principle of free movement. Tridimas calls that the 'integration model', based on value diversity which views national constitutional standards not as being in a competitive relationship with the economic objectives of the Union, but as forming part of its polity.⁶⁵ The idea was confirmed by the Court in the famous case *Sayn-Wittgenstein*⁶⁶, which

⁶¹ Article 4(1) of the Treaty on the Functioning of the European Union.

⁶² Mette Jolly, 'A Demos for the European Union' (2005) 25 *Politics* 1, 12-18. Also, see Mehreen Khan, 'In search of the European Demos' <<https://www.ft.com/content/b6ca7e8a-0004-11e8-9650-9c0ad2d7c5b5>> accessed 23 January 2018.

⁶³ Opinion of Advocate General Sir Francis Jacobs in Case C-168/91 *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsam* [1993] ECR I-01191. Also see Francis G. Jacobs, 'Human Rights in the European Union: the Role of the European Court of Justice' (2001) *ELRev* 331.

⁶⁴ Matt Phillips, 'Europe doesn't have a debt crisis – it has a democracy crisis' (7 Jul 2015) <<https://qz.com/445694/europe-doesnt-have-a-debt-crisis-it-has-a-democracy-crisis/>> accessed 1 March 2020.

⁶⁵ Takis Tridimas, *The General Principles of EU Law* (OUP 2006) 338.

⁶⁶ Case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693.

made a special reference to the Article 4(2) TEU mentioning the obligation the Union has to respect the national identities of the Member States, including their status as a Republic.⁶⁷

The reason of these choices of the ECJ may lay on the idea that there is an equivalence of protection throughout the various Member States – however, is there any possibility for the EU institutions to enforce this believed standard of protection? The application of the nuclear provision of Article 7 is not of any importance so far – so how the EU central organs safeguard the fundamental rights across the Union? The only solution seems to be a more courageous implementation of the Charter by the Court in the cases that definitely fall under the EU law scope, and a possible expansion to what is considered to fall under it. Until Member States cannot guarantee a satisfactory level of fundamental rights protection then the EU instruments should be used in a larger amplitude, for an appropriate level protection to be achieved.

However, the most realizable suggestion came from Advocate General Trstenjak, in her Opinion in the case *Commission v. Germany*.⁶⁸ There, Advocate General recommended a more ‘truth-lies-somewhere-in-the-middle’ kind of solution, as she tried to include a bidirectional test of proportionality. In other words, according to Advocate General, it is necessary to examine not only whether the restriction of a fundamental freedom for the benefit of fundamental rights’ protection satisfies the proportionality test; also, one should examine whether the restriction of a fundamental right for a fundamental freedom is appropriate and necessary. This is a ‘double proportionality test’, constituting an attempt to cover both the ends of the normative spectrum. A quite similar formula was chosen to be followed in the *Schmidberger* case, where the national authorities of Austria were given a margin of discretion regarding the demonstration under discussion. They could assess the impact of the demonstration to the free movement of goods themselves, and also consider the effect of this possible banning on the fundamental rights of speech and assembly.

It is more than obvious that this suggestion bears the sperm of the third element of the proportionality test, the *stricto sensu* proportionality, offering an approach which is closer to the true meaning of ‘balancing’. An effort close to this approach was made by the Court also in *Volker & Schecke* case,⁶⁹ in conjunction with Article 52 of the Charter.

In any case, a proposal like this, far more well-balanced than the previous one systematically applied by the Court, is pretty much welcome. Resorting to an ad hoc approach, with no stable and consistent standards, offering no guarantees and ending up to undermining the rights aspect in almost every time, is not a solution anymore. The Court has to wake up and see the truth: it may be not a ‘human rights court’, but EU legal order is now transforming into a human rights order. It has to synchronize its methods with this reality.

3 AND THE WAVES THEY GET SO HIGH: FRESH NEW CHALLENGES

The assessment procedure described above was inherently flawed, as it entailed personal opinion intrusion to a large extent and it bore the risk for arbitrary decisions, taken according

⁶⁷ *ibid*, para. 92.

⁶⁸ Case C-271/08, *European Commission v Federal Republic of Germany* [2010] ECR I- 07091.

⁶⁹ Cases C-92/09 and 93/09 *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eijfert (C-93/09) v Land Hessen* [2010] ECR I-11063.

to non-transparent and peremptory tests. However, what can be noted is that the same problem was also detected in the reverse balance procedure, i.e. in the course of a horizontal application of the four freedoms rule.

3.1 IT'S DECREED THE PEOPLE RULE: THE SOCIAL INCLUSION PROBLEM

As the EU law was unfolding its normative power in the framework of a market mainly, what was evident from the first days of the EU edifice was that the free movement provisions had to be directly applied to the private operators of the market. This led to the free movement law to be applied to the actions of private parties. And while their vertical effect was always self-evident, the extent to which the four freedoms were influencing private parties' position was a controversial matter. Driven by the need for effective and uniform application of the four freedoms dogma, the Court held in *Walrave and Koch*⁷⁰ that the 'freedoms set of rules would be applied to actions coming from private parties and aiming at regulating in a collective manner gainful employment and the provisions of services'.⁷¹ For this application to take place, the actions had to fall under the category of employment or services in a collective manner. Also, the Court set the criterion of the abstention from a statist view: the obstacles to free movement had to be the derivative of 'the exercise of legal autonomy' of private parties. In other words, this meant that the private party had to be in a position of independence from other institutions.

