The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU

By

Verica Trstenjak and Erwin Beysen

Reprinted from **European Law Review**
Issue 3, 2013

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU

Verica Trstenjak*
University of Vienna

Erwin Beysen**
Court of Justice of the European Union

EU law; European Court of Justice; Freedom of movement; Fundamental rights; Justification

Abstract

This contribution analyses the evolution of the case law of the CJEU on the scope of application of the fundamental freedoms and the fundamental rights, and on the interrelationship of those freedoms and rights. A common trait of the case law on fundamental freedoms and rights is the gradual expansion of their respective scope of application. This broadening of the scope of application has been accompanied by adjustments to the case law on the grounds of justification for restrictions of fundamental rights and fundamental freedoms. At the same time it has led to a steep increase in the areas of overlap between those freedoms and those rights, which raises new questions about their interaction at different levels of the EU legal order.

Introduction

Questions concerning the application and observance of the fundamental freedoms are among the most recurring topics in the case law of the Court of Justice of the European Union (CJEU).[1] Free movement of goods, persons, services and capital count among the fundamental principles of primary law and they are of essential importance to the EU legal order in general. The same holds true for fundamental rights. Although Treaty provisions on fundamental rights were only adopted at a relatively late stage in the development of the EU legal framework,[2] the CJEU already observed in 1969 that fundamental human

*Professor of European Law. External scientific member at Max Planck Institut Luxemburg for International, European and Regulatory Procedural Law. Former Advocate General at the Court of Justice of the European Union.
**Dr iur., LLM, Legal Secretary at the CJEU.
The views expressed in this article are the personal views of the authors.

[1] As a consequence, this article elaborates to a certain extent on the views expressed by Prof. Trstenjak in her Opinions as Advocate General at the CJEU in cases concerning the interpretation and the application of the fundamental freedoms and the fundamental rights, such as the Opinions in *Iida v Stadt Ulm* (C-40/11) [2013] 1 C.M.L.R. 47; *Dominguez v Centre informatique du Centre Ouest Atlantique* (C-282/10) [2012] 2 C.M.L.R. 14; *Commission v Austria* (C-10/10) [2011] 3 C.M.L.R. 26; *Commission v Austria* (C-28/09) December 16, 2010; and *Commission v Germany* (C-271/08) [2010] E.C.R. I-7091.

[2] Article F(2) of the Treaty on European Union ([1992] OJ C191) provided that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms

rights are enshrined in the general principles of Community law and protected by the CJEU.[3] In its subsequent case law, the CJEU clarified that the constitutional traditions common to the Member States,[4] as well as international treaties on which the Member States have collaborated or of which they are signatories,[5] constitute a significant source of inspiration to the CJEU for the identification of fundamental rights as general principles of EU law. Thus, the CJEU has identified an increasing number of fundamental rights, with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] and the Charter of Fundamental Rights of the European Union (the Charter of Fundamental Rights or "the Charter") as ever more important sources of legal guidance. With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights has become an integral part of EU primary law, thereby permanently filling the perceived statutory human rights gap in EU law.[7]

A common trait of the CJEU case law on fundamental freedoms and rights is the gradual expansion of their respective scope of application. Not only have the fundamental freedoms been applied in the most diverse fields of law, but the CJEU has also widened the circle of the parties to whom they are addressed and it has extended the obligations which flow from those provisions. A similar, though more tentative, evolution can be observed in the CJEU's case law on EU fundamental rights,[8] especially with regard to the determination of the areas of law in which those rights must be observed. This broadening of the scope of application of the fundamental freedoms and the fundamental rights has been accompanied by adjustments to the CJEU's case law on the grounds of justification for restrictions of those rights and freedoms. At the same time the broadening of the respective scopes of application has led to a steep increase in the areas of overlap between fundamental freedoms and rights, which raises new questions about their interaction in the EU legal order.

signed in Rome on November 4, 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

[3] *Stauder v City of Ulm* (29/69) [1969] E.C.R. 419; [1970] C.M.L.R. 112 at [7].

[4] Classic jurisprudence since *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* (11/70) [1970] E.C.R. 1125; [1972] C.M.L.R. 255 at [4]. Although the CJEU accepted the relevance of the Member States constitutional traditions and provisions as a source of legal guidance in *Internationale Handelsgesellschaft*, it stressed at the same time (at [3]) that national fundamental rights guaranteed by the constitution or the principles of a national constitutional structure cannot affect the validity of a measure of EU law. Hence, the CJEU explicitly extended the principle of primacy of EU law, as first identified in *Costa v ENEL* (6/64) [1964] E.C.R. 587 at 593–594. to the provisions of national constitutional law, including those, which guarantee fundamental rights. As to the relationship between Union law and the national constitutional law of the Member States, see also C. Grabenwarter, "National Constitutional Law Relating to the European Union" in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford: Hart Publishing, 2010), p.83 at pp.84–95.

[5] The leading case in this respect is *J Nold Kohlen- und Baustoffgrosshandlung v Commission* (4/73) [1974] E.C.R. 491; [1974] 2 C.M.L.R. 338 at [13].

[6] For an early example, see *Hauer v Land Rheinland-Pfalz* (44/79) [1979] E.C.R. 3727; [1980] 3 C.M.L.R. 42 at [17]–[19]. Since then, the CJEU has acknowledged in settled case law the special significance of the ECHR in this respect; see *Kadi and Al Barakaat International Foundation/Council and Commission* (C-402/05 P and C-415/05 P) [2008] E.C.R. I-6351; [2008] 3 C.M.L.R. 41 at [283]; *Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres* (C-305/05) [2007] E.C.R. I-5305; [2007] 3 C.M.L.R. 28 at [29]; *PKK and KNK v Council* (C-229/05 P) [2007] E.C.R. I-439; [2007] All E.R. (EC) 875 at [76]; and *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1986] E.C.R. 1651; [1986] 3 C.M.L.R. 240 at [18].

[7] Article 6(1) TEU now provides that the Union recognises the rights, freedoms and principles set out in the Charter and that the provisions of the Charter shall have the same legal value as the Treaties. Furthermore, art.6(2) TEU provides that the European Union shall accede to the ECHR. The conditions for this accession are set out in more detail in Protocol No.8 annexed to the TEU and the TFEU.

[8] The term "EU fundamental rights" is used as an umbrella term for the fundamental rights as general principles of EU law and the fundamental rights under the Charter.

In what follows, this evolution will be analysed, starting with the case law of the CJEU on the scope of application of fundamental freedoms and of fundamental rights. Questions concerning the interrelationship of fundamental freedoms and rights will be addressed in the final part of this article.

Scope of application of the fundamental freedoms

Scope of application according to the Treaty provisions

According to the Treaty provisions on free movement, Member States are, within the framework of the provisions set out in the TFEU, prohibited from discriminating against goods, persons, services or capital from or moving between Member States. Thus, not only are customs duties on trade in goods between Member States and charges having equivalent effect forbidden in principle,[9] but also non-fiscal quantitative restrictions on imports and exports of products originating in Member States and of third-country products[10] which are in free circulation,[11] as well as measures having equivalent effect.[12] Furthermore, discrimination based on nationality between the workers[13] or the self-employed, the companies or the firms[14] of Member States as well as discriminatory restrictions on the freedom to provide services by nationals, companies or firms of another Member State[15] are in principle prohibited. The same applies to restrictions on the movement of capital and payments between Member States, and between Member States and third countries.[16]

Expansion of the scope of application through the case law of the CJEU

The case law of the CJEU on the Treaty provisions on free movement has been characterised by a series of fundamental rulings that have paved the way for a powerful expansion of their scope of application as well as a strong increase of their practical relevance within the Member States' legal orders. Among the most important milestones in this evolution counts the case *Van Gend & Loos*,[17] in which the CJEU introduced a new understanding of the Treaty provisions on free movement not only as Member State

[9] Article 30 TFEU.

[10] According to settled case law, the Treaty provisions on the free movement of goods apply not only to the importation and exportation of goods between Member States but also to the transit of goods; see *Commission v Austria* (C-28/09) December 21, 2011 at [113], and *Commission v Austria* (C-320/03) [2005] E.C.R. I-9871; [2006] 2 C.M.L.R. 12 at [65]. Compare also *Commission v Italy* (C-173/05) [2007] E.C.R. I-4917; [2008] Env. L.R. D3 at [31]; and *SIOT Ministero delle finanze* (266/81) [1983] E.C.R. 731 at [16].

[11] The concept of products coming from third countries which are in free circulation in Member States is defined in TFEU art.29.

[12] Articles 34 and 35 TFEU.

[13] Article 45(2) TFEU.

[14] Articles 49(1) and 54 TFEU.

[15] Articles 56(1) and 62 TFEU.

[16] Article 63 TFEU.

[17] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* (26/62) [1963] E.C.R. 1; [1963] C.M.L.R. 105. The rulings of the CJEU in *Van Gend & Loos* and in *Costa* (6/64) [1964] E.C.R. 587 (concerning the supremacy of EU law) thus marked the cornerstones for a new understanding of the EU legal order, which stood in sharp contrast to the concepts and understandings of conventional international law; see in this regard R. Barents, "Kleine dingen en grote gevolgen" in *Het recht van de Europese Unie in 50 klassieke arresten* (Den Haag: Boom Juridische Uitgevers, 2010), p.22; F. Mayer, "Van Gend en Loos: The Foundation of a Community of Law" in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), p.16; E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 *American Journal of International Law* 1, 3–16. For an analysis of the socio-legal background of *Van Gend & Loos* and *Costa*, see M. Rasmussen, "The Origins of a Legal Revolution—The Early History of the European Court of Justice" (2008) 14 *Zeitschrift für Geschichte der Europäischen Integration* 77.

duties, but also as sources of directly applicable rights of citizens and economic agents that are enforceable against Member States in the national courts. In its subsequent case law, the CJEU has explicitly confirmed this analysis with regard to the Treaty provisions on the other fundamental freedoms.[18] Thus, *Van Gend & Loos* heralded the CJEU's long line of case law on the ability of provisions of EU law to produce direct effect in Member States legal orders by conferring rights on individuals which the national courts must protect.[19] A further major step was the reshaping of the fundamental freedoms guaranteed by the Treaty from non-discrimination rules towards very broad bans on restrictive measures, which started with the ruling in *Dassonville*. In this judgment, the CJEU held that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions on imports in the sense of art.34 TFEU.[20] In the following years, the *Dassonville* interpretation of the Treaty provisions on the free movement of goods[21] has spilled over to the other fundamental freedoms.[22] This evolution was accompanied by different sets of rulings of the CJEU characterised by their wide interpretation of other conditions of applicability of the different fundamental freedoms, such as to the concept of "goods" under the Treaty provisions on the free movement of goods,[23] to the interpretation of the freedom to provide

[18] See, inter alia, *Criminal Proceedings against Sanz de Lera* (C-163/94, C-165/94 and C-250/94) [1995] E.C.R. I-4821; [1996] 1 C.M.L.R. 631 at [40]–[48]. (free movement of capital); *Iannelli & Volpi SpA v Ditta Paolo Meroni* (74/76) [1977] E.C.R. 557; [1977] 2 C.M.L.R. 688 at [13]; and *Pigs Marketing Board (Northern Ireland) v Redmond* (83/78) [1978] E.C.R. 2347; [1979] 1 C.M.L.R. 177 at [66]–[67] (free movement of goods); *Belgium v Royer* (48/75) [1976] 497; [1976] 2 C.M.L.R. 619 at [19]–[23] (freedom of movement of workers); *van Binsbergen* (33/74) [1974] E.C.R. 1299 at [18]–[27] (freedom to provide services); *Reyners v Belgium* (2/74) [1974] E.C.R. 631; [1974] 2 C.M.L.R. 305 at [25]–[32] (freedom of establishment).

