EUI DEPARTMENT OF LAW

The Freedom to Conduct a Business:

The Origins and Development of Article 16 of the Charter of Fundamental Rights of the European Union

Hilary Hogan

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 23 May 2024

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I, Hilary Hogan, certify that I am the author of the work 'The Freedom to Conduct a Business: The Origins and Development of Article 16 of the Charter of Fundamental Rights of the European Union.' I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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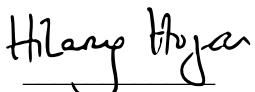

Hilary Hogan

31 January 2024

SUMMARY

This thesis undertakes a critical examination of Article 16 of the Charter of Fundamental Rights of the European Union. I address three central questions. First, how did the freedom to conduct a business come to be included in the Charter of Fundamental Rights? Second, can it be said to derive from the case law of the Court of Justice, or the constitutional traditions of the Member States? Third, what has been the impact of the freedom to conduct a business in the case law of the Court of Justice, and how has its impact varied across subject matters? These questions are important, not only by virtue of the mounting significance of the Charter of Fundamental Rights, which entered into force in December 2009, but because the protection of the freedom to conduct a business in Article 16 has not yet been subject to sustained scrutiny. Its origins, the normative interests it shields, and its capacity to serve as a deregulatory force within the European legal order have been under-examined. To many, the entry into force of the Charter of Fundamental Rights in December 2009 marked the moment when the European Union would make a decisive break with its origins as an economic trading organisation, and move towards a Union built on a commitment to non-market values. Yet the ongoing recognition and development of an open-ended right to conduct a business in the Charter of Fundamental Rights indicates that the Union's commitment to market interests is alive and well.

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ACKNOWLEDGMENTS

I would like to extend my sincere thanks to my supervisor, Professor Gábor Halmai. His insightful feedback and advice throughout this process has been invaluable. Professor Marco Goldoni agreed to join the project as co-supervisor in my second year, and I am grateful for the assistance he has so generously offered ever since.

I am indebted to Dr James Edwards, Dr Leah Trueblood and Professor Donal Nolan, who gave me the opportunity to spend a year working at Worcester College at the University of Oxford. I am grateful to have worked alongside such outstanding academics, and taught such brilliant students. Much of this thesis was written in idyllic settings overlooking the gardens at Worcester College.

I would especially like to acknowledge those who took the time to read and offer comments on draft chapters: in particular, Professor Mark Bell, Professor Gráinne de Búrca, Dr Donal Coffey, Professor Michael Doherty, Dr Alan Eustace and Professor Mike Wilkinson. Professor Stephen Weatherill was kind enough to meet with me in Oxford to discuss various aspects of consumer protection law. I am particularly grateful to Professor Jeremias Prassl, who took me on a walk around the grounds of Magdalen College, and talked me through some of the more troublesome aspects of the thesis.

I am indebted to Dr Marc Steiert and Dr Niall Coghlan, as their superb research in collating the documents relating to the drafting of the Charter made the investigation into the origins of Article 16 far more straightforward than it otherwise would have been. I am grateful to the participants at the Governance and Law of in the European Market Seminar Series at LSE who offered feedback on an earlier draft of Chapter One: in particular Dr Jan Zglinski, Dr Floris de Witte, Dr Niamh Dunne and Professor Mike Wilkinson. Professor Mike Wilkinson has been unfailingly generous with advice and encouragement throughout the doctoral process. I am grateful to Professor Deirdre Curtin, Professor Urška Šadl, Professor Joanne Scott and the participants in the EU Doctoral Workshop at the EUI, who offered feedback on an early version of this thesis. Dr Conor Crummey and Dr Oisin Suttle and the commentators at the Irish Jurisprudence Society also offered helpful feedback.

I was fortunate enough to spend a year at Yale Law School in 2018-2019, where Professor Aziz Rana first introduced me to the Law and Political Economy movement in his brilliant class on US Citizenship at YLS. I learned so much from my fellow students on the LL.M program, and I owe a special thanks to Taylor Burgess and Nikila Kaushik for all the early morning trips to Clark's.

I am grateful to my circle of family and friends, in particular the Quirk, Hogan and Keyes family who have been so supportive throughout this process. Dr Conor Casey and Dr James Rooney have generously offered advice and encouragement, long before this thesis had even begun. I owe a special thanks to Rachael O'Byrne, Molly Whelan, Susanna Breslin and Laura Lambe for many years of friendship and, in particular, for the many happy weekends we spent together in London.

Thank you to my parents, Karen and Gerard, who worked tirelessly to provide me with the gift of a wonderful education, and who have offered their unconditional love and support along the way. My father, Gerard, was my first and greatest teacher, and the early roots of this thesis date back to the many conversations we had listening to *Morning Ireland* at the height of the Euro Crisis. Finally, I owe a special thanks to Finn, who has been so encouraging from the very beginning. This thesis would not have been completed – or indeed, started – without their support, and it is to them it is dedicated.

INTRODUCTION

This thesis undertakes a critical examination of Article 16 of the Charter of Fundamental Rights of the European Union. Article 16 'acknowledges the freedom to conduct a business in accordance with Union laws and national laws and practices.' I address three central questions. First, how did the freedom to conduct a business come to be included in the Charter of Fundamental Rights? Second, can it be said to derive from the case law of the Court of Justice, or the constitutional traditions of the Member States? Third, what impact has Article 16 had in the case law of the Court of Justice? At a summit meeting in Köln in the summer of 1999, the European Council, in its 'Cologne mandate,' agreed to commission a body to draft a Charter of Fundamental Rights in order to make the importance and relevance of fundamental rights more visible to the citizens of the European Union. The stated aim of the mandate was that the new Charter would codify rights that had already been recognised. Yet the inclusion of the freedom to conduct a business was the first time that a free-standing and open-ended right to engage in business activity was included in an international human rights document.

This thesis has six chapters. Chapter One examines the drafting process of the Charter of Fundamental Rights. I outline how members of the Convention associated with the European People's Party (EPP) played a pivotal role in ensuring that Article 16 came to be included in the Charter. The draft Charter originally protected the right to engage in 'occupation or business'. At the suggestion of the members of the Convention associated with the EPP, two separate provisions were introduced: Article 15, which protects the freedom of occupation, and Article 16, which protects the freedom to conduct a business. I critically assess the claim made in the formal Explanations to the Charter that Article 16 was simply a codification of pre-existing rights recognised by the Court of Justice and the national constitutions of the Member States. In the 1970s, the Court of Justice had accepted that fundamental rights that were common to the constitutional traditions of Member States could be recognised as general principles of EU law. This was the mechanism by which fundamental rights were incorporated into EU law before the Charter was introduced. Yet contrary to the formal Explanations of the Charter and statements made in case law and academic commentary, the cases adverted to in the secondary literature as establishing a pre-Charter freedom to conduct a business do not, on a closer examination, establish such a right. In later cases, the Court of Justice occasionally referred to the 'freedom to conduct a business' as a general principle of EU law but this was

primarily as a facet of the 'freedom to pursue a trade or occupation' rather than a standalone entitlement. Significantly, there was only one occasion where the Court considered that this principle had been unjustly infringed. The inclusion of Article 16 in the Charter of Fundamental Rights represented a marked departure from this case law, by creating a free-standing *prima facie* entitlement for businesses to carry out their operations as they saw fit. This chapter argues that the Explanations to the Charter helped to obscure the distinct political motivations for the inclusion of Article 16 in the Charter.

Chapter Two examines whether the freedom to conduct a business was recognised in international human rights instruments, including the European Convention of Human Rights, or whether it was included in the national constitutional traditions of the Member States at the time of the drafting of the Charter of Fundamental Rights. This chapter argues that national provisions that are frequently cited as equivalents to Article 16 – such as Greece, Italy and Spain– establish an entirely different paradigm; one in which private economic activity is permitted provided it complies with other objectives, such as the protection of human health, dignity or the environment. I argue that these national constitutional provisions are designed to constrain the operation of private economic enterprise, while Article 16 empowers enterprise by providing for a general right to engage in economic activity. Moreover, with respect to Finland, Ireland and Luxembourg these constitutional provisions are directed at the national legislatures and are not largely not individually enforceable. As such, these provisions are not meaningfully equivalent to the open-ended freedom to conduct a business protected by Article 16. I suggest that there are only three Member States which protect a constitutional right that is meaningfully comparable to Article 16 of the Charter. The Austrian Constitutional Court has that the exercise of commercial activity is protected by the right to 'practice any kind of gainful activity' in Article 6(1) of the Austrian Basic Law, the *Staatsgrundgesetz Über die allegemeinen Rechte der Staatsbürger* ('StGG'). The German Basic Law, the *Grundgesetz,* protects the freedom of occupation in Article 12, but it also protects the 'free development of the person' in Article 2. It protects a general right of freedom of action, or what is sometimes described as a right to autonomy. The German Constitutional Court, the *Bundesverfassungsgericht,* has accepted that Article 2 includes the protection of private entrepreneurial initiative, as well the freedom of contract. In France, the *Conseil Constitutionnel* have derived the right to freedom of enterprise (*liberté d'entreprendre*) from Article 4 of the Declaration of the Rights of Man. Notably, France was not cited as an example of a Member State with a constitutional tradition of protecting the freedom of enterprise,

perhaps because it had been derived from the Constitution by the Conseil Constitutionnel, rather than from an explicit textual right to freedom of enterprise. National constitutions do, sometimes, acknowledge the existence of private enterprise, subject to the interests of the common good. National constitutions do, sometimes, recognise the right to engage in commercial activity as a means of earning a livelihood. But it is a far cry from these two facts to state that there is a long tradition in the constitutions of the Member States of a justiciable freedom to conduct a business. Even adding up all these disparate elements up, it cannot truthfully be said to reach the conclusion that the freedom to conduct a business has a long tradition in the constitutions of the Member States.

In Chapter Three, I examine the early and contemporary response to Article 16 in academic commentary. I begin by outlining the various factors that were predicted to constrain the scope and impact of Article 16. It was anticipated that the freedom to conduct a business would be classified as a principle, rather than an individually-enforceable right. It was also pointed out that Article 16 was not unqualified, as it was subject to the caveat that the freedom to conduct a business had to be exercised in accordance with Union law and national law. Other external factors, such as the protection of workers' right in Article 27 to 31 of the Charter of Fundamental Rights, were anticipated to counteract its impact. Given that many of these rights have been interpreted by the Court as principles that are not individually enforceable, the factors that were expected to limit the impact of Article 16 have proved to be weaker than predicted. I further suggest that commentators failed to take account of an additional factor: the context of negative integration. As an open-ended right to carry on business activity, as in Article 16, can be employed with relative ease by economic actors to challenge various restrictions on their commercial activity. Finally, I critically examine the rationales for the protection of the freedom to conduct a business.

Chapter Four outlines how Article 16 has been interpreted and applied in practice by the Court of Justice. The Court was often prepared to accept that various restrictions or regulations constituted a *prima facie* infringement of the freedom to conduct a business, that any such freedom was not absolute, the freedom had to be considered in light of its social function, and that the measures were proportionate restrictions on the exercise of the freedom to conduct a business. Commentators have often concluded that Article 16 does not have deregulatory potential, in particular by reference to the Court's defensiveness of consumer protection. This chapter argues that there are marked differences in how the Court deals with incursions on

Article 16 depending on the countervailing interests at stake. Article 52(1) allows for limitations on Charter rights that are both necessary and 'genuinely meet objectives of general interest recognised by the Union.' Legislative measures which are considered to be in pursuit of general objectives of EU law, even far-reaching and costly systems, have often be held to be proportionate incursions on the freedom to conduct a business. This demonstrates the Court of Justice's 'pro-integration bias' insofar as it creates a structural preference for legislation that pursues objectives of general interest recognised by the EU. This chapter argues that, given the centrality of consumer protection to the effective operation of an integrated single market, the Court's approach in such cases will not always translate to instances involving a clash between Article 16 and other objectives, such as worker protection. The Court's unwillingness to allow Article 16 to undermine consumer protection measures has helped to create the misleading impression that Article 16 is not an effective deregulatory mechanism for market interests in other respects.

Chapter Five explores the Court's significantly more expansive approach to the freedom to conduct a business in cases involving worker protection. In Case C-426/11 *Alemo-Herron,* the Court of Justice concluded that UK regulations guaranteeing dynamic protection to employees whose employer had been subsequently acquired was a violation of the freedom to conduct a business. It was soon followed by the decision in Case C-201/15 *AGET Iraklis,* where the Grand Chamber held that national legislation that allowed the Greek Minister for Labour to refuse to authorise mass redundancies was a violation of the freedom to conduct a business. The Court concluded that the basis on which the redundancies could be refused - the interests of the national economy, labour market conditions or the state of the company – were too vague, and left the employer unable to anticipate if the redundancies be implemented. Both *Alemo-Herron* and *AGET Iraklis* concerned Directives which explicitly allowed Member States to provide additional protection to workers, which was acknowledged by the Court of Justice. Yet both pieces of national legislation were assessed by reference to Article 16 of the Charter. This demonstrates the reach of the Charter of Fundamental Rights, as it can influence and shape the legislative response of Member States, even when it is within their exclusive competence.

Chapter Six examines the influence of Article 16 in a series of cases relating to employees who have been sanctioned by their employers, and who have brought challenges on the basis of the Employment Equality Directive. Unlike the previous cases outlined, these are not cases where Article 16 has been relied on by an applicant to directly challenge a particular law or regulation.

Rather, Article 16 has been relied on shape EU secondary law. Under the Employment Equality Directive, treatment that would otherwise constitute indirect discrimination can be justified if it pursues a 'legitimate aim'. An employer's desire for its employees to refrain from wearing religious dress and symbols has been accepted as a 'legitimate aim', reinforced by the argument that this derives from the freedom to conduct a business in Article 16 of the Charter of Fundamental Rights. Thanks to this line of case law, beginning with Case C-157/15 *Achbita*, all businesses must do to legitimately dismiss their headscarf-wearing employees is to enforce prohibitions on religious dress in the workplace, and demonstrate that such bans are necessary to avoid anticipated adverse consequences for their business.

This thesis employs historical, comparative, doctrinal, and theoretical methodologies. It looks to primary and secondary sources to trace the drafting and development of the freedom to conduct a business in Article 16 of the Charter. Chapter One relies on materials collated during the Convention process, including submissions and position papers from the Convention members, drafts of the Charter, meeting minutes, and accounts of debates between Convention members. It also looks to secondary literature published at the time of the Charter's publication to analyse contemporary reactions and understandings of the Charter, and in particular, Article 16. Chapter Two employs comparative methods to critically analyse whether the national provisions that have been cited as the source of inspiration for Article 16 of the Charter are, in fact, meaningful equivalents. I argue that we should not simply look to the terms that are employed within national constitutions, but to their function and purpose to determine whether they are meaningful equivalents to Article 16 of the Charter. Two legal mechanisms, although superficially similar, may in reality perform radically different functions within their respective legal systems. Functionalism within comparative law is not without its critics,[1] but as Husa has argued, functionalism can be employed as a 'methodological metaphor' rather than a rigid legal theory to combat internal blind spots when analysing and contrasting foreign legal systems.[2] Moreover, it can be particularly helpful in the context of comparing bodies of legal rules that operate within relative similar paradigms.[3] Chapter Four, Five and Six primarily employ

[1] See, for example, Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 100.
[2] Jaakko Husa, 'Functional Method in Comparative Law - Much Ado about Nothing?' (2013) 2 *European Property Law Journal* 4, 18-19. See also, Jaakko Husa, 'The Traditional Methods of Comparative Law' (1 January 2023) forthcoming in Mathias Siems and Po Jen Yap (eds) *The Cambridge Handbook of Comparative Law* (Cambridge University Press 2024). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418563.
[3] Ibid 19.

doctrinal methods to analyse how Article 16 has developed through the Court's case law, noting common patterns and inconsistencies in how the provision has been applied and understood. Purely doctrinal methods are concerned with consistency in legal doctrine, in and of itself. However, I begin from the premise that law not only conceals normative preferences and ideologies but can play an active constituent role in constructing and advancing economic power. I draw on the Law and Political Economy movement ('LPE') whose explicit normative premise embraces democratic control of the economy to combat material inequality. LPE challenges a vision of law which values efficiency, the subordination of law to market forces, and the absence of engagement with economic power or ideology in law. It seeks to replace the focus on 'efficiency' with that of power: asking 'how law creates, reproduces and protects political-economic power, for whom and with what results.'[4] Markets are created and shaped by law,[5] and as Hale famously argued, the capacity of market actors is ultimately determined by the legal entitlements granted and underpinned by the coercive power of the state.[6] Thus, purely doctrinal methods are inadequate to expose how the underlying structural biases of law benefit market actors. I consider that the doctrinal inconsistencies in the Court's application and understanding of Article 16 are not random or spontaneous oversights, but informed by the ideological preferences of the European legal order, which affords particular weight to the goal of an integrated single market. One of the tasks in approaching law from a critical law and political economy perspective is to unmask 'law's inherent biases in privileging certain paths of innovation over others.'[7]

[4] Jed Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 *Yale Law Journal* 1784, 1820.
[5] Karl Polanyi argued that the free market, far from a spontaneous occurrence, was marked by a high level of state intervention. See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1949, Beacon 2001) 145-148.
[6] Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470.
[7] Anna Beckers, Klaas Hendrik Eller and Poul F. Kjaer, 'The transformative law of political economy in Europe' (2022) 1 *European Law Open* 749, 753.

CHAPTER ONE

The Origins of Article 16 of the Charter of Fundamental Rights

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Article 16

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Introduction

How did the freedom to conduct a business, a novel concept that had received little or no acknowledgment in other human rights documents, come to be included in the Charter of Fundamental Rights of the European Union? When the Charter was published in 2000, it was the first time that a major international human rights document had recognised the freedom to conduct a business. Despite later claims to the contrary, the freedom to conduct a business did not have any broad acceptance or inclusion in the constitutions of the EU Member States.[1] To understand how conducting a business came to occupy the status of a fundamental right, I undertake an examination of the drafting process of Article 16. The early drafts of the provision protected the freedom to pursue an occupation, before the freedom to conduct a business eventually became a freestanding provision in its own right. This was largely thanks to the influence of a group of Convention members associated with the European People's Party who were instrumental in ensuring that the freedom to conduct a business was included in the draft Charter.

I then critically assess the claim contained in the formal Explanations to the Charter that Article 16 was simply a codification of pre-existing entitlements deriving from the case law of the Court of Justice, in particular the case of *Nold.*[2] The Explanations were not debated before the

[1] See, Chapter Two.
[2] Case 4-73 *Nold* ECLI:EU:C:1974:51.

Convention and were simply added by the Praesidium.[3] The Explanations sit as addendums to the text of the Charter itself, and are often used by the Court of Justice as aids to interpretation. On closer examination, however, it is not evident that the Court of Justice had ever recognised anything akin to a fundamental right to conduct a business, and there is certainly no explanation in *Nold* or any of the Court's judgments to indicate why conducting a business should amount to a fundamental exercise of human freedom.

Drafting the Charter of Fundamental Rights

For a fundamental rights document that was drafted less than twenty-five years ago, it is remarkable how little we know about the drafting of the Charter of Fundamental Rights. As one commentator put it, while the process of the Convention itself was 'extraordinarily open, the drafting history of individual provisions is far from transparent.'[4] There has been some excellent academic interrogation into various facets of the drafting process,[5] but the most significant treatise which contains accounts of contemporary debates and discussions is only available in German, and has not been translated into other major European languages.[6] It is only very recently that documents such as early drafts of the Charter, proposed amendments, and meeting records, have been collated for the first time.[7] There has been relatively scant attention paid to how Article 16, the freedom to conduct a business, came to be included in the Charter. One commentator remarked that the provision had 'seemed to have come out of a clear blue – and British – sky.'[8] One discussion by Bellamy and Schönlau mentions that Article 16

[3] See, Niall Coghlan and Marc Steiert, 'The Forgotten Birth of the Charter of Fundamental Rights' (2020) 40(5) *EU Law Live* 5-6.

[4] Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights threaten the Supremacy of Community Law?' (2001) 38 *Common Market Law Review* 1171, 1182; Christopher McCrudden, 'The Future of the EU Charter of Fundamental Rights' *Jean Monnet Working Paper No.10/01* 1, 9-10.

[5] Justus Schönlau, *Drafting the EU Charter: Rights, Legitimacy and Process* (Palgrave 2005); Gráinne de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26(2) *European Law Review* 126; Florence Deloche-Gaudez, 'The Convention on a Charter of Fundamental Rights: A Method for the Future?' (Notre Europe Research and Policy Paper 15, November 2001); Erik Eriksen, J.E. Fossum and A.J. Menéndez, *The Chartering of Europe: the European Charter of Fundamental Rights and its Constitutional Implications* (Nomos, 2003); Richard Bellamy and Justus Schönlau, 'Constitution Making as Normal Politics: Disagreement and Compromise in the Drafting of the EU Charter of Fundamental Rights' in Richard Bellamy and Dario Castiglione*, From Maastricht to Brexit* (Rowman 2019); Dario Castiglione, *Constitutional Politics in the European Union: The Convention Moment and its Aftermath* (Palgrave 2007) 63-66. Liisberg has conducted an in-depth review of the drafting of Article 53 of the Charter, see, Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights threaten the Supremacy of Community Law?' (2001) 38 *Common Market Law Review* 1171.

[6] Norbert Bernsdorff and Martin Borowsky, *Die Charta der Grundrechte der Europäischen Union Handreichungen und Sitzungsprotokolle* (Nomos, Baden-Baden 2002); Norbert Bernsdoff and Martin Borowsky, *Der Grundrechtekonvent – Unveröffentlichte Arbeitsdokumente – Band 2* (Hannover 2003).

[7] Niall Coghlan and Marc Steiert (eds) *The Charter of Fundamental Rights: the travaux préparatoires and selected documents* (EUI Cadmus 2020).

[8] Deloche-Gaudez (n 5) 28. This is a reference to the support shown for the provision by the UK representatives to the Convention.

appears to have ultimately come about by way of compromise stemming from hotly contested disputes from the ideological factions in the European Parliament.[9] However, these accounts do little to explain how conducting a business came to be accepted as a fundamental right, particularly in a context where the drafters of the Charter were specifically tasked with codifying pre-existing fundamental rights.[10] Ultimately, the Charter that was drafted and approved by the Convention clearly went further than its initial mandate.[11] To date, the critical role played by the group of Convention members associated with the European People's Party in securing the inclusion of the freedom to conduct a business has been unexplored. More specifically, key documents that led to the inclusion of Article 16 that were submitted by the European People's Party have never before been published in English.[12]

The Charter on Fundamental Rights was drafted during the German presidency of the European Council. It remained non-binding for several years, and became legally enforceable only with the entry into force of the Lisbon Treaty in 2009.[13] In 1999, the European Council in its 'Cologne mandate,' agreed to commission a body to draft a Charter of Fundamental Rights 'in order to make their overriding importance and relevance more visible to the Union's citizens.' The Convention tasked with drafting the Charter was comprised of sixty-two members, who could substitute in alternative representatives to fill their place. These included representatives from each national parliament, fifteen representatives of Heads of State and governments, a representative from the European Commission President, and a host of MEPs. There were also two representatives each from the Court of Justice and the Council of Europe present to observe proceedings. Roman Herzog, widely respected as both the former president of the Federal Republic of Germany as well as the German Constitutional Court, was elected chairman.[14] The

[9] Bellamy and Schönlau (n 5) 422.
[10] As Schönlau wrote, '…the reason given for drafting a Charter is not about *improving the protection* of the rights in question, but the aim is to '*make their overriding importance and relevance* more visible.' He went on to note that it is the 'perception of the citizens which the main target of the project of drafting the Charter according to the Cologne mandate, not the *substance* of the rights concerned. The rights themselves are therefore used instrumentally to ensure the EU's legitimacy.' Schönlau (n 5) 82-83. See also, Miguel Poiares Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in Tamara Hervey and Jeff Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective* (London: Hart Publishing 2003) 269, 277.
[11] Schönlau (n 5) 83. See also, Marta Cartabia, 'The Charter of Fundamental Rights of the European Union' in Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino and Lucrezia Reichlin (eds) *The History of the European Union: Constructing Utopia* (Oxford: Hart Publishing 2018) 113, 116.
[12] Bernsdoff and Borowsky, *Arbeitsdokumente* (n 6) 2049.
[13] For an overview, see Steve Peers, 'The Rebirth of the EU's Charter of Fundamental Rights' (2010-2011) 13 *Cambridge Yearbook on European Legal Studies* 283.
[14] Coghlan and Steiert (n 7) 757.

European Council was tasked with casting the ultimate vote of approval once the Charter had been completed.

The Charter was drafted with the explicit intention of enhancing the legitimacy of the European Union, by codifying a 'common set of values' that would increase public awareness and support for the European project, rather than to introduce substantive policy change or to enhance the protection of fundamental rights *per se.*[15] On the basis of the Cologne Mandate, the European Charter was designed to collect and codify existing fundamental rights that had long received protection in national constitutions and other human rights documents, such as the European Convention on Human Rights. In other words, the Charter was supposed to make rights that were already elsewhere protected more visible to the wider European public, although it was envisaged that this would include pre-existing rights that had been identified by the Court of Justice, but had not yet been formally recognised.[16] Given that the Court of Justice had already recognised fundamental rights as 'general principles' of European Union law, and that the Member States were subject to the European Convention of Human Rights, doubts were expressed as to whether a Charter of Fundamental Rights was strictly necessary.[17] On the other hand, many argued that adopting the Charter would improve the legitimacy of the European project.[18]

The Convention was overseen by a drafting committee, known as the Praesidium, that would prove to be the most influential force on the shape of the Charter.[19] Herzog served as Chair of the Praesidium. There were three Vice Chair positions: Íñigo Méndez de Vigo, a Spanish MEP and a member of the European People's Party, was elected by the European Parliament delegation to serve as Vice Chairman. Gunnar Jansson, a Finnish parliamentarian, was elected by the National Parliament delegation. Jansson was a member of the Liberals for Åland, a left-leaning political party that was a member of the Alliance of Liberals and Democrats for Europe ('ALDE') grouping in the European Parliament. It was agreed that the third position of Vice

[15] Bellamy and Schönlau (n 5) 419; Maduro (n 10) 277.
[16] Schönlau, (n 5) 4; de Búrca (n 5) 130-131.
[17] J. H. H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *European Law Journal* 95. However, the Court of Justice had found in Opinion 2/94 that the EU lacked the competence to accede to the European Convention on Human Rights, which prompted the creation of the Charter.
[18] See, for example, Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 *European Law Journal* 125, 141; Andrew Duff 'Consolidation of fundamental rights at EU level : the British perspective' in Kim Feus (ed) *An EU Charter of Fundamental Rights: Text and Commentaries* (London: Federal Trust 2000) 13.
[19] Coghlan and Steiert (n 7) 17; Deloche-Gaudez (n 5) 13; Maduro (n 10) 275-276.