However, this approach showed a kind of assessment which was identical to the one the Court implemented for the rights, as previously indicated. In a 'backwards' stream of thought, the Court was identifying the restriction, and then used it to justify the direct effect of the free movement provisions.⁷² No independent evaluation of the direct effect issue was involved. In other words, the Court was extremely eager to intervene in freedoms' favor: however, this intervention was fluent, variable and totally one-sided. On the other hand, as unreasoned as it was, such an intervention seldom happened for the rights' safeguarding.

3.1[a] Horizontal Application: Bauer

That this be, the question is what could be done for the rights' easier direct implementation. If we closely examine the human rights system in the EU framework, we can come to the conclusion that there is an available mechanism which can strengthen their implementation. The horizontal applicability of the rights is an apparatus borrowed from the international law field; however, its utility on an EU-level is indisputable, since in the Union environment, many non-State actors are in a position to greatly affect individuals' benefits resulting from their rights.

ECJ has many times come across the horizontal application question, however the question was always closely interwoven to the chapter of the possible direct effect of directives. More specifically, the Court in 2005 attempted a leapfrog ahead: despite the fact that until then it did not perceive the problem as such, in the *Mangold* case it ruled that

⁷⁰ Case C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1974 01405.

⁷¹ *ibid*, paras 17-18.

⁷² Barend v. Leeuwen, 'Rethinking the Structure of Free Movement Law: The Centralisation of Proportionality in the Internal Market (2017) 10 European Journal of Legal Studies', 251.

directives which embody an EU law principle can produce a direct effect and consequently can be invoked in a private parties' relationship.

This innovative development stirred up many discussions in the legal sphere, the main of them being 'is the Mangold effect still applied if the Directive concretizes a provision of the Charter?'.⁷³ The Court gave its first answer on the subject in *AMS* case.⁷⁴ There, the bench ruled that a Charter provision (Article 27 in the present case) could not be a directly applicable piece of legislation, and its particularization by a Directive could not justify the *Mangold* rationale. The pretext for this exclusion was a mind game from the Court's part: it contended that in *Mangold* the general principle could be directly invocable, since it was the requirement for no discrimination on the grounds of age. On the contrary, in *AMS* the provision of the Charter was not by then invocable, as there was no further legislation to enact it. It was also involved in a rather dishonorable series of arguments, implying that Article 27 of the Charter being discussed in *AMS* was not a right according to Article 51(2) of the Charter, but rather a 'principle'. However not clearly stated in the decision text, this reasoning outlined the picture of a supranational entity which does not have the strength to utilize the prerogatives yielded to it from the Member States, and only abandons itself in a self-consuming, empty legalism.

Fortunately, later on, the Court seemed to rephrase its position taken in *AMS*. First, in the *Egenberger*⁷⁵ case, the Court underlined the horizontality's importance, stating that the prohibition of discrimination 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law'.⁷⁶ However, the court has an obligation to balance competing fundamental rights of both parties to the dispute, so the fundamental rights of one individual are limited by the fundamental rights that may be derived from the Charter by other individuals.⁷⁷

This line of thinking was preserved and further reinforced in a subsequent ruling, in respect with the area of employment and social fundamental rights, traditionally managed with caution and circumspection by the Court. In *Bauer*,⁷⁸ the Court examined the horizontal applicability of Article 31(2) of the Charter (the right to paid annual leave) and it came to the conclusion that this provision is of a mandatory and unconditional character. According to the ruling, workers can rely on such a right in disputes between them and their employer in a field where EU law applies, and therefore is in the scope of the Charter.⁷⁹ The mere fact that the Charter is in principle directed to the Member States and the EU institutions does not mean that it precludes the application of it to the private parties' level.⁸⁰ With its ruling

⁷³ Daniel Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer' (2018) *Despite Our Differences Blog*, available at:

<<https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/>>, accessed 11 October 2020.

⁷⁴ Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014], EU:C:2014:2.

⁷⁵ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] EU:C:2018:257.

⁷⁶ *ibid*, para 76.

⁷⁷ *ibid*, para 80-81.

⁷⁸ Case C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018], EU:C:2018:871.

⁷⁹ *ibid*, para 80-85.

⁸⁰ These assumptions were repeated in many rulings after, like Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* [2018], EU:C:2018:874, Case C-147/17 *Sindicatul Familia Constanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța* [2018], EU:C:2018:926, and Case C-193/17 *Cresco Investigation GmbH v Markus Achatz* [2019], EU:C:2019:43.

in *Bauer*, the Court shifted from its traditional stance and affirmed the articles of the Charter as imperative rules which can be brought in private parties' disputes. What can guarantee this result, is the interaction between the Charter and the pertinent Directive.

Consequently, it would not be an exaggeration to say that the horizontal applicability has unequivocally been included in the fundamental rights establishment, as it is comprehensive enough taking after the Charter. This is quite a useful development, since the 'the 21st century Leviathan is often a beast of a private nature', as it has successfully been said.⁸¹

The European Union of nowadays is a heavily integrated organization from an economic perspective; however, it is not only this. The social and political reality which accompanies the economic integration require a uniform approach to the various aspects of the citizens' activities. The common denominator of these activities should be the implementation of the fundamental rights. This should penetrate all dimensions of the EU exercise, the economic activity included. That was stressed out in *Bauer*, where the Court emphasized that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law'.⁸² The fact that the Court articulated the value the horizontal application has for the first time in a social rights context is another small victory. As clearly indicated in the *Viking* and *Laval* cases, the social security field was a quite afflicted one by the freedoms' preferential implementation. The fact that ECJ explicitly ruled in favor of horizontal application in a dispute between an employer and an employee may be translated as the Court equipping the chorea of social rights with effective legal protection.