[19] On the concept of "direct effect" in EU law, see B. de Witte, "The Continuous Significance of Van Gend en Loos" in *The Past and Future of EU Law* (2010), p.9; S. Prechal, "Does direct effect still matter?" (2000) 37 C.M.L. Rev. 1047. Against this background, national judges have become the first authority for citizens and economic agents to turn to in order to enforce their rights derived from EU law in general and from the Treaty provisions on the fundamental freedoms in particular. On the role of the CJEU as *juge commun de droit de l'Union*, see T. von Danwitz, "Die Aufgabe des Gerichtshofes bei der Entfaltung des europäischen Zivil- und Zivilverfahrensrechts" (2010) 18 ZEuP 463, 466–468. For a critical analysis of the impossibility for an individual seeking to enforce rights flowing from EU law to appeal to a Union court in order to enforce those rights, see J. Basedow, "Der Europäische Gerichtshof und das Privatrecht. Über Unsicherheiten, allgemeine Grundsätze und die europäische Justizarchitektur" (2010) AcP 157, 192–193, and J. Basedow, "The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary" (2010) 18 E.R.P.L. 443, 471–472.

[20] *Procureur du Roi v Dassonville* (8/74) [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436 at [5].

[21] In recent case law, this principle is applied not only to trading rules but to all measures of the Member States; see, inter alia, *Commission v Belgium* (C-150/11) [2013] R.T.R. 2 at [50]; *Bonnarde v Agence de Services et de Paiement* (C-443/10) [2012] 1 C.M.L.R. 37 at [26]; and *Commission v Finland* (C-54/05) [2007] E.C.R. I-2473; [2007] 2 C.M.L.R. 33 at [30]. It must be noted, however, that unlike quantitative restrictions themselves, to which the Court has given parallel definitions in the context of arts 34 TFEU and 35 TFEU, measures having equivalent effect to quantitative restrictions on exports under art.35 TFEU are defined in the case law much more restrictively than measures having equivalent effect to quantitative restrictions on imports under art.34 TFEU; see *Criminal Proceedings against Gysbrechts and Santurel Inter* (C-205/07) [2008] E.C.R. I-9947; [2009] 2 C.M.L.R. 2 at [40]; and *PB Groenveld BV v Produktschap voor Vee en Vlees* (15/79) [1979] E.C.R. 3409; [1981] 1 C.M.L.R. 207 at [7].

[22] See, inter alia, *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (33/74) [1974] E.C.R. 1299; [1975] 1 C.M.L.R. 298 at [10]–[11]; and *Säger v Dennemeyer & Co Ltd* (C-76/90) [1991] E.C.R. I-4221; [1993] 3 C.M.L.R. 639 at [12] (freedom to provide services); *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* (C-415/93) [1995] E.C.R. I-4921; [1996] 1 C.M.L.R. 645 at [93]–[96] (freedom of movement for workers); *Commission v France* (C-483/99) [2002] E.C.R. I-4781 at [40]–[41] (free movement of capital); *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (C-55/94) [1995] E.C.R. I-4165; [1996] 1 C.M.L.R. 603 at [37] (freedom to provide services).

[23] In its ruling in *Commission v Italy* (7/68) [1968] E.C.R. 424 at 428; [1969] C.M.L.R. 1, the CJEU described goods as products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions. The CJEU furthermore clarified that "goods" consist of tangible property (*Robert Bosch GmbH v*

services as also encompassing the freedom to receive services in cross-border situations[24] or to the extension of the free movement of capital to inheritances,[25] monetary donations and donations in kind with a cross-border element.[26]

Another significant development in the case law of the CJEU was the acceptance of the principle that Member States must exercise their powers and competences consistently with EU law in general and with the Treaty provisions on the fundamental freedoms in particular even in areas in which they have exclusive powers.[27] As a consequence, Member States must exercise their sovereignty with due respect for the obligations arising from the fundamental freedoms. The far-reaching implications of this duty of the Member States to exercise their competences consistently with Union law is exemplified by the CJEU's case law examining the compatibility of national tax rules with the Treaty provisions on the fundamental freedoms. In this context, the CJEU has found national tax treatments of, among others, income from moveable assets received in another Member State,[28] the pensions of certain non-resident persons,[29] the payment of dividends by resident subsidiaries to non-resident parent companies[30] and gifts to research and teaching institutions,[31] to be contrary to the fundamental freedoms guaranteed by the Treaty.

On vertical and horizontal direct effect of the fundamental freedoms

A more tentative approach to enlarge the scope of application of the fundamental freedoms can be observed in the case law of the CJEU concerning the personal scope of application of those provisions. The primary addressees of the Treaty provisions on the free movement of goods, persons, services and capital are the

Hauptzollamt Hildesheim (1/77) [1977] E.C.R. 1473; [1977] 2 C.M.L.R. 563 at [4]). However, in its subsequent case law, the CJEU has used the corporality criterion in a rather pragmatic manner, by applying the Treaty provisions on the free movement of goods, among others, to electricity; see *Gemeente Almelo v Energiebedrijf Ijssellmij NV* (C-393/92) [1994] E.C.R. I-1477; [1994] 2 C.E.C. 281 at [28]; *Commission v Italy* (C-158/94) [1997] E.C.R. I-5789; [1998] 2 C.M.L.R. 373 at [17]; and *PreussenElektra AG v Schleswag AG* (C-379/98) [2001] E.C.R. I-2099; [2001] 2 C.M.L.R. 36 at [68]–[81]. The same holds true for the assessment of the monetary value, where the CJEU has accepted to treat waste as goods within the meaning of the provisions on the free movement of goods; see *Commission v Belgium* (C-2/90) [1992] E.C.R. I-4431 at [22]–[28]. Furthermore, the condition that the goods must form the subject of commercial transactions does not necessarily require that merchants participate in this transaction; see *Commission v Germany* (C-62/90) [1992] E.C.R. I-2575; [1992] 2 C.M.L.R. 549 at [4]–[8]; and *Schumacher v Hauptzollamt Frankfurt am Main-Ost* (215/87) [1989] E.C.R. 617; [1990] 2 C.M.L.R. 465.

[24] See in this regard *Zanotti v Agenzia delle Entrate — Ufficio Roma 2* (C-56/09) [2010] 3 C.M.L.R. 34 at [41]; and *Luisi and Carbone v Ministero del Tesoro* (286/82 and 26/83) [1984] E.C.R. 377; [1985] 3 C.M.L.R. 52 at [16].

[25] See *Scheunemann v Finanzamt Bremerhaven* (C-31/11) [2012] 3 C.M.L.R. 51 at [22]; *Missionswerk Werner Heukelbach eV v Belgium* (C-25/10) [2011] 2 C.M.L.R. 35 at [16]; *Grundstucksgemeinschaft Busley/Cibrian Fernandez v Finanzamt Stuttgart-Korperschaften* (C-35/08) [2009] E.C.R. I-9807; [2010] 1 C.M.L.R. 41 at [18]; *Arens-Sikken v Staatssecretaris van Financien* (C-43/07) [2008] E.C.R. I-6887; [2008] 3 C.M.L.R. 43 at [30]; *Eckelkamp v Belgium* (C-11/07) [2008] E.C.R. I-6845; [2008] 3 C.M.L.R. 44 at [39]; and *Barbier's Heirs v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland te Heerlen* (C-364/01) [2003] E.C.R. I-15013; [2004] 1 C.M.L.R. 40 at [58].

[26] See *Commission v Austria* (C-10/10) [2011] 3 C.M.L.R. 26 at [24]–[27]; *Mattner v Finanzamt Velbert* (C-510/08) [2010] 3 C.M.L.R. 29 at [20]; and *Persche v Finanzamt Ludenscheid* (C-318/07) [2009] E.C.R. I-359; [2009] 2 C.M.L.R. 32 at [27].

[27] See, inter alia, *Commission v United Kingdom* (C-246/89) [1991] E.C.R. I-4585; [1991] 3 C.M.L.R. 706 at [12]; *R. v Secretary of State for Transport Ex p. Factortame Ltd* (C-221/89) [1991] E.C.R. I-3905; [1991] 3 C.M.L.R. 589 at [14]; *Commission v Greece* (127/87) [1988] E.C.R. 3333 at [7]; and *Greece v Commission* (57/86) [1988] E.C.R. 2855; [1990] 1 C.M.L.R. 65 at [9].

[28] *Dijkman and Dijkman-Lavaleije* (C-233/09) [2011] 1 C.M.L.R. 6—infringement of free movement of capital.

[29] *Commission v Estonia* (C-39/10) [2012] 3 C.M.L.R. 8—infringement of free movement for workers.

[30] *Denkavit Internationaal BV and Denkavit France v Ministre de l'Economie, des Finances et de l'Industrie* (C-170/05) [2006] E.C.R. I-11949; [2007] 1 C.M.L.R. 40—infringement of freedom of establishment.

[31] *Commission v Austria* (C-10/10) [2011] 3 C.M.L.R. 26—infringement of free movement of capital.

Member States. Thus, as a result of the case law on the direct effect of Union law, citizens and economic agents can invoke and enforce the rights they derive from those provisions against Member States. This power to produce legal effects in the relationship between citizens and Member States is generally referred to as the vertical direct effect of the fundamental freedoms. However, as is apparent from the case law, the CJEU has developed a broad view of the concept of Member States' actions, so that, under specific circumstances, measures taken by private individuals or organisations may be treated like action taken by a Member State, to which the fundamental freedoms apply, even though the person or organisation cannot be formally linked to or classified as a public body or as a body exercising official authority. Against this background, the CJEU has, for instance, examined measures which were taken by non-state professional organisations for their compatibility with the fundamental freedoms where, under national law, those organisations had been granted powers similar to sovereign powers and where those powers had been exercised in a way which was capable of affecting intra-Union trade.[32]

In addition, the CJEU has also enlarged the scope of the fundamental freedoms to include, by way of exception and under special circumstances, action taken by private individuals, even though they have not been granted any powers similar to sovereign powers. This tendency is reflected in the case law according to which the Member States are, under certain conditions, required by Union law to protect the exercise of the fundamental freedoms against proscribed obstruction by private individuals.[33] Apart from the indirect enlargement of the scope of the fundamental freedoms through the acceptance of a positive obligation of Member States to actively prevent infringements by private individuals, the CJEU has also accepted the direct application of the fundamental freedoms to certain types of collective rules adopted by private individuals or organisations. Starting with its judgment in *Walrave*,[34] the CJEU rules in what is now settled case law that arts 45 TFEU, 49 TFEU and 56 TFEU do not only apply to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.[35] This line of case law has been extended to the free movement of goods in a recent judgment, in which the CJEU ruled that art.34 TFEU also applies to the standardisation and certification activities of an organisation governed by private law and whose activities are neither financed nor controlled by a Member State, if, taking into account the full legal and factual context, this private law body holds the de facto power to regulate, through its standardisation and certification activities, the entry into the market of the products that it certifies.[36] This

[32] See *Hünermund v Landesapothekerkammer Baden-Wurttemberg* (C-292/92) [1993] E.C.R. I-6787 at [12]–[16]; and *R. v Royal Pharmaceutical Society of Great Britain Ex p. Association of Pharmaceutical Importers* (266/87 and 267/87) [1989] E.C.R. 1295; [1989] 2 C.M.L.R. 751 at [13]–[15], regarding measures taken by national organisations representing pharmacists. See, furthermore, *Commission v Germany* (C-325/00) [2002] E.C.R. I-9977; [2003] 1 C.M.L.R. 1 at [14]–[20]; and *Hennen Olie BV v Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten* (302/88) [1990] E.C.R. I-4625 at [13]–[16], regarding measures taken by legal persons established under private law and controlled, directly or indirectly, by a Member State.

[33] As a consequence, the actions of private individuals can, under certain conditions, be measured against an obligation on the Member States to protect the guarantees of the fundamental freedoms and so, indirectly, against those fundamental freedoms. See *Eugen Schmidberger Internationale Transporte Planzuge v Austria* (C-112/00) [2003] E.C.R. I-5659; [2003] 2 C.M.L.R. 34; and *Commission v France* (C-265/95) [1997] E.C.R. I-6959.

[34] *Walrave and Koch v Association Union Cycliste Internationale* (36/74) [1974] E.C.R. 1405; [1975] 1 C.M.L.R. 320.