Chairman would correspond with the Council Presidency. In theory this allowed Finland, Portugal and France to each send a representative at various points throughout the drafting process. While Jansson was soon replaced by Pedro Bacelar de Vasconcellos of the Socialist Party when Portugal assumed the EU presidency in January 2000, the French representative, Guy Braibant, attended from the very beginning. [20] Bacelar de Vasconcellos also remained a member of the Praesidium once EU presidency moved to France in June.[21] Antónino Vitorino, a member of the Portuguese Socialist Party, and the European Commissioner for Justice and Home Affairs, served as the fifth member of the Praesidium. The Praesidium was assisted by a General Secretariat who, in addition to secretariat services, also were responsible for drafting the early outlines and amendments for the Convention.[22]

The initial preparatory phase ran from roughly December 1999 to May 2000.[23] The Praesidium released a draft list of rights in late January 2000 which, by the spring, had been expanded into draft articles. By early May, the formal drafting phase had begun.[24] The Praesidium released the first full drafts of all articles, and the first round of amendments begun. These were circulated to the Convention on 25 May, while the Praesidium responded with its analysis on 4 June. A second round of amendments were gathered on 16 June, with the Praesidium's response released by 23 June. Candidate countries for the European Union were invited to give their views on 19 June, while NGOs had been invited in early April.[25] These developments were debated at Convention meetings throughout the summer, and the first full draft of the Charter and Explanations were issued by the Praesidium by the end of July. Revisions continued to be made throughout September, and the final formal draft was issued on 25 September 2000.

Drafting the freedom to conduct a business

An initial list of fundamental rights and their corresponding, pre-existing source was issued by the Praesidium of the Convention at the end of January 2000. It made no reference to the freedom to conduct a business. It did, however, include a right to work, encompassing the

[20] Deloche-Gaudez (n 5) 13.
[21] Ibid.
[22] Deloche-Gaudez (n 5) 14.
[23] Coghlan and Steiert (n 7)18.
[24] Ibid 18-19.
[25] Deloche-Gaudez (n 5) 16-23.

'freedom to choose and engage in an occupation.'[26] The Finnish representative Paavo Nikula was one of the first to mention the concept of the freedom to conduct a business, in a submission he made to the Praesidium in January 2000, by reference to the Finnish Constitution.[27] Although newly drafted, the Constitution was not actually in force and was not due to come into effect until March 2000. The Finnish Constitution remains a rare example of a national constitution that explicitly protects such a right, albeit not one that is justiciable.[28] As Finland held the presidency of the European Council, Nikula was at that time serving as one of the Vice Chairs of the Praesidium. Nikula, a Green MP, had previously served as a Minister for the Liberal People's Party, and at that time, he also occupied the position of Chancellor of Justice.[29] By the time a draft list of social rights circulated to the Convention at the end of March, the draft article read:

> Everyone has the right to choose and to engage in his occupation or business, without prejudice to the rules in the Treaty relating to the free movement of persons.[30]

The explanatory comment noted that the right was acknowledged 'without any ambiguity' in the case law of the Court of Justice, citing its 1974 judgment in *Nold*.[31] Members of the Convention were then given the opportunity to make amendments. The French representative Guy Braibant argued that there was no reason for 'freedom' to be limited to commercial activities, and pointed out that, by reference to the *Nold* judgment itself, the freedom was never characterised in absolute terms.[32] The Greek representative, Georgios Paradimitriou, suggested that the removal of the term 'business' should be considered.[33] By May, any mention of business freedom had vanished, and the proposed wording read: 'Everyone has the right to

[26] It cited Article 127 EC, Article 1 Social Charter and Point 4 of the Community Charter of Social Rights as the origins. Coghlan and Steiert (n 5) 1077.
[27] Coghlan and Steiert (n 7) 1099. There is, notably, no mention of this in his later (admittedly brief) account of Finland's influence on the Charter of Fundamental Rights, see Paavo Nikula, 'Charter of Fundamental Rights of the European Union' (2000) 11 *Finnish Yearbook of International Law* 3.
[28] Jakka Husa, *The Constitution of Finland: A Contextual Analysis* (Bloomsbury 2010) 187-8.
[29] See, Jenni Karimaki 'From Protest to Pragmatism: Stabilisation of the Green League into Finnish Political Culture and Party System during the 1990s' (2022) 31(3) *Contemporary European History* 456, 464.
[30] Coghlan and Steiert (n 7) 1353-1355.
[31] *Nold* (n 2).
[32] Coghlan and Steiert (n 7) 1430. Braibant was a high-ranking civil servant who served as the Vice President (and effectively the President) of the Higher Commission for Codification. He served as the personal representative of the French Government to the Convention, and was a member of the French Communist Party. See, Jacques Fournier, 'Guy Braibant: un grand juriste au service de libertés' (2008) 365 *La Revue Administrative* 455.
[33] Coghlan and Steiert (n 7) 1441.

choose and engage in an occupation.' The explanatory accompanying statement again noted that the Court of Justice had clearly recognised the freedom to pursue an occupation in *Nold*.

There were extensive suggestions for amendment.[34] One French MEP and a member of the right-wing *Mouvement pour la France*, Georges Berthu, argued that the freedom to choose one's occupation should be widened to encompass the freedom to make contracts and to set up businesses, both of which were 'essential in a market economy.'[35] The UK Prime Minister's Personal Representative, Lord Goldsmith QC, proposed an amendment that included the addition of the freedom 'to set up in business' arguing that 'the right of establishment (i.e. to set up in business) is a very important right, but it is not included.'[36] The Swedish MEP Charlotte Cederschiöld, member of the conservative *Moderata samlingspartiet* ('Moderate Party') echoed the link to freedom of establishment, arguing that business activity 'including the freedom of establishment and entrepreneurship' should fall within the scope of the provision.[37] Álvaro Rodríguez Bereijo, the personal representative of the Spanish Prime Minister, argued for the inclusion of a 'right of freedom of enterprise' as a 'logical correlative of the right to private property' recognised, he stressed, by the Court of Justice in *SpA Eridania.*[38] Based on these amendments, by 23 June 2000 this article had become:

> 1. Everyone has the right to work, to choose his or her work and to enjoy job protection
> 2. Everyone has in particular the right to engage in an occupation or commercial activity, and to have access to a free job placement service.[39]

The summary of the amendments drawn up by the Secretariat of the Convention, however, makes no reference to the suggestions for the inclusion of the freedom of enterprise.[40] This highlights one of the difficulties with the drafting of the Charter. The Praesidium was an extremely powerful actor in the drafting process. The Chair and Vice Chairpersons had been

[34] Coghlan and Steiert (n 7) 2498-2528.
[35] Coghlan and Steiert (n 7) 2499.
[36] See, Coghlan and Steiert (n 7) 2507. Lord Goldsmith Q.C. later served as Attorney General for England and Wales under Prime Minister Tony Blair, leader of the UK Labour Party.
[37] Coghlan and Steiert (n 7) 2508.
[38] Coghlan and Steiert (n 7) 2518. Rodriguez Bereijo was a former president of the Spanish Constitutional Court, and he served as a representative of Prime Minister José María Aznar, who led the conservative *Partido Popular* ('People's Party') after the party won an absolute majority in the general elections in March 2000.
[39] Coghlan and Steiert (n 7) 2945.
[40] Coghlan and Steiert (n 7) 2949.

given a broadly worded discretion to determine how drafting decisions would be made.[41] The Praesidium had then consolidated its power with a series of procedural motions that ensured that it had the final word on proposed changes.[42] There were no criteria to determine what amendments should be accepted, or on what basis certain amendments were overlooked or accepted with modifications. When amendments were made and presented to the Convention, voting was largely avoided and the Convention sought to proceed 'by consensus.'[43] Thus it is challenging to determine, purely on the basis of the documents available, how certain decisions or modifications came to be made.

What is clear is that the appropriate place of social and economic rights soon began to cause tension between members of the Convention, who were predictably split largely along the lines of their political affiliations. Eventually, a proposal was advanced by Guy Braibant, representative of the French Government,[44] and Jürgen Meyer, the representative of the German Parliament.[45] This proposal managed to break the gridlock that was threatening to envelop the Convention. The Braibant-Meyer proposal included Article 31, entitled Labour Rights, which protected the right to work, job protection, and included the 'right to choose and to engage in an occupation and the right of free access to job-placement services free of charge.'[46] The 15th Convention meeting was held in July. During the drafting of the Convention, many of the Convention members had arranged to meet in groupings by political affiliation to co-ordinate amendments. One such grouping was composed of the members of European

[41] The mandate determined at the Council held in Tampere stated that: 'When the chairperson, in close concertation with the Vice Chairpersons, deems that the text of the draft Charter elaborated by the body can eventually be subscribed to by all the parties, it shall be forwarded to the European Council through the normal preparatory procedure.' See Coghlan and Steiert (n 7) 745.

[42] As Coghlan and Steiert (n 7) wrote at 20:

> '..the Praesidium appears to have acted decisively in consolidating its power. It established a monopoly on drafting proposals, restricted speaking time and repeatedly postponed consideration of members' specific proposed amendments. It controlled information flows. It declined to permit votes on particular articles, drafts or amendments, instead judging itself whether particular rights should be incorporated into its drafts and when consensus was reached. Further, no objective criteria were offered as to when a proposal for amendment should lead to an adjustment of the draft.'

[43] Schönlau (n 5) 111; Deloche-Gaudez (n 5) 23-32.

[44] Braibant was a high-ranking civil servant who served as the Vice President (and effectively the President) of the Higher Commission for Codification. He served as the personal representative of the French Government to the Convention, and was a member of the French Communist Party. See, Jacques Fournier, 'Guy Braibant: un grand juriste au service de libertés' (2008) 365 *La Revue Administrative* 455.

[45] See, Coghlan and Steiert (n 7) 3001. See also, Win Griffiths, 'A Charter of Fundamental Rights of the European Union: A Personal Political Perspective' in Kim Feus (ed) *An EU Charter of Fundamental Rights: Text and Commentaries* (London: Federal Trust 2000) 45, 49.

[46] See, Coghlan and Steiert (n 7) 3002.

People's Party ('the EPP'). The EPP is an affiliate political grouping in the European Parliament, composed of Christian Democratic, conservative and centre-right political parties. It includes, for example, the German Christian Democratic Union/Christian Social Union (CDU/CSU), Les Républicains of France, the Dutch Christen-Democratisch Appèl, Forza Italia, the Spanish Partido Popular, Fine Gael of Ireland, and before the UK's departure from the EU, the Conservatives. The grouping that met regularly to 'agree on common positions'[47] during the drafting of the Convention was composed of Ingo Friedrich (who served as Chair),[48] Heinrich Neisser,[49] Lord Bowness,[50] Peter Altmaier,[51] Ernst Hirsch Ballin,[52] Lars Tobisson,[53] Gabriel Cisneros Laborda,[54] Peter Mombaur,[55] and Charlotte Cederschiöld.[56] As the Convention gathered for its fifteenth meeting, the members of this political grouping met to draw up a position paper on the Braibant-Meyer proposal. A draft was proposed by Hirsch Ballin and Altmaier, which was subsequently signed by the nine members.[57] The proposal praised the 'attractive structure' of the Braibant-Meyer proposal, but their draft included a new Article 30, entitled 'Freedom of enterprise and right to set up a business.' This read:

> (1) Freedom of enterprise is recognised in the framework of the social market economy.
>
> (2) Every citizen of the Union has the right to set up a business and provide services.

A subsequent right, Article 31 'Labour Rights' stated that:

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[47] 'Social, Economic and Cultural Rights: Joint Statement by Hirsch Ballin, Altmaier, Friedrich, Neisser, Lord Bowness, Tobisson, Cisneros Laborda, Mombaur and Cederschiöld on the proposed Compromise Paper on economic and social rights presented by Braibant and Meyer in Document Charte 4401/00 Contrib. 258 (document on 1 July 2000' reproduced in Bernsdoff and Borowsky, *Arbeitsdokumente* (n 6) 1555.

[48] Full member of the Convention, and a member of the European Parliament for Germany under the EPP banner.

[49] Personal Representative of the government of Austria. Wolfgang Schüssel was the Chancellor of Austria, leading the centre-right *Österreichische Volkspartei* (ÖVP) in coalition with the far-right *Freiheitliche Partei Österreichs* (FPÖ). The coalition was considered to be so extreme that it was subject to sanctions for a period of six months by the European Union. See, Suzanne Daly, 'Europe lifts sanctions on Austria, but vows vigilance' *The New York Times* 13 September 2000.

[50] Representative of the UK House of Lords, and a member of the UK Conservative Party.

[51] Alternate member of the Convention, representative of the German Bundestag, and member of the CDU.

[52] Full member of the Convention, representative of the Dutch Parliament, and member of the conservative *Christen-Democratisch Appèl* (the 'Christian Democratic Appeal').

[53] Full member of the Convention, representative of the Swedish Parliament, and member of the Moderate Party.

[54] Representative of the Spanish Parliament, and member of the Partido Popular.

[55] Alternate member, delegation of the European Parliament, member of the European Parliament, EPP grouping, and a member of the CDU.

[56] Full member, delegation of the European Parliament, member of the European Parliament, EPP grouping, and member of the Moderate Party.

[57] This position paper is available only as an appendix to Bernsdoff and Martin Borowsky, *Arbeitsdokumente* (n 6) 1558. Coghlan and Steiert highlight the origins of Article16 in the lead-up to the drafting of the Charter, noting that: 'At the meeting immediately preceding the first complete draft, a group of 11 conservative delegates presented a position paper including freedom of enterprise as a condition for *any* Charter. A similar paper was resubmitted in September 2000…neither paper is public.' See, Coghlan and Steiert (n 3) 5-6.

(1) In order to earn his living every citizen of the Union has the right to exercise an occupation freely entered upon.
(2) Everyone has the right to protection against unjustified or abusive termination of employment.

This was the first time that two distinct rights had been drafted: one clearly protecting the freedom of enterprise, and another to protect the freedom to pursue an occupation.

First draft of Charter

The first full draft was issued on 28 July 2000, and the draft Explanations followed on 31 July. The draft Charter included a new Article 16, the freedom to conduct a business, stating without any qualification that: 'The freedom to conduct a business is recognised.'[58] The preceding provision, Article 15, protected the right to 'engage in a freely chosen occupation.' The draft Explanation outlined that Article 16 was 'based on Court of Justice case law which has recognised freedom to exercise an economic or commercial activity.' The Explanation made reference to *Nold,* as well as *SpA Eridania*[59] and *Sukkerfabriken*[60] and *Spain v Commission.*[61] The latter cases, the Explanation outlined, protected freedom of contract and free competition respectively. *Nold* had, of course, originally been cited in the draft Explanations six months previously as a case recognising the right to freely pursue an occupation. It was now cited as a case which had recognised the freedom to conduct a business.

With the first full draft of the Charter released, the Convention broke for the summer, giving the representatives an opportunity to return with further criticism and proposed amendments to the Praesidium. Some objections to the provisions of Article 16 were raised, most notably by the Italian representative Andrea Manzalla of the social democratic *Partito Democratico* who wrote that the provision actually deviated from domestic constitutional provisions,[62] as he

[58] Coghlan and Steiert (n 7) 3063.
[59] Case C-230-78 *SpA Eridania* ECLI:EU:C:1979:216.
[60] Case 151/78 *Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture* ECLI:EU:C:1979:4.
[61] C-240/97 *Spain v Commission* ECLI:EU:C:1999:479.
[62] The full paragraph stated: 'The affirmation of free entrepreneurship must be reconciled here with the concept of balanced and sustainable development, according to the fundamental orientation of the European social model. In this regard, it is recalled that in none of the European Constitutions is the law of business affirmed in an absolute and unconditional manner. It is always balanced with principles of social and ecological sustainability and economic balance. A characteristic element of all constitutionalism of the twentieth century was, in fact, precisely that of linking the recognition of the rights of economic freedom to social aims. If the current formulation of

pointed out that in: 'none of the European Constitutions is the law of business affirmed in an absolute and unconditional manner.'[63] He suggested that the provision be qualified by reference to sustainable development and in conformance with other fundamental rights in the Charter. The representative of the Irish Government, Michael O'Kennedy, suggested that Article 16 be explicitly 'restated as a principle.'[64] By contrast, Lord Goldsmith proposed that the provision encompass the other economic rights, the four freedoms and freedom of establishment, and suggested strengthening the wording. The term 'recognised' he argued, was weaker than the words 'protected', 'guaranteed' and 'respected' that were used elsewhere throughout the Draft, and the freedom of enterprise should warrant similar wording.[65] Ernest Ballin, one of the most enthusiastic supporters of Article16, argued for 'more substance' to the wording, echoing the position paper of which he was an author. His proposed reformulation recognised the 'freedom of enterprise…in the framework of the social market economy,' and guaranteeing that 'every citizen of the Union has the right to set up a business and to provide services.'[66]

The Fifth Heads of State and Government (HOSG) Meeting took place on 11 and 12 September 2000 which included, amongst other matters, a debate on the provisions of Article 16.[67] Jürgen Meyer, the representative from the German Bundestag, voiced his objection to the provisions of Article 16. He argued that the provision created an imbalance as entrepreneurs were singled out from other occupations. Article 16, he argued, did not bring anything new, but its potential political impact should not be underestimated. He suggested that the article be deleted, or alternatively, that the right to strike should be included as a counterbalance.[68] Andrea Manzella, the Italian representative, argued that Article 16 on entrepreneurial freedom should not be unqualified. Ben Fayot (Luxembourg), Caspar Einem (Austria), Lukas Apostolidis (Greece) and Win Griffiths (UK) all suggested that the provisions of Article 15 and Article 16 should be combined.[69] Einem endorsed the inclusion of a right to work, and argued that the freedom to

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Article 16 were maintained (like that of the subsequent Article 17), the provision in question would therefore be perceived as a retreat from common constitutional traditions.' See, Coghlan and Steiert (n 7) 3397.

[63] Coghlan and Steiert (n 7) 3492-3493.

[64] Coghlan and Steiert (n 7) 3465-3466. This objection seemed to stem from Ireland's general resistance to the recognition of any social or economic rights, which it argued ought not to be justiciable. See, 'Charter of Fundamental Rights' *The Irish Times* 11 October 2000.

[65] Ibid 3276-3277.

[66] Ibid 3328-9. Yet this particular wording would have, in fact, narrowed the scope of the provision, by the additional limitations of 'citizens of the Union' and the right to establish a business, rather than to conduct a business *per se.*

[67] While no records remain of the meeting, a contemporary account of the debate is available. See, Bernsdorff and Borowsky, *Sitzungsprotokolle* (n 6) 362-368.

[68] Ibid 364.

[69] Win Griffiths of the UK Labour Party was the House of Commons representative to the Convention.

conduct a business was covered by the freedom to provide services, which was already protected in draft Article 15. Lord Bowness, however, argued that Article 16 should be retained as its own distinct provision, and argued that economic rights should be granted the same status as social rights.[70]

The second full draft was issued on 14 September 2000. Article 16 remained identical to the earlier, first draft, stating that: 'The freedom to conduct a business is recognised'.[71] The 17th Meeting of the Convention was held on 25 to 26 September. The groups within the Convention met separately on 25 September. At the session on 25 September, Meyer once again addressed the question of Article 16. He stated that he had no objection to Article 16 recognising freedom of enterprise in principle, but queried why entrepreneurs should be singled out for protection: they were one occupation amongst many. He suggested that Article 16 be subsumed in Article 15, or at the very least, the same limits that existed for other employees – such as in Article 26 – should apply.[72] He noted that the provision should be drafted to ensure that the right correlated with national and EU law. Gunnar Jansson, who spoke next, pointed out that there was no majority in the Praesidium to subsume Article 16 into Article 15. Hirsch Ballin also defended the provisions of Article 16: the text of the Charter was now balanced, he argued, and it was included in its present form as the social democratic representatives had insisted on the inclusion of the right to strike.[73]

EPP insists on freedom of enterprise

The representatives in the European People's Party met on the evening of 25 September 2000, with German MEP Ingo Friedrich serving as chair. The record of the meeting states that: '…the impression prevailed that the pendulum had "swung to the left" again with the second overall draft'.[74] The group agreed that it was essential that economic rights, namely the freedom of enterprise, be included in the Charter. The document drawn up by the meeting resolved that:

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[70] Bernsdorff and Borowsky, *Sitzungsprotokolle* (n 6) 366.

[71] Coghlan and Steiert (n 7) 3565. A revised draft was released on 21 September after a review by specialist legal linguistic team. Ibid 3578.

[72] Bernsdorff and Borowsky, *Sitzungsprotokolle* (n 6) 381.

[73] Lord Bowness echoed his support for the inclusion of Article 16 as a separate article, as did Altmaier and Gnauck. Ibid 382-4.

[74] 'The impression prevailed that the pendulum had 'swung to the left' again with the overall draft in document Charte 4470/00 CONVENT 47 of 14 September 2000 and document CHARTE 4470/1/00 REV 1 CONVENT 47 of 21 September 2000 respectively compared to the first, very positively assessed overall draft of the Charter in document CHARTE 4422/00 Convent 45 of 28 July 2000. Therefore, the 'family', which was mainly Christian Democratic, quickly agreed on the remaining 'main points' that evening, with which they attempted to 'counteract' the situation - quite successfully in the end. Friedrich (D) was able to introduce these 'main points

> In order to maintain the balance between social and economic rights in the Charter, it is essential to include an article concerning the freedom of enterprise (Article 16). It may be subject to the limitations provided for in Article 51(1) of the Charter. No other restrictions are needed.[75]

The proposal was submitted to the 20th Praesidium Meeting, which was also taking place on the evening of 25 September to evaluate the conclusions of those meetings of the various groups that had taken place that day.[76] The following morning, the Convention reconvened for a plenary session to debate the final approval of the draft Charter. The Praesidium distributed an updated draft, and the revised wording of Article 16 now read:

> The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.[77]

Guy Brabaint, Vice Chair of the Praesidium, explained that the additional text of 'in accordance with national and Community law' had been inserted to ensure that the provision was not unconditional.'[78] Jürgen Meyer welcomed the additional caveat on Article 16, on the basis that the text of the provision now expressly provided for limitations on the freedom to conduct a business. On the whole, he welcomed the draft text of the Charter as demonstrating that the European Union was not merely an economic order, but a community based on values.[79] Another member of the Convention, Johannes Voggenhuber, an Austrian MP, voiced his objection to the lack of balance between social and economic rights, arguing that unlike social rights, economic rights were clearly and robustly protected, and Article 16 represented the creation of an entirely new right.[80] But these criticisms made little impact. The draft finalised on 26 September 2000 effectively became the final text of the Charter, and the Praesidium concluded that the draft was ready to be sent to the European Council.[81] The finalised draft

EPP/DE-Family meeting', which are reproduced here, later in the evening in the deliberations of the Praesidium, which was meeting at the same time.' Bernsdoff and Borowsky, *Arbeitsdokumente* (n 6) 2049.
[75] Ibid 2051. This is referenced also in Deloche-Gaudez (n 5) 30.
[76] Bernsdorff and Borowsky, *Sitzungsprotokolle* (n 6) 384.
[77] Coghlan and Steiert (n 7) 3601.
[78] Bernsdorff and Borowsky, *Sitzungsprotokolle* (n 6) 386.
[79] Ibid 387.
[80] Ibid 390.
[81] 'Community law' later became 'Union law.'

Charter was approved in October at Biarritz EUCO, and the solemn proclamation of the Charter took place on 7 December 2000.

Why did the Convention agree to Article 16?

One of the most striking features that emerges from the Convention process is the role played by the representatives of the European People's Party, who were instrumental in ensuring that the freedom to conduct a business was included in the Charter. When the mention of 'business' was dropped from the freedom to pursue an occupation in May, the members of the Convention associated with the EPP made a series of amendment proposals to have the term re-included. The position paper submitted to the Praesidium after their meeting in July was the first time that the freedom to conduct a business was separated from the freedom to pursue an occupation into a separate, stand-alone right. This ultimately became the model that was adopted in the Charter itself. The group made a critical intervention at the end of September on the very eve of the deadline, grouping together to insist upon the inclusion of the freedom to conduct a business as the price of their support for the draft Charter.

This particular group included the UK representative, Lord Bowness. Both Lord Goldsmith and Lord Bowness were amongst the most vocal supporters of the inclusion of the freedom to conduct a business, and the most critical of the Charter's provisions relating to social rights. The Praesidium were particularly keen to have the support of the UK, who it was felt were one of the more sceptical Member States and with enough geopolitical capital to sink the project entirely, if they chose.[82] There appears to have been considerable relief when Lord Goldsmith announced to the Convention that he would be recommending the adoption of the Charter to the UK government.[83] The involvement of the UK representatives in advocating for the inclusion of Article 16 is somewhat ironic, given that the UK had publicly argued on a number of occasions that the Charter should not include novel rights.[84] Previous analyses of the drafting of the Charter have noted that while individual Government representatives at the Convention

[82] On the UK's sceptical approach to the Charter, see Deloche-Gauze (n 5) 10, 15; David Anderson and Cian C. Murphy, 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *Law after Lisbon* (Oxford University Press 2012) 154, 156; Elizabeth Wicks, '"Declaratory of existing rights" – the United Kingdom's role in drafting a European Bill of Rights, Mark II' (2001) 51 *Public Law* 527. The UK was later to insist on Protocol 30 on the application of the Charter to Poland and United Kingdom to clarify the limits of the Charter; see Daniel Denman, 'The EU Charter of Fundamental Rights: How Sharp Are Its Teeth' (2014) 19(3) *Judicial Review* 160, 171.

[83] Deloche-Gaudez (n 5) 10. Deloche-Gaudez wrote that the Convention appeared to pay particular attention to comments and contributions from the UK, 26-28.

[84] Wicks (n 82) 533-534.

may have threatened to exercise a 'veto' (although it was not clear at all that they did, in fact, possess such a power) there was no evidence to suggest that 'members from either the national or the European Parliament having tried to influence the Praesidium in its drafting in a similar way.'[85] However, it is difficult to see how the actions of this group, particularly the intervention on 25 September, could be characterised as anything other than an implied threat to withdraw their support for the Charter if their demands were not met.

Second, it is important to take note of something of a contradiction running throughout the discussion around Article 16. At times throughout the drafting process, and most notably in the Explanations, it is characterised as a codification of pre-existing rights. Yet Article 16 was plainly novel: at the very least, it was the first time that the concept and the specific wording of 'the freedom to conduct a business' would be codified as a standalone right in an international human rights instrument. Its supporters successfully argued that the various elements of the entitlement already existed, albeit in piecemeal fashion; in the case law of the Court of Justice of the European Union and in some select national constitutions. Despite the various elements that were used in support of the inclusion of Article 16, it is not clear that they add up to a coherent whole. For rights that were, according to its supporters, firmly entrenched in the EU legal order, one might wonder why there was so much insistence that the provision be included in the Charter. Yet proponents of the provision managed to inject enough ambiguity into the discussion of Article 16 to convince the sceptical elements of the Convention that it was little more than an acknowledgment of rights that – albeit in a dispersed fashion – already existed.