3.1 [b] *Topfit & Biffi*: Harmonizing EU's Rights?

However, a direct obligation to protect the fundamental rights was imposed by the Union in a framework much more unexpected than that of employment– the one of athletics. In a ruling deciding on sports, the Court broadened the scope of what was protected under EU law. Differentiating from the traditional interpretations applying until then, the Court said that, subject to EU law, were not only the activities which could be considered economic, but all the obligations resulting from the various provisions of the Treaty.⁸³ In *Bauer*, the Court added that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law'.⁸⁴ This unusual approach led to the conclusion that practicing any sport activity which is subordinate to the law of the Union can be perceived as the tangible realization of the fundamental rights and freedoms enshrined in the Charter by individuals. The Union jumped in the observance of these rights, abolishing the clearly economic nature of an activity if a right was to be protected.

⁸¹ Wojciech Lewandowski, 'Is Bauer the new Bosman? – The implications of the recent jurisprudence of the Court of Justice of the European Union for FIFA' (2019), *Verfassungsblog*, <<https://verfassungsblog.de/is-bauer-the-new-bosman-the-implications-of-the-recent-jurisprudence-of-the-court-of-justice-of-the-european-union-for-fifa/>> accessed 16 December 2020.

⁸² *Bauer et al* (n 78) para. 52.

⁸³ Case C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006], ECR 2006 I- 06991, para. 28.

⁸⁴ *Bauer et al* (n 78) para.52.

The same outcome was noticed in a later judgment also concerning sports, i.e. *Topfit and Biffi*.⁸⁵ The case was deciding on dual careers of students performing at the same time as athletes. It was a case having consequences linked to the freedom of movement since, according to the Commission, ‘athletes represent one of the most internationally mobile parts of the European population’.⁸⁶ Under those conditions, it would be impossible to risk the athletes’ right to access the sporting events they were interested in on a non-discriminatory basis because of the lack of harmonization of national laws and regulations.⁸⁷

The main implication about this case was, as it is easily understood, the particular nature of the athletes’ career: the subjects of EU law in this case, being students and sportsmen at the same time, were exercising a non-economic sporting activity. However, the nature of the activity did not hold the Court back from ruling in favor of the rights’ integrity. At that, the Court did not hesitate to go one step further and state that EU law must be interpreted as precluding a national provision relating each time to the case. In this way, the judgment, developing an *erga omnes* binding effect moved to the direction of creating a de facto level of harmonization of Members’ States legislation. This is what prominent members of the academy and lawyers meant when they were ascertaining that the decision did its small bit to the direction of integration in the field of rights.

This integration is closely linked to the EU law-making procedure. In the field of sport, just like the one of education, Union has a supporting competence, meaning that it cannot replace the respective competence coming from the Member States, and that legally binding acts of the Union for these areas shall not entail any kind of harmonization of the Members’ laws. The bold move from ECJ was that in *Topfit and Biffi* it ruled *contra* to this notion. Despite the sport was regulated in this field, the Court, ignoring Advocate General Tanchev’s divergent opinion,⁸⁸ proceeded to decide that leisure activities like sports justify for the persons to move freely pursuing their practice of an amateur sport in another Member State.

The decision marked an intersection for the EU case-law, as it brought two innovations: first, it stretched the boundaries of the supporting competences in EU, in order to serve a greater purpose; and second, it brought into the fore the indirect effect of harmonizing the Member States’ national legislating through the implementation of a right, the right to leisure and amateur sporting activities. It is really interesting that the Court decided to rule these developments in a decision relating to second-rate sportsmanship of minor importance. The effort is even more surprising if someone thinks that EU’s supreme court had previously ignored the same possibility in cases which were of much more significance, like the ones involving social security rights. The fact that *Topfit and Biffi* was about amateurs and not workers stroke many people, questioning the whole priority list the Court mentally sets. Amateur athletics is of course a pastime with remarkable benefits;

⁸⁵ Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* [2019], EU:C:2019:497.

⁸⁶ Commission, EU Guidelines on Dual Careers of Athletes. Recommended Policy Actions in Support of Dual Careers in High-Performance Sport, Approved by the EU Expert Group ‘Education & Training in Sport’ at its meeting in Poznan on 28 September 2012, <https://ec.europa.eu/assets/eac/sport/library/documents/dual-career-guidelines-final_en.pdf> accessed 16 December 2020.

⁸⁷ Stefano Bastianon, ‘The *TopFit* judgment on amateur sport and its potential aftermath on the relationship between EU law and dual careers of athletes’ (2019) *Eurojus*, 85.

⁸⁸ See Opinion AG Tanchev in Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* [2019] EU:C:2019:181, para. 99.

however, since it does not put at stake rights of great gravity, like that of fair working conditions or that of social protection, it was surprising that the Court was so zealous about it. Nevertheless, the value of this decision should be highlighted, irrespectively of the motivation behind it. It created much more space for the fundamental rights in EU, and it shook the realm of the ‘economicism’ in Europe. Its contribution will be greatly appreciated, especially in the face of new challenges ahead.

3.2 A SMILE FROM A VEIL: NON-PRIVACY & ANONYMITY

From the decade of 2000s on, a new destabilizing factor came to be added in the truncated culture of EU in regard with human rights. The zeitgeist of the digital technologies contributes to a blurred image the subjects of the law have nowadays for their position in the society, for the others, even for themselves. Consequently, these technologies have a massive impact on the human rights area, too. They fragment the direct democratization process by intervening in the comprehensive information flow, and they distort possible accountability processes on a continuous basis. An example of this intervention is the dreary events in France during the public transport strikes last year. Three of the country’s most active transport syndicates saw their pages to be blocked from Facebook, so their content could not disseminate information either to workers or to the public.⁸⁹ The result of this sui generis censorship was that almost 20,000 people were not able to reach the news streaming regarding the employees’ mobilization and subsequently not able to form a knowledgeable opinion.⁹⁰ But the intervention is not only positive, meaning the ban of freedom of speech and association, but also negative, since in the online environment phenomena like harassment, intrusion of privacy or even violence are quite often nowadays.