[35] See *International Transport Workers' Federation and Finnish Seamen's Union (Viking Line)* (C-438/05) [2007] E.C.R. I-10779; [2008] 1 C.M.L.R. 51 at [33]. See also *Casteels v British Airways Plc* (C-379/09) [2013] 1 C.M.L.R. 26 at [19]; *Olympique Lyonnais SASP v Bernard* (C-325/08) [2010] 3 C.M.L.R. 14 at [30]; *Meca-Medina and Majcen v Commission* (C-519/04 P) [2006] E.C.R. I-6991 at [24]; *Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* (C-176/96) [2000] E.C.R. I-2681 at [35]; and *Bosman* (C-415/93) [1995] E.C.R. I-4921 at [82].

[36] *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)—Technisch-Wissenschaftlicher Verein* (C-171/11) [2012] 3 C.M.L.R. 38 at [21]–[32]. Until this judgment, the question whether the case law of the

broad interpretation of the scope of the fundamental freedoms to include certain types of action taken by private individuals is generally referred to as the horizontal direct effect of the fundamental freedoms. As, however, the horizontal effect concerns private individuals only in the context of well-defined activities, it is more appropriate to describe it as a limited horizontal direct effect of the fundamental freedoms.[37]

Broadening of the grounds for justification of restrictions of the fundamental freedoms

The enlargement of the scope of application of the Treaty provisions on free movement in the case law of the CJEU has been accompanied—and partly counterbalanced—by a broadening of the grounds for justification of restrictions of the fundamental freedoms. Thus, the CJEU has ruled that restrictions of the fundamental freedoms, which are prohibited in principle, can be justified not only on the basis of the "written" grounds for justification explicitly provided for in the TFEU,[38] but also on the basis of "unwritten" overriding reasons in the public interest,[39] which are determined in the case law of the CJEU.[40] In certain

CJEU regarding the horizontal direct effect of the free movement of persons and services was also valid for the Treaty provisions on the free movement of goods, was highly controversial in legal doctrine. For a positive assessment of the possibility for the Treaty provisions on the free movement of goods to have horizontal direct effect, see C. Krenn, "A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods" (2012) 49 C.M.L. Rev. 177, 197–214. For a critical assessment of such horizontal direct effect, see C. Birkemeyer, "Die unmittelbare Drittwirkung der Grundfreiheiten" (2010) 5 EuR 662, 674–675; M. Burgi, "Mitgliedstaatliche Garantenpflicht statt unmittelbare Drittwirkung der Grundfreiheiten" (1999) 9 EWS 327.

[37] It must be noted, however, that, in its judgment in *Angonese*, the CJEU took an important step towards binding private individuals to the Treaty provisions on the freedom of movement for workers, in a context other than the establishment of certain kinds of collective rules. For in this judgment, the CJEU arrived at the general conclusion that the prohibition of discrimination on the grounds of nationality laid down in art.45 TFEU also applies to private individuals; see *Angonese v Cassa di Risparmio di Bolzano SpA* (C-281/98) [2000] E.C.R. I-4139; [2000] 2 C.M.L.R. 1120 at [36]. The practical relevance of this judgment has, until now, remained rather opaque. Nevertheless, this judgment has recently been confirmed in *Erny v Daimler AG — Werk Worth* (C-172/11) [2012] 3 C.M.L.R. 31 at [36] and in *Raccanelli v Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV* (C-94/07) [2008] E.C.R. I-5939; [2008] 3 C.M.L.R. 25 at [45].

[38] For the free movement of goods, see TFEU art.36. For the freedom of movement for workers, see TFEU art.45(3). For the freedom of establishment, see TFEU art.52. For the freedom to provide services, see TFEU art.62. For the free movement of capital, see TFEU art.65.

[39] The leading ruling in this regard is *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)* (120/78) [1979] E.C.R. 649; [1979] 3 C.M.L.R. 494 at [8], where the CJEU ruled that national obstacles to the free movement of goods must be accepted in so far as the national provisions at issue may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. Since such unwritten overriding reasons in the public interest can provide a justification for "reasonable" national restrictions of the fundamental freedoms, this solution in the case law of the CJEU is also referred to as the "rule of reason". This rule of reason has since been applied to all fundamental freedoms.

[40] Apart from the overriding reasons in the public interest identified in *Cassis de Dijon*, the CJEU has accepted as unwritten grounds for justification, among others: the protection of the environment—see *Aklagaren v Mickelsson and Roos* (C-142/05) [2009] E.C.R. I-4273; [2009] All E.R. (EC) 842 at [32]; the need to ensure road safety—see *Commission v Portugal* (C-438/08) [2009] E.C.R. I-10219; [2010] 1 C.M.L.R. 40 at [48]; the encouragement of student mobility—see *Commission v Netherlands* (C-542/09) [2012] 3 C.M.L.R. 27 at [72]; the defence and promotion of one or several of a Member States official languages—see *UTECA v Administracion General del Estado* (C-222/07) [2009] E.C.R. I-1407; [2009] 3 C.M.L.R. 2 at [27]; the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies—see *Haim v Kassenzahnarztliche Vereinigung Nordrhein* (C-424/97) [2000] E.C.R. I-5123; [2002] 1 C.M.L.R. 11 at [59]. However, according to settled case law, purely economic objectives cannot constitute an overriding reason in the public interest; see *CIBA Speciality Chemicals Central and Eastern Europe Szolgaltato, Tanacsado es Keresdedelmi kft v Ado- es Penzugyi Ellenorzesi Hivatal (APEH) Hatosagi Foosztaly* (C-96/08) [2010] 3 C.M.L.R. 21 at [48]; *X and Y v Riksskatteverket* (C-436/00) [2002] E.C.R. I-10829 at [50]; and *Staatssecretaris van Financien v Verkooijen* (C-35/98) [2000] E.C.R. I-4071; [2002] 1 C.M.L.R. 48 at [48].

cases concerning restrictions of the fundamental freedoms by collective rules of a non-public law nature, the CJEU even seems to have taken special grounds in the private interest into consideration for the assessment of the legality of those restrictions.[41] Nevertheless, those cases still seem to constitute an exception to the general rule that the justification of a restriction of the fundamental freedoms by collective rules of a non-public law nature requires either evidence of a ground explicitly provided for in the TFEU or genuine evidence of a recognised overriding reason in the public interest.[42]

What the grounds for justification explicitly provided for in the TFEU and the overriding reasons in the public interest have in common is that they can be brought to bear only if the measure to be justified passes the proportionality test.[43] However, the question whether and, if so, under what conditions and to what extent overriding reasons in the public interest can also be relied upon in order to justify discriminatory measures of the Member States has not been conclusively answered yet. In *Gebhard*[44] the CJEU explicitly ruled that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty can only be justified by imperative requirements in the general interest if they are applied in a non-discriminatory manner. The affirmation of this ruling in settled case law[45] may thus suggest that discriminatory restrictions of the fundamental freedoms can only be justified by evidence of one of the written grounds for justification explicitly provided for in the TFEU. Further support for this view results from a series of recent judgments in which the CJEU ruled that overriding reasons in the public interest can only be relied upon to justify restrictions of the freedom to provide services[46] or of the freedom of establishment[47] if those restrictions are applicable without discrimination on grounds of nationality. Nevertheless, in the CJEU's more recent case law there are also clear indicators that overriding reasons in the public interest may be relied on in certain fields of law to justify discriminatory restrictions

[41] See, in particular, *Olympique Lyonnais* (C-325/08) [2010] 3 C.M.L.R. 14 at [38]–[39], concerning the possibility of relying on the objective of promoting the recruitment and training of young players in order to justify a rule of a football association which restricted the freedom of movement for workers. See also *Bosman* (C-415/93) [1995] E.C.R. I-4921 at [106]–[110], where the Court examined the possibility to justify transfer rules of football associations which restricted the freedom of movement for workers by relying on their objective of guaranteeing a balance among the clubs, while preserving a certain equality of opportunity and the uncertainty of results, and of promoting the recruitment and training of young players.

[42] See, inter alia, *Casteels* (C-379/09) [2013] 1 C.M.L.R. 26 at [30]–[32]; and *Viking Line* (C-438/05) [2007] E.C.R. I-10779 at [75].

[43] As regards the written grounds set out in art.36 TFEU, the CJEU rules in settled case law that the principle of proportionality is based on the second sentence of art.36 TFEU; see *Nationale Raad van Dierenkwekers en Liefhebbers VZW v Belgium* (C-219/07) [2008] E.C.R. I-4475; [2009] Env. L.R. D2 at [30]; and *Commission v France* (C-55/99) [2000] E.C.R. I-11499 at [29]. In addition, the CJEU has confirmed that a measure restricting the fundamental freedoms guaranteed by the Treaty may be justified only if it complies with the principle of proportionality. See *Attanasio Group Srl v Comune di Carbognano* (C-384/08) [2010] 3 C.M.L.R. 6 at [51]; *Öberg v Försäkringskassan, länskontoret Stockholm* (C-185/04) [2006] E.C.R. I-1453 at [19]; *Rockler v Försäkringskassan* (C-137/04) [2006] E.C.R. I-1441 at [22]; and *Ministre de l'Intérieur v Oteiza Olazabal* (C-100/01) [2002] E.C.R. I-10981 at [43].

[44] *Gebhard* (C-55/94) [1995] E.C.R. I-4165 at [37].

[45] See *Corporación Dermoestética SA v To Me Group Advertising Media* (C-500/06) [2008] E.C.R. I-5785; [2008] 3 C.M.L.R. 33 at [35] and *Criminal Proceedings against Gambelli* (C-243/01) [2003] E.C.R. I-13031; [2006] 1 C.M.L.R. 35 at [64]–[65].

[46] See *Commission v Spain* (C-153/08) [2009] E.C.R. I-9735; [2010] 1 C.M.L.R. 30 at [36]–[37]; *Servizi Ausiliari Dottori Commercialisti Srl v Calafiori* (C-451/03) [2006] E.C.R. I-2941; [2006] 2 C.M.L.R. 45 at [36]–[37]; and *Commission v Italy* (C-388/01) [2003] E.C.R. I-721; [2003] 1 C.M.L.R. 40 at [19].

[47] *Commission v Spain* (C-400/08) [2011] 2 C.M.L.R. 50 at [73]; *Criminal Proceedings against Engelmann* (C-64/08) [2011] 1 C.M.L.R. 22 at [34]; *Blanco Pérez and Chao Gómez v Consejería de Salud y Servicios Sanitarios* (C-570/07) and *Principado de Asturias* (C-571/07) June 1, 2010 at [61]–[62]; *Apothekerkammer des Saarlandes v Saarland* (C-171/07 and C-172/07) [2009] E.C.R. I-4171; [2009] 3 C.M.L.R. 31 at [25]–[26]; *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung* (C-169/07) [2009] E.C.R. I-1721; [2009] 3 C.M.L.R. 5 at [44]–[45]; and *Servizi Ausiliari Dottori Commercialisti* (C-451/03) [2006] E.C.R. I-2941 at [36]–[37].

of the fundamental freedoms. This is the case, for example, in the area of national environmental measures which restrict the fundamental freedoms in a discriminatory manner. Since its judgment of July 9, 1992 in *Commission/Belgium*,[48] in which a directly discriminatory restriction of the free movement of goods was declared justified in view of overriding requirements relating to the protection of the environment,[49] the CJEU has acknowledged, at least implicitly, in several other cases that overriding requirements relating to the protection of the environment can, in principle, be relied on to justify discriminatory measures restricting the freedom of movement under the Treaty provisions.[50]

The acceptance of certain overriding reasons in the public interest, such as the protection of the environment, as grounds of justification for discriminatory restrictions of the fundamental freedoms deserves approval. Indeed, taking into consideration the settled case law according to which the protection of the environment is to be regarded as one of the essential objectives of the European Union,[51] it would be difficult to understand why discriminatory restrictions of the fundamental freedoms could not, under any circumstances, be justified by overriding reasons relating to the protection of the environment. Nevertheless, the possibility of justifying discriminatory restrictions of the fundamental freedoms by invoking certain overriding reasons in the public interest does not mean that such justification necessarily has to be examined in identical fashion in relation to discriminatory and non-discriminatory measures. Instead, it must be assumed that, in such cases, the discriminatory character of a measure restricting a fundamental freedom can be taken into account in a proportionality test in which the necessity and the reasonableness of the measure at issue are examined more closely.[52]

[48] *Commission v Belgium* (C-2/90) [1992] E.C.R. I-4431. The action for failure to fulfil obligations at issue concerned a national prohibition on the storage, tipping or dumping in a Member State of hazardous waste originating in another Member State.