This is reminiscent of what Smismans has described as the European Union's 'fundamental rights myth.'[86] This is what he argues is the revisionist tendency of the European Union to inaccurately insist that the protection of human rights has always been at its core. In a similar vein, Olgiati described the 'creative jurisprudence' used by the Court of Justice as a type of legal analysis that employs 'certain values *as if* they were constitutive sources' of EU law, only for those values to be later codified within the Treaties as if they had been there all along.[87] As

[85] Schönlau (n 5) 113.
[86] Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48(1) *Journal of Common Market Studies* 45. For a historical account of the evolution of human rights protection in the EU, see Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105(4) *American Journal of International Law* 649.
[87] Vittorio Olgiati, 'The EU Charter of Fundamental Rights. Text and context to the rise of a 'public interest' EU-oriented European lawyer' (2002) 9(3) *International Journal of the Legal Profession* 235, 242.

outlined in the next chapter in further detail, the freedom to conduct a business was not recognised in any international human rights instrument, including the European Convention on Human Rights, and it was not embedded in the constitutional traditions of the Member States. As one commentator described it, while the members of the Convention 'made a commendable effort to demonstrate that all of the Charter's precepts are founded on pertinent texts' in reality, 'it did not hesitate to look for them wherever it could…it becomes evident that the identification of sources serves to justify their decisions, not to explain them.'[88] Consequently, the Convention did not abide by its mandate merely to collate existing fundamental rights, but rather drafted 'the Charter of Rights that, in the opinion of the majority of its members, the EU need[ed].'[89] This experience suggests that, when drafting a proposed provision for inclusion in a constitution, it matters whether the proposal is characterised as a new departure or a continuation of a pre-existing entitlement. For supporters of a proposed provision, drawing attention to its novelty risks attracting further resistance. It can be an advantage to frame a provision as simply the codification of what already exists.

Third, it is notable that only a handful of representatives seemed to appreciate the novelty and potentially far-reaching scope of Article 16. Perhaps most of the members of the Convention were prepared to accept that the entitlement could be derived from the case law of the Court of Justice, or in any event, that the impact of the provision would be minimal, given that the Charter did not have any immediate binding legal effect. Nor was the novelty of the freedom to conduct a business objected to by any other body. In fact, in one of its communications, the Commission approvingly noted that the Convention had led to the inclusion of rights not originally identified by the Praesidium in January, including the freedom to conduct a business.[90] Members of the Convention may also have been reassured by the fact that the freedom to conduct a business was merely 'recognised' rather than some of the more robust language – 'guaranteed' – that was used elsewhere in the Charter. Moreover, the last-minute addition of the qualifying phrase 'in accordance with Union law and national law and practices' seems to have won over some of the more sceptical elements of the Convention, such as Guy Braibant.[91] Yet, as we will see, the suggestion that the freedom to conduct to business could be

[88] Francisco Rubio Llorente, 'A Charter of Dubious Utility' (2003) 1(3) *International Journal of Constitutional Law* 405, 419.
[89] Ibid.
[90] Coghlan and Steiert (n 7) 3762.
[91] This phrase was used elsewhere in the Charter, in particular in Articles 28, 30 and 34(2).This qualification came about partly due to the insistence of Lord Goldsmith QC in the interests of limiting the impact of these rights; see

constrained by the caveat that it should be subject to Union and national law and practices has proved to be less effective that it may initially have appeared. For one thing, as Bercusson has pointed out, how could a provision of EU law be limited by reference to national laws and practices? If the Charter was subject to national laws and practices, and thus the national standard were to become the height of fundamental rights protection, the Charter's additional value would be negligible.[92] The supposed limitation on Article 16 is out of kilter with the traditional understanding of fundamental rights as trumps. Fundamental rights, to be effective, must shape the scope and application of existing and future laws. There would be little point in possessing a fundamental right if it could be overridden by ordinary legislative measures. In any event, the inclusion of the freedom to conduct a business seems to have been accepted as an inevitable compromise to pacify the right-leaning faction within the Convention, and most of the members of the Convention seemed to have accepted that the Charter, overall, struck a reasonable balance between the protection of social rights and economic interests.

Explanations to Article 16

The Explanations cite the case law of the Court of Justice as the origins of Article 16, suggesting that its components had already been recognised: namely the freedom to exercise an economic activity in *Nold* and *SpA Eridania;* the freedom of contract in *Sukkerfabriken* and *Commission v Spain;* and the recognition of free competition in the Treaties. Article 119 TFEU does, of course, protect free competition. The Explanations were not debated before the Convention and were simply added by the Praesidium.[93] The Explanations sit as addendums to the text of the Charter itself, and while they are not legally binding, it has been suggested that they ought to be afforded a considerable degree of weight in the interpretation of the Charter, and are often used by the Court of Justice as aids to interpretation.[94] Yet on closer examination, it is not evident that the protection of the freedom to conduct a business in Article 16 represented a straightforward codification of this line of case law. The formal Explanations to Article 16 of the Charter state:

Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *Common Market Law Review* 1201, 1213.

[92] Brian Bercusson, *European Labour Law* (Cambridge University Press 2009) 209-210.

[93] Coghlan and Steiert (n 3) 5-6.

[94] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 401-402.

> This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230-78 *SpA Eridania and others* [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see inter alia *Sukkerfabriken Nykøbing* judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, C-240/97 *Spain v Commission* [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.

Nold

In *Nold,* the applicant unsuccessfully argued that the imposition of new trading rules by the European Commission had threatened the profitability of its coal business by reducing its sales, violating its proprietary rights over the business, and 'the free development of its business activity.'[95] The applicant argued that these rights were protected by the *Grundegesetz* in Germany, other (unspecified) national constitutions and the European Convention on Human Rights. In a passage for which the judgement is most often remembered, the Court of Justice accepted that in safeguarding fundamental rights, it could not uphold measures that were incompatible with rights protected by the constitutions of Member States, and accepted that international human rights law should inform the interpretation of EC law. While rights of ownership and the freedom to freely choose and practice one's trade or profession may receive protection in national constitutions, the CJEU noted, 'far from constituting unfettered prerogatives' they must, in fact, be considered 'in light of the social function of their property and activities protected thereunder.' Within EC law, these rights could always be subject to appropriate limitations in the public interest, provided the substance of the right was protected. Moreover, these protections could not be afforded to 'mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.'[96] In summary, what the Court actually said was:

[95] *Nold* (n 2) para 12.
[96] Ibid para 14.

i) that it could not uphold measures that violated the fundamental rights recognised by the constitutions of its Member States;

ii) international human treaties signed by Member States could supply guidance that should be followed within the boundaries of EU law;

iii) any rights of ownership or right to freely practice one's profession had to be viewed in light of the social function of the property and the activities protected thereunder;

iv) thus, any such rights would always be subject to limitations within the public interest;

v) within the EU legal order, any rights should be limited by reference to the objectives of the EU, provided the substance of the right is protected;

vi) mere commercial interests or opportunities cannot be protected, given that uncertainty is the very essence of economic activity.

Thus, *Nold* does not make any reference to a free-standing freedom to conduct a business, and certainly does not outline any normative basis for that entitlement. In fact, the Court of Justice stressed that measures that negatively impacted profit-making opportunities could not be considered to be a breach of fundamental rights. Given the inherent uncertainty of market activity, profit-making could not amount to a protected right. It is, to say the least, a stretch to say that the Court recognised the exercise of commercial activity as fundamental right, although that appears to have been what the litigant in question was hoping to achieve. The efforts of a number German litigants to compel the Court of Justice to recognise the importance of national fundamental rights – in particular, economic rights - was in an attempt to undermine the Community's regulation of the common market.[97] Nonetheless, that was not the prevailing understanding of the case at the time.[98] Even when the Charter was drafted, the common understanding of *Nold* as expressed in the *travaux préparatoires* was that the Court had recognised the right to freely pursue an occupation. It was only sometime during the drafting of the Charter that it was asserted that the freedom to conduct a business had already been recognised as a fundamental right in *Nold*, which should be reflected in the body of the Charter.

[97] de Búrca (n 86) 667-668.

[98] Chava Shachor-Landau, 'Protection of Fundamental Rights and Sources of Law in European Community Jurisprudence' (1976) 10(3) *Journal of World Trade* 289, 294; 296.

Yet *Nold* continues to be cited as the definitive example of the recognition of the freedom to conduct a business as a fundamental right, in spite of the plain text of the judgment.[99] O'Connor, for example, described *Nold* as 'noteworthy…for the clear recognition that there is freedom of commerce', yet he went on to acknowledge that, despite the Explanations to the Charter, the freedom to pursue an economic activity 'is not actually used in *Nold* at all.'[100] Similarly, Groussot, Pétursson and Pierce cited *Nold* as an instance where the Court referenced 'the principles of freedom to conduct a business early on' although they acknowledged that 'the Court did not examine the claim based explicitly on the freedom to conduct a business.'[101] Schmidt was one of the few to question the fact that the Explanations cited *Nold* as the basis for Article 16, given that the concept of the freedom to conduct a business was not mentioned in the judgment.[102] Notably, the same overlapping paragraphs in *Nold* are cited in the Explanations to Article 15, the freedom to choose an occupation.[103] As Kumm wrote of *Internationale Handelgesellschaft* and *Nold*:

> …it was not at all clear that these types of interests would warrant protection as fundamental rights…To the extent that the original six Member States recognised judicially enforceable constitutional rights at all in 1970, it was not obvious that these types of economic interests enjoyed protection. It is true that any liberty interests and certainly interests related to the freedom to pursue a trade and profession enjoyed *prima facie* protection as judicially enforceable constitutional rights *in Germany*, where both of these cases originated. But even there the Federal Constitutional Court recognised a general right to liberty only

[99] See, for example, Peter Oliver, 'What Purpose does Article 16 serve?' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU and European Private Law* (Kluwer 2013) 281, 283; Michelle Everson and Rui Correia Gonçalvez, 'Article 16' in Steve Peers and Tamara Hervey (eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2014) 464, 468; Berdien B.E. van der Donk, 'The Freedom to Conduct a Business as a Counterargument to Limit Platform Users' Freedom of Expression' in Steffen Hindelang and Andreas Moberg (eds) *YSEC Yearbook of Socioeconomic Constitutions* (Springer 2022) 33, 38; See also, Peter Oliver and Christopher Stothers, 'Intellectual Property Under the Charter: Are the Court's Scales Properly Calibrated?' (2017) 54 *Common Market Law Review* 517, 535 fn. 104.

[100] Niall O'Connor, 'Whose autonomy is it anyway? Freedom of contract, the right to work and the general principles of EU law' (2020) 49(3) *Industrial Law Journal* 285, 291. See also, Niall O'Connor, 'The Impact of EU Fundamental Rights on the Employment Relationship' (PhD thesis, University of Cambridge 2018) 71.

[101] Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak Right, Strong Court – the freedom to conduct a business and the EU Charter of Fundamental Rights' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* (Elgar 2017) 326 fn 5.

[102] Frederik Schmidt, *Die Unternehmerische Freiheit im Unionsrecht* (Duncker and Humblot 2010) 183.

[103] The Explanation to Article 15 states: 'Freedom to choose an occupation, as enshrined in Article 15(1), is recognised in Court of Justice case law (see inter alia judgment of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraphs 12 to 14 of the grounds; judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 8 October 1986, Case 234/85 *Keller* [1986] ECR 2897, paragraph 8 of the grounds).

> as a result of a highly controversial interpretation of a clause guaranteeing the free development of personality. It is striking that the Court did not make much of an effort to find out what the various constitutions of Member States or the European Convention of Human Rights actually had to say about the issue.[104]

SpA Eridania

A further case cited in the Explanations to the Charter is *SpA Eridania*, which concerned a challenge to a regulation that had altered sugar quotas. One of the grounds of challenge was that the sugar producers were carrying out economic activities which ought to be guaranteed as part of fundamental rights protected by Community law.[105] The Court of Justice held that the alteration of the quotas simply changed the quantities of sugar which could be marketed in line with the arrangements established by the common organisation of the market. Economic factors that would determine the direction of the overall common agricultural policy would inevitably vary. The Court was not willing to allow entities to claim 'a vested right to the maintenance of an advantage' which stemmed from the regulation of the common market.[106] The reduction in such an advantage was not, the Court stressed, an infringement of a fundamental right. Much like *Nold*, the decision in *SpA Eridania* does not explicitly state that economic activity is, or even should be, a fundamental right. It does not say the very thing for which it most cited. It is true that the judgement later did refer on to the 'interests of beet and cane producers' but stressed that these interests must be reconciled with wider objectives of the common agricultural policy, not least the interests of consumers and increasing agricultural supply.[107] Acknowledging 'interests' is, of course, very different from acknowledging 'fundamental rights' – although it seems as though later interpretations of *SpA Eridania* have blurred that distinction.[108]

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[104] Mattias Kumm, '*Internationale Handelsgesellschaft*, *Nold* and the New Human Rights Paradigm' in Miguel Maduro, and Loic Azoulai (eds) *Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Bloomsbury 2010) 106, 108.
[105] *SpA Eridania* (n 59) para 20.
[106] Ibid para 22.
[107] Ibid para 31.
[108] As Webber has noted, 'To speak of rights as though they were synonymous with 'interests' or 'values' obfuscates the merits and moral worth of rights.' Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2010) 123.

Sukkerfabriken* and *Commission v Spain

The Explanations state that the freedom of contract is encompassed within Article 16, and cite *Sukkerfabriken* and *Spain v Commission* as instances where freedom of contract was recognised by the Court of Justice. In *Sukkerfabriken,* the Court of Justice was asked to determine the correct interpretation of Regulation (EEC) No 741/75 which laid down particular rules for the purchase of sugar beet. Sukkerfabriken Nykøbing was one of two Danish undertakings tasked with producing and refining sugar. As a co-operative, it obtained its supplies both internally from its members, and its externally-contracted producers. When Denmark joined the EEC, the new Community quotas exceeded the quantities which could be produced at guaranteed prices under Danish legislation.[109] Sukkerfabriken and its contractual producers fell into dispute over how the increased quota should affect their existing contractual arrangements, and the Danish authorities intervened to resolve the situation by ministerial order, which Sukkerfabriken challenged. The Court considered that the Regulation made it clear that existing agreements continued to be governed 'by the domestic law of contract under which they were concluded', and that Member States were entitled under EU law to intervene in accordance with their own national legal procedures.[110] The preamble to the Regulation provided that Member States could lay down special rules, and the Regulation was based solely on Article 43 of the Treaty. This suggested that the Regulation was intended to ensure that the common organisation of the market did not prevent action on the part of the Member States. Moreover, this interpretation was bolstered by the fact that no rules or information had been provided on the procedure in Regulation No 741/75, 'such as would be expected if a restriction were to be placed upon the freedom to contract.'[111]

This is a rather thin basis for asserting a long-standing recognition of the freedom of contract as a general principle of EU law. The cited paragraph in the Explanations, paragraph 19, makes no reference whatsoever to the freedom to contract.[112] As Prassl has pointed out, the subsequent paragraph 20 'merely speaks of freedom to contract.'[113] While O'Connor described the case as the 'first explicit recognition of a freedom of contract as opposed to the more general freedom to pursue a trade or economic activity', he acknowledged that 'one could certainly be forgiven

[109] *Sukkerfabriken* (n 60) para 11.
[110] Ibid para 8.
[111] *Sukkerfabriken* (n 60) para 20.
[112] Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law - Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*' (2013) 42 *Industrial Law Journal* 434, 442 fn. 49.
[113] Ibid 442.

for missing this supposed commitment to contractual autonomy.'[114] With respect to *Commission v Spain,* the final case mentioned in the Explanations, the cited paragraph notes that parties are entitled to amend contracts they have concluded 'based on the principle of contractual freedom' and that this cannot be limited without EU law imposing clear limitations on that entitlement.[115] Taken at its height, this case simply states that any restrictions on the freedom of contract must be clearly laid out.[116] Yet subsequent case law and academic commentary has regularly repeated the claim that Article 16 had merely drawn on a right had that been firmly established in the case law of the Court of Justice.[117] As Weatherill has argued, the very cases cited in the Explanations in support of the existence of a freedom of contract 'on closer inspection, do not bear the load.'[118]

General principles of EU law

In a series of cases throughout the 1970s, the Court of Justice identified and developed the 'general principles of EU law' which incorporated fundamental rights into the EU legal order.[119] The freedom to pursue an economic activity was occasionally described as one of these general principles. The Court of Justice is well-known for its foray into new arenas, most famously as the driving force of the 'integration through law' project.[120] Yet even by its standards, the basis for the identification and exposition of the general principles of EU law are distinctly murky.[121] Nonetheless, the freedom to pursue an economic activity was occasionally described as one of these general principles. Despite the Court's actual conclusions in *Nold,* the case soon came to be described as one in which the Court of Justice had recognised the freedom to pursue an occupation or business, including by the Court itself.[122] There are, however, subtle and important differences between this line of cases and those that followed

[114] Niall O'Connor, 'The Impact of EU Fundamental Rights on the Employment Relationship' (n 100) 74.
[115] *Spain v Commission* (n 61) para 99.
[116] Guido Comparato and Hans-W. Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) 121, 126.
[117] See, for example, Case C-261/20 *Thelen Technopark Berlin GmbH v MN* Opinion of Advocate General Szpunar ECLI:EU:C:2021:620 para 80.
[118] Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract' (2014) 10 *European Review of Contract Law* 167, 180.
[119] R. Alonso Garcia, 'The General Provisions of the Charter of Fundamental Rights of the European Union' 8 (2002) *European Law Journal* 492, 493; Kumm (n 104) 106.
[120] See, for example: Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 (1) *International Organization* 41; JHH Weiler, 'The Transformation of Europe' (1991) 100 (8) *Yale Law Journal* 2403.
[121] Constanze Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19(4) *European Law Journal* 457, 460.
[122] Case 44/79 *Hauer* ECLI:EU:C:1979:290 para 32.

under Article 16. First, the freedom to pursue an economic activity was described as a facet of the freedom to pursue a trade or occupation.[123] The Court did occasionally reference 'the freedom to pursue an economic activity' or the 'right to carry on an economic activity.'[124] Only on a handful of occasions did the Court refer to the 'freedom to conduct a business.'[125] For example, in *Spain and Finland v Parliament and Council* the First Chamber of the Court of Justice made reference to 'the freedom to conduct a business' which the Court noted coincided with the freedom to pursue an occupation.[126] The 'general principles' case law used a variety of terms to describe a variation of the same principle.[127] In an Opinion offered in 2004, Advocate General Stix-Hackl commentated on this very point, noting that:

> ..the right to freedom of commercial activity ('ibertà di impresa') is expressly regarded as a subgroup of the freedom to pursue a profession. Although the Court has also sometimes used the concept of 'freedom to carry on a business' or of 'freedom of trade as a fundamental right', it is not because these are distinct from the right to pursue a trade or profession or to pursue an economic activity, but because terminology is not consistent.[128]

With respect to the freedom of competition, the Court noted in *Bayer* that 'the case-law of the Court of Justice indirectly recognises the importance of safeguarding free enterprise when applying the competition rules of the Treaty.'[129] In other words, it was less an individually enforceable entitlement than an overarching principle that should shape the interpretation of existing competition law.

Second, while the 'general principles' case law used varying terminology, it was consistent in one crucial respect: it described a far more limited entitlement than that which was to follow

[123] Case C-177/90 *Kühn* ECLI:EU:C:1992:2 para 16; Case C-200/96 *Metronome* ECLI:EU:C:1998:172 para 21; Joined Cases C-37/02 and C-38/02 *Di Lenardo Adriano Srl v Ministero del Commercio* ECLI:EU:C:2004:443, para 82; Case C-210/03 *Swedish Match* ECLI:EU:C:2004:802 para 72.
[124] Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449 para 120; 126; Cases C-143/88 and C-92/89 *Zuckerfabrik* ECLI:EU:C:1991:65 para 76-77.
[125] Joined Cases C-37/02 and C-38/02 *Di Lenardo Adriano Srl v Ministero del Commercio* ECLI:EU:C:2004:443 para 77; Joined Cases C-184 and 223/02 *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* ECLI:EU:C:2004:497 para 51.
[126] *Spain and Finland v European Parliament* (n 124) para 51.
[127] Groussot et al (n 101) 326.
[128] Joined Cases C-37/02 and C-38/02 *Di Lenardo Adriano Srl v Ministero del Commercio* Opinion of Advocate General Stix-Hackl ECLI:EU:C:2004:38 para 110.
[129] T-41/96 *Bayer v Commission* ECLI:EU:T:2000:242 para 180.

in the Charter.[130] A useful summation of the case law was given by the Court in *Atlanta v European Community,* where the Court of First Instance stated that:

> It is settled case-law that freedom to pursue an economic activity is one of the general principles of Community law. It is not, however, an absolute prerogative and must be considered in relation to its social function. It confers the assurance that a trader will not be arbitrarily deprived of the right to pursue his activity but it does not guarantee him a particular volume of business or a specific share of a given market. The guarantees accorded to traders cannot in any event be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (see Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 14). It follows that restrictions may be placed on the freedom to pursue an economic activity, particularly in a common market organization, provided that they are required in order to meet objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which entrenches upon the very substance of the right guaranteed (see Case 265/87 *Schräder v Hauptzottamt Gronau* [1989] E CR 2237, paragraph 15).'[131]

Notably, *Nold* was cited in *Atlanta v European Community* for the proposition that 'mere commercial interests' could not be protected, as those risks were an inherent aspect of economic activity. This was how it was described and understood by academic scholars at this time. As Tridimis wrote, the freedom to pursue an economic activity ensured that a 'trader may not be arbitrarily deprived of the right to pursue his professional activities.'[132] There was a distinction, he noted, between measures that restricted access to the profession or industry and those that regulated the exercise of the economic activity. The former, he considered, were much more challenging to justify.[133] The general principle to pursue an economic activity was not, in other words, considered to be the freedom to act autonomously in every facet of business activities. Instead, the general principles case law describes an entitlement that is much closer to the protection of the freedom of occupation for sole traders. In other words, references to the

[130] T-521/93 *Atlanta v European Community* ECLI:EU:T:1996:184 para 62; Takis Tridimas, *The General Principles of EC Law* (2nd ed, Oxford University Press 2006) 316-317.
[131] T-521/93 *Atlanta v European Community* ECLI:EU:T:1996:184 para 62.
[132] Takis Tridimas, *The General Principles of EC Law* (2nd ed, Oxford University Press 2006) 317.
[133] Ibid.

freedom to conduct a business or the freedom to pursue an economic activity were understood in far more narrow terms than their contemporary successor in Article 16.

But finally – and most significantly – there was only one case where the Court of Justice found that a particular measure constituted a breach of this entitlement. This occurred in *Jean Neu* where the Court held that a Member State could not revert part of an individual producer's quota to the national reserve simply because he had altered his supplier, as this would undermine their 'freedom to choose whom to do business with.'[134] Overall, however, it proved impossible for economic actors to overturn inconvenient legislative measures purely on the basis that they constituted an interference with the general principles.[135] In these cases the Court usually followed a familiar formula; it emphasised that there could not be an unfettered freedom to engage in economic activity, the entitlement had to be analysed in light of the importance of the social function it served, provided the restrictions related to the general objectives recognised under EU law and did not constitute a disproportionate interference with the freedom to pursue a trade or profession.[136]

The justification provided in the Explanation to Article 16 - that the Charter is simply a seamless codification of this prior case law – has been largely accepted.[137] Several scholars have pointed out, however, that this is difficult to square with some of the Court's more far-reaching interpretations of Article 16.[138] Everson and Gonçalves have argued that decisions such as *Alrosa* contrast starkly with the post-Article 16 absolutist approach taken to the freedom of contract in judgments such as *Alemo-Herron.*[139] Similarly, Prassl argued that the judgment in *Alemo-Herron* was 'clearly incompatible' with the earlier approach the Court had adopted

[134] Joined Cases C 90/90 and C 91/90 *Jean Neu* ECLI:EU:C:1991:303 para 13.
[135] Takis Tridimas, *The General Principles of EC Law* (2nd ed, Oxford University Press 2006) 315; Frederik Schmidt, *Die Unternehmerische Freiheit im Unionsrecht* (Duncker & Humblot 2010) 158.
[136]Case C-200/96 *Metronome* ECLI:EU:C:1998:172 para 21; Case C-280/93 *Germany v Council* ECLI:EU:C:1994:367 para 78; Case C-44/94 *R* v *Minister of Agriculture, Fisheries and Food,* ex parte *Fishermen's Organisations and Others* ECLI:EU:C:1995:325 para 55; Case C-177/90 *Kühn* ECLI:EU:C:1992:2 para 16; Case C-210/03 *Swedish Match* ECLI:EU:C:2004:802 para 72; Case C-210/00 *Käserei* ECLI:EU:C:2002:440; Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449 para 126.
[137] See, for example, Groussot, Pétursson and Pierce (n 101) 326; Thorsten Sasse, 'Die Grundrechtsberechtigung juristischer Personen durch die unternehmerische Freiheit gemäß Art. 16 der Europäischen Grundrechtecharta' (2012) 6 *Europarecht* 628, 629; Comparato and Micklitz (n 116) 121.
[138] See, for example, Eduardo Gill-Pedro, 'Whose freedom is it anyway? The fundamental rights of companies in EU law' (2022) 18(2) *European Constitutional Law Review* 183, 190; Michelle Everson and Rui Correia Gonçalvez (n 99) 438; Jeremias Prassl (n 112) 443; Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 176.
[139] Everson and Correia Gonçalvez (n 99) 483.

in respect to the general principles of EU law.[140] O'Connor noted that in its earlier case law, the Court of Justice 'took as its starting point that restrictions on that right were *prima facie* lawful'; a position it was to reverse in judgments such as *Alemo-Herron.*[141]

This is not to suggest, however, that a return by the Court to the approach it adopted under the auspices of the general principles of EU law would put to rest any concerns regarding Article 16 of the Charter. O'Connor, for example, has argued that the Court's forceful interpretation of Article 16 has proved problematic, and has advocated for a return to the approach under the general principles of EU law.[142] One might note in response that, first, the same normative concerns remain even when the freedom to conduct a business is recognised as a general principle of EU law, rather than a right under Article 16 of the Charter. There has never been any meaningful explanation or justification as to why the freedom to conduct a business deserved the status of a fundamental right. Moreover, if the Court was to return to the approach it previously adopted, what value does Article 16 of the Charter add? If the freedom to conduct a business was to be interpreted in a far more limited manner - that would effectively render it impossible to challenge legislative measures on that basis – it is not clear why Article 16 ought to be recognised in the Charter in the first instance. Nor is it clear why sole traders or the self-employed could not seek to rely on the freedom to pursue an occupation in Article 15 of the Charter.

The interest shielded by Article 16

Why does it matter whether the freedom to conduct a business had been established by the Court of Justice prior to the introduction of the Charter? It matters because this is a justification that has been consistently relied on for the existence of Article 16 in the first place. It is important to challenge such a longstanding assertion because it helps us to understand how such a far-reaching entitlement such as Article 16 became part of the Charter of Fundamental Rights of the European Union. It arose, in part, from a premise that was simply not accurate. The members of the Convention had been able to neatly sidestep the question of why the freedom to conduct a business deserved the status of a fundamental right by presenting Article 16 as a codification of pre-existing law.

[140] Prassl (n 112) 443.
[141] O'Connor, 'Whose autonomy is it anyway?' (n 100) 298-299.
[142] Ibid 287.