The business model sustaining this problematic situation has once been named ‘surveillance capitalism’.⁹¹ Because of the large capitalization of the sector, respecting human rights is taken as an externality no one is willing to be charged. The scheme is not effective from a competition standpoint and the tech-giants constantly try to avoid it. It would be premature and inequitable to blame EU that its legal framework nourishes this very model. However, the traditional dipole of ‘freedoms or rights’ might be considered to facilitate the commodification of personal data;⁹² this becomes very evident in the case of the ‘big four’ of the technology services, i.e. Apple, Facebook, Google and Amazon.

The major players of the field are heavily and systematically involved in commercialization of private information and no adequate remedy can be claimed against them. Uber was about to face fines for keeping data breach secret,⁹³ just like Facebook after

⁸⁹ Vincent Vérier, ‘SNFC: Facebook restraint les comptes des syndicats SUD Rail et CGT cheminots *Le Parisien* (22 October 2019) <<https://www.leparisien.fr/economie/sncf-facebook-restraint-les-comptes-des-syndicats-sud-rail-et-cgt-cheminots-22-10-2019-8178201.php>> accessed 16 December 2020.

⁹⁰ Benjamin Hue, ‘Perturbations à la SNFC: Facebook censure-t-il les pages des syndicats de cheminots?’ *RTL* (23 October 2019) <<https://www.rtl.fr/actu/debats-societe/perturbations-a-la-sncf-facebook-censure-t-il-les-pages-des-syndicats-de-cheminots-7799312041>> accessed 16 December 2020.

⁹¹ Shoshana Zuboff, *The Age of Surveillance Capitalism, The Fight for a Human Future at the New Frontier of Power* (BBS Public Affairs Publications, 2019).

⁹² See University of Cambridge, ‘Human rights in a digital age, Privacy. Democracy. Freedom of speech’, <<https://www.cam.ac.uk/cammagazine/humanrightsindigitalage>> accessed 11 October 2020.

⁹³ Peter Teffer, ‘Uber may face fines in EU for keeping data breach secret’, *euobserver.com* (22 November 2017) <<https://euobserver.com/digital/139975>> accessed: 17 October 2020.

a big scandal in 2019, caused by the social media platform's tendency to 'play fast and loose' with its users' privacy. Facebook was found to put its users in online security risk in 2019, as almost 419 million user records (like phone numbers and passwords) were traced down in an unprotected server domain, at risk for serious hacking incidents or potential leakage.⁹⁴ Previously the same year, similar Facebook data were found exposed on Amazon servers leading community to think that at this point we may use Facebook at our own risk.⁹⁵ The Cambridge Analytica-scandal⁹⁶ gave us a strong flavor of what an unlawful use of personal data might be: scary and Orwellian, dangerous to lead even to 'unperson' practices. So, does EU roll its eyes in front of such practices, in the expense of people's individual rights?

The main vehicle for facing such breaches from EU's part has always been imposing financial sanctions (anti-trust and competition policy fines included). Again, a pro-market consideration takes precedence and becomes the suggested solution for the Union. After the investigation on the social media platforms which took place in 2018 was concluded, Facebook reviewed its Terms and Conditions in order to clearly explain how the company handles its users' data to develop profiling activities and target advertising to finance their company.⁹⁷ However, even this reform was not taken as an interference for the human rights standards to be raised; it was seen rather as consumer empowerment, than a human rights stance. As Commissioner Jourová said in her statement: 'Today Facebook finally shows commitment to more transparency and straight forward language in its terms of use. [...] By joining forces, the consumer authorities and the European Commission, stand up for the rights of EU consumers'.⁹⁸ The text stresses out the importance of safeguarding clear information and explaining the digital space policies for the consumers' sake, and not for any respect for fundamental rights to be attained. EU's subjects are economic operators in the integrated market, i.e. consumers directing their purchasing power towards a specific drift, not people needing to safeguard a high level of respect because of their inherent value.

At the end, Commission asked the regional data protection authorities to investigate Facebook's streaming of data to Cambridge Analytica, an investigation which led to the imposition of a tremendous fine to the social networking platform: 1 million euros dictated from the Italian privacy regulator, the biggest levy in connection to the misuse of people's data until that time.⁹⁹ The UK's Information Commissioner's Office also hit the company

⁹⁴ Davey Winder, 'Unsecured Facebook Databases Leak Data of 419 Million Users', *forbes.com* (5 September 2019) <<https://www.forbes.com/sites/daveywinder/2019/09/05/facebook-security-snafu-exposes-419-million-user-phone-numbers/>> accessed: 17 October 2020.

⁹⁵ Seth Fiegerman and Donie O'Sullivan, 'Hundreds of millions of Facebook records exposed on Amazon cloud servers', *cnn.com* (3 April 2019) <<https://edition.cnn.com/2019/04/03/tech/facebook-records-exposed-amazon/index.html>> last access: 17 October 2020.

⁹⁶ Julia Carrie Wong, 'The Cambridge Analytica scandal changed the world – but it didn't change Facebook', *theguardian.com* (18 March 2019) <<https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook>> accessed 17 October 2020.