[49] *Commission v Belgium* (C-2/90) [1992] E.C.R. I-4431 at [29]–[36]. It must be pointed out, however, that in its ruling, the CJEU avoided expressly confirming the applicability of the unwritten justification of overriding requirements relating to the protection of the environment to a discriminatory restriction. Instead, it held that the discriminatory prohibition on importing waste at issue was in fact non-discriminatory. For a highly critical analysis of this solution, which indeed fails to convince from an argumentative point of view, see opinions of A.G. Jacobs in *Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-203/96) [1998] E.C.R. I-4075; [1998] 3 C.M.L.R 873 at [90] and in *PreussenElektra* (C-379/98) [2001] E.C.R. I-2099 at [222]–[225]. See also C. Nowak, "Die Grundfreiheiten des EG-Vertrags und der Umweltschutz" (2002) 3 *VerwArch* 368, 376; D. Scheuing, "Regulierung und Marktfreiheit im Europäischen Umweltrecht" (2001) 1 EuR 1, 5–6.

[50] See *Aher-Waggon GmbH v Germany* (C-389/96) [1998] E.C.R. I-4473; [1999] 2 C.M.L.R. 589, concerning the justification, by considerations of public health and environmental protection, of an indirect discrimination arising from national rules governing noise emissions. See also *PreussenElektra* (C-379/98) [2001] E.C.R. I-2099, concerning the justification, by environmental protection requirements and the particular features of the electricity market, of directly discriminatory national rules on the purchase of electricity from renewable sources. Although it is not clear from the judgment whether the overriding reasons relating to the protection of the environment constituted an independent justification in this case, the predominant view is that ultimately it did. See, in this regard, Nowak, "Die Grundfreiheiten" (2002) VerwArch 368, 380–381; T. Kuhn, "Implications of the 'Preussen Elektra' Judgement of the European Court of Justice on the Community Rules on State Aid and the Free Movement of Goods" (2001) 28 *Legal Issues of Economic Integration* 361, 374–375. The possibility of invoking reasons relating to the protection of the environment in order to justify discriminatory restrictions of fundamental freedoms was furthermore accepted in several cases in which the CJEU ultimately established an infringement of the fundamental freedoms; see *Commission v Austria* (C-28/09) December 21, 2011; *Commission v Austria* (C-320/03) [2005] E.C.R. I-9871; and *Commission v Germany* (C-463/01) [2004] E.C.R. I-11705.

[51] See *British Aggregates v Commission* (C-487/06 P) [2008] E.C.R. I-10515; [2009] 2 C.M.L.R. 10 at [91]; *Greece v Commission* (C-86/03) [2005] E.C.R. I-10979 at [96]; and *Commission v Council* (C-176/03) [2005] E.C.R. I-7879; [2005] 3 C.M.L.R. 20 at [41].

[52] See, in this regard, C. Nowak in S. Heselhaus and C. Nowak (eds), *Handbuch der Europäischen Grundrechte* (Munich: Beck, 2006), §60, para.25.

From Dassonville *to* Keck and Mithouard *and beyond*

Despite the mitigating effects of the case law on the justification of restrictions of the fundamental freedoms through overriding reasons in the public interest, the *Dassonville* case law still leaves certain latitude for abuse. As a consequence, the CJEU saw itself confronted with a number of cases where traders invoked the Treaty provisions on the free movement of goods in order to challenge Member State rules which had been introduced in order to regulate a trade or profession without targeting products from other Member States.[53] In order to counter this unwarranted use of the *Dassonville* formula, the CJEU reconsidered its case law in *Keck and Mithouard* and ruled that national provisions restricting or prohibiting certain selling arrangements of goods were not to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of art.34 TFEU, so long as those measures do not discriminate, in law or in fact, against traders or products from the other Member States.[54]

From the outset, the *Keck and Mithouard* case law of the CJEU has been the object of much debate in legal doctrine and it has been reviewed by various Advocates General at the CJEU.[55] Partly in response to those analyses, the CJEU restated the *Dassonville* formula and the *Keck and Mithouard* formula in *Commission v Italy*. According to this restated formula, the following types of measures are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of art.34 TFEU: firstly, measures adopted by a Member State, the object or effect of which is to treat products coming from other Member States less favourably; secondly, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules laying down requirements to be met by such goods, even if those rules apply to all products alike; and thirdly, any other measure which hinders access of products originating in other Member States to the market of a Member State.[56]

Furthermore, it is worth noting that the CJEU has refrained from explicitly introducing the *Keck and Mithouard* exception into its case law on the other fundamental freedoms.[57] Nevertheless, this does not mean that the *Dassonville* formula has retained its full impact in the field of the Treaty provisions on the free movement of persons, services or capital between Member States. For, in its subsequent case law, the CJEU has resorted to the use of other criteria and distinctions in order to exclude certain types of

[53] See *Criminal Proceedings against Keck and Mithouard* (C-267/91 and C-268/91) [1993] E.C.R. I-6097; [1995] 1 C.M.L.R. 101 at [14].

[54] *Keck and Mithouard* (C-267/91 and C-268/91) [1993] E.C.R. I-6097 at [16]. The following have been qualified as national rules governing selling arrangements falling outside the scope of art.34 TFEU: national legislation imposing a general prohibition on resale at a loss—*Keck and Mithouard* (C-267/91 and C-268/91) [1993] E.C.R. I-6097; rules on advertising by pharmacists—*Hünermund* (C-292/92) [1993] E.C.R. I-6787; national provisions reserving the retail sale of tobacco products to authorised distributors—*Criminal Proceedings against Banchero* (C-387/93) [1995] E.C.R. I-4663; rules on the closing times of shops—*Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco* (C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94) [1996] E.C.R. I-2975.

[55] See, among others, the Opinion of A.G. Poiares Maduro in *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos v Greece* (C-158/04 and C-159/04) [2006] E.C.R. I-8135; [2007] 2 C.M.L.R. 2 at [24]–[52]; the Opinion of A.G. Kokott in *Mickelsson and Roos* (C-142/05) [2009] E.C.R. I-4273 at [42]–[72]; and the Opinion of A.G. Bot in *Commission v Italy* (C-110/05) [2009] E.C.R. I-519 at [48]–[107].

[56] *Commission v Italy* (C-110/05) [2009] E.C.R. I-519 at [37]. This new formula has been confirmed in *ANETT v Administracion del Estado* (C-456/10) [2012] 2 C.M.L.R. 45 at [34]–[35]; *Ker-Optika bt v ANTSZ Del-dunantuli Regionalis Intezete* (C-108/09) [2011] 2 C.M.L.R. 15 at [49]–[50]; and *Mickelsson and Roos* (C-142/05) [2009] E.C.R. I-4273 at [24].

[57] A transposition of the *Keck and Mithouard* exception to the field of the free movement of services was envisaged, among others, by J. Da Cruz Vilaça, "On the Application of Keck in the Field of Free Provision of Services" in M. Andenas and W.-H. Roth (eds), *Services and Free Movement in EU law* (Oxford: Oxford University Press, 2002), p.25 at pp.35–40.

national measures from the scope of application of those freedoms, even though a strict application of the *Dassonville* criteria would have led to the opposite conclusion. Thus, the CJEU has examined in several cases the causal link between national measures and the Treaty provisions on free movement in order to determine whether the restrictive effect of a national measure on the fundamental freedoms was to be considered as too uncertain or too indirect to warrant the conclusion that the freedom at issue may have been infringed.[58]

Scope of application of EU fundamental rights

Fundamental rights as a standard to assess acts emanating from the European Union

Fundamental rights were first introduced into the EU legal order through the case law of the CJEU. As early as 1969, the CJEU ruled that fundamental rights are enshrined in the general principles of EU law and that they are protected by the CJEU.[59] One of the driving forces behind this acceptance of fundamental rights as general principles of EU law were the legal actions of German litigants, who were used to judicial control of the compatibility of state actions with fundamental rights under German law and who demanded the same level of judicial protection in relation to acts emanating from the European Union and its institutions.[60] As a consequence, the fundamental rights as general principles of EU law are conceived, from a historical point of view, as a standard to assess the actions of EU bodies and institutions.[61] They consequently constitute a ground for review of Union measures in the context of actions for annulment

[58] For the freedom of movement for workers, see *Graf v Filzmoser Maschinenbau GmbH* (C-190/98) [2000] E.C.R. I-493; [2000] 1 C.M.L.R. 741 at [25]. For the freedom of establishment, see *Coname v Comune di Cingia de Botti* (C-231/03) [2005] E.C.R. I-7287; [2006] 1 C.M.L.R. 2 at [20], and *Semeraro Casa Uno* (C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94) [1996] E.C.R. I-2975 at [32]. For the freedom to provide services, see *SC Volksbank România v Autoritatea Nationala pentru Protectia Consumatorilor - Comisariatul Judetean pentru Protectia Consumatorilor Calarasi (CJPC)* (C-602/10) [2012] 3 C.M.L.R. 45 at [81]. In other cases, the CJEU has examined the causal link between a national measure and a possible distortion of intra-Union trade as an alternative or even as a co-existing criterion to the *Keck and Mithouard* formula for the assessment of the compatibility of such measures with art.34 TFEU; see *Francesco Guarnieri & Cie v Vandevelde Eddy VOF* (C-291/09) April 7, 2011 at [17]; *BASF Präsident des Deutschen Patentamts* (C-44/98) [1999] E.C.R. I-6269 at [16]–[21]; *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl* (C-266/96) [1998] E.C.R. I-3949 at [31]; *Centro Servizi Spediporto v Spedizioni Marittima del Golfo Srl* (C-96/94) [1995] E.C.R. I-2883; [1996] 4 C.M.L.R. 613 at [41]; and *Criminal Proceedings against Peralta* (C-379/92) [1994] E.C.R. I-3453 at [24].

[59] *Stauder* (29/69) [1969] E.C.R. 419 at [7].

[60] At first, the CJEU had refused to operate this kind of judicial review based on fundamental rights, as was made clear in *Stork & Cie v High Authority of the European Coal and Steel Community* (1/58) [1959] E.C.R 19 at 26; and in *Präsident Ruhrkohlen-Verkaufsgesellschaft v High Authority* (36, 37, 38 and 40/59) [1960] E.C.R. 424 at 438–439. However, in view of the ongoing debate in the German doctrine and the accompanying threat of a national judicial review of EU actions on the basis of provisions of national constitutional law, the CJEU changed its position. See P.J.G. Kapteyn, "Een zich van zijn rechten bewuste bijstandstrekker en de aankoop van goedkope Europese boterbergboter" in *Het recht van de Europese Unie in 50 klassieke arresten* (Den Haag: Boom Juridische Uitgevers, 2010), p.38.