Article 16 can be classified as a new kind of 'negative right'. Negative rights place limits on the exercise of state power,[143] and derive from traditional liberal political thought that considers the state to be the greatest threat to individual liberty.[144] Article 16 may have quietly made its way into the Charter, but the normative values it espouses have deep and contestable roots. It stems from assumptions underpinning capitalist systems and aspects of classic liberal thought: that human beings are driven by profit and achieve fulfilment by acting in their own self-interest. Ordoliberalism is usually rightly credited as a major influence on the economic outlook of the European Union, particularly in the wake of the Maastricht Treaty.[145] While sympathetic to the Anglo-American economic liberalism that re-emerged in the 1980s, there are important distinctions between ordoliberalism and classic economic liberalism; not least that ordoliberalism envisages a prominent role for the state through the creation of competitive markets through its institutions, including the legal system.[146] The protection of the freedom to conduct a business does not, however, sit entirely easily with ordoliberal thought. Article 16 is a *prima facie* right to conduct a business as the right-holder sees fit, ensuring that any incursions on the right must be proportionately justified. The provision is designed to empower and promote private enterprise by rendering its regulation more challenging.[147] Ordoliberalism accepts the premise of economic liberalism; namely that 'economic freedom is an essential concomitant of political freedom.'[148] Yet ordoliberalism is less sceptical of state regulation, considering that in an unhampered capitalist system, monopolies and other concentrations of private power would inevitably emerge and undermine competitive conditions.[149] In fact, the protection of the freedom to conduct a business is far closer to the concepts of economic liberty

[143] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 1-6; Quincy Wright, 'Relationships Between Different Categories of Human Rights' in UNESCO (eds) *Human Rights: Comments and Interpretations* (Allan Wingate 1949) 147.
[144] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 27.
[145] Magnus Ryner, 'The Authoritarian Neoliberalism of the EU' in Eva Nanopolous and Fotis Vergis (eds) *The Crisis behind the Eurocrisis* (Cambridge University Press 2019) 81.
[146] See generally, Christian Joerges, 'The Overburdening of Law by Ordoliberalism and the Integration Project' in Josef Hien and Christian Joerges (eds) *Ordoliberalism, Law and the Rule of Economics* (Oxford University Press 2017) 182; Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 66.
[147] As Advocate General Nils Wahl wrote, the protection of the freedom to conduct a business 'ensures that private operators and persons can conduct a business without undue interference from the state.' Nils Wahl, 'The Freedom to Conduct a Business: a Right of Fundamental Importance to the Future of the European Union' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds) *The Internal Market and the Future of European Integration* (Cambridge University Press 2019) 273, 276.
[148] David Gerber, 'Constitutionalising the Economy: German Neoliberalism, Competition Law and the "New Europe"' (1994) 42 *American Journal of Comparative Law* 25, 36.
[149] Ibid 36-7.

theorised by Hayek, and later Tomasi and Nickel.[150] Indeed, it has been argued that this vision of the market as one where undertakings ought to be subject to minimal oversight is divorced from that outlined in the Treaties.[151]

Conclusion

This section examines how the freedom to conduct a business come to be included in the Charter of Fundamental Rights. This process merits examination, as once a contested interested has been codified as a fundamental right, the normative interests it serves are shielded and harder to critique. While the initial aim in drafting the Charter was to collect and codify established fundamental rights, the freedom to include a business came to be included as a standalone right. The grouping associated with the European People's Party were instrumental in securing this outcome. The case of *Nold,* cited in an early draft as the acknowledgement of the freedom to conduct a business, was cited in the Explanations to Article 16 as the origin of the provisions. This was clearly intended to suggest that Article 16 was, in theory, the legal codification of a right that had already been acknowledged by the Court of Justice. On closer examination, however, this is not entirely accurate representation of what the Court had determined. Article 16 does not simply protect the entitlement of individuals to found or establish their own business. Instead, it is a remarkably far-reaching entitlement which has the capacity to grant every economic actor an entitlement to challenge any law, regulation or measure that might potentially impact their business operations. Yet subsequent case law and academic commentators have repeated the claim that Article 16 had merely drawn on existing case law and national constitutions, and international human rights documents.[152] This obscures the true ideological origins of Article 16, and the EPP's efforts to ensure its inclusion specifically to counteract the social rights contained in the Charter. The updated Explanations from 2007 repeated the same claim that Article 16 derived from *Nold, SpA Eridania* and *Spain v Commission*. The Explanations served as a useful legitimising tool, and the success of the endeavour is demonstrated by the fact that the Explanations have largely been unquestionably accepted and repeated both in case law and academic commentary. Describing Article 16 of the

[150] F.A. Hayek, *The Constitution of Liberty* (Routledge 1960) 104-6; Jeppe von Pletz and John Tomasi, 'Liberalism and Economic Liberty' in Steven Wall (ed) *The Cambridge Companion to Liberalism* (Cambridge University Press 2015) 261; James W. Nickel, 'Economic Liberties' in Victoria Davion and Clark Wolf (eds) *The Idea of a Political Liberalism: Essays on Rawls* (Rowman and Littlefield 2000) 155.
[151] Giubboni (n 138) 175; Gill-Pedro (n 138) 205.
[152] See, for example, Peter Oliver, 'What Purpose Does Article 16 of the Charter Serve?' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) 281, 282-283.

Charter of Fundamental Rights as a continuation of the previous case law under the general principles of EU law belies the marked transformation that has taken place in the Court's approach when it comes to interpreting the freedom to conduct a business.

CHAPTER TWO

International Human Rights and the Constitutional Traditions of Member States

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Introduction

The freedom to conduct a business in Article 16 of the Charter of Fundamental Rights is a novel right. Yet it is rarely recognised as such. Prior to the introduction of the Charter of Fundamental Rights, a fundamental right was recognised through the case law of the Court of Justice if it was protected by the European Convention on Human Rights, by international human rights treaties, or if it derived from the constitutional traditions of Member States. First, I examine whether the freedom to conduct a business, or anything akin to it, had been recognised by the European Court of Human Rights prior to the adoption of the Charter. In this chapter, I critically examine whether the freedom to conduct a business had an established tradition in the national constitutions of the Member States at the time of the drafting of the Charter. I consider that only Austria, Germany and France have recognised a right that is functionally equivalent to Article 16 of the Charter.

Freedom to conduct a business in international human rights law

The inclusion of the freedom to conduct a business in Article 16 of the Charter of Fundamental Rights was the first time that such a right had received protection in any international human rights document. No such right had been included in the Universal Declaration on Human Rights or the United Nations International Covenant on Cultural, Economic and Social Rights, although state parties did recognise the right to work in Article 6, and the right to just and favourable working conditions in Article 7. Nor was the freedom to conduct a business mentioned in the European Parliament's Declaration of Fundamental Rights and Freedoms of 1989, which provided only for the right to choose and pursue an occupation in Article 12, and right to property in Article 9.[1] The freedom to conduct a business was also absent from the

[1] European Parliament, *Declaration of Fundamental Rights and Freedoms,* 12 April 1989. No C 120/51.

1969 American Convention on Human Rights, and the 1981 African Charter of Human and Peoples' Rights.

The European Convention on Human Rights ('ECHR') does not protect the freedom to conduct a business, or indeed, the freedom of occupation.[2] This has not, however, prevented some commentators from concluding that elements of the right protected by Article 16 of the Charter are also protected by the European Convention. Schmidt, for example, wrote that while neither the freedom to conduct a business nor the freedom of occupation was protected by the European Convention, judgments with references to entrepreneurial activity could be found in cases where Article 1 of the First Protocol ('A1FP') had been extended to the right to enforce contracts and to encompass business activity.[3] In fact, A1FP, which protects property rights, is the height of protection for what might be described as economic rights within the ECHR, where the Strasbourg Court has occasionally accepted that it can extend to areas which might be properly classified as belonging to the sphere of entrepreneurial or commercial activity. In *Van Marle v Netherlands,* the European Court of Human Rights accepted that the refusal of the Dutch authorities to formally recognise the parties as professional accountants 'radically affected the conditions of their professional activities and the scope of those activities was reduced.' As a result, 'their income fell, as did the value of their clientele, and more generally, their business.'[4] The Strasbourg Court concluded that there had been an interference with their right under Article 1 of the First Protocol, but it was justified by the interests of the Dutch authorities in regulating the profession.

In *Iatridis v Greece,* the European Court of Human Rights accepted that the applicant had suffered a breach of his property rights under Article 1 of the First Protocol.[5] In this case, the rented site on which the applicant operated his open-air cinema was confiscated after a long-running dispute over its title between the owners of the site and the Greek authorities. The applicant was left unable to operate his cinema, which was by then being run by the local town council. There are, however, important differences between the case law of the European Court in cases such as *Iatridis v Greece* and the Court of Justice's case law on Article 16 of the Charter

[2] It has been argued that the European Convention indirectly provides some protection to the right to work, such as some requirements of procedural fairness in dismissal. See, Rory O'Connell, 'The Right to Work in the ECHR' (2021) 2 *European Human Rights Law Review* 176, 185-188.
[3] Frederik Schmidt, *Die Unternehmerische Freiheit im Unionsrecht* (Duncker and Humblot 2010) 66.
[4] *Van Marle v Netherlands* (1986) 8 EHRR 483 para 42.
[5] *Iatridis v Greece* (2000) 30 EHRR 97.

of Fundamental Rights. The European Court's conclusion in *Iatridis* that there had been a breach of A1FP arose in circumstances where the tenant's business had been suddenly confiscated by the Greek authorities after over a decade of his occupying the site and he had built up a customer base, which the Court was prepared to accept could constitute an 'asset' within the meaning of A1FP.[6] More, the Court considered there was no plausible case that the lessors of the land were not the true owners of the land.[7] It is also worth noting that some protection has been afforded to business activities by the Strasbourg Court, under Article 8, the right to privacy and respect for one's dwelling. The Court has held that this can encompass a business premises for the purposes of a search, and that there was no principled justification that 'private life' should exclude 'professional or business' activities.[8]

Yet the suggestion that these cases from the Strasbourg Court effectively provide protection to the same interest recognised by Article 16 CFR is misleading. It is true that in *Van Marle* that the European Court of Human Rights accepted that the value of the applicants' business had been affected by their failure to receive formal certification as professional accountants, within the meaning of A1FP. Yet that was clearly a case that involved a challenge to barriers to entry into a particular profession. If anything, comparisons should more properly be drawn with the freedom of occupation protected by Article 15 of the Charter. There is no suggestion by the European Court of Human Rights of a fundamental right to conduct one's business autonomously as one sees fit. Unlike cases involving Article 16 of the Charter, none of these cases could be characterised as instances where an applicant had sought to challenge generally applicable laws or regulations on the basis that it was in some way inconvenient to the operation of the business or damaging to its profitability. In *Iatridis v Greece,* for example, the applicant had suffered the wholescale deprivation of his livelihood on an arbitrary basis. These cases concern the relationship between the State authorities and the applicants' entitlement to enter or continue a particular line of work, rather than challenges to the operation of a business *per se.* This position has not altered since the Charter of Fundamental Rights has been drafted.[9] Supporters of the freedom to conduct a business have concluded that the European Court's

[6] Ibid para 54.
[7] *Iatridis* (n 15) para 52.
[8] *Niemitz v Germany* (1992) 16 EHRR 97 para 29.
[9] See, for example, *Oklešen v Slovenia,* No. 35264/04 (30 November 2010) para 62. Here, the European Court of Human Rights concluded that the applicant's desire to continue his funeral business after the nationalisation of the funeral service industry did not constitute 'a claim of a kind that was sufficiently established to constitute a legitimate expectation and hence a distinct 'possession' within the meaning of the Court's case law.'

scant lack of protection in this arena stems from the failure by the European Convention to explicitly protect any economic rights, including any right to entrepreneurial freedom.[10]

Article 16 drawn from the constitutional traditions of Member States

The freedom to conduct a business in Article 16 of the Charter of Fundamental Rights is often described as a codification of the Court of Justice's pre-existing case law, and a reflection of a right that was commonly protected in the Member States.[11] Internal EU reports, as well as academic commentators, have repeatedly identified the constitutional traditions of the Member States as the source of Article 16 of the Charter.[12] Pataut and Robin-Olivier wrote that inspiration for Article 16 was drawn from the constitutional traditions of Member States, later citing Germany, Italy, Spain, Poland and France as examples of countries that provide protection to freedom of enterprise.[13] Usai wrote that the right to economic initiative was previously recognised by the constitutions of Spain, Luxembourg, Italy, Finland, Ireland, and Portugal.[14] Similarly, Oliver noted that the freedom to conduct a business was 'rooted' in the national constitutions of several Member States, including Germany, Italy and Ireland.[15]

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[10] Henning Schwier, *Der Schutz der 'Unternehmerische Freiheit' nach Artikel 16 der Charta der Grundrechte der Europäischen Union* (Peter Lang 2008) 130.

[11] Pacheco acknowledged the novelty of Article 16 insofar as it did not appear in any international legal declarations of human rights, or most constitutions of EU Member States. However, he noted that, as was made clear by the Explanations, it was a codification of case law of the Court of Justice. Pedro Mercado Pacheco, 'Libertades económicas y derechos fundamentales. La libertad de empresa en el ordenamiento multinivel europeo' (2012) 26 *CEFD* 341, 345. He cited Spain, Italy, Portugal, Greece and Luxembourg as exceptions of constitutions that do recognise rights of private enterprise, and later stated that Article 16 adopted a model of freedom to conduct a business very similar to that developed in these Member States. Ibid 347.

[12] A 2015 report on Article 16 carried out by the EU Agency for Fundamental Rights wrote that the right 'is derived from the case law of the CJEU, which itself was inspired by the national laws of EU Member States.' European Union Agency for Fundamental Rights, *Freedom to conduct a business: exploring the dimensions of a fundamental right* (Publications Office of the European Union, 2015) 21. The report went on to assert that, except for the United Kingdom, 'Freedom to conduct a business is an explicit constitutional right in all 27 Member States…. however, the nature and scope of the constitutional provisions related to Article 16 vary widely.' Ibid 51.

[13] Etienne Pataut and Sophie Robin-Olivier, 'L'envahissante irruption de la liberté d'entreprise en Europe, Remarques sur l'arrêt *AGET Iraklis*' in Martine Le Friant, Pascal Lokiec, Cyril Wolmark, Antoine Jeammaud (eds) *Mélanges en l'honneur d'Antoine Lyon-Caen* (Dalloz 2018) 717, 727-728. Other commentators have concluded that while the precise formulation of the 'freedom to conduct a business' does not exist elsewhere, it might as well have. Toggenburg, for instance, has argued that while the freedom to conduct a business is not widely accepted in national constitutions, 'its main components are.' Gabriel Toggenburg, 'The 16th of all EU-r rights: the right to conduct a business and how the Charter contributes' *EuracResearch* 12 January 2021.

[14] Andrea Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration' (2013) 14(9) *German Law Journal* 1867, 1868-1869.

[15] Peter Oliver, 'What Purpose Does Article 16 of the Charter Serve?' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) 281, 282. See also, Peter Oliver, 'Companies and their Fundamental Rights: A Comparative Perspective' (2015) 64 *International and Comparative Law Quarterly* 661, fn. 155; Filip Dorssemont, 'Values and Objectives' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann, *The Lisbon Treaty and Social Europe* (Oxford: Hart Publishing 2012) 45, 55.

Writing in the immediate aftermath of *Nold,* another commentator acknowledged that there was 'no common mode of protecting freedom of economic activity' amongst the Member States.[16] Yet she went on to cite Germany and Luxembourg as examples of constitutions that clearly regulated the freedom of economic activity, and that France, Italy and Ireland had 'vague points of reference' to such a right in their constitutions.[17]' Other, more far-reaching claims are not uncommon. One recent article noted that a concept akin to the freedom to conduct a business had existed in the national laws of Member States 'for over 200 years' and in national constitutions 'for more than 150 years.'[18] Everson and Correia Gonçalves traced the origins of the freedom to conduct a business as far back as the Scottish Enlightenment, and wrote that it could 'be argued to form an (implicit) core guarantee…to establish and defend an autonomous sphere of market exchange from unjustifiable state intrusion.'[19] They wrote that Article 16 was sourced from the 'constitutional traditions' of the Member States, where it had often had an 'implied place' as a result of judicial development of the rights to property and the right to work.[20] They admitted that when the Court of Justice gave its judgment in *Nold* in 1974, the protection of business freedom in national constitutions were 'sparse'. [21] Yet they go on to state that the express recognition of such rights could be found in the constitutions of Italy, Ireland and Luxembourg.[22]

This is despite the fact that a preliminary survey commissioned in 1976 of national constitutions instigated by the European Commission had found that, of the EU Member States, only the Constitutions of Germany and Luxembourg expressly recognised a right of freedom of economic activity.[23] In his examination of the constitutional protection of economic rights,

[16] Sylvia Paisley, 'A Stitch in Time to Save the Nine: A Code of Fundamental Rights for the European Economic Community' (1980) 31 *Northern Ireland Legal Quarterly* 267, 275.
[17] Ibid.
[18] Dalia Vasarienė and Lyra Jakulevičienė, 'Freedom to Conduct Business During the Covid-19 Pandemic' (2021) 26(1) *Tilburg Law Review* 16, 18. A similar claim was made by the EU Fundamental Rights Agency; see (n 12) 25. Groussot, Pétursson and Pierce wrote that the freedom to conduct a business 'without unnecessary state intervention' was 'an almost universally acknowledged requirement' which was reflected in the constitutional apparatus of Italy, Spain, Ireland, Germany, France and Denmark. See, Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak Right, Strong Court – the freedom to conduct a business and the EU Charter of Fundamental Rights' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* (Elgar 2017) 326.
[19] Michelle Everson and Rui Correia Gonçalves, 'Article 16 – Freedom to Conduct a Business' in Steve Peers and Tamara Hervey (eds) *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury: Hart 2021) 463, 467.
[20] Ibid 464.
[21] Ibid 471.
[22] Ibid.
[23] Rudolf Bernhardt, 'The problems of drawing up a catalogue of fundamental rights for the European Communities: A Study requested by the Commission' 58 . See, Annex to European Commission, 'The protection

Daintith pointed out that 'freedom of enterprise never received express constitutional formulation and was, until very recently, regarded only as a 'general principle of law' of uncertain constitutional status.'[24]

Freedom to Pursue an Occupation

Throughout the discussion on national constitutions and Article 16, commentators often operate from the premise that the freedom to pursue an occupation,[25] or the right to work, is equivalent to the right protected in Article 16 of the Charter.[26] It has even been suggested by the former president of the European Court of Human Rights that Article 16 can be derived from the protection of the right to work in Article 6 of the International Covenant on Economic, Social and Cultural Rights.[27] This is an easy assumption to make. Many national constitutions do protect the freedom of occupation or the right to work. These rights are usually used to challenge arbitrary or unfair restrictions on the entry into a particular profession or general workforce, or to challenge other regulations on the exercise of work. There is, of course, a natural overlap with the freedom of enterprise or economic activity. In some countries – either through judicial doctrine or even in the constitutional text – the right to engage in commercial or economic activity as a facet of the right to work has been acknowledged, either through judicial interpretation or, in some rare cases, it is explicitly acknowledged in the text itself. It would seem inconsistent to protect the freedom of occupation to a worker but to deny the extension of that protection to those establishing and running their own businesses, for example.

However, there are good reasons not to conflate the two rights, and not to conclude that any reference to the freedom of occupation, either in an international human rights instrument or a national constitution, is functionally equivalent to Article 16 of the Charter. First, the Charter itself separates these rights into distinct and separate entitlements: Article 15 of the Charter

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of fundamental rights in the European Community' *Report of the Commission of 4 February 1976 submitted to the European Parliament and Council* 19.

[24] Terence Daintith, 'The Constitutional Protection of Economic Rights' (2004) 2(1) *International Journal of Constitutional Law* 56, 80.

[25] This widely protected right is varyingly described as the right of freedom of occupation, or the right to pursue an occupation, or the right to work. Article 15(1) of the Charter uses both formulations, stating that 'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation' and Article 15(2) protects both the 'freedom to seek employment, to work'. For the purposes of this chapter, I use the term 'freedom to pursue an occupation.'

[26] European Union Agency for Fundamental Rights (n 12) 38-37.

[27] Dean Spielmann, 'Article 16—Liberté d'Entreprise' in EU Network of Independent Experts on Fundamental Rights (eds) *Commentary of The Charter of Fundamental Rights of the European Union* (June 2006) 158.

protects the right to engage in work and the freedom of occupation, while Article 16 protects the freedom to conduct a business.[28] As outlined in Chapter One, this development was instigated by the European People's Party, who wanted to create a free-standing freedom to conduct a business. If we are to look to the equivalent Charter provision to mirror the freedom of occupation protected by national constitutions, then it is clearly Article 15 that represents those interests, not Article 16. Second, Article 16 has developed in a distinct manner to Article 15. Article 16 has scarcely ever been used by self-employed individuals to challenge barriers to entry into a particular industry or profession.[29] Instead, the case law has been dominated by companies challenging regulations on their wider commercial operations. As outlined in later chapters, Article 16 has been used to justify a gradually widening entitlement to companies to challenge any law or policy which encroaches on their autonomy in respect of how the activities of a business are conducted.[30]

Constitutions of Member States

Let us examine the constitutions of the Member States that are commonly referenced as protecting rights which are varyingly described as rights of economic initiative or economic or commercial activity, or freedom of economic liberty. Table 1 (below) outlines the relevant provisions. These were the Member States that formed part of the European Union in 2000, when the Charter of Fundamental Rights was drafted.

TABLE 1. Right to Conduct a Business/ Engage in Entrepreneurial/Commercial Activity

Member State	***Wording***
1. Austria	**Article 6(1) of the Basic Law** Every national can take up residence and domicile at any place inside the boundaries of the state, acquire every kind of real property and freely dispose of the same, as well as practice every kind of gainful activity subject to the conditions of the law. (…)
2. Belgium	n/a
3. Denmark	n/a

[28] See generally, Diamond Ashgiabor, Virginia Mantouvalou and Eleni Frantziou, 'Article 15' in Steve Peers and Tamara Hervey (eds) *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury: Hart 2021) 459.
[29] One example is Case C-367/12 *Sokoll Seebacher* ECLI:EU:C:2014:68 where the applicant sought to challenge domestic restrictions on the opening of a pharmacy, although the case was ultimately determined on the basis of Article 49 TFEU.
[30] See Chapter Four, Five and Six.

4. Finland	**Article 18 - The right to work and the freedom to engage in commercial activity** Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice.
5. France	n/a
6. Germany	**Article 12** All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training.
7. Greece	**Article 106 (2)** Private economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of the national economy.
8. Ireland	**Article 45(3)** 1° The State shall favour and, where necessary, supplement private initiative in industry and commerce. 2° The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.
9. Italy	**Article 41** Private economic initiative is freely exercised. It cannot be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.
10. Luxembourg	**Article 11.6** The freedom of commerce and industry, the exercise of liberal professions and of agricultural labour are guaranteed, save for the restrictions established by the law.
11. The Netherlands	n/a

12. Portugal	**Article 61** Private economic enterprise shall be undertaken freely within the overall frameworks laid down by this Constitution and the law and with regard for the general interest.
13. Spain	**Article 38** Free enterprise is recognized within the framework of a market economy. The public authorities guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the general economy and, as the case may be, of economic planning.
14. Sweden	**Article 17** Limitations affecting the right to trade or practise a profession may be introduced only in order to protect pressing public interests and never solely in order to further the economic interests of a particular person or enterprise.
15. United Kingdom	n/a

The first observation we should make is that of the constitutions of the fifteen Member States in 2000, five do not mention the existence of private enterprise whatsoever, much less acknowledge the freedom to conduct a business. These are Belgium, Denmark, France, the Netherlands, and the United Kingdom. As the United Kingdom's uncodified, political constitution does not explicitly protect many rights beyond those protected at common law, this is less a rejection of the protection of the freedom of enterprise rather than a general rejection of a codified legal constitution. It has been pointed out that the freedom of contract, for example, enjoys long-standing protection at common law, although this falls short of the far-reaching scope of Article 16.[31] The French Conseil Constitutionnel has, however, derived a right of freedom of enterprise from the text of the Declaration of the Rights of Man which is incorporated into the Constitution of France.

[31] As highlighted by Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521. The UK Supreme Court (Lord Hope) had noted at para. 9 in *Parkwood Leisure Ltd v Alemo-Herron* [2011] UKSC 26 that the provision in question was 'entirely consistent with the common law principle of freedom of contract.' O'Connor has argued that the Court of Justice's decision in *Alemo-Herron* could be viewed as undermining contractual autonomy: he wrote that: 'In denying the rights of the employees who in good faith agreed to be so bound, the CJEU in its Article 16 jurisprudence was interfering with their freedom of contract and, thereby, their right to work viewed as an expression of autonomy or freedom. In this respect, the English dynamic approach is more respectful of party autonomy as a whole than that adopted by the CJEU.' Niall O'Connor, 'Whose autonomy is it anyway? Freedom of contract, the right to work and general principles of EU law' (2020) 49(3) *Industrial Law Journal* 285, 314.

After that, the remaining ten national constitutions can be split into two categories. First, there are the national constitutions that permit the operation of private economic activity, subject to the wider public interest. These are Finland, Greece, Ireland, Italy, Luxembourg, Spain, Sweden and Portugal. These constitutions acknowledge the existence of private enterprise, but clarify that the State authorities can regulate the exercise of such activity. Any reference to freedom of economic initiative sits squarely within a paradigm that makes any such activity subject to the wider public interest. The emphasis is on ensuring that economic activity must remain within the parameters set by the State authorities. The Constitution of Greece even frames the interest in the negative: private economic enterprise shall not be allowed to develop at the expense of human dignity, freedom or the national economy. The purpose of these provisions is clear: they are designed to limit and constrain private economic activity and ensure that it can be checked in accordance with the public interest. It is an acknowledgment that private enterprise and the public interest can often be in tension. By contrast, Article 16 is a free-standing entitlement to 'conduct a business' in accordance with EU and national law (although even this caveat has been interpreted to mean that national laws must comply with the freedom to conduct a business.) It is a *prima facie* right to conduct a business as the right-holder sees fit, and ensuring that any incursions on the right must be proportionately justified. Article 16 is designed to empower and promote private enterprise.[32]

Second, there are the national constitutions where rights that are, at the very least, comparable to the freedom to conduct a business, have been derived from the constitutional text. These have been derived from the existing protections of the freedom to pursue an occupation, or from general rights of autonomy or liberty. In the case of Germany and Austria, there are instances where existing rights of freedom of occupation have been interpreted to encompass rights of entrepreneurial or commercial activity. The German Constitutional Court has on occasion referred to the freedom of economic initiative as derived from Article 12 (the right to work) and Article 2 (the protection of the human personality).[33] Another example is Austria, where the right to 'practice any kind of gainful activity' has been interpreted to encompass private enterprise. As previously noted, the *Conseil Constitutionnel* in France have in recent

[32] As Advocate General Nils Wahl wrote, the protection of the freedom to conduct a business 'ensures that private operators and persons can conduct a business without undue interference from the state.' Nils Wahl, 'The Freedom to Conduct a Business: a Right of Fundamental Importance to the Future of the European Union' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds) *The Internal Market and the Future of European Integration* (Cambridge University Press 2019) 273, 276.
[33] Werner Heun, *The Constitution of Germany: A Textual Analysis* (Hart 2011) 213.

years developed the protection of the freedom of *liberté d'entreprendre,* which is derived from the Article 4 of the Declaration of the Rights of Man, which protects a general liberty interest. Ironically, France - the one country that does appear to have increasingly robust protection for economic liberty - was scarcely mentioned during the drafting of the Charter of Fundamental Rights, nor in subsequent academic literature which discusses freedom of enterprise.