⁹⁷ Commission, Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities (Press Release, 9 April 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048> accessed 11 October 2020.

⁹⁸ James Cook, 'Facebook bows to EU demands to end 'misleading' use of personal data' *The Telegraph* (9 April 2019) <<https://www.telegraph.co.uk/technology/2019/04/09/facebook-bows-eu-demands-end-misleading-use-personal-data/>> accessed 10 October 2020, (emphasis added).

⁹⁹ Mark Scott, 'Facebook fined € 1M over Cambridge Analytica scandal', *politico.com* (28 June 2019) <<https://www.politico.eu/article/facebook-fined-cambridge-analytica/>> accessed 10 October 2020.

with a huge penalty, implementing European data protection rules.¹⁰⁰ In other words, Commission has chosen to speak to the Big Tech in a language they understand: money. Making money is the utmost purpose of companies using data-hungry mechanisms in a way which builds a very self-serving relationship with the concept of human rights. As information is the 21st century currency, imposing fines to them does not contribute to the solution of the problem in any way: in the opposite, it further pushes forward the monetization of data. Nevertheless, if we accept the perspective that personal data is like a tradeable commodity, then the social aspect of the privacy and its self-development advantages fall apart. It is a model bolstered even since the '70s, through a cynical economic analysis of law. Back then, even without the excessive interconnection of computers and social networking, personal information was appraised as having value to others, and that others would incur costs to discover it.¹⁰¹ This resulted in ranking privacy and information as intermediate goods, namely instrumental values, driving utterly to financial gain. This notion drives society to a very neoliberal version of human rights,¹⁰² similar to the one developed by the Chicago school of economics: there is a possibility for the people who have fewer resources to sell their personal records, as a lucrative activity, in the environment of an economy which depends on big data more and more.

This is one more example where EU falls short of advocating human rights over economic freedoms. In fact, the Union systematically, thoroughly and easily suspends the rights implementation for the financial growth's sake: it is well-known that tech champs as Google is, yield to Commission great deals of money, even these monies do not come from the expected sources. For the financial year 2018, for instance, the fines paid from Google were escalated up to \$5.1 billion, compared to income taxes of just \$4.2 billion. In other words, Google paid more money in EU fines than it paid in taxes, but this does not make any difference to the Union. As long as it earns money, the latter will not act to the companies' substantial detriment.

3.2[a] *Schrems I & II: Waking Up to Ash and Dust*

The ECJ started to expand its oversight into the area of the digital surveillance, starting from the *Digital Rights Ireland*¹⁰³ case. There, building upon the Kadi-line of case-law,¹⁰⁴ the Court ruled that if any kind of digital interaction of the citizens is kept for future intelligence reasons and law enforcement purposes, then undesirable lattermaths are plausible in the sphere of

¹⁰⁰ 'ICO issues maximum £500,000 fine to Facebook for failing to protect users' personal information', ico.org.uk (25 October 2018) <<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/10/facebook-issued-with-maximum-500-000-fine/>> accessed 17 October 2020.

¹⁰¹ Richard A. Posner, 'The Right of Privacy' (1978) 12 *Georgia Law Review*, 394.

¹⁰² See Human rights in a digital age (n 92).

¹⁰³ Case C-293/12 and C-594/12 *Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014], EU:C:2014:238.

¹⁰⁴ Federico Fabbrini, 'Human Rights in the Digital Age. The European Court of Justice Ruling in the Data Retention Case and its Lessons for Privacy and Surveillance in the US' (2015) 28 *Harvard Human Rights Journal* 22.

individuals' private life.¹⁰⁵ However, the turning point came with the *Maximilian Schrems* case.¹⁰⁶

In the *Schrems* saga, the Court seemed to come to awareness of the pervasive nature a data collection program could have, invalidating the key mechanism for EU-US data transfers for two times in a row. Maximilian Schrems, an Austrian privacy rights activist filed a complaint with the Irish courts, criticizing the incompatibility of US surveillance programs and existing EU law permitting transfers to the US. Under the EC's Safe Harbor Decision,¹⁰⁷ the US data importers were able to 'self-certify' that they provided essentially equivalent protection to that guaranteed under EU law, including the protection of fundamental rights under the EU Charter. Schrems' complaint was about this very specific provision as, in the light of Edward Snowden disclosures, he thought that these arrangements were not adequate for ensuring private data protection. After the High Court of Ireland made a referral to ECJ, the latter took the stance that Safe Harbor did not afford the equivalent level of protection to that provided on an EU level, ending up to its invalidation.¹⁰⁸

It was a shining example of the Court that it did condemn not only the governmental surveillance as usual, but also an evident misuse of data coming from private operators. Facebook and other similar companies relied on decisions which enabled data transfers if the protection achieved was tantamount to that afforded by EU laws. The invalidation of the Safe Harbor scheme leads to a startling conclusion regarding the status of the freedom of data, as opposed to the four fundamental freedoms of EU law. Unlike the traditional freedoms, the free flow of personal data in EU is not enshrined in the EU treaties, but only in pieces of secondary law, the main of them being the Data Protection Regulation.¹⁰⁹ From a technical standpoint, the online data freedom is subordinated to the other freedoms, lacking a status of primacy.¹¹⁰ This holds special gravity if someone thinks that its main rival, i.e. the right to privacy and anonymity, has been bestowed the status of primary law, as it is introduced in the Charter of Fundamental Rights, and also protected through a special article in TFEU.¹¹¹

After the invalidation of Safe Harbor, the Irish DP Authority asked Schrems to reformulate its complaint. Schrems acted accordingly, and this time his application was mainly directed against Facebook's data transfers outside EU based on SCCs (Standard Contractual Clauses), the alternative to Safe Harbor. He especially claimed that the protection could not be of the same quality in US, because of the obligation of private companies in the

¹⁰⁵ In para. 27, the ECJ ruled that '[t]hose data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them'.