[61] Already in 1977, the European Parliament, the Council and the Commission had adopted a joint declaration stressing the prime importance they attach to the protection of fundamental rights and reaffirming that they respect and will continue to respect those rights in the exercise of their powers; see Joint Declaration by the European Parliament, the Council and the Commission [1977] OJ C103/1.

under art.263 TFEU[62] as well as in the context of preliminary ruling procedures under art.267 TFEU.[63] The obligation of the EU institutions and bodies to respect the EU fundamental rights also has important ramifications for the interpretation of the measures they adopt. For, if the provisions of secondary Union law touch upon a subject that falls into the scope of application of one or more EU fundamental rights, they must necessarily be interpreted in the light of the fundamental rights at issue.[64]

Fundamental rights as a standard to assess the actions of Member States

The basic idea that all actions of the EU institutions and bodies can be reviewed in the light of EU fundamental rights is nowadays accepted without much controversy in the case law of the CJEU as well as in legal doctrine.[65] The question whether and, if so, under what conditions and to what extent Member States must observe fundamental rights as general principles of EU law is, in contrast, much more controversially discussed. In its leading judgment *Wachauf*, the CJEU held that the requirements of the protection of fundamental rights in the EU legal order are also binding on the Member States when they implement EU rules, so that the Member States must apply those rules in accordance with those requirements.[66] In view of this statement, one of the main challenges since *Wachauf* has been the identification of the situations in which Member States "implement" EU rules in the sense of this ruling. As regards such "implementation" of EU rules by Member States, it is now commonly accepted that the application of Treaty provisions, as well as the application and the transposition of provisions of secondary Union law by Member States, must be effected in due consideration of the requirements of the fundamental rights. Furthermore, the concepts of application and transposition of Union law are to be interpreted in a broad sense, so that Member States must observe the requirements of the protection of the fundamental rights even when the provisions of Union law grant a large margin of appreciation.[67] This view was first expressed in *Wachauf* with regard to the discretion available to Member States for the application of a Regulation[68] and has since been confirmed with respect to the transposition of Directives into national

[62] See, for example, *X v Commission* (C-404/92 P) [1994] E.C.R. I-4737; [1995] I.R.L.R. 320, concerning a breach of the fundamental right to respect for private life in the context of a recruitment procedure. See also *Melli Bank Plc v Council* (C-380/09 P) March 13, 2012 at [61], as to the compatibility of EU fund-freezing measures with the fundamental right to property of the bank concerned.

[63] See, for example, *Metronome Musik GmbH v Music Point Hokamp GmbH* (C-200/96) [1998] E.C.R. I-1953 at [21]–[26]; and *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* (C-143/88 and C-92/89) [1991] E.C.R. I-415 at [72]–[77].

[64] See, inter alia, *Rechnungshof v Österreichischer Rundfunk* (C-465/00, C-138/01 and C-139/01) [2003] E.C.R. I-4989; [2003] 3 C.M.L.R. 10 at [68].

[65] It remains a fact, however, that, until now, not many acts of secondary Union law have been held to be incompatible with EU fundamental rights and, as a consequence, struck down by the CJEU; see, in this regard, D. Chalmers, "Looking Back at ERT and its Contribution to an EU Fundamental Rights Agenda" in *The Past and Future of EU Law* (2010), p.140 at pp.142–143.

[66] *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (5/88) [1989] E.C.R. 2609 at [19]. For an analysis of this judgment and the circumstances leading up to it, see F. Jacobs, "Wachauf and the Protection of Fundamental Rights in EC Law" in *The Past and Future of EU Law* (2010), p.133.

[67] Other examples for the extensive interpretation of the concept of "implementation" of EU rules are the rulings in *Kücükdeveci v Swedex GmbH & Co KG* (C-555/07) [2010] E.C.R. I-365; [2010] 2 C.M.L.R. 33 and in *Aklagaren v Fransson* (C-617/10) February 26, 2013.

[68] In *Wachauf* the CJEU confirmed the consistency of a Commission Regulation with fundamental rights by referring to the margin of appreciation available to the Member States for the application of this Regulation, which allowed for an application in a manner consistent with fundamental rights. This solution necessarily implied that decisions made by the Member States on the basis of the discretion available to them under a Regulation must be made in accordance with the requirements of the protection of the fundamental rights. This assessment was confirmed in *R. (on the application of NS) v Secretary of State for the Home Department* (C-411/10 and C-493/10) [2012] 2 C.M.L.R. 9, with regard to the exercise by Member States of their right, by way of derogation from the normal rules, to take

law. Thus, Member States must, when transposing Directives, take care to rely on an interpretation of the Directives in accordance with the fundamental rights. Furthermore, when implementing the measures transposing those Directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those Directives, but also make sure that they do not rely on an interpretation which would be in conflict with EU fundamental rights.[69]

Since most provisions of EU law are either applied or implemented by the Member State authorities, the practical importance of the ruling of the CJEU in *Wachauf* is remarkable.[70] Still, in *ERT* the CJEU went one step further by confirming that Member States must observe the fundamental rights as general principles of EU law whenever national rules or measures fall within the scope of Union law.[71] This open-ended description of the scope of application of the fundamental rights as general principles of EU law, which has since been confirmed in settled case law,[72] does not only encompass all national rules and measures falling under the *Wachauf* formula, but also extends into areas in which Member States still have exclusive powers. Thus, the CJEU ruled in *ERT* that national rules which obstruct the exercise of the freedom to provide services fall within the scope of Union law, so that this restriction can only be justified if the national measures at issue are compatible with the fundamental rights as general principles of EU law.[73] In its subsequent case law, the CJEU has confirmed this ruling with regard to the other fundamental freedoms.[74] This link between the applicability of the fundamental rights as general principles of EU law and restrictions of the fundamental freedoms implies that the widening of the ambit of the Treaty provisions on the fundamental freedoms automatically results in an enlargement of the scope of the fundamental rights.

The question whether the *ERT* case law is transposable to the provisions on the citizenship of the Union in the sense of art.20 TFEU and on the right of free movement and residence of EU citizens under art.21 TFEU[75] has been answered in the affirmative in *Dereci* with regard to the fundamental rights under the

on the examination of an asylum application under art.3(2) of Regulation 343/2003 of establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

[69] *Promusicae v Telefonica de Espana SAU* (C-275/06) [2008] E.C.R. I-271; [2008] 2 C.M.L.R. 17 at [68]. See also *Bonnier Audio AB v Perfect Communication Sweden AB* (C-461/10) [2012] 2 C.M.L.R. 42 at [56]; *Detiček v Sgueglia* (C-403/09 PPU) [2009] E.C.R. I-12193; [2010] Fam. 104 at [34]; *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH* (C-557/07) [2009] E.C.R. I-1227 at [28]; *Ordre des Barreaux Francophones et Germanophones* (C-305/05) [2007] E.C.R. I-5305 at [28]; and *Criminal Proceedings against Lindqvist* (C-101/01) [2003] E.C.R. I-12971; [2004] 1 C.M.L.R. 20 at [87].

[70] See, in this regard, Chalmers, "Looking Back at ER" in *The Past and Future of EU Law* (2010), pp.141–142, who refers to Dutch and French estimates suggesting that 30% of all legislation within the Netherlands is either EU law or implements EU law.

[71] *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis* (C-260/89) [1991] E.C.R. I-2925 at [42].

[72] See, inter alia, *Velasco Navarro v Fondo de Garantia Salarial (Fogasa)* (C-246/06) [2008] E.C.R. I-105; [2008] 2 C.M.L.R. 6 at [31]; *Steffensen* (C-276/01) [2003] E.C.R. I-3735 at [70]; *Rodríguez Caballero v Fondo de Garantia Salarial (FOGASA)* (C-442/00) [2002] E.C.R. I-11915; [2003] I.R.L.R. 115 at [31]; *SFI v Belgium* (C-85/97) [1998] E.C.R. I-7447; [2000] S.T.C. 164 at [29]; *Annibaldi v Sindaco del Comune di Guidonia* (C-309/96) [1997] E.C.R. I-7493; [1998] 2 C.M.L.R. 187 at [13]; *Kremzow* (C-299/95) [1997] E.C.R. I-2629; [1997] 3 C.M.L.R. 1289 at [15]; and *R. v Ministry of Agriculture, Fisheries and Food Ex p. Dennis Clifford Bostock* (C-2/92) [1994] E.C.R. I-955 at [16].

[73] *ERT* (C-260/89) [1991] E.C.R. I-2925 at [43].

[74] See, inter alia, *Commission v Germany* (C-441/02) [2006] E.C.R. I-3449 at [108]; *Orfanopoulos and Oliveri v Land Baden-Wurttemberg* (C-482/01 and C-493/01) [2004] E.C.R. I-5257; [2005] 1 C.M.L.R. 18 at [97]; *Carpenter v Secretary of State for the Home Department* (C-60/00) [2002] E.C.R. I-6279; [2002] 2 C.M.L.R. 64 at [40]; and *Familiapress v Heinrich Bauer Verlag* (C-368/95) [1997] E.C.R. I-3689 at [24].

[75] Another question which has been raised, among others, in the Opinion of A.G. Sharpston in *Ruiz Zambrano v Office National de l'Emploi (ONEm)* (C-34/09) [2011] 2 C.M.L.R. 46 at [163], is whether the scope of application

Charter.[76] This solution deserves approval. Indeed, taking into account the significance of arts 20 and 21 TFEU in the overall structure of EU law, it seems appropriate to accept that restrictions of those provisions also qualify as a connecting factor for the applicability of the EU fundamental rights. At the same time, the *Dereci* case opens the debate on the applicability of EU fundamental rights in situations where national constraints to the rights under arts 20 and 21 TFEU do not amount to a legally relevant restriction of those provisions under the existing case law of the CJEU. Even though this specific question should, in general, be answered in the negative in order to prevent a competence creep through the application of EU fundamental rights, it cannot be excluded that, under specific circumstances, certain national constraints to the EU citizens rights under arts 20 and 21 TFEU could function as a connecting factor for the applicability of EU fundamental rights even though they do not amount to a legally relevant restriction of those provisions under the existing case law of the CJEU.

Relationship between fundamental rights enshrined in the general principles of EU law and fundamental rights under the Charter

The CJEU's case law on the scope of application of the fundamental rights enshrined in the general principles of EU law is, in essence, transposable to the fundamental rights under the Charter. As regards the scope of application of the provisions of the Charter of Fundamental Rights, the second subparagraph of art.6(1) TEU provides that the Charter shall not extend in any way the competences of the Union as defined in the Treaties. With regard to the specific interpretation and application of the Charter, the third subparagraph of art.6(1) TEU refers to Title VII (arts 51 to 54) of the Charter. In this context, art.51 of the Charter confirms, first of all, that the provisions of the Charter are addressed to the EU institutions, bodies, offices and agencies, and, within certain limits, to the Member States. Secondly, art.51 ensures that the binding force of fundamental rights with regard to the EU institutions and the Member States does not have the effect of either shifting powers at the expense of the Member States or extending the field of application of EU law beyond the powers of the European Union as established in the Treaties.[77] In order to preclude such an extension, art.51(1) of the Charter provides, inter alia, that the Member States are bound by the Charter only when they are implementing EU law. As can be seen from the Explanations

of the EU fundamental rights ought to be determined by the existence and scope of the Union's competences, so that EU fundamental rights would be applicable in all fields where the European Union has exclusive or shared competences, even if this competence has not yet been exercised. For a criticism of such an approach, see A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei and M. Smrkolj, "Reverse Solange—Protecting the essence of fundamental rights against EU Member States" (2012) 49 C.M.L. Rev. 489, 500.

[76] *Dereci v Bundesministerium für Inneres* (C-256/11) [2012] 1 C.M.L.R. 45 at [70]–[73]. In particular, the observation of the CJEU at [72] of its ruling that the referring court must examine a possible violation of the right to respect for private and family life under art.7 of the Charter "if it considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union Law" refers to the hypothesis in which the referring court would find that the national measures at issue in the main proceedings are to be qualified as restrictions of a Union citizen's rights under the TFEU. See also A. Stanislas and P. Van Elsuwege, "Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*" (2012) 37 E.L. Rev. 167, 184–185.