The functional method of comparative law examines how particular social issues are addressed through law, recognising that different systems may seek to resolve the same issue in profoundly different ways.[34] It begins with identifying the purpose, or the function, of the legal rule or principle in question, rather than merely examining apparently similar textual provisions side by side. As Husa outlines, 'the comparativist [is] seeking to identify foreign norms that are *functionally equivalent* to those rules, principles or institutions that have been taken into comparison from other systems.'[35] Put differently, there may be superficial textual similarities between provisions which have been understood and developed divergently, and which seek to accomplish quite different aims in within their respective legal systems. It is difficult not to suspect that most commentators have assumed that any reference to 'private enterprise' in a national constitution is functionally equivalent to Article 16 of the Charter of Fundamental Rights, even if the provisions have entirely different wording, emphasis, and - most importantly - purposes. Moreover, when drawing comparisons, it is vital to take account of what might be absent from the constitutional text. Comparative scholars have long been alive to the dangers of comparing legal texts side by side, in the absence of examining how these provisions have been developed and interpreted. France, for example, has a well-developed doctrine of *liberté d'entreprendre,* which appears nowhere in the text of the French Constitution, but has been derived from the Rights of Man. The Finnish Constitution, by contrast, *does* make reference to the freedom of commercial activities within the context of the freedom of occupation. But the text of the Finnish Constitution does not tell us that judicial review is so rare in Finland as to be almost non-existent: there have been less than 10 cases of judicial review since the new Finnish Constitution was introduced. Looking only to constitutional text risks overlooking important, relevant examples which do not rely on an explicit constitutional provision.

[34] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Methodology* (Hart 2014) 13-15.
[35] Jaakko Husa, 'The Traditional Methods of Comparative Law' (1 January 2023) forthcoming in Mathias Siems and Po Jen Yap (eds) *The Cambridge Handbook of Comparative Law* (Cambridge University Press 2024). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418563 1, 10.

Category 1

i) Finland

Article 18

> Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice.

Finland is a rare example of a national constitution that explicitly protects the freedom to engage in 'commercial activity' as a fact of the freedom to pursue an occupation. However, the protection of this right must be contextualised against the broader background of Finnish constitutionalism. While Finland – much like the rest of the Nordic countries– has an excellent record in human rights protection, it does not – again, much like its neighbours - have a long tradition of constitutional supremacy.[36] Judicial review of legislation was, in fact, prohibited by law in Finland until the introduction of its new Constitution in 2000.[37] The previous Finnish Constitution of 1919 adopted a model of legislative supremacy, with the prospect of *ex ante* review by a Constitutional Law Committee by Parliament; a procedure that remains in place under the new Constitution.[38] The protection of the fundamental rights in the Finnish Constitution was considered to be the primary responsibility of the legislature. Judicial review exercised by a constitutional court, with the power to strike down legislation, was an alien prospect for much of Finnish history.[39] As one set of scholars write, 'there was no genuine tradition of judicial review based on constitutional or human rights in Finland before the 1990s.'[40]

By the 1990s, the wariness of judicial review had waned somewhat, aided by the incorporation of the European Convention on Human Rights into Finnish law in 1990.[41] A further factor was that Finland had joined the European Union in 1995, and as a result of EU membership, the

[36] Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' (2011) 9(2) *International Journal of Constitutional Law* 505, 507. See also Ran Hirschl, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) 9(2) *International Journal of Constitutional Law* 449.
[37] Tuomas Ojanen,'From Constitutional Periphery Toward the Center – Transformations of Judicial Review in Finland' (2009) 27(2) *Nordic Journal of Human Rights* 194; Hirschl (n 36).
[38] Serkan Yolcu, 'East Nordic Model of Pre-Enactment Constitutional Review: Comparative Evidence from Finland and Sweden' (2020) 26(2) *European Public Law* 505, 526-528.
[39] Lavapuro (n 36)
[40] Ibid 512.
[41] Ibid 512-513; Hirschl (n 36) 460.

Finnish courts were obliged to review national law for potential breaches of EU law.[42] Finland embarked on far-reaching reform of its Constitution, and introduced a comprehensive set of fundamental rights through legislation in 1995, including the right to earn a livelihood through commercial activity. The new Constitution contains a weak form of judicial review, which allows courts to grant primacy to the Constitution in the case of any conflict with legislation, but this represents only a 'modest step' towards strong form judicial review.[43] The dominant avenue for constitutional review remains the Constitutional Law Committee of the Finnish Parliament. While this is a respected committee, it nonetheless represents internal legislative review, rather than independent review by the judicial branch.[44]

Article 18 of the Constitution of Finland protects the freedom to earn a livelihood. This means that every individual is entitled to earn a livelihood by engaging in work or through commercial activity.[45] Crucially, for our purposes, this aspect of Article 18 'is not regarded as a directly enforceable right.'[46] As Husa points out, given the particular context of the Finnish Constitution, this particular provision is primarily directed at the State to take measures to ensure fair working conditions for workers through legislation. The one 'hard constitutional dimension' emanating from Article 18 is a prohibition on dismissal from employment without lawful excuse; a principle that has been affirmed by the Supreme Administration Court in Finland.[47] Commercial or economic liberty is not protected as a free-standing right in Finland. Rather, commercial activity is protected as an aspect of the right to earn a livelihood, and those who are self-employed or run their own businesses are also protected by the right to work. As previously outlined, the Finnish representative Paavo Nikula was one of the first to mention the concept of the freedom to conduct a business during the drafting of the Charter. In January 2000, Nikula made a submission to the Praesidium in January 2000, by reference to the newly drafted (if not yet enacted) Finnish Constitution.[48] But the context of how the right was framed in the Finnish Constitution was originally how Nikula's suggestion was incorporated into the drafting of the Charter. It was originally conceived of as an addition to the freedom to choose an occupation. The initial list of fundamental rights and their corresponding, pre-existing

[42] Lavapuro (n 36) 514. See also, Ojanen (n 37) 200-203.
[43] Martin Scheinin, 'Constitutionalism and Approaches to Rights in the Nordic Countries' in Joakim Nergelius (ed) *Constitutionalism: New Challenges: European Law from a Nordic Perspective* (Brill 2007) 135, 137.
[44] Ojanen (n 37) 196.
[45] Jaakko Husa, *The Finnish Constitution: A Contextual Analysis* (Bloomsbury 2010) 187.
[46] Ibid 188.
[47] Husa (n 45) 187.
[48] Niall Coghlan and Marc Steiert (eds) *The Charter of Fundamental Rights of the European Union: the travaux préparatoires and selected documents* (EUI Cadmus 2020) 1099.

source issued by the Praesidium in early January included the *'freedom to choose and engage in an occupation.'*[49] Later, after interventions from the delegates from the European People's Party, this provision was to become uncoupled from the freedom of occupation into two distinct provisions: Article 15, the right to work, and Article 16, the freedom to conduct a business. This separation ensured that the entitlement to engage in economic or commercial activity was no longer protected within the paradigm of earning a livelihood; it was now a freestanding right to *conduct* a business.

However, it would simply be inaccurate to suggest that the freedom to conduct a business had a long, established tradition in Finnish constitutional history. First, it should be noted that the Finnish Constitution was not even in force when Nikula first made the proposal in January 2000, as the Constitution did not become binding until 1 March 2000. Could any right or interest be said to be 'established' in the national constitutions of a Member State where the primary example of it had only come into force a few months previously? Moreover, as we have noted, the right to engage in private economic activity is protected as a facet of the right to earn a livelihood; much like Article 12 of the German Basic Law. It is not equivalent to the free-standing freedom to conduct a business in Article 16. But finally, and most importantly, Article 18 is not considered to be a legally-enforceable right that can be asserted by individuals or legal persons to protect commercial activity. Article 18 of the Constitution of Finland is a general right of freedom of occupation that directs the State to protect the status of workers through its laws, rather than individual right of business freedom.

ii) Greece

Article 106 (2)

> Private economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of the national economy.

The Constitution of Greece has been described as a social democratic constitution, as distinct from a liberal constitution. This is evidenced, one scholar has suggested, by the fact that the Greek Constitution does not simply seek to regulate the exercise of State power, but to 'regulate

[49] Ibid 1353-1355.

the imbalance in private law relationships.'[50] This can be seen in Article 106 of the Constitution of Greece, which empowers the State to co-ordinate and regulate economic activity in the public interest. The provisions of Article 106(2) represent a very clear limitation on the operation of private economic activity. The text is drafted in the negative form: private economic activity cannot be allowed to detrimentally affect freedom and human dignity or to damage the wider economy. This can scarcely be described as an affirmative constitutional right; rather it is an instruction that private economic activity can exist only within strictly controlled parameters. It is also notable that private economic initiative is explicitly portrayed as in tension with freedom and human dignity. The Greek Council of State have consistently acknowledged throughout their case law that the State possesses wide-ranging power under the Constitution to oversee and intervene in the Greek economy in the wider general interest.[51] Any application of the proportionality test does not tend to be particular rigorous, given that, as one pair of scholars describe, 'the starting point of the analysis is the constitutional affirmation of the state power to take measures for the sake of the economy.'[52] Only measures that are considered to be irrational or otherwise arbitrary have been found to be in breach of Article 106.[53]

iii) Ireland

Article 45(3)

1° The State shall favour and, where necessary, supplement private initiative in industry and commerce.

2° The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.

Ireland is regularly cited by commentators as an example of a country that protected the freedom to conduct a business when the Charter was drafted.[54] Everson and Correia Gonçalves,

[50] Ioannis Katsaroumpas, 'De-Constitutionalising Collective Labour Rights: the Case of Greece' (2018) 47 *Industrial Law Journal* 465, 471-472.
[51] Xenophōn Kontiadēs and Ioannis A. Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution' in Xenophōn Kontiadēs (ed) *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Taylor and Francis Group 2013) 195, 204.
[52] Ibid 205.
[53] Council of State (in plenum) 2125/1977, 1149/1988. See also, Theodora D. Antoniou, 'The Constitutional Restrictions of Privatisation' (1998) 51 *The Revue Hellenique de Droit International* 277.
[54] See, for example, Usai (n 14) 1869; Schmidt (n 3) 107.

for example, wrote that although explicit protections of the freedom to conduct a business were 'sparse' in 1974, when *Nold* was decided, one of the express recognitions was found in the 1937 Irish Constitution.[55] Most commentators seem to have overlooked the fact that Article 45 of the Irish Constitution contains directive principles of social policy, which are non-justiciable, and are designed for the guidance of the legislature, the Oireachtas.[56] 'These provisions, while often admired by international commentators, have had little or no impact on the development of Irish constitutional law. One recent empirical study demonstrates that they have scarcely ever been mentioned, either by the courts or in parliamentary debates.[57] Moreover, Article 45(3) does not even explicitly mention freedom to conduct a business *per se,* and it has certainly never been used to ground a judicially-protected freedom to conduct a business, or any kind of right to engage in economic activity. One might also note that Article 45(2)(iii) of the Constitution clearly envisages the risk to the public interest associated with a free market economy, and instructs the State to ensure that free competition should not give rise to monopolies of 'essential commodities in a few individuals to the common detriment.'[58]

On one of the rare occasions where Article 45(3) has been cited by an Irish court, the High Court expressly rejected the argument advanced by the plaintiffs that the Irish Constitution contained 'an ideological preference in favour of private enterprise and private initiative in commerce' which meant that the State would be obliged to justify any limitation on private economic activity.[59] On at least one occasion, the Irish Supreme Court accepted that the 'right to carry on a business and earn a livelihood' was a right that could be derived from the constitutional protection of property rights.[60] However, invocations of such an entitlement have been confined to the remit of the right to earn a livelihood, and subsequent cases have emphasised that any such entitlement is subject to a broad range of interventions by the State. There is no indication that this judgment has made its way on to the radar of commentators on

[55] Everson and Correia Gonçalves (n 19) 471.
[56] Article 45 states that 'The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.' Schwier is one of the few scholars to note that Article 45 is contained in the guiding principles of social policy in the Irish Constitution. Schwier (n 10) 68-69.
[57] David Kenny and Lauryn Musgrove McCann, 'Directive Principles, Political Constitutionalism, and Constitutional Culture: the case of Ireland's failed Directive Principles of Social Policy' (2022) 18 *European Constitutional Law Review* 207.
[58] Article 45(2) states that: 'the State shall, in particular, direct its policy towards securing: ensure that the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.'
[59] *Attorney General v Paperlink Ltd* [1984] ILRM 373, 386.
[60] *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 366.

this issue, who continue to point to the Directive Principles as the national equivalent to Article 16.

iv) Italy

Article 41

> Private economic initiative is freely exercised.
> It cannot be carried out against the common good or in such a manner that could damage safety, liberty, human dignity and the environment.
> The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social and environmental purposes.

The Italian Constitution is frequently cited as an example of a national constitution that protects a right that is functionally equivalent to the freedom to conduct a business in Article 16.[61] Yet the comparison between Article 41 of the Italian Constitution and Article 16 of the Charter fails in several important respects. While Article 41 begins by declaring that 'private economic initiative is freely exercised', the full text makes it clear that any entitlement to carry out economic activity is subject to the qualification that such activity must be carried out in accordance with the wider common good. Specifically, private economic activity cannot undermine health, safety, human dignity, and since 2022, environmental protection.[62] As the *Corte Constituzionale* noted in a judgment given in 2019, 'freedom of economic initiative is protected on condition that it does not compromise other values which the Constitution considers pre-eminent: it cannot, in fact, be conducted "in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity."'[63]

[61] Everson and Correia Gonçalves (n 19) 471; Groussot (n 18) 326.
[62] In 2022, Article 41 was amended to include that economic activity should not be carried out in a manner that damages the environment. Constitutional Reform No. 1/2022. See, Agenieszka Kaminska, 'Environmental Protection and Italian Constitutional Reform. Some Profiles of Interest and Critical Remarks' (2022) 15 (1) *Teka Komisji Prawniczej PAN Oddział W Lublinie* 73; Massimiano Sciascia, 'Riforma in itinere degli artt.9 e 41 della costituzione: l'habitat umano quale bene collettivo unitario' (2021) *Amministrativ@mente* 3:465–76.
[63] Corte Constituzionale, Judgment No. 141 of 2019, 12. English translation available < https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_141_del_2019_eng_red_Modugno.pdf>

Unlike Article 16, Article 41 is not a general, free-standing right to conduct a business or economic initiative where the presumption is that any limitations on the right must be justified. Instead, Article 41 establishes a paradigm whereby economic activity may be exercised within a highly regulated framework.[64] The case law of the Italian Constitutional Court has been largely consistent in upholding the public interest orientated nature of Article 41.[65] The text of Article 41 is clear that private economic activity is always subject to the wider public interest, which as De Caria has argued, hampered the development of a robust freedom of enterprise, to the point where it is not entirely clear that it qualifies as a 'fundamental' right.[66] The cases where the Court has ventured into striking down legislation on the basis of a conflict with Article 41, one commentator suggested, were limited to cases involving outdated legislation which the Court sensed no longer had the full support of the legislator.[67] A recent example can be found in a case involving the continued operation of the Ilva plant near the city of Taranto in the south of Italy. The Constitutional Court considered that the continuation of economic activity had been privileged to the detriment of the rights to life and health of others, which, the Court stressed, was at odds with the provision, given its emphasis that economic initiative always had to be carried out in a manner that did not undermine safety, freedom and human dignity.[68] One commentator has lamented that, despite the fact that the constitutional text protects freedom of enterprise, in reality there were strict controls and limitations on its exercise.[69]

v) Luxembourg

Article 11(6)

[64] It has been suggested that this is a common trend throughout the Italian Constitution: individual personal rights must always be considered in light of the simultaneous obligation to the wider community, see Schwier (n 10) 63.
[65] Andrea Biondi, 'The Legal Protection of Traditional Commercial Activities: Two Decisions of the Italian Constitutional Court' (1995) 4 *International Journal of Cultural Property* 129. It has been suggested that the Italian Constitutional Court were somewhat sceptical of the public-interest orientated nature of the provision, but given the text of Article 41, were relatively powerless to counteract it. See, Riccardo de Caria, 'The 'Social Principle' Fractal: The Italian Constitutional Tradition and the Reproduction of the Economic Constitution in the Areas of Free Speech and National Sovereignty' (2022) 14 *Italian Journal of Public Law* 242, 250, citing Giovanni Bognetti, *Costituzione economica e Corte Costituzionale* (Giuffrè 1983).
[66] De Caria (n 65) 251.
[67] Giovanni Bognetti, 'Political Role of the Italian Constitutional Court' (1974) 49 *Notre Dame Law Review* 981, 986.
[68] Corte Constituzionale, Judgment No. 85 of 2013.
[69] Terence Daintith, 'The Constitutional Protection of Economic Rights' (2004) 2(1) *International Journal of Constitutional Law* 56, 84-85.

(6)…the freedom of commerce and industry, the exercise of liberal professions and of agricultural labour are guaranteed, save for the restrictions established by law.

The Constitution of the Grand Duchy of Luxembourg dates back to 1868, making it one of the oldest constitutions in Europe.[70] Despite its longevity, the Constitution plays a marginal role in Luxembourgish political culture, which has led to it being described as a 'forgotten Constitution.'[71] The constitutional court in Luxembourg was established only in 1997, which granted the courts the power to review legislation in light of the Constitution, and one of the legislative chambers, the *Conseil d'État*, retains the power to review draft bills for their compatibility with existing law, the Constitution and any international law commitments.[72] Article 11(6) was added to the Constitution in May 1948. It is considered to be an 'objective of constitutional value' which is legally binding on the legislature, but it is not directly enforceable before the courts.[73] Much like many of their European counterparts, the Constitutional Court can only receive preliminary ruling queries from the ordinary courts. Individuals cannot mount direct challenges to existing laws before the Constitutional Court on the grounds that they constitute breaches of fundamental constitutional rights.[74] Thus despite the text of Article 11(6), there is no functional equivalent to the freedom to conduct a business in Article 16.

vi) Spain

Article 38

Free enterprise is recognised within the framework of a market economy.

The public authorities shall guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the economy in general and, as the case may be, of its planning.

[70] Jörg Gerkrath, 'The Constitution of Luxembourg in the Context of EU and International Law as 'Higher Law'' in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law - National Reports* (2019) 221, 222.
[71] Jörg Gerkath, 'Luxembourg' in Stefan Griller, Roman Puff and Lina Papadopoulou (eds) *National Constitutions and EU Integration* (Oxford: Hart 2022) 459, 466.
[72] Jörg Gerkath and Jean Thill, *The Grand Duchy of Luxembourg* in Leonard Besselink, JLW Broeksteeg, PPT Bovend'Eert, Roel de Lange, Boguslaw Banaszak and Wim Voermans (eds) *Constitutional Law of the EU Member States* (Kluwer 2014) 1085, 1097-1098.
[73] Ibid 1105.
[74] Gerkath (n 71) 471.

Commentators on the text of the Spanish Constitution have observed that, despite the protection for freedom of enterprise in Article 38, it remains subject to the important caveat that it would be protected 'in accordance with the demands of the economy's planning.'[75] Five other provisions of the Spanish Constitution - Article 40, 128, 129, 130 and 131 - stress the importance of the importance of the State's redistributive capacity in managing the economy.[76] The protection of freedom of enterprise in Article 38 is included within a series of rights (Articles 30 to 38) which can be adjudicated on by reference from a lower court, or by way of the abstract reference procedure.[77] Yet since the introduction of the Constitution in 1978, Article 38 has had relatively little impact. Early attempts to invoke the provision were unsuccessful, as the Court tended to conclude that the impugned measures did not come within the scope of Article 38.[78] The judicial doctrine that exists has largely been to confirm that 'the content of the freedom to conduct a business would be fully subject to legislative provisions' with the relatively narrow caveat that only restrictions that could be deemed unreasonable or otherwise arbitrary would violate Article 38.[79] Article 38 establishes only the right to initiate and sustain business activity, but the exercise of that activity is carefully regulated.[80] For the Constitutional Tribunal, Article 38 lays out the parameters of the economic order, but not constitutional rights of economic activity. The Spanish Constitutional Tribunal has repeatedly held that the freedom of enterprise could not be considered as foundational a right as other fundamental rights protected by the constitutional text. A judgment from 2010 involved the constitutionality of a prohibition on the advertisement and marketing of alcohol. The Constitutional Tribunal held that while Article 38 acknowledged that private enterprise was permitted, this right could not, generally speaking, be prioritised over that of the right to health.[81] In other words, Article 38 ensures that private enterprise is permitted, but the Court has eschewed the kind of enforceable right of freedom in business conduct contained in Article 16.

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[75] Lukas Prakke and Camilo Schutte, 'The Kingdom of Spain' in Leonard Besselink (eds), *Constitutional Law of the EU Member States* (Kluwer 2014) 1523, 1551.
[76] Geoffrey Brennan and Jose Casas Pardo, 'A Reading of the Spanish Constitution (1978)' (1991) 2 *Constitutional Political Economy* 53, 64; Victor Ferreres Comella, *The Constitution of Spain: A Contextual Analysis* (Oxford: Hart 2013) 21-22.
[77] James Casey, 'The Spanish Constitutional Court' (1990) 25 *The Irish Jurist* 26, 30.
[78] José María Rodríguez de Santiago and Luis Arroyo Jiménez, 'A Silent Revolution. Property and Free Enterprise Before the Spanish Constitutional Court' in Cristina Izquierdo-Sans, Carmen Martínez-Capdevila and Magdalena Nogueira-Guastavino (eds) *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer 2021) 289.
[79] Ibid 293.
[80] See, Pedro Mercado Pacheco, 'Libertades económicas y derechos fundamentales. La libertad de empresa en el ordenamiento multinivel europeo' (2012) 26 *CEFD* 341, 367.
[81] Civil Division (Sala Civil del Tribunal Supremo) Decision STS 891/2010, 3 January 2011.

vii) Sweden

Article 17

> Limitations affecting the right to trade or practise a profession may be introduced only in order to protect pressing public interests and never solely in order to further the economic interests of a particular person or enterprise...

The Swedish Constitution is comprised of four fundamental laws, including the 1974 Instrument of Government which contains fundamental rights in Chapter 2.[82] The Constitution occupies a relatively marginal position in Swedish politics, which has been attributed to the high value placed on comprehensive and effective action by the democratic branches, over and above checks on political actors.[83] There is no dedicated constitutional court, and a significant institutional actor is the Law Council, which exercises a power of pre-enactment review of legislation.[84] As one commentator writes, 'judicial review has scarcely been performed during the two thirds of the 20th century, even though it was constitutionalised in 1979.'[85] The Constitution was amended in 2010 to include a broader power of judicial review, although this new wording notes that a court should take account of the democratic mandate of the Riksdag in exercising such review.[86] Article 17 of the Instrument of Government provides that any restrictions on trade or the practise of a profession shall only be introduced to further 'pressing public interests' and not any individual actor's economic interests. While this seems to set a relatively high benchmark for the introduction of laws affecting the exercise of commercial trade, and can thus be seen to provide 'some protection for free market competition', Article 17 is not framed as an absolute right, unlike rights such as the freedom of religion.[87] Instead, it is among several rights which can be limited by standard legislation, and it is not included within the group of rights that must satisfy the more stringent qualified procedure rules within

[82] These are the Act of Succession (1810), the Freedom of the Press Act (1949), the Instrument of Government (1974), and the Fundamental Law on Freedom of Expression (1991).
[83] Shirin Ahlbäck Öberg, 'Constitutional Design' in Jon Pierre (ed) *The Oxford Handbook of Swedish Politics* (Oxford University Press 2015) 87-88; Olaf Petersson 'Constitutional History' in Jon Pierre (ed) *The Oxford Handbook of Swedish Politics* (Oxford University Press 2015) 89; Iris Nguyen Duy, 'New Trends in Scandinavian Constitutional Review' (2015) 61 *Scandinavian Studies in Law* 11, 19.
[84] Joakim Nergelius, 'Judicial Review in Swedish Law - A Critical Analysis' (2009) 27(2) *Nordisk Tidsskrift for Menneskerettigheter* 142.
[85] Duy (n 83) 14. See also, Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84(3) *Modern Law Review* 477, 492-493.
[86] Ibid 22.
[87] Sveriges Riksdag, *The Constitution of Sweden: The Fundamental Laws and the Riksdag Act* (Sveriges Riksdag 2016) 30.

the Swedish Riksdag for their restriction.[88] Thus, it is one of the rights protected in 'weaker terms' by the Constitution.[89]

viii) Portugal

Article 61

> Private economic enterprise shall be undertaken freely within the overall frameworks laid down by this Constitution and the law and with regard for the general interest.

The original 1976 Portuguese Constitution was explicitly committed to the creation of a socialist society.[90] Unsurprisingly, the Constitution is infused with progressive values as a result. It has one of the most comprehensive lists of social rights commitments in Europe.[91] It has been argued that the Portuguese Constitution is premised 'on the subordination of economic interests to democratic political power.'[92] The original text of Article 61 of the Portuguese Constitution placed private economic initiative subject to the requirements of collective progress. This was altered in 1982 in favour of the present day wording, which states that private economic activity can take place 'freely' within the overall constitutional and legal framework, and 'with regard for the general interest'.[93] Much like the Spanish Constitution, other provisions of the Portuguese Constitution make it clear that economic activity is subject to State oversight and regulation. Article 86(1) states that the State will ensure that the private sector complies with its legal obligations, particularly those that operate in areas of public interest, and Article 86(3) allows for the designation of certain sectors of the economy within which the private sector cannot operate. Most importantly for our purposes, the catalogue of fundamental rights in the Portuguese Constitution are not on an equal footing: economic rights, including Article 61, are understood to be addressed to the legislature. It is scarcely possible,

[88] Ibid 31-32.
[89] Nerglius (n 84) 330.
[90] Claire Kilpatrick 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in Thomas Beukers (ed) *Constitutional Change Through Euro-Crisis Law* (Cambridge University Press 2017) 283. While it retains this aspiration in its preamble, the more explicit textual commitments in the Constitution have been gradually amended or watered down. See, Jónatas E.M. Machado, 'The Portuguese Constitution of 1976: Half Life and Half Decay' in Xenophōn Kontiadēs (eds) *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Taylor and Francis 2012) 273, 276.
[91] Mónica Brito Vieira and Filipe Carreira da Silva, 'Getting rights right: Explaining social rights constitutionalization in revolutionary Portugal' (2013) 11(4) *International Journal of Constitutional Law* 898.
[92] Jónatas E.M. Machado, 'The Sovereign Debt Crisis and the Constitution's Negative Outlook' in Xenophōn Kontiadēs (ed) *Constitutions in the Global Financial Crisis* (Taylor and Francis 2013) 219, 239.
[93] Schwier (n 10) 65.

one commentator concluded, to describe Article 61 as a fundamental right, because it is not one that can be directly enforced before the courts.[94]

Portugal has an unusual hybrid system of constitutional review. Any court in Portugal may disapply laws found to be unconstitutional, subject to an appeal to the Constitutional Court.[95] The Constitutional Court is tasked with abstract review of legislation, which may be sought by legal or political actors, such as Ombudsmen or members of Parliament. The Portuguese legislature is tasked with striking down laws that the Constitutional Court considers to be in breach of the Constitution. In cases of legislative omission, the legislature may opt to ignore rulings from the Constitutional Court. The Portuguese Constitutional Court has occupied a relatively minor position in Portuguese public life, largely due to the fact that it has been more circumspect in its use of strong form judicial review than some of its European counterparts.[96] It has, as one set of commentator described it, largely eschewed 'acting as a contra-majoritarian force'.[97] The lower courts in Portugal have, however, analysed Article 61 in their case law. In 2006, the Supreme Administrative Court held that Article 61 was not an absolute right, but a right that could be subject to strict limits. The right of private economic enterprise presupposed respect for the rules that defined each economic activity by sector. The Court noted that '*Livre iniciativa não corresponde a fazer-se o que se quer quando se quer*': or, in other words, that free enterprise does not entail doing what you want, when you want.[98] In another case, the applicant had been refused permission to install large-scale scanning equipment used for the detection of cancer and other diseases, and challenged the decision of the Ministry of Health

[94] Schwier (n 10) 66.