¹⁰⁶ Case C- 362/14 *Maxillian Schrems v Data Protection Commissioner* [2015] EU:C:2015:650, C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maxillian Schrems* [2020] EU:C:2020:559.

¹⁰⁷ Commission Decision 2000/520 of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US [2000] OJ L 215/7.

¹⁰⁸ *Schrems I* (n 106) paras. 98, 104-106.

¹⁰⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119.

¹¹⁰ Oliver Linden, Eric Dahlberg, 'Data flows – A fifth freedom for the Internal Marke?' (2016) National Board of Trade of Sweden 19.

¹¹¹ Art. 16(1) TFEU.

States to provide access to personal data to public authorities under US surveillance programs. In essence, he was arguing against the Privacy Shield Framework signed between US and EU.

The *Schrems* decisions were in fact turned against the practice of ‘contracting out’ data across the Atlantic. The Court ruled with clarity that DPAs should take action against irregular transfers and this induces changes for the usual private companies’ activities. As pointed out,¹¹² what is at stake is the \$7.1 trillion economic relationship between EU and US; this has to remain intact. That is why the US government insists supporting that the protection under its national security laws ‘meets’ and ‘exceeds’ the safeguards ‘in foreign jurisdictions, including Europe’. So, the Commission and the US Department of Commerce have to seek for another solution for EU companies to contract out the protection for human rights in case the public authorities are unwilling to ensure it.

However, *Schrems* cannot be directly linked to the intra-European freedom of trade: it is clearly an interpretation having also exoteric echoes, in relation to EU’s federal competitive force, and not a set of standards with exclusively internal influence. *Schrems II* decision was amplifying the scope of the ruling effects not only in transfers of data from EU to USA, but also to all transfers of personal data from EU to countries outside the EEA.¹¹³ In other words, does Europe have double standards, being strict to its antagonists and resilient towards its own democracies?¹¹⁴ That remains to be seen.

3.2[b] *Faster Than a Cannonball: What’s Next?*

The *Schrems* decision made very obvious that the EU personal data transmission guarantees have universal application. The ruling effectively terminated the privileged access that US companies had over personal information from data pools like Facebook, baptizing EU a prominent defender of the very much needed anonymity. This being said, one can understand that the certain title entails responsibility: if EU likes to see itself as a global standard setting actor,¹¹⁵ it has to take substantial action, and not to pay mere lip service to the data freedom. The Union has to duly respect the personal information of its subjects, which, in the age of media, form the very core of their personality. This respect lies in the heart of the EU commitment for democracy and fundamental rights. The fact that EU chooses to consistently oppose this right to the freedom of goods or the freedom of capitals, takes down the whole narrative of EU as the champion of the right to privacy.

Furthermore, EU does not seem amenable to start the conversation for the real bitter pills to swallow. It eagerly takes initiatives to discuss topics like the notorious right to be forgotten or the right to object to data processing (the celebrated ‘consent question’), but it

¹¹² Genna Churches and Monika Zalnieriute, ‘Contracting Out’ Human Rights in International Law: *Schrems II* and the Fundamental Flaws of U.S. Surveillance Law’ (2020) *Harvard International Law Journal* Online 2.

¹¹³ Cynthia O’ Donoghue, Philip Thomas, Sarah O’ Brien, Andreas Splittgerber, Christian Leuthner, Elle Todd, ‘Schrems II: History repeats itself but it is not all bad news for international data transfers’ (2020) Reed Smith, <<https://www.reedsmith.com/en/perspectives/2020/07/schrems-ii-history-repeats-itself-but-it-is-not-all-bad-news>> accessed 11 October 2020.

¹¹⁴ Rana Foroohar, ‘Europeans have double standards on transatlantic trade’ *Financial Times* (20 October 2019) <<https://www.ft.com/content/b526c2a2-f191-11e9-bfa4-b25f11f42901>>, accessed 11 October 2020.

¹¹⁵ Stefano Saluzzo, *The EU as a Global Standard Setting Actor: The case of Data Transfers to Third Countries in Use and Misuse of New Technologies* (Springer 2019) 115-134.

does not encourage the public dialogue on hot topics like the ownership regime of the data. This failure clearly demonstrates that EU misses the real question: this is not about individuals, but about collectivity. Brussels bureaucrats insist to centre this debate around the individual and not the community. However, the digital rights are not a private affair. They are the expression of a wider concern, presenting mass characteristics and having collective implications. The digital footprint, for instance, the unique set of the traceable digital activities someone manifests in an online environment, incarnates this exact notion, as it is created, detected and used always in respect to others. It is released by a user for the purpose of sharing information about someone by means of websites or social media, meaning in the course of an interactive process. Being an isolated, self-centered function, this process would not have any worth: it is this impact the information has to the rest of the community that defines its value. It is also the same for the meta-data digital forms: these descriptive elements have grown an impact on one's professional life, private affairs or behavioral traits, because of their statistical and referential relative value.

Seeing the data problem as a phenomenon remote from other social aspects and adopting a kind of neoliberal perception for the civil rights represents a threat for the collective systems the regional organizations like EU have failed to protect. The fact that during recent years civil society has brought landmark data protection challenges in the courts¹¹⁶ is indicative of a legal void which is quite tangible at the time. Citizens feel that they are left hanging between the tech colossus' interests and the EU's reluctance to harm a significant market, a choice which can be solvent for the democratic nucleus of the Union itself. Ahead of these developments, they decide to take over the reins and start efforts to do justice.