[77] See, in this respect, the Explanations relating to art.51 of the Charter of Fundamental Rights [2007] OJ C 303/17, 32). Under art.52(7) of the Charter of Fundamental Rights, the Explanations relating to the Charter of Fundamental Rights, drawn up under the authority of the Praesidium of the European Convention as a way of providing guidance in the interpretation of the Charter, are to be given due regard by the courts of the European Union and of the Member States. The importance of the Explanations for the interpretation of the individual provisions of the Charter is also expressly confirmed in the third subparagraph of art.6(1) TEU.

relating to the Charter of Fundamental Rights, this statement is to be regarded as a confirmation of the *Wachauf* and the *ERT* case law of the CJEU.[78]

The definition of the scope of application of the fundamental rights under the Charter in art.51 thereof underlines the strong line of continuity between the case law of the CJEU on the fundamental rights as general principles of EU law on the one hand, and fundamental rights under the Charter on the other hand. This high level of continuity can be explained by the fact that the CJEU has used the Charter before its entry into force as an important source of legal guidance for the identification of fundamental rights as general principles. Against that background, it is worth noting that the resulting high level of congruence between the fundamental rights as general principles and the fundamental rights under the Charter has comforted the CJEU in its pragmatic attitude, as regards the application of the Charter, in cases where the facts of the case predated the entry into force of the Charter, but the procedure before the CJEU was conducted afterwards. As has been correctly remarked in legal doctrine, the judgments of the CJEU after the entry into force of the Charter have included direct references to the provisions of the Charter in cases where the facts predated the change in legal nature of the Charter, without explicit consideration of the question of the applicability *ratione temporis* of the Charter's provisions.[79] Even though, strictly speaking, this line of case law is not completely above criticism, it is clearly aimed at avoiding the development of two separate systems of protection of EU fundamental rights, according to whether they are laid down in the Charter or whether they stem from general principles of law. As the creation of two separate systems of protection of EU fundamental rights would ultimately lead to a weakening of the level of protection of those rights,[80] the approach chosen by the CJEU appears defensible.

Horizontal direct effect of fundamental rights?

The issue whether and, if so, to what extent and under what conditions actions of private individuals can also fall under the scope of EU fundamental rights has not yet been definitively settled. Such horizontal direct effect of the fundamental rights in relations between individuals could either take the *indirect* form of an obligation of Member States to protect EU fundamental rights against a proscribed obstruction by other private individuals, or the *direct* form of a duty of private individuals to respect the EU fundamental rights as such.

[78] In this sense, see Opinion A.G. Bot in *Scattolon v Ministero dell'Istruzione, dell'Universita e della Ricerca* (C-108/10) [2012] 1 C.M.L.R. 17 at [116]. See also K. Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung" (2012) 1 EuR 3, 5; A. Hatje in J. Schwarze (ed.), *EU-Kommentar*, 3rd edn (Baden-Baden: Nomos, 2012), art.51 GRC, para.18; R. Streinz and W. Michl in R. Streinz (ed.), *EUV/AEUV*, 2nd edn (München: Beck, 2012), art.51 GR-Charta, para.14. This view is, however, not without controversy. See, for example, D. Borowsky in J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, 3rd edn (Baden-Baden: Nomos, 2011), art.51, para.24, who advances the view that the wording of art.51(1) of the Charter and in particular the statement that the Member States are bound by the Charter "only when they are implementing EU law" constitutes a clear signal to the CJEU to show "judicial self restraint" and to reassess or even abandon its *ERT* case law. In the same sense, De Búrca analyses the drafting process of art.51(1) of the Charter as an illustration of an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases of an actual implementation of the EU legislation; see G. de Búrca, "The Drafting of the European Union Charter of Fundamental Rights" (2001) 26 E.L. Rev. 126, 137. For a critical assessment of the transposition of certain aspects of the *ERT* case law to the fundamental rights under the Charter, see also C. Ladenburger in P. Tettinger and K. Stern (eds), *Europäische Grundrechtecharta* (Munich: Beck, 2006), art.51 para.37.

[79] S. Iglesias Sánchez, "The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights" (2012) 49 C.M.L. Rev. 1565, 1573.

[80] See, inter alia, Opinion A.G. Bot in *Scattolon* (C-108/10) [2012] 1 C.M.L.R. 17 at [120].

Even though certain rulings of the CJEU contain indications of direct applicability of general principles of EU law in relationships between individuals,[81] the CJEU has not yet expressly answered the crucial question of whether and, if so, under what conditions EU fundamental rights have horizontal direct effect.[82] As regards the ability of EU fundamental rights to have horizontal indirect effect between private individuals, the wording of art.51(1) of the Charter contains a clear indication in favour of the acceptance of a *limited* obligation of Member States to actively protect EU fundamental rights under the Charter against infringements by private individuals.[83] For, according to this provision, the Member States shall promote the rights and principles of the Charter, when they are implementing Union law. An obligation of the Union and the Member States bound by the provisions of the Charter to actively intervene in order to protect fundamental rights in relations between private individuals is also implied in the wording of certain fundamental rights under the Charter, such as art.3(2) concerning the fundamental right to the integrity of the person in the fields of medicine and biology, or art.5(3) concerning the prohibition of trafficking in human beings.[84]

The position that certain fundamental rights under the Charter can give rise to a duty of the Member States to ensure that those rights are also observed by private individuals is further corroborated by the case law of the European Court of Human Rights, which acknowledges, under certain conditions, an obligation of the State to take measures in order to prevent violations of various fundamental rights by private individuals. According to this case law, the responsibility of a State is engaged whenever a violation of one of the rights and freedoms defined in the ECHR is the result of non-observance by that State of its obligation under art.1 ECHR to secure those rights and freedoms in its domestic law to everyone within its jurisdiction.[85] Thus, the European Court of Human Rights has ruled that the right to liberty and security under art.5(1) ECHR—which is also guaranteed under art.6 of the Charter—must be construed as laying down a positive obligation on the State to protect the liberty of those within its jurisdiction.[86] In a similar

[81] See, in particular, *Defrenne v SA Belge de Navigation Aerienne (SABENA)* (43/75) [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98 at [24], where the CJEU accepted the direct applicability of the principle laid down in (now) art.157 TFEU that men and women should receive equal pay in relations between private individuals and private employers. Since the principle of equal pay is expressly confirmed in art.23 of the Charter, the question arises whether, and if so, to what extent, the direct horizontal effect accepted by the CJEU in *Defrenne* can be transposed to art.23 of the Charter. See, in this regard, C. Hilson, "What's in a Right? The Relationship between Community, Fundamental and Citizenship Rights in EU Law" (2004) 29 E.L. Rev. 636, 645–646, who considers that it would be a retrograde step if art.23 of the Charter were to lack the direct horizontal effect which had been accepted by the CJEU in *Defrenne* with regard to art.157 TFEU. Other authors, however, emphasise that the direct horizontal effect of art.157 TFEU as accepted in *Defrenne* cannot be extended to encompass the complete scope of art.23 of the Charter; see H. Jarass, *Charta der Grundrechte der Europäischen Union* (München: Beck, 2010), art.23, para.6.

[82] One of the most important questions to be answered in this regard is whether and, if so, to what extent, the rulings of the CJEU in *Mangold v Helm* (C-144/04) [2005] E.C.R. I-9981; [2006] 1 C.M.L.R. 43 and *Kücükdeveci* (C-555/07) [2010] E.C.R. I-365 on the horizontal direct effect of the general principle of non-discrimination on grounds of age as given expression in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, can pave the way towards a more generalised acceptance of horizontal direct effect of the principle of non-discrimination as such, of other EU fundamental social rights or even of EU fundamental rights in general; see, in this regard, T. Papadopoulos, "Criticising the Horizontal Direct Effect of the EU General Principle of Equality" (2011) E.H.R.L.R. 437, 446–447. In this context A.G. Kokott proposed in her Opinion in *Belov* (C-394/11) September 20, 2012 at [80]–[83], to transpose the *Kücükdeveci* case law to the prohibition of discrimination based on racial and ethnic origin as a general principle of EU law, which is enshrined in art.21 of the Charter, in combination with Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[83] The Explanations relating to the Charter of Fundamental Rights remain silent in this regard.

[84] See, in this sense, Borowsky in Meyer (ed.), *Charta der Grundrechte der Europäischen Union* (2011), art.51, para.31.

[85] See *Sychev v Ukraine* (4773/02) October 11, 2005 at [53]; and *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112 at [26].

[86] See *Stanev v Bulgaria* (2012) 55 E.H.R.R. 22 at [120]; and *Storck v Germany* (2006) 43 E.H.R.R. 6 at [100]–[101].

line of case law, it has been ruled that the right to respect for private and family life under art.8 ECHR—which is also guaranteed under art.7 of the Charter—may give rise to positive obligations of the State in order to secure effective respect for private or family life, and that these obligations may involve the adoption of measures designed to secure respect for those values even in the sphere of the relations of individuals between themselves.[87] In view of art.52(3) of the Charter, which ensures the consistency between the overlapping provisions of the Charter and the ECHR by providing that the rights under the Charter shall have the same meaning and scope as the corresponding rights guaranteed by the ECHR, this case law of the European Court of Human Rights on the indirect horizontal effect of certain fundamental rights under the ECHR must be taken into consideration for the interpretation and application of the overlapping fundamental rights under the Charter.[88]

Although it follows from the above observations that several fundamental rights under the Charter have the potential to give rise to a duty for the Member States to intervene and take measures in order to prevent their violation by private individuals, the practical consequences from those observations have, until now, been rather limited. This can be explained, to a certain extent, by the limitation of the scope of application of the Charter to Member State rules or measures falling within the scope of Union law, which remains narrower than the scope of the fundamental freedoms, which may cover all Member State actions.

The interrelationship of fundamental freedoms and fundamental rights

Constructive interplay between fundamental freedoms and fundamental rights

The widening of the ambit of the fundamental freedoms and the EU fundamental rights has been accompanied by an increasing interconnection, as well as by a growing overlap of their respective scope of application. In many ways, the increased interaction takes the form of a constructive interplay, which results in a further consolidation of the common values and guarantees protected by the EU fundamental rights and the fundamental freedoms. A fine example in this regard is illustrated by the relationship between the Treaty provisions on the free movement of goods and the fundamental right to property under art.17 of the Charter, which has also been recognised as a general principle of EU law in the case law of the CJEU.[89] Since the free movement of goods applies in essence to goods that are owned by a natural or legal

[87] See *Đorđević v Croatia* (2012) 15 C.C.L. Rep. 657 ECtHR at [151]; and *Von Hannover v Germany (No.2)* (2012) 55 E.H.R.R. 15 at [98].

[88] According to the Explanations relating to art.52(3) of the Charter [2007] OJ C303/17, p.33, the reference to the ECHR should be construed not only as a reference to the text of the ECHR and the Protocols to it, but also to the clarification in the case law of the European Court of Human Rights of the meaning and the scope of the guaranteed rights. This reflects the view expressed in consistent case law by the European Court of Human Rights that the ECHR is to be construed as a "living instrument"; see *Tyler v United Kingdom* (5856/72) April 25, 1978 at [31]; and *V v United Kingdom* (2000) 30 E.H.R.R. 121 at [72]. It follows that the reference to the ECHR contained in art.52(3) of the Charter is to be construed as an essentially dynamic reference which, in principle, covers the case law of the European Court of Human Rights. See also, in this connection, H.-W. Rengeling and P. Szczekalla, *Grundrechte in der Europäischen Union* (Cologne: Heymanns, 2004), para.468; K. Naumann, "Art. 52 Abs. 3 GrCh zwischen Kohärenz des europäischen Grundrechtsschutzes und Autonomie des Unionsrechts" (2008) 3 EuR 424. This approach is confirmed in the case law of the CJEU, which systematically takes into consideration the case law of the European Court of Human Rights on the relevant provisions of the ECHR in interpreting the provisions of the Charter. See, inter alia, *McB* (C-400/10 PPU) [2011] Fam. 364 at [53]; *Volker and Markus Schecke GbR v Land Hessen* (C-92/09 and C-93/09) [2012] All E.R. (EC) 127 at [51]–[52]; and *Elgafaji v Staatssecretaris van Justitie* (C-465/07) [2009] E.C.R. I-921; [2009] 2 C.M.L.R. 45 at [44].