[95] The Constitutional Court is comprised of a majority of judges who are approved by supermajority in parliament, and the remaining minority are co-opted by the judges themselves. See, Teresa Violante, 'A Constitutional Crisis in Portugal: Deadlock at the Constitutional Court' *IConnect Blog,* 23 February 2023: http://www.iconnectblog.com/2023/02/a-constitutional-crisis-in-portugal-the-deadlock-at-the-constitutional-court/

[96] Teresa Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law' in António Costa Pinto and Conceição Pequito Teixeira (eds) *Political Institutions and Democracy in Portugal: Assessing the Impact of the Eurocrisis* (Springer 2019) 121; Mónica Brito Vieira and Filipe Carreira da Silva, 'Getting rights right: Explaining social rights constitutionalization in revolutionary Portugal' (2013) 11(4) *International Journal of Constitutional Law* 898, 919.

[97] Vieira and da Silva (n 96) 919. A notable exception was, of course, the Constitutional Commission's intensely controversial findings that several austerity measures imposed by the Portuguese government during the Eurocrisis were unconstitutional. But even those judgments – which found that some pay cuts and retroactive tax increases were unconstitutional - were not based on Article 61. See, Jónatas E.M. Machado, 'The Sovereign Debt Crisis and the Constitution's Negative Outlook', in Xenophōn Kontiadēs (ed) *Constitutions in the Global Financial Crisis* (Routledge 2013) 235-238; Mariana Canotilho, Teresa Violante and Rui Lanceiro, 'Austerity measures under judicial scrutiny: the Portuguese constitutional case-law' (2015) 11 *European Constitutional Law Review* 115.

[98] Supreme Administrative Court, 0262/02, 9 November 2006, para 6.

on the basis that, *inter alia,* it interfered with their right under Article 61.[99] The right to free private economic initiative, the Court concluded, did not constitute an absolute right but a right that was subject to limits and restrictions mainly from the wider public interest. In this instance, it was the responsibility of the authorities to regulate the use of treatment facilities.[100] Article 61 arose in a recent case before the North Central Administrative Court of Portugal. The appellant sought to annul a decision of local authorities in Porto, who had ordered him to cease operating a beverage establishment on the basis that it was not licensed for that purpose. He argued, *inter alia,* that his fundamental rights of private initiative under Article 61 had been violated. The Court noted that the appellant was not prevented from carrying out a particular type of commercial activity, or that his capacity to create a company was hampered, or any limitations on his business activity. Instead, the appellant had simply been subject to lawful measures to restrict the unauthorised exercise of commercial activity. Article 61, the Court noted, applied only in the context of lawful private economic initiative, and it could not be said to have been violated in this particular instance.[101]

Assessment of Category I

A few observations can be made at this juncture. Of the Member States of the European Union at the time of the drafting of the Charter, eight constitutions–Finland, Greece, Ireland, Italy, Luxembourg, Spain, Sweden and Portugal – contain an express reference to private economic activity. At first glance, this might appear to provide a basis for the claim that Article 16, the freedom to conduct a business, is derived from the constitutional traditions of the Member States. However, the national constitutional provisions that are often cited as the corresponding 'national' equivalents of Article 16 are not equivalents at all. There are subtle, but significant differences between these domestic constitutional texts and that of Article 16. The national provisions tend to recognise the existence of private economic activity but they explicitly clarify that private enterprise must be conducted subject to other countervailing interests, and this has how such provisions have been understood and applied by national courts. Rather than insisting that state regulation must be limited within strict parameters, instead it is private commercial activity that can operate within defined parameters set by the state. The national constitutions by and large stress the importance of regulating enterprise in the interests of the

[99] North Central Administrative Court, 00383/07.3 BECBR, 9 November 2012, para 3.2.2.
[100] Ibid para XXV.
[101] On appeal to the Third Division of the Constitutional Court, this decision was upheld. See, Judgment No. 674/2019, Tribunal Constitucional.

common good, including the interests of protecting human dignity and safety. Significantly, in the case of Finland, Ireland and Luxembourg, these rights are not individually enforceable before a court: rather, they are considered to be within the purview of the legislature to take account of when formulating legislation.

Only a handful of scholars have identified that the purposes of these national provisions and that of Article 16 of the Charter diverge significantly. Garben has rightly noted that where such rights are protected in national constitutional system, they tend 'to allow a relatively wide scope of limitation in the public interest and it is generally conceived as a right of individuals to set up an economic activity or join a profession rather than concerning the general exercise of economic activity.'[102] By contrast, Article 16 protects a free-standing right to conduct a business, subject to 'Union law and national law and practices.' There is a considerable difference between acknowledging the operation or existence of private market activity subject to the public interest, and the protection of the freedom to conduct a business. The former accepts the existence of market activity as an institution, but one that is subject to regulation and oversight by the state in the light of wider public interests. It is an acknowledgment that the interests of the market and the general interests of the public are distinct. The purpose of these provisions is ensure that market activity operates within parameters set by the state in terms of oversight, redistribution of wealth, or correcting for market failure. The latter shifts the paradigm entirely: market actors do not engage in the activity subject to the state's approval. Rather, they have a *de facto* entitlement to operate and act as they wish in the exercise of commercial activities. It shifts the burden onto the state to justify any restrictions placed on that activity, usually by reference to the proportionality test. Its purpose is to empower private enterprise and to make state intervention more challenging.

Category 2

i) Austria

Article 6(1)

[102] Sacha Garben, 'The 'Fundamental Freedoms' and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework' in Sacha Garben and Inge Govaere, *The Internal Market 2.0* (Oxford: Hart 2020) 335, 351.

> Every national can take up residence and domicile at any place inside the boundaries of the state, acquire every kind of real property and freely dispose of the same, as well as practice every kind of gainful activity subject to the conditions of the law. (…)

The Basic Law of General Rights of Citizens (*Staatsgrundgesetz Über die allegemeinen Rechte der Staatsbürger* ('StGG')) dates from 1867 and was incorporated into the Constitution of the new Republic of Austria in 1920, and revived in the wake of World War II. There is no explicit guarantee of the freedom to conduct a business, or freedom of enterprise. However, Article 6(1) of the Basic Law on the guarantees, *inter alia* freedom of acquisition of property and for each individual to 'practice every kind of gainful activity subject to the law.' This has been interpreted to encompass the freedom to establish a company, freedom of investment and freedom of contract. Case law on Article 6(1) has included legal challenges to barriers to entry into particular occupations or professions. Given the tradition of protecting small and medium-sized businesses in Austria many of the cases involve a natural person rather than a corporation. For example, the requirement to demonstrate market demand as a prerequisite to obtaining a licence for a particular occupation has been subject to successful challenge in the case of taxi drivers,[103] cinemas,[104] driving instructors[105] and ski instructors.[106] Other similar challenges from chimney sweeps, funeral undertakers and pharmacies[107] have failed. The Austrian Constitutional Court (*Verfassungsgerichtshof*) has considered that restrictions on the right to freedom of employment in Article 6(1) are permitted only insofar as they are required by the public interest, are suitable means of achieving that objective, and otherwise objectively justifiable. It has acknowledged that restrictions on barriers into a particular profession warrant greater justification than the regulation and oversight of the industry and profession *per* se, as the former represent a greater threat to the integrity of the interest protected under Article 6.[108] Restrictions in the interest of protecting small and medium-sized businesses, advancing consumer protection and protecting local supply have been accepted as justifying limitations on Article 6. While Article 6(1) has been described by the Constitutional Court as protecting the right to entrepreneurial freedom, in practice any such entitlement often been balanced against the wider public interest. Nonetheless, the VfGH has accepted that Article 6 constitutes

[103] Vfslg 10932/1986.
[104] Vfslg 11749/1988.
[105] Vfslg 11276/1987.
[106] Vfslg 11652/1988.
[107] Vfslg 15103/1998.
[108] Ibid.

a normative choice in favour of a market-based economic order, designed to protect free competition by market participants. Consequently, legislative intervention is only permitted in prescribed cases.[109] In this respect, the Austrian example comes much closer to Article 16 of the Charter many of the national Member State constitutions outlined above. Notably, the VfGH has been prepared to accept –albeit with relatively little analysis - that Article 6 of the StGG was functionally equivalent to Article 16 of the Charter of Fundamental Rights.[110]

ii) Germany

Article 12

> All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training.

The German Constitution, the *Grundgesetz*, has been described as reflecting a 'corporatist welfare system' that eschews 'classical liberalism or libertarianism.'[111] This is found not only in the basic rights provisions, in the protection of the human personality and human dignity (Article 2),[112] the right to form and participate in trade unions (Article 9(3)), but also in the provision for the creation of a Federal Social Court and Federal Labour Court.[113] Several articles within the Basic Law describe Germany as a social state, meaning that there is an overarching constitutional commitment to *Sozialstaatprinzip* (the social state principle), which 'obligates the state to construct a just social order.'[114] The wide-ranging protection of workers' rights and the powerful commitment to *Sozialstaat* is designed to avoid 'an economy of unbridled entrepreneurship.'[115] The German Constitution, it should be noted, does not explicitly commit to any particular economic ideology, and the *Bundesverfassungsgericht,* the German Federal Constitutional Court, has stressed that the Constitution is agnostic towards economic policy. Yet despite this, the Constitution does set parameters on the exercise of

[109] Schwier (n 10) 73.
[110] Vfslg G44-45/2017-9, 29 September 2017 para 2.4.
[111] Jeff King, 'Social Rights, Constitutionalism and the German Social State Principle' (2014) 3 *E-Pública: Revista Electronica de Direito Publico* 1, 9.
[112] Edward J. Eberle, 'The German Idea of Freedom' (2008) 10 *Oregon Review of International Law* 2.
[113] King (n 111) 10.
[114] Donald Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed, Duke University Press 2012) 622. As King writes, case law has demonstrated that the Social State principle is legally enforceable principle that 'obligates the state to provide for, and to shape, a just social order, compensating for inequalities.' King (n 111) 12.
[115] Kommers and Miller (n 114) 659.

economy activity.[116] While Article 12 protects the right of freedom of occupation, it is subject to the overarching public interest.[117] The exercise of constitutional rights is permitted only within a highly regulated framework, and situated within an overarching commitment to a social market economy.

Article 12 of the Basic Law has been interpreted as encompassing the protection of the right of any individual to pursue 'any permitted activity' as employment. The *Pharmacy Case* draws a distinction between occupational choice and the regulation of that occupation.[118] The right to choose one's occupation should not be unduly restricted, but the Court affirmed that the exercise of an occupation may be regulated in the public interest.[119] This echoes the distinction drawn in the text between choice of occupation and its exercise.[120] The Constitutional Court has been prepared to accept robust regulations on the practice of a trade or occupation. Examples include unsuccessful challenges to a quota for long-haul truck permits,[121] restrictions on the sale of medicinal drugs only by licensed pharmacists,[122] a ban on public advertising by doctors,[123] and restrictions on trading hours.[124] The Constitutional Court has continuously stressed that the importance of Article 12, much like other fundamental rights protected by the *Grundgesetz*, stems from its value to the development of the individual human personality. Thus the protection of Article 12 has primarily been tailored towards natural, rather than legal, persons.[125] Article 12 is a general protection of the right to earn a livelihood, ensuring that unreasonable and arbitrary burdens are not placed on barriers to entry into certain professions,

[116] Kommers, writes that the Constitution 'proclaims the fundamental neutrality of the Basic Law with respect to economic policy, but undergirds this view with certain assumptions about the nature of humankind and its relationship to society, thus combining elements of the Rechtsstaat with those of the Sozialstaat.' See, Kommers and Miller (n 114) 624.
[117] King (n 111) 10-11.
[118] *Pharmacy Case* (1958) 7 BVerfGE 377. See also, discussion in Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press 2015) 56-57 where she situates these judgments as a liberal statement by the Court the context of the Cold War.
[119] The Court noted that: 'The practice of an occupation may be restricted by reasonable regulations predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only for the sake of a compelling public interest.' See, Kommers and Miller (n 114) 668.
[120] Ibid 670.
[121] *Long Haul Truck Licensing Case* (1975) 40 BVerfGE 196.
[122] *Drug Order Case* (1959) 9 BVerfGE 73.
[123] *Medical Advertising Case* (1959) 9 BVerfGE 213.
[124] *Barber Shop Closing Case* (1982) 59 BVerfGE 336; *Baker's Working Hours Case* (1968) 23 BVerfGE 50.
[125] Schwier (n 10) 166-168. Further, Article 19 of the German Constitution permits non-legal persons to avail of fundamental rights, 'insofar as they are applicable to them by their nature.' The Court has accepted that the legal persons can invoke Article 12, if there are identifiable persons who are exercising their rights through the company. It has, for example, recognized in principle the entrepreneurial freedom of legal persons to found and run companies. The Court has distinguished between small and medium-sized companies as compared with large, multi-national corporations, on the basis that it is doubtful whether a clear individual rights-holder can be identified within the latter. Ibid 172-173. See, BVerfGE 50, 290.

or the exercise of these professions.[126] However, in a recent judgment released in April 2021, the Constitutional Court was prepared to accept that the provisions of Article 16 were equivalent to Article 12 of the Basic Law, and that the provisions of the Charter of Fundamental Rights should inform the interpretation of the Basic Law.[127] While Article 12 may not have been meaningfully equivalent to the freedom to conduct a business when the Charter was first drafted in 2000, any subtle distinctions between Article 12 and Article 16 of the Charter are now likely to disappear over time.

Article 2

Article 2 of the Constitution guarantees 'the right to the free development of the person.' In short, it protects a right of general freedom of action.[128] Since the landmark *Elfes* judgment,[129] it has been understood as a remarkably broad provision; so broad that as one commentator puts it, 'almost every act of state intervention needs to be justified.'[130] The provisions of Article 16 of the Charter establish a remarkably wide scope, a *prima facie* entitlement for a business to act as it sees fit. Article 2, then, is a rare example of a constitutional provision that establishes the same kind of paradigm for human activity, rather than business activity. Both rights set up a paradigm whereby the State and personal freedom are set in opposition to one another, rather than considering whether State action may be a necessary precondition for securing basic conditions in which liberty can be exercised. Article 2 is a general right of freedom of action, an entirely autonomy-centric right. This means that a huge swathe of measures are, in theory, capable of interfering with that right, and that potential infringement or violation must be proportionately justified. A wide range of recreational and social activities were considered to

[126] However, see for example *Retail Trade Case* (1965) 19 BVerfGE 330 where the owner of a general store successfully argued that the imposition of a requirement for technical education posed an excessive burden on the freedom of occupational choice. Another example was a producer of rice chocolate products who argued that a statutory prohibition on products that might be mistaken for chocolate foodstuffs was excessive, and that a labelling requirement would have been adequate to achieve the aim of consumer protection. *Chocolate Candy Case* (1980) 53 BVerfGE 138.

[127] *Two subsidiaries of a pharmaceutical company v Federal Administrative Court* (2021) 2 BvR 206/14 para 81.

[128] Werner Heun, *The Constitution of Germany: A Textual Analysis* (Oxford: Hart 2011) 204.

[129] The Constitutional Court noted in *Elfes Case* (1957) 6 BVerfGE 32, para. 2(c) that 'laws must not violate a person's dignity, which represents the highest value of the Basic Law; nor may they restrict a person's spiritual, political, or economic freedom in a way that would erode the essence of personhood..'

[130] Wolfram Cremer, 'The Basic Right to 'Free Development of the Personality' – Mere Protection of Personality Development versus General Right of Freedom of Action' in Hermann Pünder and Christian Waldhoff (eds) *Debates in German Public Law* (Hart 2014) 57, 61.

come within the scope, of Article 2, including travel,[131] outdoor horse-riding[132] and falconry.[133] The German Constitutional Court has accepted that Article 2 can also encompass the protection of private entrepreneurial initiative, as well the freedom of contract.[134]

Nonetheless, the Court has stressed that the individual economic entrepreneur is subject to restrictions from the legislature, acting in accordance with the overarching constitutional commitment to the *Sozialstaatprinzip* (the social state principle), restricts the exercise of this freedom in the interests of the common good,[135] as well as the principle of 'overall economic balance' in Article 109(2). It should be noted, finally, that boundary between the protection of economic freedom in Article 12 and Article 2 is not entirely clear: it is not evident when one provision should be employed over the other. The consensus appears to be that it depends on the type of intervention at issue: in cases where the impugned measure specifically regulates corporate activity, Article 12 is engaged. In cases of where a particular measure is not specifically aimed at regulating such activity, but nonetheless has an indirect effect, the measure can be reviewed on the basis that it restricts 'general economic freedom.'[136] Given its broad scope, and its underlying commitment to freedom of action in economic life as an expression of individual liberty, Article 2 of the Grundgesetz is certainly much closer to Article 16 of the Charter than many of the national constitutional provisions outlined in this chapter.

iii) France

The Conseil Constiutionnel has derived a right of *liberté d'entreprendre,* or freedom of enterprise, from Article 4 of the Declaration of the Rights of Man, which forms the preamble to the French Constitution.[137] This judicially-developed freedom of enterprise has elements that

[131] *Elfes Case* (1957) 6 BVerfGE 32
[132] *Equestrian Case* (1989) 80 BVerfGE 137 (1989).
[133] *Falconry Case* (1980) 55 BVerfGE 159.
[134] See, Aurelia Colombi Ciacchi, 'Party Autonomy as a Fundamental Right in the European Union' (2010) 3 *ERCL* 303, 305-308.
[135] Rupert Scholz, 'Das Grundrechet der freien Entfaltung der Persönlichkeit' (1975) 100(2) *Archiv des öffentlichen Rechts* 275.
[136] Schwier (n 10) 50-51.
[137] Article 4 states that: 'Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to other members of society the enjoyment of those same rights. These limits can only be determined by law.' *Déclaration des droits de l'homme et du citoyen* 26 August 1789 See: < https://avalon.law.yale.edu/18th_century/rightsof.asp>. Later judgments have also identified the Preamble to the 1946 Constitution as a source for the right, see CC Décision No 2009-588 DC, of 6 August 2009, *Law reaffirming the principle of Sunday rest*, para 3.

are remarkably similar to the freedom to conduct a business contained in Article 16.[138] It has been developed by the Conseil through case law. As it lacks a textual basis, it is an open-ended right, and it is limited according to the general requirements of proportionality. It does not explicitly centre the freedom of enterprise within a wider public interest paradigm, which is the case for most other national provisions. The French example did not appear, however, to be cited in the drafting of Article 16, perhaps because the protection of the freedom of enterprise in the French Constitution is entirely judicially developed, rather than deriving from a specific textual right to freedom of enterprise.[139] The two rights seem to have developed largely independently of one another, although French scholarship on *liberté d'entreprendre* has occasionally referred to similar entitlements in European Union law, including the free movement provisions and the freedom of establishment, and in some instances, the adoption of Article 16.[140] This particular example demonstrates that there is at least one example where a wide-ranging right to freedom of enterprise has been developed internally within a national constitutional system, and – apparently - without the influence of Article 16. Second, there are striking similarities between the two provisions. The development of *liberté d'entreprendre* could provide insights into the future development of Article 16.

The Conseil Constitutionnel first acknowledged the freedom of enterprise – or *liberté d'entreprende* – as a fundamental right in the *Nationalisation Law* case in 1982.[141] The Conseil Constitutionnel clarified that the right can be limited by either specific constitutional requirements or in the wider public interest, provided that any restrictions did not interfere with the core of the right.[142] Since the early 2000s, there has been a marked acceleration in the

[138] See generally, Denys De Béchillon, 'Le volontarisme politique contre la liberté d'entreprendre,' *Les nouveaux Cahiers du Conseil constitutionnel*, (October 2015) 7; Victor Audubert, 'La liberté d'entreprendre et le Conseil constitutionnel : un principe réellement tout puissant?' *La Revue des droits de l'homme* [Online], 18 | 2020, online 15 June 2020, accessed 07 January 2023. URL : http://journals.openedition.org/revdh/9921 ; DOI : https://doi.org/10.4000/ revdh.9921*;* Guillaume Drago, 'Droit de propriété et liberté d'entreprendre dans la jurisprudence du Conseil constitutionnel : une relecture,' (2011) 9 *Cahiers de la recherche sur les droits fondamentaux* 395.

[139] For an overview of the Conseil Constitutionnel's influence in this regard, see Arnaud Sée, 'Le Conseil Constitutionnel, Gardien des Libertés Économiques?' (2020). Available: https://www.academia.edu/44387264/Le_Conseil_constitutionnel_gardien_des_libert%C3%A9s_%C3%A9conomiques.

[140] Véronique Champeil-Desplats, 'La liberté d'entreprise au pays des droits fondamentaux' (2007) 1 *Revue de Droit du Travail* 19, 24.

[141] CC Décision No. 81-132 DC of 16 January 1982, *Loi de nationalisation*, para 16.

[142] CC Décision No. 89-254 DC of 4 July 1989, *Modalités d'application des privatisations*, para 41; CC Décision No. 90-287 DC of 16 January 1991, *Public Health and Social Insurance*, paras. 24, § 21; CC Décision No. 92-316 DC of 20 January 1993, *Prevention of Corruption*, para 14, § 30 and 40.

development of the right of freedom of enterprise.[143] This increased use of freedom of enterprise has also been linked to the introduction of the *question prioritaire de constitutionnalité* ('la QPC') in 2010, which allows individual litigants to challenge the constitutionality of existing laws before the Conseil Constitutionnel.[144] Before this development, the Conseil Constitutionnel's role was limiting to reviewing bills before they were enacted as laws. A significant number of cases have been initiated by companies challenging a variety of business regulations as breaches of their economic freedoms.[145] Recent case law has confirmed that the freedom of enterprise has two elements: the freedom to access a profession or economic activity, and the freedom in the exercise or conduct of the activity.[146] It has also been extended to public companies.[147] The provision has been used with considerable regularity: a law that required a mayor's authorisation in Paris, Lyon and Marseille before a change in commercial premises could be approved was found to be a disproportionate interference with the freedom of enterprise.[148] The same right was cited to strike down a 2002 provision that proposed to restrict redundancies until the company was at risk of insolvency,[149] a provision that purported to limit the amount of retailers in overseas territories,[150] a law that mandated companies to inform their employees of a company's transfer,[151] and a law that compelled multinational companies to publish their financial information to combat money laundering.[152] In 2013, the Conseil Constitutionnel considered that a wider definition of tax optimisation would, *inter alia,* amount to a breach of the right of freedom of enterprise, noting that each individual could legitimately seek to reduce their tax burden. 'From the vaguest of

[143] Victor Audubert, 'La liberté d'entreprendre et le Conseil constitutionnel : un principe réellement tout puissant?' *La Revue des droits de l'homme* [Online], 18 | 2020, online 15 June 2020, accessed 07 January 2023. URL : http://journals.openedition.org/revdh/9921 ; DOI : https://doi.org/10.4000/ revdh.9921

[144] Stéphanie Hennette Vauchez, '...Les droits et libertés que la constitution garantit: *quiproquo* sur la QPC ?'(2016) 10 *La Revue des droits de l'homme* 1, 5 and fn 61; Arnaud Sée, 'La QPC et les libertes économiques' (2014) 718 (5) *La semaine juridique* 1; Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Hart 2013)

[145] Arnaud Sée, 'Le Conseil Constitutionnel, Gardien des Libertés Économiques?' (2020) 5-6. Available at Academia.edu<https://www.academia.edu/44387264/Le_Conseil_constitutionnel_gardien_des_libert%C3%A9s_%C3%A9conomiques>.

[146] CC Décision No. 2012-285 QPC du 30 novembre 2012. M. Christian S. (Obligation d'affiliation à une corporation d'artisans en Alsace-Moselle).

[147] CC Décision No. 2018-732 QPC, September 21, 2018, *Grand port maritime de la Guadeloupe*.

[148] CC Décision No. 2000-436 DC of 7 December 2000, *Loi SRU*, *Rec.* 176, para 20

[149] CC Décision No. 2001-455 DC, January 12, 2002*, Social Modernization Law*, cons. 50.

[150] CC Décision No. 2000-435 DC of 7 December 2000, *Loi d'orientation pour l'outre-mer*, para 52-53.

[151] CC Décision No. 2015-476 QPC, July 17, 2015, *Société Holding Désile*.

[152] CC Décision No. 2016-741 DC, December 8, 2016, *Law on transparency, the fight against corruption and the modernization of economic life*, cons. 103.

premises' one commentator pointed out, the Conseil had crafted a judicial doctrine reminiscent of the Lochner era.[153]

Consensus within the Member States

One might ask: why does it matter whether the freedom to conduct a business was, in practice, well-established in Member State constitutions? First, referring to the constitutional traditions of the Member States presupposes the existence of a constitutional 'tradition' of a particular right. It suggests that the right has been broadly accepted at a domestic level and recognised in some shape or form, even if they are not identically protected in all Member States. But claiming that the freedom to conduct a business is a codification of rights that have already been recognised at a national level is profoundly misleading. Of the constitutions of the Member States that acknowledged private enterprise at the time of the drafting of the Charter, most explicitly clarified that its exercise was subject to other competing interests. Many of these rights are not individually-enforceable. They are not, in other words, meaningful equivalents to the open-ended freedom to conduct a business.

The concept of the European consensus is useful in this regard, as it allows us to consider to what extent such a right was protected by the national constitutions of the Member States. The concept of the European consensus, as it has been employed by the European Court of Human Rights, has either meant general agreement on a particular aspect of law or at least indication of a clear direction in the laws of Member States.[154] Schmidt argued that there was a core minimum consensus amongst the EU Member States insofar as elements of entrepreneurial freedom were guaranteed in national constitutions or by the case law of the national constitutional court.[155] Schmidt did acknowledge, however, that none of these rights were guaranteed unconditionally and were often subject to restrictions. He concluded that partial guarantees of entrepreneurial freedom could be found through the national fundamental rights catalogues of all the Member States. However, this perspective assumes that any reference to private economic activity in national constitutions are accurate comparisons to Article 16,

[153] Terence Daintith, 'The Constitutional Protection of Economic Rights' (2004) 2(1) *International Journal of Constitutional Law* 56, 86. Similarly, Arnaud Sée wrote that the Court had largely embraced economic liberalism. See, Arnaud Sée, 'Le Conseil Constitutionnel, Gardien des Libertés Économiques?' (2020) 5. Available:https://www.academia.edu/44387264/Le_Conseil_constitutionnel_gardien_des_libert%C3%A9s_%C3%A9conomiques>.