It seems that EU still does not have a plan as to how to move forward. Trapped in a pompous rhetoric regarding its position as the patron of privacy, it denies itself as it tolerates data misuses on its ground, doing nothing but imposing fines. The future will be demanding, and if someone is to respond to it, then it is better to act on the substance, not the form. It is the only way forward, in an era of computers.

4 CONCLUDING REMARKS

What was attempted in the previous pages, was an evaluation of the 'balance of terror' between fundamental rights and freedoms, the two propositions of a long-held dualism in EU. The ongoing evaluation process taking place inside the EU institutions in general puts at stake fundamental rights status continuously. Each time a fundamental freedom is under examination, the rights' status becomes asthenic, as they are seen as an exemption to the rule, not as a comprehensive legal regime. The Court itself seems to affirm this observation. Despite the fact that there were some examples of real balancing work, like *Schmidberger*, the rest of the case-law seems to confirm a sad statistic: in the majority of the cases, freedoms take head over rights in a predetermined course, ending up to evaluate freedoms as too valuable to be sacrificed. *Viking* and *Laval* are characteristic examples of this mentality, even if the importance of their facts was broadly recognized. So, the most the fundamental rights

¹¹⁶ Except *Digital Rights Ireland* case brought before CJEU, see also *Roman Zakharov v Russia (2015) Application no 47143/06* and *10 Human Rights Organisations and Others v. the United Kingdom Application 24960/15*, both before ECtHR, regarding surveillance regimes violating human rights.

will ever have in the EU legal framework is being a self-standing category of exception grounds.

The Court of the Union has evolved to be the undisputable hegemon of the EU establishment: its legacy influences the political and economic choices in a decisive way. Its sophisticated culture promoting legal cosmopolitanism and constitutional pluralism has gone to lengths no other court has gone. But is this a justification for the activist approach it adopts many times, in the detriment of fundamental rights? Even if someone accepts the reality that personal movement rights of EU citizens should be safeguarded against social protectionism or heavy forms of statism, this does not supersede the fact that the Court most of the times leans towards the economic integration on every cost.

The new realities emerging due to the extended use of technology bring along new tendencies in the field of the dilemma 'freedoms or rights'. Members of the civil society and other social factors swing into action, transforming into what EU, in a narcissistic way, thinks it has become: a guardian of the fundamental rights. And despite the fact that the Union conducts in a complacent manner regarding the safeguarding of confidentiality of data, as it was the crucial regulator in the field, the latter is not true. EU might waste much energy on the data debate; however, it does not take essential action towards the big companies' scandals and misconducts. It insists seeing financial penalties as the most appropriate response to practices which undermine rights over profit. Its myopic view is not corrected even after realizing that this tactic has no results: the companies pay the fines and then keep falling in failures, putting at risk people's personal lives.

Networking degradation due to the Union's incompetence is of course a development no one wishes for - and most of all, community itself. But this should not entail a subsequent undermining of the rights' fundamental status. If Europe is to understand and overcome the difficulties facing after the advent of a financial crisis, it must deny a privileged position to the freedoms. Only if the two fundamentals enjoy the same status stability, unity and ever-greater harmonization will be attained the upcoming years.

LIST OF REFERENCES

Auel K and Rittberger B, 'Fluctuant nec Merguntur. The European Parliament, National Parliaments and European Integration' in J. Richardson (ed.), *European Union, Power and Policy-making* (Routledge, 3rd ed., 2006)

Baquero Cruz J, (ed.), *Between competition and free movement: the economic constitutional law of the European Community* (Oxford: Hart, 2002)

Barnard C, 'Gender Equality in the EU: A Balance Sheet' in P. Alston et al. (ed.), *The EU and human rights* (Oxford 1999)

Barnard C, 'Social Dumping or Dumping Socialism?' (2008) 67 *The Cambridge Law Journal*
DOI: <https://doi.org/10.1017/S0008197308000627>

Bastianon S, 'The *TopFit* judgment on amateur sport and its potential aftermath on the relationship between EU law and dual careers of athletes' (2019) *Eurojus*

Bengoetxea J, 'Principia and Teloi', in S. Besson and P. Pichonnaz (eds.) in collaboration with M.-L. Gächter-Alge, *Principles in European Law – Les principes en droit européen* (L.G.D.J, 2011)

Brown C, 'Case C-112/00, Eugen Schmidberger, Internationale Transport und Planzilge v. Austria, Judgment of 12 June 2003, Full Court' [2003] 40 *Comm. Market L. Rev*

Churches G and Zalnieriute M, "Contracting Out" Human Rights in International Law: Schrems II and the Fundamental Flaws of U.S. Surveillance Law' (2020) *Harvard International Law Journal Online*

Commission Decision 2000/520 of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US [2000] OJ L 215/7

de Boer N.J., 'Fundamental Rights and the EU Internal Market: Just how fundamental are the EU Treaty Freedoms? A Normative Enquiry based on John Rawl's Political Philosophy' (2013) 9 *Utrecht Law Review*
DOI: <https://doi.org/10.18352/ulr.219>

De Búrca G, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) *American Journal of International Law*
DOI: <https://doi.org/10.5305/amerjintelaw.105.4.0649>

De Vries S.A, 'Tensions within the internal market: The functioning of the internal market and the development of horizontal and flanking policies' (2006) 9 Utrecht L Rev

Directorate-General for Internal Policies, Policy Department C (Citizens' Rights and Constitutional Affairs), *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures, Study for the PETI Committee* (2016)