[89] See *R. (on the application of British American Tobacco (Investments) Ltd) v Secretary of State for Health* (C-491/01) [2002] E.C.R. I-11453; [2003] 1 C.M.L.R. 14 at [149]; *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Standley* (C-293/97) [1999] E.C.R. I-2603; [1999] 2 C.M.L.R. 902 at [54]; and *R. v Licensing Authority Ex p. Generics (UK)* (C-368/96) [1998] E.C.R. I-7967 at [79].

person,[90] the EU fundamental right to property can be assessed as part of the foundation on which the free movement of goods is based.[91] As far as the substantive guarantees inherent in certain fundamental rights coincide with the substantive guarantees of the fundamental freedoms, those fundamental rights can also be relied upon to bolster the effective enforcement and implementation of the fundamental freedoms in the Member States. Thus, the fundamental right to choose an occupation and to engage in work under art.15 of the Charter and the fundamental right to conduct a business under art.16 of the Charter, which have also been recognised as general principles of EU law by the CJEU,[92] can be relied upon to support the implementation of the freedom of services and the freedom of establishment in cases where the respective scope of application of those fundamental freedoms and rights overlap.[93]

Conflicts between fundamental freedoms and fundamental rights

Although the widening overlap of the scope of EU fundamental rights and fundamental freedoms can result in a symbiotic interaction in cases where their substantive guarantees converge, it also increases the potential for conflicts, in particular in cases where the substantive guarantees of those rights and freedoms diverge or even oppose each other. Among the most famous examples of such collisions in the case law of the CJEU are the cases *Schmidberger*,[94] where the guarantees under the free movement of goods collided with the fundamental rights to freedom of expression and freedom of assembly, and *Viking Line*,[95] where the guarantees under the freedom of establishment collided with the fundamental right to take collective action. In this context, it is not without importance to note that *Schmidberger* concerned the obligation of a Member State to prevent unlawful infringements of the Treaty provisions on the free movement of goods by private individuals, and that *Viking Line* confirmed the applicability of the Treaty provisions on the right of establishment to certain forms of collective action initiated by a trade union. Seen from this angle, those cases reflect the strong potential for conflicts between fundamental freedoms and fundamental rights with opposing substantive guarantees to arise in situations where the fundamental freedoms are accepted to produce some sort of horizontal effect. This assessment is further corroborated by the recent ruling in *Fra.bo*, where the CJEU held that the standardisation and certification activities of a private law body such as the one at issue in the main proceedings must comply with the Treaty provisions on the free movement of goods.[96] Although this issue was not explicitly addressed in the ruling of the CJEU, it is

[90] See, for example, *Bosch* (1/77) [1977] E.C.R. 1473 at [4], where the CJEU held, in the context of the application of the Common Customs Tariff, that "goods" consist of tangible property.

[91] See, in this regard, W. Frenz, "Annäherung von europäischen Grundrechten und Grundfreiheiten" (2011) 16 *Neue Zeitschrift für Verwaltungsrecht* 961, 963.

[92] The CJEU has recognised the freedom to pursue a trade or profession as part of the general principles of EU law; see, inter alia, *Di Lenardo and Dilexport v Ministero del Commercio con l'Estero* (C-37/02 and C-38/02) [2004] E.C.R. I-6911 at [82]; *R. v Minister of Agriculture, Fisheries and Food Ex p. National Federation of Fishermen's Organisations* (C-44/94) [1995] E.C.R. I-3133 at [55]; *Neu v v Secrétaire d'Etat à l'Agriculture et à la Viticulture* (C-90/90 and C-91/90) [1991] E.C.R. I-3617 at [13]; and *Staatsanwaltschaft Freiburg v Franz Keller* (234/85) [1986] E.C.R. 2909 at [8]. As regards the freedom to pursue a trade or business, see *Interseroh Scrap and Metals Trading GmbH v SAM* (C-1/11) [2012] Env. L.R. 33 at [43]; and *SAM Schiffahrt and Stapf v Bundesrepublik Deutschland* (C-248/95 and C-249/95) [1997] E.C.R. I-4475 at [72].

[93] See, in particular, Frenz, "Annäherung von europäischen Grundrechten und Grundfreiheiten" (2011) *Neue Zeitschrift für Verwaltungsrecht* 961, 965.

[94] *Schmidberger* (C-112/00) [2003] E.C.R. I-5659.

[95] *Viking Line* (C-438/05) [2007] E.C.R. I-10779.

[96] *Fra.bo* (C-171/11) [2012] 3 C.M.L.R. 38. This case concerned the activities of a German private law association which, inter alia, draws up technical standards for products used in the drinking water supply sector and certifies such products on the basis of those technical standards. In the course of its standardisation and certification activity, the private law association at issue had acquired such a leading position on the German market of products used in the

obvious that the duty of a private law standardisation and certification body to comply with the Treaty provisions on the free movement of goods may easily interfere with its fundamental right to freely conduct its business under art.16 of the Charter, which has also been recognised as a general principle of EU law by the CJEU.

As the aforementioned rulings in *Schmidberger* and in *Viking Line* illustrate, conflicts between EU fundamental rights and fundamental freedoms can arise when the application or enforcement of a fundamental freedom gives rise to a restriction of a fundamental right, or vice versa. However, such conflicts can also arise when secondary EU law provisions giving effect to fundamental freedoms collide with fundamental rights or with secondary EU law provisions giving effect to those fundamental rights, and vice versa. Examples of such conflicts are provided by the rulings of the CJEU in cases where the implementation and the application of the EU public procurement Directives, which give effect to Treaty provisions on the freedom of establishment and the freedom to provide services,[97] give rise to restrictions of the exercise of EU fundamental rights.[98] In order to resolve such conflicts between provisions of primary and secondary EU law, they must first be restated on the primary law level as conflicts between the fundamental rights and the fundamental freedoms at issue. This restatement is necessary in view of the duty to interpret—and apply—rules of secondary EU law in conformity with primary law, which constitutes one of the basic principles of interpretation of EU law and can be analysed as a consequence of the principal of conferral of competences as laid down in art.5(1) TEU.[99] Consequently, in the case of a collision between EU public procurement Directives and fundamental rights, the collision must be treated as one between the fundamental freedoms which are given effect to by the Procurement Directives on the one hand, and the EU fundamental rights at issue on the other hand. The resolution of this conflict achieved at a primary law level must subsequently be implemented at the secondary law level through an interpretation of the public procurement provisions of the Directive in accordance with the outcome achieved at the primary law level.

The resolution of conflicts between fundamental rights and fundamental freedoms

The resolution of conflicts between different fundamental rights or between fundamental rights and fundamental freedoms should reflect the principle that the EU fundamental rights and the fundamental

drinking water supply sector that it was de facto able to determine, by issuing standards and certifying products, which products could gain access to the German market.

[97] Insofar as the EU public procurement Directives have led to a full harmonisation of certain areas coming under the fundamental freedoms, Member State actions falling into an area that has been fully harmonised by those Directives must be measured against those Directives and may not be measured directly against the fundamental freedoms at issue. This principle that national measures may no longer be assessed on the basis of the Treaty provisions if and to the extent that the measure is covered by exhaustive secondary legislation, is generally referred to as the principle of the priority of application of secondary law and has been confirmed in settled case law. See, in this regard, *AGM-COS.MET Srl v Finland* (C-470/03) [2007] E.C.R. I-2749; [2007] 2 C.M.L.R. 41 at [50]; *Deutscher Apothekerverband v eV v 0800 DocMorris NV* (C-322/01) [2003] E.C.R. I-14887; [2005] 1 C.M.L.R. 46 at [64]; and *Criminal proceedings against Vanacker and Lesage* (C-37/92) [1993] E.C.R. I-4947 at [9].

[98] See, for example, *Commission v Germany* (C-271/08) [2010] E.C.R. I-7091, concerning the relationship between the EU fundamental rights to bargain collectively and to autonomy in collective bargaining and the duty of national authorities to observe the provisions of the EU Procurement Directives, where they are applicable, even if such observation would lead to a restriction of the above-mentioned fundamental rights.

[99] Thus, the CJEU rules in settled case law that, where it is necessary to interpret a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaties and the general principles of EU law. See *Lietuvos geležinkeliai AB v Vilniaus teritorine muitine* (C-250/11) [2013] S.T.C. 31 at [40]; *Bertelsmann and Sony Corp of America v IMPALA* (C-413/06 P) [2008] E.C.R. I-4951; [2008] 5 C.M.L.R. 17 at [174]; and *Borgmann GmbH & Co. KG v Hauptzollamt Dortmund* (C-1/02) [2004] E.C.R. I-3219 at [30].

freedoms stand on an equal footing.[100] It follows that conflicts between EU fundamental rights and fundamental freedoms are to be resolved by determining the right balance between the protected guarantees and interests at issue. Although the case law of the CJEU is clearly marked by its willingness to establish such a reasonable balance between fundamental freedoms and EU fundamental rights, it does not always follow the same approach in order to equilibrate the primary law objectives in case of conflict.

In a first approach, the CJEU has resolved conflicts between guarantees under a fundamental freedom and guarantees under a fundamental right by analysing the protection of the fundamental right as an overriding reason in the public interest which can justify a restriction on the fundamental freedom, provided that all the conditions specified in the case law on the overriding reasons in the public interest are fulfilled. Particularly instructive in this regard is the reasoning of the CJEU in *Viking Line*, which concerned the compatibility with EU law of actual and threatened collective actions against a Finnish ferry operator in order to force this operator into a collective bargaining agreement with a Finnish trade union, which would make it pointless for this operator to pursue its plans to re-flag one of its ferries to another Member State. After determining that the collective actions at issue restricted the freedom of establishment of the ferry operator,[101] the CJEU refrained from examining whether the EU fundamental right to take collective action[102] was, as such, apt to justify this restriction on the freedom of establishment by the actions of the trade unions. Instead, the CJEU focused on the notion of protection of workers, which is inherent in the fundamental right to take collective action and which had already been recognised in settled case law as an overriding reason in the public interest.[103] Against this background, the CJEU reached the conclusion that, if the referring court were to find that the collective action at issue in the main proceedings served the protection of workers, this goal could be relied upon as an overriding reason of public interest in order to justify the restriction of the fundamental freedom of establishment, having regard to the principle of proportionality.[104] A similar scheme of analysis was adopted by the CJEU in *Laval un Partneri*,[105] which concerned the compatibility with EU law of the collective actions of Swedish trade unions in view of the disruption of Swedish worksites of a Latvian company in order to force this company to enter into negotiations and to sign a Swedish collective agreement for the building sector. In its assessment of this collective action, the CJEU again started by confirming the right to take collective action as a fundamental right,[106] but subsequently conducted its analysis of the justification of the impairment of the freedom to

[100] See, in this regard, K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 *European Constitutional Law Review* 375, 392–393. An exception to the principle of equal ranking is of course to be made with regard to the fundamental rights under Title I of the Charter of Fundamental Rights. The absence of a strict hierarchy between EU fundamental rights and fundamental freedoms—and the principle of equal ranking arising therefrom—is illustrated by the broad convergence in terms of structure of the fundamental freedoms and the fundamental rights which protect economic activity. In this regard, it is worth noting that the substantive guarantees inherent in fundamental freedoms can, for example, be formulated in terms of fundamental rights which protect economic activity. See V. Skouris, "Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht" (2006) 59 *Die Öffentliche Verwaltung* 89, 93–96. See also S. Prechal and S.A. De Vries, "Viking/Laval en de grondslagen van het internemarktrecht" (2008) 56 *Tijdschrift voor Europees en economisch recht* 425, 434–435, who point to the fact that a conflict between fundamental rights and fundamental freedoms can often be reformulated as a conflict between two fundamental rights.

[101] *Viking Line* (C-438/05) [2007] E.C.R. I-10779 at [74].

[102] The right to take collective action, including the right to strike, had been recognised as a fundamental right which forms an integral part of the general principles of Union law in *Viking Line* (C-438/05) [2007] E.C.R. I-10779 at [42]–[44].

[103] *Viking Line* (C-438/05) at [77]–[90].

[104] *Viking Line* (C-438/05) at [90], and operative part.

[105] *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* (C-341/05) [2007] E.C.R. I-11767; [2008] 2 C.M.L.R. 9.