[154] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 11-12.

[155] Schmidt (n 3) 117-118.

when, as outlined, there are significant differences between the purposes of such provisions and how they have been applied by national courts. On that basis, it is not self-evident that there was any general agreement on the concept of the freedom to conduct a business amongst the Member States at the time of the drafting of the Charter. As outlined in this chapter, a survey of the national constitutional provisions of the-then Member States demonstrate that there was no widespread adoption of a freestanding right to conduct a business or entrepreneurial activity. In fact, this was the conclusion of a report carried out by the European Commission in 1976 and submitted to the European Parliament.[156] Only Austria, Germany and France had acknowledged rights to engage in economic activity at a national level that come anywhere close to the freedom to conduct a business. If there was any European consensus on this particular right, it was either that a) no such right was recognised, or b) that any entitlement to engage in private enterprise was subject to the far-reaching restrictions in public interest, and that such a right was not necessarily individually enforceable.

If Article 16 was to be representative of the common constitutional traditions of the Member States, its development should have taken account of the far more limited entitlement that was protected in those domestic constitutional traditions. Admittedly, the Court of Justice does not engage in a 'mathematical-empirical task' when it draws on the constitutional traditions of Member States.[157] The right in question does not need be enshrined in every national constitution for it to be recognised by the Court of Justice, nor is every national right protected by the Charter of Fundamental Rights or the general principles of EU law.[158] The rather unclear basis for the extrapolation of fundamental rights as general principles of law has prompted criticism in the past.[159] On occasion, the Court of Justice has been resistant to the suggestion that particular principles or rights that can be identified in a small number of Member States should be applied to the whole.[160] For example, in *Hoechst* the applicant sought to argue that the inviolability of the dwelling should encompass business premises, and should be recognised

[156] Bernhardt (n 23).
[157] Franz C. Mayer, 'Constitutional comparativism in action: The example of general principles of EU law and how they are made—a German perspective' (2013) 11(4) *International Journal of Constitutional Law* 1003, 1006.
[158] This rather ambiguous means of selecting what fundamental rights ought to be recognised at EU level proved useful to the Court of Justice when it was developing its general principles of EU law, as it allowed the Court to 'pick and choose from among national constitutional orders without being obliged to explain in detail its 'inspiration'.' Ibid 1007.
[159] Constanze Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19(4) *European Law Journal* 457, 460.
[160] See, for example, on the right to remain silent in Case T–112/98 *Mannesmannröhren-Werke* ECLI:EU:T:2001:61 para 84.

as a general principle by the Court of Justice. The Court rejected that argument, noting that there were: 'not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.'[161] Much the same approach was taken in *Akzo Nobel* on the question of whether the right of legal professional privilege applied to in-house lawyers, as the Grand Chamber noted that it was 'not possible to identify tendencies which were uniform or had clear majority support in the laws of the Member States.'[162] On other occasions, it has employed a 'maximalist standard' by providing robust protection to rights that were not clearly protected across all the legal systems of the Member States.[163] While such an approach has been defended on the basis of extending fundamental rights protection, it is not without its drawbacks: as Besselink acknowledged, this meant that 'a fundamental right which is adhered to in one Member State becomes as a matter of fact operative in other Member States where this right was not a fundamental right, or was not recognised as a right at all.'[164] The recognition of the freedom to conduct a business in Article 16, I suggest, is one such example.

Finally, it matters whether the freedom to conduct a business was genuinely derived from the constitutional traditions of the Member States because this is a justification that has been consistently relied on for the existence of Article 16 in the first place. It is important to challenge such a longstanding assertion because it helps us to understand how such a far-reaching entitlement such as Article 16 became part of the Charter of Fundamental Rights of the European Union. Asserting that the freedom to conduct a business was already long-established in the constitutional traditions of Union Member States meant that during the drafting process, the proponents of Article 16 were not called upon to defend and justify the status of the freedom to conduct a business as a fundamental right, or to speculate on what the ramifications of its inclusion might be. The argument that the freedom to conduct a business was long-established is a useful retrospective legitimising tool, and the success of the

[161] Joined Cases C-46/87 and 227/88 *Hoechst* ECLI:EU:C:1989:337 para 17.
[162] Case C–550/07 P *Akzo Nobel* ECLI:EU:C:2010:512 para 71.
[163] Case C-155/79, *AM & S Europe Ltd v Commission* ECLI:EU:C:1982:157 where the Court recognised the protection of legal protection privilege as a general principle, despite noting at para. 19 that: 'it is apparent from the legal systems of the Member States that, although the principle of such protection is generally recognised, its scope and the criteria for applying it vary.' See also, Ian S. Forrester, 'Legal Professional Privilege: Limitations on the Commission's Powers of Inspection following the *AM & S* Judgment' (1983) 20 *Common Market Law Review* 75, 78. On the maximalist standard, see, Leonard F.M. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629, *cf* Takis Tridimas, *The General Principles of EC Law* (2nd ed, Oxford University Press 2006) 312.
[164] Besselink (n 162) 673.

endeavour is demonstrated by the fact that this claim largely been unquestionably accepted and repeated both in case law and academic commentary on Article 16. The reality is, of course, a great deal more complex than a straightforward replication of existing national traditions.

Conclusion

National constitutions do, sometimes, acknowledge the existence of private enterprise, subject to the interests of the common good. National constitutions do, sometimes, recognise the right to engage in commercial activity as a means of earning a livelihood. But it is a far cry from these two facts to state that there is a long tradition in the constitutions of the Member States of a justiciable right to conduct a business. Even adding up all these disparate elements up, it cannot truthfully be said that the freedom to conduct a business has a long tradition in the constitutions of Member States. As one commentator described it, while the members of the Convention 'made a commendable effort to demonstrate that all of the Charter's precepts are founded on pertinent texts' in reality, 'it did not hesitate to look for them wherever it could…it becomes evident that the identification of sources serves to justify their decisions, not to explain them.'[165] The claim that Article 16 does nothing more than codify and reflect pre-existing commitments should be challenged: allowing this claim to persist makes it easier to deflect from the provision's controversial normative worldview. The more it is asserted that the freedom or right has always existed, the less the obligation to provide a justification for its status as a fundamental right, or defend such a freedom from first principles. Article 16, and the manner in which the provision has been interpreted by the Court of Justice, allows private enterprises to claim that every decision or action they take in furtherance of the undertaking's activities is the exercise of a fundamental right.

[165] Francisco Rubio Llorente, 'A Charter of Dubious Utility' (2003) 1(3) *ICON* 405, 419.

CHAPTER THREE

Early and Contemporary Responses to Article 16

Introduction

In this chapter, I examine the early and contemporary academic response to the inclusion of the freedom to conduct a business in the Charter of Fundamental Rights. Some considered the inclusion of Article 16 as a welcome recognition of private autonomy. Others were less than enthusiastic about the normative foundations of Article 16, but considered that its impact was likely to be minimal. In recent years, there is an emerging group of scholars who have expressed concern about the wide potential for Article 16 to be used by economic actors to challenge inconvenient laws or regulations, particular those that related to the protection of workers. I then critically examine the rationales that have been offered for the protection of the freedom to conduct a business.

New right or unenforceable principle?

The inclusion of the freedom to conduct a business attracted relatively little fanfare when the Charter was published in 2000. The primary focus of scholarship tended to debate topics such as the strength of the 'Solidarity' chapter to the Charter,[1] the merits of the non-binding nature of the Charter, and whether the Charter was a precursor to a European Constitution.[2] The first major point of discussion was the appropriate categorisation of Article 16. Initially, there was considerable debate over which provisions of the Charter were enforceable fundamental rights or vaguer 'principles.'[3] Lord Goldsmith QC, who had played an important role in drafting the Charter, described the inclusion of Article 16 as a 'fundamental right.'[4] By contrast, Article 16

[1] See, for example, Albrecht Weber, 'The European Charter of Fundamental Rights' (2000) 43 *German Yearbook of International Law* 101.
[2] Miguel Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in Tamara K. Hervey and Jeff Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective* (Hart 2003) 269.
[3] A.W. Heringa and Luc Verhey, 'The EU Charter: Text and Structure' (2001) 8 *Maastricht Journal of European and Comparative Law* 11, 14-15.
[4] Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *Common Market Law Review* 1201, 1213.

was absent from Heppel's outline of the articles of the new Charter which he stated created 'clear individual rights'.[5] There was also the question of whether the Charter had created new rights. The same Lord Goldsmith, speaking in 2008, stated unequivocally that the Charter had not created any new rights.[6] Hunt considered that Article 16 was simply a recognition of pre-existing EU law.[7] Yet there were a few commentators who took account of the novelty of Article 16. Anthony Lester, then-member of the House of Lords, gave the example of Article 16 as one of the 'new' rights protected by the EU Charter of Fundamental Rights.[8] Sacerdoti also included Article 16 in his list of the Charter's 'new' rights,[9] and he is one of the few commentators to refer the controversial origins of Article 16, citing the freedom 'of economic enterprise' as one of the most hotly debated rights.[10]Attuci cited Article 16 as one of the rights protected by the Charter despite its rather dubious claim to recognition as a fundamental right, noting that it was 'far from being universally recognised' as a human right.[11] Another scholar who took issue with the substantive content of Article 16 was Keith Ewing, who noted that not only did the provision fail to 'distinguish between the cornershop on the one hand and the global corporation' but that it seemed to encompass rights for legal persons, not merely individuals. He argued that:

> …it is noteworthy that article 16 does not say that 'Everyone has a right [or freedom] to conduct a business', but that 'The freedom to conduct a business... is recognised', thereby reinforcing the sense that it is the business and not the individual which bears the right. Is this the only international treaty to recognise free enterprise as a fundamental right, and so nakedly to entrench the economic rights of the corporation?[12]

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[5] Bob Heppel, 'The EU Charter of Fundamental Rights' (2001) 30(2) *Industrial Law Journal* 225, 228.
[6] Lord Goldsmith QC, 'The Charter of Fundamental Rights' *Speech to BIICL,* 15 January 2008, 1, 26.
[7] Hunt noted that:'…within the EU constitutional order, the status of certain second-generation rights appears already assured. It could be argued that rights such as those relating to freedom to conduct a business, and the right to property, and, of course the rights to free movement for economic purposes, are more deeply entrenched and afforded greater legal protection under Community law than other categories of human rights, of whatever generation.' See Jo Hunt, 'Fair and Just Working Conditions' in Tamara Hervey and Jeff Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective* (London: Hart Publishing, 2003) 45, 47.
[8] Anthony Lester, 'The EU Charter of Fundamental Rights: Its Purpose and Effectiveness' in Frances Butler (ed) *Human Rights Protection: Methods and Effectiveness* (Kluwer 2002) 197, 200.
[9] Giorgio Sacerdoti, 'The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizen's Europe' (2002) 8 *Columbia Journal of European Law* 37, 45.
[10] Ibid 42.
[11] Claudia Attucci, 'An Institutional Dialogue on common principles: reflections on the significance of the EU Charter of Fundamental Rights' in Lynn Dobson and Andreas Follesdal (eds) *Political Theory and the European Constitution* (Routledge 2004) 151, 154.
[12] Keith Ewing, *The Charter of Fundamental Rights: Waste of Time or Wasted Opportunity?* (Institute of Employment Rights 2002) 17.

More recent scholarship has identified Article 16 as both a new and unorthodox right.[13] Prassl wrote that 'the inclusion of Article 16 CFR represents a stark example of legal innovation.'[14] However, by and large, Article 16 tends to be described as a codification of existing Court of Justice case law, which is in turn derived from the constitutional traditions of the Member States.[15]

Scholarship on Article 16

In the years before the Lisbon Treaty, the Charter of Fundamental Rights of the European Union had relatively little impact. As is the common fate of non-binding legal documents, the Charter was left to languish in relative obscurity. It was cited occasionally by the Court of Justice,[16] and somewhat more frequently by Advocates General.[17] However, when it became clear that the plans for a Constitution of Europe would be shelved, the Charter of Fundamental Rights was amended slightly and re-proclaimed in December 2007. Article 6(1) of the Lisbon Treaty acknowledged the rights, freedoms, and principles of the Charter of Fundamental Rights, and once the Treaty entered into force on 1 December 2009, the Charter became a binding source of EU law. As a result, the Charter attracted renewed interest and attention from scholars, aided by the fact that references to the Charter in the case law of the Court of Justice increased exponentially.[18] Much like the other provisions of the Charter, Article 16 has now been subject to increased scrutiny.

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[13] Veneziani wrote that 'Article 16 must be considered a true novelty in the web of international legal sources and above all in the overall context of the EU's economic and legal framework.' See, Bruno Veneziani, 'Article 16 – the Freedom to Conduct a Business' in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds) *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 351. Nyman-Metcalf described Article 16 as a 'more unusual' right. See, Katrin Nyman-Metcalf, 'The Future of Universality of Rights' in Tanel Kerikmäe (ed) *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer 2013) 201.

[14] Jeremias Prassl, 'Business Freedom and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Law Studies* 189, 192.

[15] See, for example, Andrea Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration' (2013) 14(9) *German Law Journal* 1867, 1868-1869.

[16] Case T-54/99 *Max.mobil Telekommunikation Service GmbH v Commission* ECLI:EU:T:2002:20, paras 48 and 57.

[17] Juliane Kokott and Christoph Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon' (2012) 5 *Revista Romana de Drept European* 93, 94.

[18] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168; Jasper Krommendijk 'The Use of ECTHR Case Law by the CJEU after Lisbon: The View of the Luxembourg Insiders' (2015) 22 *Maastricht Journal of European and Comparative* 812.

There is general agreement that the inclusion of the freedom to conduct a business in Article 16 represents a further commitment to the European Union's capitalist, free market economy. Everson and Correia Gonçalves had written that the protection of the freedom to conduct a business may indicate a constitutional commitment to 'specified form of political economy.'[19] It has elsewhere been described as a clear commitment to 'individual economic freedom within the European order.'[20] Dorssement considered that the inclusion of Article 16 of the Charter was part of a broader trend of the constitutionalisation of capitalist principles in EU law.[21] After that, the scholarship on Article 16 can be broadly split into three camps. First, there is the literature that broadly welcomes the recognition and protection of the freedom to conduct a business as normatively desirable. Much of that scholarship anticipated that the impact of Article 16 would be limited by its qualified wording. Second, there are the scholars that were less enthusiastic about the normative foundations of economic liberty, but, much like their colleagues, considered that Article 16 was drafted in weak enough terms that it was unlikely to undermine the rights of workers or otherwise have a particularly dramatic impact. Third, there are a growing group of scholars who are not only critical of the substantive interest shielded by Article 16, but have become increasingly concerned about its potential to undermine regulatory measures, in particular labour rights.

i) Article 16 as a positive development

Amongst the first cohort of commentators are those that consider that the recognition of the freedom to conduct a business is a positive development. Article 16 is welcomed, first, because it is the formal recognition of a valuable fundamental right, and second, because of its likely instrumental outcomes, such as greater entrepreneurship, free competition, and deeper European integration. This perspective implicitly endorses the tenets of economic liberalism as an unqualified good. Leczykiewicz falls into the first category. She characterised Article 16 as a partial protection of private autonomy.[22] Citing cases such as *Scarlet Extended,* she wrote that 'after the Lisbon Treaty, and largely thanks to Article 16 of the Charter of Fundamental Rights,

[19] Michelle Everson and Rui Correia Gonçalves, 'Article 16' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2021) 464.
[20] Femke Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction? The Clash between the European Business Freedoms and the National level of Workers' Protection' (2018) 9 *European Labour Law Journal* 50, 65-66.
[21] Filip Dorssemont, 'Values and Objectives' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds) *The Lisbon Treaty and Social Europe* (Oxford: Hart Publishing 2012) 45, 54.
[22] Dorota Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) 171, 179.

private actors can enjoy a more explicit recognition of their autonomy in EU law.'[23] Oliver concluded that the drafters of the Charter were 'undoubtedly right' to recognise the freedom to conduct a business.[24] Usai highlighted the instrumental benefits of protecting the freedom to conduct a business, as a means of advancing and deepening the single market. Indeed, Usai appeared to envisage that Article 16 was best understood as a general protection for a free market economy, rather than protecting the individual interests of particular market actors.[25] He wrote that 'Article 16 CFR protects all economic and social benefits deriving from the free market..[and] a single and competitive free market always brings benefits to consumers.'[26] Usai suggested that the provision would deepen integration in the single market, challenge protectionism by the Member States and buffer competition law.[27] He also argued – rather counter-intuitively – that Article 16 of the Charter was likely to improve the recognition of social rights. Usai argued that Article 16, 'if read in light of citizenship provisions and in light of its social function, could paradoxically help make social rights more enforceable.'[28]

Dean Spielmann, former president of the European Court of Human Rights, praised the recognition of freedom to conduct a business as a core feature of liberal market economy, and viewed it as complementary addition to the existing Treaty provisions for free competition.[29] This link with the other existing provisions European Treaties and the broader goal of market integration was highlighted by other academic commentary. Nils Wahl, Judge of the Court of Justice and former Advocate General, described the freedom to conduct a business as 'the bedrock of European integration.'[30] Wahl wrote that Article 16 allowed economic operators to run their businesses 'without undue interference from the state…it is also intrinsically linked to the realisation of an internal market and to the four freedoms.'[31] Babayev considered that Article 16 could be characterised as 'the first provision to explicitly recognise the concept of

[23] Ibid 182.
[24] Peter Oliver, 'What Purpose does Article 16 Serve?' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) 281, 300.
[25] Usai (n 15) 1877. This understanding of Article 16 has not been borne out by the Courts, given that it well established as an individual enforceable right.
[26] Ibid 1870.
[27] Ibid 1881.
[28] Usai (n 15) 1881.
[29] Dean Spielmann, 'Article 16—Liberté d'Entreprise', in EU Network of Independent Experts on Fundamental Rights (eds) *Commentary of The Charter of Fundamental Rights of the European Union* (June 2006) 158.
[30] Nils Wahl, 'The Freedom to Conduct a Business' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds) *The Internal Market and Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 273.
[31] Ibid 275.

private (economic) autonomy at Union level.'[32] In respect of the overlap between free movement rights and Article 16, he concluded that 'they are both very much rooted in the idea of an individual's freedom to organise his/her economic life and accordingly, engage in legal relations of his/her own choice.'[33] Babayev pointed to the fact that, unlike the four fundamental freedoms, the freedom to conduct a business could be invoked by any individual, provided the context is governed by EU law. [34] While Article 16 and other provisions of EU law, such as the four freedoms, and Article 101 TFEU, represented a commitment to the preservation of free market principles at the heart of the internal market,[35] he considered that Article 16 went beyond the instrumentalist aim of the creation of an internal market. Article 16, he wrote, protects 'general right to individual economic self-determination.'[36]

Comparato and Micklitz also fall into the first category. They argued that some values of the private law system can be considered so foundational that they should be afforded constitutional protection and recognition. They suggested that this is the case for the principle of private autonomy, which they defined as 'the freedom of individuals to determine their legal relationships according to their free will.'[37] This is an expression of a general idea of human freedom which traditionally receives constitutional protection, but also includes specific expressions of that freedom, namely 'economic freedom and freedom of contract.'[38] Yet they stopped short of viewing Article 16 as a blanket extension of private autonomy in the classical liberal sense. Rather, they viewed Article 16 as a protection of 'regulated autonomy' which could be moulded in line with the goal of attaining EU objectives.[39] As they put it, 'the EU system was meant to integrate markets rather than simply eliminate state interventions.'[40]

Other scholars have provided descriptive accounts of the impact of the provision and the interests it shields, but have been more circumspect on the normative merits of Article 16. Yet

[32] Rufat Babayev, 'Private Autonomy at Union Level: on Article16 CFREU and Free Movement Rights' (2016) 53 *Common Market Law Review* 979, 982.
[33] Ibid 983.
[34] Ibid 988.
[35] Rufat Babayev, 'Duality of Economic Freedom Protection in the interplay of Article 16 CFR and Article 102 TFEU' (2020) 45(5) *European Law Review* 694, 696.
[36] Ibid 697.
[37] Guido Comparato and Hans-W. Micklitz, 'Regulated autonomy between market freedoms and fundamental rights in the case law of the CJEU' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) 121.
[38] Ibid.
[39] Comparato and Micklitz (n 37) 121.
[40] Ibid 151.

the absence of sustained criticism suggests an implicit acceptance that the freedom to conduct a business is deserving of the status of fundamental right. Van der Donk considered that the essence of Article 16 protected the 'continuation of economic activity.'[41] Article 16 shielded the existence and ongoing operation of a business, and that 'a measure can limit the way the economic activity is carried out as long as it does not prevent the absolute end of the economic activity.'[42] He considered that a proposed law or measure that had the effect of bringing the economic activity to an end would be unlikely to survive challenge. Yet otherwise, van der Donk concluded that Article 16 had been 'reduced to an empty shell' and was unlikely to provide any meaningful protection to applicants seeking to challenge limitations on their economic activity.[43] Van der Donk does not appear to have taken account of decisions where Article 16 *has* been successful in instances where the economic activity in question had not been brought to an end, and the legislative measure simply sought to regulate its exercise.

However, even if Van der Donk was correct to say that this is the only protection offered by Article 16, it remains a profoundly significant one. There are many instances where policies or laws enacted by the State have the effect of bringing about the end of a business or, indeed, of an industry as a whole. There are may be worthwhile reasons for state authorities to do so: the threat of climate breakdown, for example, may necessitate far-reaching restrictions on the fossil fuel industry. The State may consider that it is in the best interests of the public that a particular industry be nationalised, or privatised, or that barriers to entry to a particular industry should be reduced. If such purported measures could be successfully challenged as a violation of the freedom to conduct a business, that represents a major encroachment on the capacity of the state authorities to regulate private economic activity. One might add that the mere existence of Article 16 grants considerable leverage to private parties to persuade a Member State to halt the introduction of regulation, without the need to initiate legal proceedings, as even the threat of potential litigation has a powerful chilling effect in its capacity to alter the State's response and commitments.[44]

[41] Berdien B. E. van der Donk, 'The Freedom to Conduct a Businessas a Counterargument to Limit Platform Users' Freedom of Expression' in Steffen Hindelang and Andreas Moberg (eds) *Yearbook of Socio-Economic Constitutions 2021* (Springer 2022) 33, 48.
[42] Ibid 43.
[43] Van der Donk (n 41) 57.
[44] See, for example, Gus van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 *Journal of International Dispute Settlement* 92-116.

ii) Unconcerned by Article 16

A second category of academics were not particularly enthusiastic about the normative interests shielded by the protection of the freedom to conduct a business in Article 16, but considered that there was a limited prospect that the provision could be used to advance an aggressively deregulatory agenda. The wording of Article 16 did not give rise to a 'right' but a 'freedom'; it was 'acknowledged' rather than 'guaranteed' and it was subject to the caveat that it must be exercised 'in accordance with Union law and national laws.' Weatherill emphasised the weakness of the provision's wording, and endorsed Comparato and Micklitz's characterisation of the Court's case law as a form of 'regulated autonomy.'[45] Similarly, Gill-Pedro argued that Article 16 did not entail a right for economic operators to act as they pleased. Rather, the qualifying language of the provision limited such action to what was lawfully permitted.[46] Article 16 could not be interpreted to mean freedom from regulation *per se:* this was neither mirrored in the text of the Charter itself, nor in the case law of the Court of Justice. Markakis acknowledged that Article 16 'can be and indeed is used' by companies to target 'various regulatory requirements which are seen to stand in their way.'[47] Yet he went on to note that, as the EU Fundamental Rights Agency had pointed out, the freedom to conduct a business could bring social benefits, including an additional boost to entrepreneurship and a reduction in unemployment. The 'social dimension' of the freedom to conduct a business, he argued, should not be overlooked.[48] This is, however, rather a strange conclusion for Markakis to endorse in the midst of a discussion on *AGET Iraklis,* where Article 16 had been used to make mass redundancies easier to implement. Moreover, Markakis himself goes on to acknowledge that the ability of the EU Fundamental Rights Agency 'to engage in fresh and critical thinking' on the Charter was questionable, given that it was itself 'embedded in the EU institutional framework' and that its arguments was based on 'certain economic assumptions' common to EU institutions.[49]

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[45] Stephen Weatherill 'Use and abuse of the EU's Charter of Fundamental Rights: On the improper veneration of 'freedom of contract' (2014) 10 *European Review of Contract Law* 167–182, 180. See also, Tobias Locke, 'Article 16 CFR and the freedom to conduct a business' in Manual Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2148.

[46] Eduardo Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination' (2017) 9 *European Journal of Legal Studies* 103, 119.

[47] Menelaos Markakis, 'Can Governments Control Mass Layoffs by Employers: Economic Freedoms vs Labour Rights in Case C-201/15 *AGET Iraklis'* (2017) 13 *European Constitutional Law Review* 724, 738.

[48] Ibid 738.