Douglas-Scott S, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) Human Rights Law Review
DOI: <https://doi.org/10.1093/hrlr/ngr038>

European Commission, *EU Guidelines on Dual Careers of Athletes. Recommended Policy Actions in Support of Dual Careers in High-Performance Sport, Approved by the EU Expert Group "Education & Training in Sport"* at its meeting in Poznan on 28 September 2012

European Commission, *Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities* (Press Release, 9 April 2019)

European Commission, Report of the Expert Group, *Models to reduce the regulatory burden on SMEs*

European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI))

European Parliament, *Conclusions of the Cologne European Council* (June 1999)
Fabbrini F, 'Human Rights in the Digital Age. The European Court of Justice Ruling in the Data Retention Case and its Lessons for Privacy and Surveillance in the US' (2015) 28 Harvard Human Rights Journal 22

Fabbrini F, 'Human Rights in the EU: Historical, Comparative and Critical Perspectives' (2017) *Il Diritto dell'Unione Europea* (G. Giappichelli Editore)

Ferraro F and Carmona J, 'Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty' (2015) European Parliament Research Service

Fiegerman S and O'Sullivan D, 'Hundreds of millions of Facebook records exposed on Amazon cloud servers', *cnn.com* (3 April 2019)

Foroohar R, 'Europeans have double standards on transatlantic trade' *Financial Times* (20 October 2019)

Groussot X, Petursson G.T., Pierce J, 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' in S. Douglas – Scott and N. Hatzis (eds.), *Research Handbook on EU Human Rights Law* (Edward Elgar, 2019)

Hue B, 'Perturbations à la SNFC: Facebook censure-t-il les pages des syndicats de cheminots?' *RTL* (23 October 2019)

Jacobs Francis G, 'Human Rights in the European Union: the Role of the European Court of Justice' (2001) *ELRev*

Jolly M, 'A Demos for the European Union' (2005) 25 *Politics* 1.
DOI: <https://doi.org/10.1111/j.1467-9256.2005.00224.x>

Khan M, 'In search of the European Demos' *Financial Times* (23 Jan 2018)

Lasser M, 'Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms' (2014) 15 *Theoretical Inq L*.

Leczykiewicz D, 'Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U. Bernitz et al. (eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013)

Leeuwen B.v, 'Rethinking the Structure of Free Movement Law: The Centralisation of Proportionality in the Internal Market' (2017) 10 *European Journal of Legal Studies*

Lewandowski W, 'Is Bauer the new Bosman? – The implications of the recent jurisprudence of the Court of Justice of the European Union for FIFA' (2019), *Verfassungsblog*

Linden O and Dahlberg E, 'Data flows – A fifth freedom for the Internal Marke??' (2016) *National Board of Trade of Sweden*

Maduro M.P., *We the Court. The European Court of Justice and the European Economic Constitution* (OUP 1998)

Morijn J, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 *European Law Journal*
DOI: <https://doi.org/10.1111/j.1468-0386.2006.00305.x>

Münchau W, 'Europe's four freedoms are its very essence' *Financial Times* (12 Nov 2017)

Novitz T, 'A Human Rights Analysis of the Viking and Laval Judgments' (2008) *Cambridge Yearbook of European Legal Studies*
DOI: <https://doi.org/10.1017/S1528887000001439>

O' Donoghue C, Thomas P, O' Brien S, Splittgerber A, Leuthner C, Todd E, 'Schrems II: History repeats itself but it is not all bad news for international data transfers' (2020) *Reed Smith*

Phillips M, 'Europe doesn't have a debt crisis – it has a democracy crisis' (7 Jul 2015) quartz.com

Posner R.A, 'The Right of Privacy' (1978) 12 Georgia Law Review

Saluzzo S, *The EU as a Global Standard Setting Actor: The case of Data Transfers to Third Countries in Use and Misuse of New Technologies* (Springer 2019)

Sarmiento D, 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice', *EJIL TALK* (2018)

Sarmiento D, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer' (2018) Despite Our Differences Blog

Sauter W, 'The Economic Constitution of the European Union' (1998) 4 Colum. J. Eur. L.

Schimmelfennig F, 'Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union' (2006) 13 Journal of European Public Policy

DOI: <https://doi.org/10.1080/13501760600999557>

Snell J, 'The Notion of Market Access: A Concept or Slogan?' (2010) Comm. Market L. Rev

Spaventa E, 'From Gebhard to Carpenter: Towards a (non)- economic European Constitution' (2004) Comm. Market L. Rev

Taylor P, 'How Brexit made me a citizen of nowhere' (20 May 2018) politico.eu

Teffer P, 'Uber may face fines in EU for keeping data breach secret' (22 November 2017) euobserver.com

Tridimas T, *The General Principles of EU Law* (OUP 2006)

University of Cambridge, 'Human rights in a digital age, Privacy. Democracy. Freedom of speech'

Vérier V, 'SNFC: Facebook restraint les comptes des syndicats SUD Rail et CGT cheminots' (22 October 2019) *Le Parisien*

Watson C, 'Fundamental freedoms versus fundamental rights – The Folly of the EU's Denial over its Economic Core' (2016) 3 Edinburgh Student L Rev

Winder D, 'Unsecured Facebook Databases Leak Data of 419 Million Users', forbes.com

Wong J.C, 'The Cambridge Analytica scandal changed the world – but it didn't change Facebook' (18 March 2019) [theguardian.com](https://www.theguardian.com)

Zuboff S, *The Age of Surveillance Capitalism, The Fight for a Human Future at the New Frontier of Power* (BBS Public Affairs Publications, 2019)