[106] *Laval un Partneri* (C-341/05) at [90]–[91].

provide services caused by the collective action by treating the right to take collective action for the protection of workers as an overriding reason in the public interest.[107]

In other cases, however, the CJEU has followed a different approach for the balancing of interests protected under the fundamental freedoms and the fundamental rights. In *Schmidberger*,[108] on a reference for a preliminary ruling, the CJEU had to rule, inter alia, whether a restriction on the free movement of goods resulting from a 30-hour blockade of the Brenner motorway in Austria could be justified having regard to the fact that this blockade constituted the result of the exercise of the fundamental rights to freedom of expression and freedom of assembly. In order to resolve the conflict between those fundamental rights and the free movement of goods, the CJEU examined, in essence, whether the impairments to the free movement of goods arising through the exercise of the fundamental rights were proportionate to the protection of those rights.[109] Conversely, it was examined also whether strict enforcement of the free movement of goods would have resulted in an excessive interference in the exercise of the fundamental rights.[110] As both questions were answered in the affirmative, the restriction on the free movement of goods arising through the exercise of the fundamental rights at issue, ultimately, had to be regarded as compatible with Union law. Accordingly, central to the reasoning of the CJEU in *Schmidberger* was the idea of equal ranking for conflicting fundamental rights and fundamental freedoms which, ultimately, by an examination of the proportionality of the opposing restrictions in question, were fairly brought into balance. This approach also seems to have guided the CJEU in its reasoning in its judgment of July 15, 2010 in the case *Commission v Germany*.[111]

On the whole, the *Schmidberger* approach for the balancing of colliding guarantees under the fundamental freedoms and the fundamental rights appears preferable to the reasoning adopted by the CJEU in *Viking Line* and *Laval un Partneri*. The approach of the CJEU in the latter rulings, according to which collisions must be resolved by determining whether written or unwritten grounds of justification inherent in the fundamental rights can justify the restrictions of the fundamental freedoms, sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms,[112] for the inability of fundamental rights to justify as such and without reference to the written or unwritten grounds of justification a restriction on a fundamental freedom suggests a hierarchical relationship between fundamental freedoms and fundamental rights which does not exist. Furthermore, as has been discussed above, it is not yet clear whether and to what extent discriminatory restrictions of the fundamental freedoms can be justified by overriding reasons in the public interest. It follows that, if the exercise of an EU fundamental right results in a discriminatory restriction on a fundamental freedom, the analysis of this fundamental right as an overriding reason in the public interest would have to be followed up by an analysis of whether, and if so to what extent, such overriding reasons in the public interest can be relied upon for the justification of the discriminatory restriction of the fundamental freedom. This additional preliminary condition would

[107] *Laval un Partneri* (C-341/05) at [101]–[110].
[108] *Schmidberger* (C-112/00) [2003] E.C.R. I-5659.
[109] *Schmidberger* (C-112/00) at [81]–[88].
[110] *Schmidberger* (C-112/00) at [89]–[93].
[111] *Commission v Germany* (C-271/08) [2010] E.C.R. I-7091 at [52]. In this sense, see also C. Barnard, "The European Court of Justice as a Common Law Court?" (2011) 3 *Neue Zeitschrift für Arbeitsrecht*—Beilage 122, 125.
[112] See, in this regard, also P. Rodière, "L'impact des libertés économiques sur les droits sociaux dans la jurisprudence de la C.J.C.E." (2010) 5 *Droit social Numéro special* 5 573, 578; C. Barnard, "Social dumping or dumping socialism?" (2008) 67 *Cambridge Law Journal* 262, 264; M. Franzen, "Europäische Grundfreiheiten und nationales Arbeitskampfrecht" in J.-H. Bauer, M. Kort, T. Möllers and B. Sandmann (eds), *Festschrift für Herbert Buchner zum 70. Geburtstag* (München: Beck, 2009) p.231 at p.238; E. Kocher, "Kollektivverhandlungen und Tarifautonomie—welche Rolle spielt das europäische Recht?" (2008) 1 *Arbeit und Recht* 13, 15; R. Rebhahn, "Grundfreiheit vor Arbeitskampf—der Fall Viking" (2008) 3 *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 109, 115; and B. Zwanziger, "Arbeitskampf- und Tarifrecht nach den EuGH-Entscheidungen Laval und Viking" (2008) 6 *Der Betrieb* 294, 295–296.

accentuate the impression of a hierarchical relationship between fundamental rights and fundamental freedoms.

Therefore, in the case of a collision between a fundamental right and a fundamental freedom, a fair balance must be sought according to the *Schmidberger* approach. Under this approach, the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right and vice versa, provided the principle of proportionality is observed. For the purpose of evaluating the proportionality of restrictions of fundamental freedoms by fundamental rights and vice versa, a three-stage scheme must be deployed. Thus, even though the case law of the CJEU is not completely straightforward in this regard,[113] the application of the proportionality test requires that the appropriateness,[114] necessity[115] and reasonableness[116] of the restrictive measure at issue are to be reviewed.[117] Accordingly, restrictions of a fundamental freedom caused by the exercise of a fundamental right are to be regarded as compatible with Union law when they do not go beyond what is appropriate, necessary and reasonable to exercise the guarantees under that fundamental right. Conversely, the exercise of a fundamental freedom may restrict fundamental rights insofar as this restriction is appropriate, necessary and reasonable to implement the guarantees under that fundamental freedom. Indeed, this analysis based on a three-stage proportionality test is best suited to achieve an outcome which ensures the optimum effectiveness of fundamental rights and fundamental freedoms in the case of collision.

Concluding remarks

The case law of the CJEU on the scope of application of the fundamental freedoms is characterised by a seemingly unavoidable widening of their respective ambit, which has caused a senior German judge to compare those primary law provisions to the kraken, a mythical sea monster which threatens to consume everything that comes within its grasp.[118] Although such a comparison is clearly exaggerated, the widening ambit of the fundamental freedoms has resulted in a major overhaul of the relationship between the EU legal order and the national legal orders. An important marker in the reshaping of this relationship has been the case law of the CJEU on the duty of Member States to observe the obligations which flow from the Treaty provisions on the fundamental freedoms, even in the areas in which they have preserved their exclusive powers. In addition, the fundamental freedoms guaranteed by the Treaty have been expanded

[113] In most rulings concerning the justification of restrictions on the fundamental freedoms, the CJEU admittedly simply finds that the principle of proportionality requires that the overriding reasons in the public interest are suitable or appropriate for securing the attainment of the public interest objective they pursue (= appropriateness) and do not go beyond what is necessary for attaining that objective (= necessity). See, inter alia, *Commission v Belgium* (C-387/11) [2013] 1 C.M.L.R. 43 at [74]; and *Hartlauer* (C-169/07) [2009] E.C.R. I-1721 at [44]. However, insofar as in those rulings the reasonableness of the measures to be examined is typically not important, they do not allow the conclusion to be drawn that the proportionality test must follow a two-stage scheme of analysis without consideration of the reasonableness of the measure in question.

[114] According to settled case law, a restrictive measure can be regarded as suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner. See, inter alia, *Hartlauer* (C-169/07) [2009] E.C.R. I-1721 at [55]; and *Apothekerkammer des Saarlandes* (C-171/07 and C-172/07) [2009] E.C.R. I-4171 at [42].

[115] The "necessity" of a restrictive measure is reviewed by way of an examination as to whether there are less restrictive measures which would enable the objective to be attained just as effectively. See *Apothekerkammer des Saarlandes* (C-171/07 and C-172/07) [2009] E.C.R. I-4171 at [52].

[116] The "reasonableness" of a restrictive measure is reviewed by way of an examination as to whether this measure results in excessive interference with the other interests at issue.

[117] See, in this regard, V. Trstenjak and E. Beysen, "Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung" (2012) 3 EuR 265, 282–283.

[118] See U. Scharen, "Vertragslaufzeit und Vertragsverlängerung als vergaberechtliche Herausforderung?" (2009) 11 *Neue Zeitschrift für Baurecht und Vergaberecht* 679.

from non-discrimination rules towards very broad bans on restrictive measures in general. Furthermore, a more tentative evolution towards a broadening of the circle of addressees of those provisions is reflected in the case law accepting a limited horizontal direct effect of the fundamental freedoms. Although this general extension of the scope of the Treaty provisions on free movement has been accompanied by a broadening of the grounds for justification of restrictions of the fundamental freedoms and by efforts of the CJEU to shield those provisions from excessive and unwarranted use against Member States, it cannot be denied that the case law of the CJEU reveals a clear tendency towards a wide interpretation of the ambit of the fundamental freedoms.

A similar tendency is discernible in the case law on the scope of application of the EU fundamental rights, which covers not only all the actions and measures of the EU institutions and bodies, but also all Member State rules and measures that fall within the scope of Union law. Since, according to the case law of the CJEU, national rules which obstruct the exercise of a fundamental freedom fall within the scope of Union law, the progress towards a broadening of the scope of the fundamental freedoms automatically leads to a widening of the ambit of the fundamental rights. This correlation reflects, on the one hand, the fact that the growing overlap and the increasing interconnection between the fundamental freedoms and the fundamental rights leads to a consolidation of the common guarantees protected by those rights and freedoms as well as to a strengthening of their influence in the national legal orders. Nevertheless, with the growing overlap and interconnection also comes an increased potential for collisions between fundamental freedoms and fundamental rights, in particular in cases where the substantive guarantees under those rights and freedoms diverge. Even though the case law of the CJEU is not yet completely consistent in this regard, it is imperative that those collisions should be resolved in such a way as to ensure that the principle of equal ranking for fundamental rights and fundamental freedoms in the EU legal order is observed. This result can best be achieved by the application of a three-stage proportionality test, so that restrictions of fundamental freedoms caused by the exercise of fundamental rights are to be regarded as compatible with Union law when they do not go beyond what is appropriate, necessary and reasonable to exercise the guarantees under that fundamental right, and vice versa.

The Limits of General Principles: A Procurement Case Study

Sylvia de Mars*
Newcastle Law School

Equal treatment; EU law; European Court of Justice; Public procurement procedures; Subordinate legislation; Transparency

Abstract

Using public procurement as a case study, this article considers how the European Court of Justice's use of general principles to supplement existing secondary law obligations affects Member States in their design of national regulatory systems. It finds that the EU legislature and the Court appear to be pushing for different levels of market integration, to the displeasure of the Member States evaluated in this case study. Moreover, the Court's use of the general principles as a regulatory approach has left the Member States with substantial legal uncertainty that they do not seem to be able to respond to with national legislation or guidance. The article concludes that further revision to secondary legislation in this area will not result in a simplified EU public procurement policy unless the Court's case law is somehow addressed in such a revision.

Introduction

Public procurement,[1] or the activity by which the government purchases the supplies, works and services it needs, represents 17–18 per cent of the European Union's GDP, and consequently eliminating barriers to cross-border trade in procurement has historically been a key aspect of internal market integration. Its importance was again stressed in the Monti report, the European Union's 2010 effort to revitalise a waning interest in completing the internal market; the report notes that, though public procurement integration is generally deemed to be a success, the European Union can nonetheless benefit from a "a re-think of the policy" that results in simpler, more modern and sharper rules.[2]

By the "policy", the Monti report means the European Union's secondary legislation on public procurement. The procurement directives[3] have established extensive positive obligations on Member

*The author expresses gratitude to Sue Arrowsmith, Colin Murray and Francesco De Cecco for providing comments on drafts of this work, which is in part based on a PhD thesis awarded by the University of Nottingham in 2011.

[1] On EU public procurement generally, see S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London: Sweet & Maxwell, 2005); P. Trepte, *Public Procurement in the EU: A Practitioner's Guide* (Oxford: Oxford University Press, 2007); C. Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar, 2008).

[2] M. Monti, "A New Strategy for the Single Market: At the Service of Europe's Economy and Society" (May 9, 2010), *http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf* [Accessed April 30, 2013].

[3] Currently, Directive 2004/17 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1; and Directive 2004/18 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114; these are supported by Directive 2009/81 on the co-ordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17 and 2004/18 [2009] OJ L216/7 on defence procurement and Directive 2007/66 amending Council