[49] Ibid 739.

iii) 'Dangerously open-ended'

However, in recent times, a small number of scholars have expressed a great deal more concern about the potential scope of Article 16, and more recently, its growing influence as a deregulatory force in the case law of the Court of Justice. Dorssement has been critical of what he considered to be the 'stealthy upgrading' of economic principles to substantive fundamental rights, including Article 16.[50] He considered that it was unlikely, as a result, that the Charter of Fundamental Rights would result in a shift in the Court's existing *Viking/Laval* jurisprudence on the balance between economic rights and the right to strike.[51] Giubboni wrote that the introduction of the freedom to conduct a business 'finalis[ed] the explicitly neoliberal restyling regarding the internal market doctrine' which had been flagged by the notorious *Viking/Laval* decisions.[52] Similarly, Robin-Olivier argued that the Charter had 'bolster[ed] economic freedoms' particularly through Article 16.[53] The apparent equilibrium in the Charter between economic rights and social rights had not, she argued, prevented priority being afforded to the former.[54] Groussot and Petursson concluded that while the language of Article 16 was worded in relatively weak terms, Article 16 had the capacity to be a powerful substantive right, particularly given that the 'teloi' of Union law, as understood by the Court of Justice, was economic in nature.[55] Everson and Correria Gonçalves recognised Article 16 as 'a unique legal experiment.'[56] They argued that 'in beginning to sketch out and to defend the performative elements of the freedom to conduct business' the Court of Justice was steadily moving towards a 'neo-liberally flavoured vision of European economic activity.'[57] Veneziani wrote that, given its wording as a 'simple freedom' that was merely 'recognised,' Article 16 ought to be subject to fairly weak protections.[58] Yet despite the provision's wording, Veneziani noted that the case law had ensured that Article 16 has become a substantial 'counterweight to other fundamental rights, such as the right to the protection of privacy, health and intellectual property' as well as

[50] Filip Dorssemont, 'Values and Objectives' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds) *The Lisbon Treaty and Social Europe* (Oxford: Hart Publishing 2012) 45, 54.
[51] Ibid 59.
[52] Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 180.
[53] Sophie Robin Olivier, 'Fundamental Rights as a New Frame: Displacing the Acquis' (2018) 14 *European Constitutional Law Review* 96, 99.
[54] Ibid 104.
[55] Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak Right, Strong Court – the freedom to conduct a business and the EU Charter of Fundamental Rights' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* (Elgar 2017) 326, 344.
[56] Michelle Emerson and Rui Correia Gonçalves, 'Article 16 – Freedom to Conduct a Business' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2021) 464, 488.
[57] Ibid 481.
[58] Veneziani (n 13) 352.

for workers' rights. He suggested that the weight afforded by the Court of Justice to 'economic fundamental rights and freedoms of the EC/EU reveals the strong ideological baggage affecting its decision.'[59] With judgments such as *AGET Iraklis,* the Court of Justice was in the process of widening the scope of Article 49, influenced by Article 16. This development would 'inevitably have a negative impact' on labour rights.[60] Similarly Davies wrote that, given how Article 16 had been used in *AGET Iraklis,* 'almost any national labour law is potentially open to the charge that it infringes the rights of employers.'[61] Similarly, Prassl recognised that Article 16 was a novel right that elevated 'a dangerously open-ended notion of business freedom to the normative level of fundamental rights.'[62] He suggested that it had the potential for boundless application, as so much of employment law in particular could be characterised as an interference with economic freedom of employers, and that the provisions of the Charter are not subject to the usual doctrines that limit economic EU freedoms, such as a cross-border element or other regulatory demands. Yet even Prassl concluded that Article 16 would not be used to successfully undermine labour rights.[63]

Limitations on Article 16

To understand why the recognition of the freedom to conduct a business in the Charter was not initially considered to be an object of concern, we must turn now to examine various factors that were viewed as constraining the operation of Article 16. There were factors that were considered to limit the scope of the freedom to conduct a business specifically, including the suggestion that Article 16 was a principle rather than an individually-enforceable right, and that the proviso that the exercise of the freedom to conduct a business was subject to 'Union law and national laws and practices'. There were also indirect factors that were predicted to blunt the range of its effect, such as the various provisions in the Charter that protected workers' rights, and Article 51 of the Charter, which limits the Charter's application overall. These limitations, I suggest, have gradually lost their force. In addition, I argue that commentators largely failed to anticipate that the freedom to conduct a business would have particular success in an environment of negative integration. Moreover, as an open-ended right to carry on business activity, it can be employed with relative ease by economic actors to challenge various

[59] Ibid 364.
[60] Ibid 354.
[61] A.C.L. Davies, 'Has the Court of Justice changed its management and approach towards the social acquis?' (2018) 14 *European Constitutional Law Review* 154, 169-170.
[62] Jeremias Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *Cambridge Year Book of European Legal Studies* 1, 3.
[63] Ibid 12-16.

restrictions on their commercial activity. It is well established that well-resourced economic actors are amongst the most frequent litigators before the Court of Justice. On the sheer balance of probability, Article 16 is likely to be pleaded by litigants and analysed more extensively by the Court of Justice than other provisions of the Charter.

i) Status of principles

As noted, initially it was not clear whether Article 16 amounted to a principle of EU law, or a fully-fledged enforceable right. After all, the Charter contained a mix of both rights and principles, and while the provisions that explicitly used the language of 'rights' clearly fell into that category, it was not immediately apparent whether every provision that did not use that terminology should be considered a principle. This deliberate ambiguity seemed to be a product of the intense disagreement during the drafting of the Charter on the status of the provisions relating to social entitlements.[64] This distinction carries considerable legal consequences: the most obvious is that a principle cannot be legally enforced by an individual.[65] Article 51(1) of the Charter directed that rights be 'respect[ed]' while principles should be 'observed.' Article 52(5) clarified that principles were 'judicially cognisable only' in the interpretation of EU and national law, and in rulings on their legality. Principles, it appears, must be given effect to via national or EU legislation. Despite the significance of the right-principle categorisation, the Charter itself did not identify which provisions were rights and which were principles, and thus, it was not clear which provisions of the Charter fell into which category. The rights-or-principle conundrum provoked considerable commentary, far beyond the scope of Article 16.[66] The grounds on which certain provisions of the Charter have been classified as principles, and others as rights, has been subject to sustained criticism.[67] The actual text of the Charter is not always conclusive: as Olsson points out, the headline description in Article 27 contains the

[64] Jasper Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11(2) *European Constitutional Law Review* 321-322.
[65] Case C-356/12 *Glatzel* ECLI:EU:C:2014:350. See, for example, Petra Herzfeld Olsson, 'Possible Shielding Effects of Article 27 on Workers' Rights to Information and Consultation in the EU Charter of Fundamental Rights' (2016) 32(2) *The International Journal of Comparative Labour Law and Industrial Relations* 251, 255-259.
[66] Alicia Hinarejos '*Laval* and *Viking*: The Right to Collective Action versus EU Fundamental Freedoms' (2008) 8(4) *Human Rights Law Review* 714, 724-727; Agustín José Menéndez, 'The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the European Union' (2003) 16 *Ratio Juris* 374, 380-381; Constanze Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19(4) *European Law Journal* 457, 471.
[67] Krommendijk (n 64) 334. This distinction has been criticised as unconvincing. See, Olsson (n 65) 262. See also, Chris Hilson, 'Rights and Principles in EU Law: A Distinction Without Foundation?' (2008) 15 *Maastricht Journal of European and Comparative Law* 193.

word 'right.' The term 'principle' is only used on three occasions.[68]To add to the confusion, before the introduction of the Charter, the Court of Justice had developed a category of fundamental rights protected by the 'general principles of EU law.'[69] Even after the Charter was published, several cases made reference to the freedom to pursue economic activity as a 'general principle' of EU law.[70] There was some early speculation that Article 16 was a codified continuation of that line of case law, given that the Charter of Fundamental Rights itself created a distinction between principles and rights. However – even more confusingly – general principles of EU law carry greater legal weight than the 'principles' of the Charter, as they possess constitutional status. Thus, as Krommendijk has argued, a principle of the Charter of Fundamental Rights could never have been classified as the same *kind* of principle as a general principle of EU law.[71]

However, it was not obvious that Article 16 would be understood as an enforceable right, rather than a principle. As we will see, other provisions that used relatively similar language to Article 16, such as Article 27, have been interpreted as principles.[72] It was widely predicted that Article 16 would be categorised as a principle by the Court of Justice. It was noted that Article 16 is described as a 'freedom' not a 'right' which was considered to be significant. Article 16, Oliver wrote, had been drafted in 'almost diffident terms.'[73] Nic Shuibhne, in discussing the broader question of whether economic freedoms in EU law constitute fundamental rights, noted that Article 16 used the 'freedom' rather than the 'right' to conduct a business.[74] Everson and Correia Gonçalves placed similar weight on the wording of Article 16, and the use of 'freedom' and the inclusion of the phrase 'in accordance with Union and national law and practices.' This particular wording, they suggested, raised a presumption that the exercise of the freedom to conduct a business would be curtailed in a manner that its neighbours in Article 15 and Article 17 would not be.[75] In drawing this distinction between rights and principles contained in the Charter, Everson and Correia Gonçalves placed weight on the perspective of Lord Goldsmith

[68] Krommendijk (n 64) 330.
[69] Case 11/70 *Internationale Handelgesellschaft* ECLI:EU:C:1970:114 para 4.
[70] See for example, Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449 para 126-127.
[71] Krommendijk (n 64) 328-329.
[72] Olsson, for example, has argued that the factors that were used to justify the conclusion that Article 27 was a principle, rather than a right, applied equally to other provisions that had been held to be fundamental rights. See, Olsson (n 65) 261.
[73] Oliver (n 24) 295.
[74] Niamh Nic Shuibhne, 'The Outer Limits of EU Citizenship' in Catherine Barnard and Okeoghene Odudu (eds) *The Outer Limits of European Union Law* (Hart 2009) 183, 194.
[75] Everson and Correia Goncalves (n 19) 469.

Q.C., who had participated in the Convention (and indeed, argued for the inclusion of Article 16 in the Charter). Yet while Lord Goldsmith drew a distinction between enforceable rights and socio-economic principles, he had, in fact, described Article 16 as a 'fundamental right' in 2001.[76] Picod considered that because the text of Article 16 stated that the freedom to conduct a business was subject to 'Union laws and national laws and practices', the provision was properly considered a principle.[77] There is even recent scholarship that argues that Article 16 is more properly viewed as a principle, rather than a free-standing right.[78] In any event, this question appears to have been resolved by the case law of the Court of Justice, which clearly treats Article 16 as an enforceable right, not as a principle. Its previous case law on economic activity as a general principle of EU law appears to have largely been subsumed within its discussion of Article 16.[79] The weaker language used in Article 16 does not seem to have affected its interpretation: in later case law the Court of Justice has treated it in much the same way as any other fundamental right contained in the Charter. The prediction that Article 16 would have a limited role as a 'principle' has not come to pass.

ii) Union law and national law and practices

Another anticipated constraint on Article 16 was that the freedom to conduct a business was acknowledged 'in accordance with Union law and national law and practices.' This phrase, as we have seen in Chapter One, was added at a late stage to Article 16 precisely to ensure that the article was not unqualified.[80] In other words, 'in accordance with Union law and national law and practices' was understood as a limitation on the exercise of the freedom to conduct a business. How should the phrase 'in accordance with Union law and national law and practices' be understood? Bercusson has suggested that it appears to act as a constraint on the operation

[76] Lord Goldsmith wrote that the reference to 'national law and practices' was included to stress 'the need to respect national differences and that it is not for the Union to impose rights in this area except through recognized treaty procedures. This was a reference which was (rightly) reported at the time, extremely important to the UK and for which we had to fight very hard.' See, Goldsmith (n 4) 1213.

[77] Fabrice Picod, 'Pour un développement durable des droits fondamentaux de l'Union européenne' in Olivier de Schutter, Loic Azoulai and Ami Brav (eds) *Chemins d'Europe – Mélanges en l'honneur de Jean-Paul Jacqué* (Dalloz 2010).

[78] Klaus Lörcher, 'Interpretation and Minimum level of protection' in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds) *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 135, 149. Similarly, Dóra Gudmundsdóttir was critical of the Court of Justice's characterisation of Article 16 as a right in *Alemo-Herron,* noting that: '[t]his was despite the fact that many people would categorize this broad provision as a principle – and the ECJ has indicated that there are similarities between Article 16 EUCFR and provisions of the Solidarity Title of the Charter.' See, Dóra Gudmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' (2015) 52 *Common Market Law Review* 685, 717. See also, Veneziani (n 13) 364.

[79] Oliver (n 24) 284.

[80] Goldsmith (n 4) 1213.

of the Charter of Fundamental Rights. Yet he argued that the reference to 'national law and practices' is particularly problematic in light of the doctrine of supremacy: how could the EU Charter be limited by reference to national laws and practices?[81] Another way to interpret it is to consider it in light of the division of competences. Menéndez has argued that the phrase effectively reflected the same principle contained in Article 51, in other words that the Charter should not be understood as expanding the competence of the European Union.[82] Hinarejos has also suggested that 'in accordance with national law' means that the right at issue is recognised 'at the EU level to the extent that it is recognised by national law.'[83] Yet Article 16 has been successfully invoked in cases where it was not clear that EU law was applicable.[84] Another way of understanding the phrase 'in accordance with Union law and national law and practices' is that the entitlement to conduct a business was protected, provided it remained within the parameters laid down by law. In other words, the freedom to conduct a business is *subject to* existing EU law and national law. Gill-Pedro has argued that this was the understanding that prevailed in the Court's early interpretations of Article 16: corporate entities were entitled to conduct their activities in accordance with the law, but 'if the law did not allow them to conduct business in the way they prefer, then they could not rely on Article 16 to challenge that law.'[85] But in reality, this has proved to be a meagre qualification on Article 16. The Court of Justice has, on occasion, either overlooked or failed to implement this as a qualification, which has inevitably affected how much protection could be provided by Member States. [86]

When Article 16 had been drafted, the caveat of 'in accordance with Union law and national law and practices' had been added precisely to ensure that the remit of the provision was limited. As it turned out, it was a fairly ineffective limitation. As previously noted, this was an entirely predictable development: laws are nearly always subject to being assessed by their compatibility with fundamental rights and freedoms, rather than the other way around. The supposed limitation on Article 16 is out of kilter with the traditional understanding of

[81] Brian Bercusson, *European Labour Law* (Cambridge University Press 2009) 209.
[82] Menéndez (n 66) 385.
[83] Hinarejos (n 66) 723.
[84] Marija Bartl and Candida Leone, 'Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for Social Legislation?' in Hugh Collins (eds) *European Contract Law and the Charter of Fundamental Rights* (Cambridge University Press 2017) 113, 117.
[85] Eduardo Gill-Pedro, 'Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law' (2022) 18 *European Constitutional Law Review* 183, 191.
[86] Catherine Barnard, 'Are social 'rights' rights?' (2020) 11(4) *European Labour Law Journal* 351, 356; Gill-Pedro (n 89) 192-193. See further, discussion of Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521and Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972 in Chapter Five.

fundamental rights that a right must be subject to the parameters of law. Fundamental rights, to be effective, must shape the scope and application of existing and future laws. The value of fundamental rights is that they are a form of higher law, with the capacity to trump existing law. Laws are, in theory, supposed to respect the parameters of fundamental rights, and any infringement on a national right must usually be proportionately justified. If the Charter was subject to national laws and practices, and thus the national standard were to become the height of fundamental rights protection, the additional value provided by the Charter would be negligible.[87] National and EU laws are regularly measured by reference to their compliance with fundamental rights, rather than the other way around. The Court of Justice, for example, has affirmed that provisions of European Union law must be interpreted in a manner that is consistent with the Charter of Fundamental Rights.[88] Once it was established conclusively that Article 16 *was* a fundamental right, and not just a principle, it was inevitable that national and EU laws would be assessed by referenced to their compatibility with Article 16. To put it another way, Article 16 would not be much of a fundamental right if its exercise could always be overridden by reference to secondary law. Over time, Article 16 has in fact shaped both national and EU law.

However, it should also be noted that the reference to 'in accordance with Union law and national law and practices' is not limited to Article 16. Identical or similar wording is found throughout the Charter, particularly in the Solidarity Chapter, such as Article 27 (workers' right to information and consultation),[89] Article 28 (right to collective bargaining and right to strike),[90] Article 30 (right to protection against unjustified dismissal),[91] and Article 34 (social security benefits).[92] Yet it is striking that the phrase 'in accordance with Union law and national

[87] Bercusson (n 81) 210.
[88] See, for example, Case C-179/11 *Cimade and GISTI* ECLI:EU:C:2012:594 para 42.
[89] Article 27 provides that: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.'
[90] Article 28 provides that: 'Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'
[91] Article 30 provides that: 'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.'
[92] Article 34 states that:
'1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.'

law and practices' has been interpreted radically differently with respect to other articles of the Charter. In interpreting Article 27, which the Court understood to be a principle rather than an individually enforceable right, the Court of Justice considered that the provision meant that workers had to be provided with information and consultation 'under the conditions provided for by European law and national law and practices.'[93] Given the text of Article 27, the Court concluded that in order for the provision to be 'fully effective' it had to be 'given more specific expression' in EU or domestic law.[94] Article 27 could not be directly relied upon to show that a national law which did not comply with existing EU law should be set aside.[95] In one recent Opinion, Advocate General Szpunar, whilst acknowledging that Article 27 and Article 16 used similar wording, considered that the references were 'of a different nature.'[96]

iii) Counterbalance of workers' rights in the Charter

A further factor which may explain why Article 16 did not provoke concern amongst commentators was that the Charter of Fundamental Rights included a list of apparently comprehensive labour rights in Articles 27 to 31, as noted above. This provided reassurance that the Charter was not an openly imbalanced document, and that the freedom to conduct a business would be counterbalanced by the protection afforded to workers' rights. In fact, early commendatory praised the inclusion of a robust array of social rights and workers' rights in the Charter and predicted that it would produce a move away from the European Union's pro-market origins.[97] Many commentators operated on the (understandable) presumption that these rights would be individually enforceable.[98] Pacheco, for example, considered that Article 16 would face unavoidable limitations, both in the form of the rights of workers in Article 27 and Article 28 of the Charter of Fundamental Rights, as well as EU law and the domestic law of Member States.[99] It was even suggested that Article 27 was more robustly worded than Article 16. Veneziani pointed to the fact that workers were 'guaranteed' a right to information and consultation, while the freedom to conduct a business in Article 16 was merely 'recognised.'[100]

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[93] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* ECLI:EU:C:2014:2 para 44.
[94] Ibid para 45.
[95] *AMS* (n 93) para 48-50.
[96] C-261/20 *Thelen Technopark v MN* Opinion of Advocate General Szpunar ECLI:EU:C:2021:620 para 87.
[97] See, for example, Agustín José Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' (2002) 40(3) *JCMS* 471, 480.
[98] Marianne Gijzen, 'The Charter: A Milestone for Social Protection in Europe' (2001) 8 *Maastricht Journal of European and Comparative Law* 33, 38- 42.
[99] See, Pedro Mercado Pacheco, 'Libertades económicas y derechos fundamentales. La libertad de empresa en el ordenamiento multinivel europeo' (2012) 26 *CEFD* 341, 348-350.
[100] Veneziani (n 13) 431.

It was even anticipated that Article 16 would be subject to much the same analysis as Article 27, and rendered unenforceable by individuals. Babayev has argued that the inclusion of the term 'conditions provided for by Union law and national laws and practices' renders Article 27 sufficiently different to Article 16 to justify the fact that the former is not individually enforceable.[101] This conclusion is far from self-evident; it is difficult to understand why individual enforceability should turn on the difference in phrasing between 'conditions provided for by Union law and national law' and 'in accordance with Union law and national law.' The Court of Justice itself has acknowledged the similarity in the wording of the two provisions. However, the Court of Justice concluded in *Association de médiation sociale (AMS) v CGT* that Article 27 does not grant an individually-enforceable right.[102] To be effective, the Court concluded that Article 27 needed to be supplemented by EU or national law.[103] Article 27 is, consequently, a principle rather than a justiciable right and occupies a 'secondary status' within the Charter.[104]

With respect to the other labour rights in the Charter, Article 28 provides that workers and employers, or their representative organisations 'have the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.' They have this right 'in accordance with Union law and national law and practices'. The Court of Justice has accepted that Article 28 contains a right to engage in collective bargaining.[105] The Grand Chamber also acknowledged in both *Viking* and *Laval* that Article 28 of the Charter protected the right to take industrial action, only immediately to affirm that the 'right may none the less be subject to certain restrictions.' This was underlined by the text of Article 28 which stated that the right was to be 'protected in accordance with Community law and national law and practices.'[106] Thus, this particular phrase (the same turn of phrase that can be found in Article 16) was used to justify far-reaching limitations on Article 28. The judgment in *Laval* and its companion in

[101] Babayev (n 34) 995.
[102] *AMS* (n 93) para 49.
[103] Ibid para 45.
[104] Tonia Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 243, 251.
[105] C-271/08 *Commission v Germany* ECLI:EU:C:2010:426. See, Phil Syrpis, 'Reconciling Economic Freedoms and Social Rights – The Potential of *Commission v Germany* (Case C-271/08, Judgment of 15 July 2010)' (2011) 40(2) *Industrial Law Journal* 222.
[106] Case C-438/05 *Viking* ECLI:EU:C:2007:772, para 44; Case C-341/05 *Laval* ECLI:EU:C:2007:809 para 91.

Viking are, of course, notorious for the comparatively low weight the Court attached to the right to strike.

Article 30 protects the right of workers against unjust dismissal, again, 'in accordance with Union laws and national laws and practices.' The most pressing problem with Article 30 is that the European Union has, thus far, left the issue of dismissal of workers to be governed by the Member States. Consequently, the Court of Justice has largely declined to determine questions that relate to the compatibility of domestic employment law with Article 30 of the Charter.[107] Article 30 can arise only in the context of specific legislation on redundancy, which has limited its effectiveness.[108] Article 31(1) protects the right to safe and dignified working conditions, while Article 31(2) grants every worker the right to limited working hours and to an annual period of paid leave. Advocate General Tanchev recently held that Article 31(1) could not be directly relied upon by individuals without more specific EU or national law, given its 'open-ended' nature.[109] Unlike the provisions outlined above, Article 31(2) has been accepted as an individually enforceable right. The Court of Justice has accepted that Article 31(2) 'enshrines the "right" of all workers to an "annual period of paid leave".'[110] Recent case law has demonstrated how Article 31 has impacted existing directives on labour protection, including the Working Time Directive.[111] While Article 31(2) has been referenced in a number of the Court's judgments, as Starke wrote, the impact of the provision has largely been to bolster the Court's conclusion, rather than meaningfully affecting its logic.[112]

While the labour rights contained within the Charter seem, on its face, to be robust and extensive, in reality they have been significantly weakened by the interpretation afforded to them by the Court of Justice. Consequently, when it comes to clashes between the freedom to conduct a business and the rights afforded to workers, it is the former that has triumphed. In

[107] Joined Cases C-488-491/12 and C-526/12 *Nagy* ECLI:EU:C:2013:703 para 16.
[108] Witschen cites the Acquired Rights Directive or the Whistleblower Directive. See, Stefan Witschen, 'Which Labour Rights Are Fundamental Rights? Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2023) 39(2) *International Journal of Comparative Labour Law and Industrial Relations* 221, 223.
[109] Case C-232/20 *NP v Daimler AG* ECLI:EU:C:2010:712 Opinion of Advocate General Tanchev para 65-66. This aspect was not addressed by the Court in its judgment.
[110] C-569/16 and C-570/16 *Bauer and Willmeroth* ECLI:EU:C:2018:871.
[111] C-233/20 *WD v job-medium GmbH* ECLI:EU:C:2021:960 para 35.
[112] Max Fabian Starke, 'Fundamental Rights before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm?' *European Contract Law and the Charter of Fundamental Rights* (Cambridge University Press 2018) 93, 105. He cites Case C-214/10 *KHS AG v Winfried Schulte* ECLI:EU:C:2011:761; Joined Cases C-229/11 and C-230/11 *Alexander Heimann and Konstantin Toltschin v Kaiser GmbH* ECLI:EU:C:2012:693.

the wake of this decision, it was anticipated that, in fact, economic actors would be able to rely on rights such as the freedom to conduct a business in Article 16 with relative ease, rather than rights such as the right to collective bargaining in Article 28.[113] This prediction has been borne out by the case law. For example, in *AGET Iraklis,* the Court of Justice concluded that Greek national legislation that required authorisation from the Minister for Labour to approve collective redundancies constituted a breach of Article 16, on the basis that the circumstances in which such authorisation could be refused (the interests of the national economy, the labour market or the circumstances of the company) were too broad. Article 30 is only briefly mentioned, where it acknowledges that any national law imposing a framework for collective redundancies had to strike a fair balance between the interests of workers and employers. This did not affect the Court's ultimate conclusion.[114]

It is certainly striking that for such similarly-worded provisions, Article 16 has been interpreted as having the status of a fully-fledged enforceable right, while the provisions relating to workers' rights have been hollowed out. One judgment, as Starke has pointed out, could be explained away, but as the Court of Justice has opted not to apply other social rights contained in the Charter 'there seems to be more to it.'[115] A similar conclusion was reached by Veneziani, who considered that the Court of Justice was affected by a 'strong ideological baggage affecting its decisions' which sought 'to protect the position of business in a competitive market.'[116] The net result is that the protections the Charter affords to workers have, perhaps, transpired to be weaker than the drafters envisaged, while the protection afforded to the freedom to conduct a business has become more robust than had previously been imagined. The end result, Oliver suggested, was that the Charter of Fundamental Rights prioritised economic rights even more than the Treaties of the European Union.[117]

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[113] Novitz (n 104) 251.
[114] C201/15 *AGET Iraklis* ECLI:EU:C:2016:972 para 89. Femke Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction? The Clash between the European Business Freedoms and the National level of Workers' Protection' (2018) 9 *European Labour Law Journal* 50,70. See also, Simon Deakin, 'In Search of the EU's Social Constitution: Using the Charter to Recalibrate Social and Economic Rights' in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds) *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Oxford, 2019) 53, 70; Dagmar Schiek, 'Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market' (2017) 13 *European Constitutional Law Review* 611, 635.
[115] Starke (n 112) 110.
[116] Veneziani (n 13) 364.
[117] Peter Oliver, 'Companies and their Fundamental Rights: A Comparative Perspective' (2015) 64 *International and Comparative Law Quarterly* 661, 679-680.

iv) Article 51 of the Charter

The application of the Charter of Fundamental Rights was considered to be relatively constrained. Article 51(1) of the Charter of Fundamental Rights clarified that the provisions of the Charter was addressed to the Member States only when they were implementing EU law, stating that:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Thus, the Charter of Fundamental Rights applies to the institutions of the European Union at all times, which includes the main organs of the EU, such as the European Parliament, Commission and Council, and of course, the Court of Justice.[118] It also includes the range of agencies and bodies that derive their authority from EU law, such as the European Ombudsman, the EU Fundamental Rights Agency and Europol. While the Charter of Fundamental Rights only applied to the Member States when they were implementing EU law, the Member States were required to respect the fundamental rights and observe the principles contained in the Charter, and promote their application.[119] It was initially anticipated that Article 51(1) would limit the application of the Charter to quite narrow parameters: namely where Member States were implementing EU law. However, pre-Charter case law had established that Member States were bound to respect fundamental rights, not just while implementing EU law, but when they act 'within the scope of application' of EU law.[120] This appeared to be echoed by the

[118] This arose in C-370/12 *Pringle v Government of Ireland* Opinion of Advocate General Kokott ECLI:EU:C:2012:675. While it was found that the ESM was an intergovernmental agreement that was external to EU law, the Advocate General's Opinion clearly noted the European Commission was bound by the Charter of Fundamental Rights. The Court of Justice did not address the issue directly but accepted this position in Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd v Commission and European Central Bank* ECLI:EU:C:2016:701.

[119] The question as to whether the requirement to 'observe' principles and 'respect' rights creates two different standards has also been the source of some debate. See, Krommendijk (n 64) 334-335.

[120] Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333 para 75. The Court noted here that where 'a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR..' See also, Case 5/88 *Wachauf* ECLI:EU:C:1989:321; Case C-260/89 *ERT* ECLI:EU:C:1991:254; Case C-309/96 *Annibaldi* ECLI:EU:C:1997:631.

Explanations to Article 51, which state that: 'As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.'

There was, consequently, some debate as to whether Article 51 of the Charter provided for a more limited application for fundamental rights.[121] Writing in 2001, De Búrca noted that the wording of Article 51 was 'clearly narrower in some ways than the existing case law of the Court of Justice.'[122] Lord Goldsmith clearly considered that the narrower option applied; he wrote in 2003 that the Charter was primarily address to the EU institutions and not the Member States. He explained that Member States were subject to the Charter only insofar as they were implementing EU law, and that when they acted in that capacity, they were serving as 'agents of the Community.'[123] Yet he stressed that 'in areas of national competence, the Charter is not intended to affect Member States…this is critical.'[124] However, the judgment of the Grand Chamber in *Åkerberg Fransson* provided an authoritative answer to this question, as the Court confirmed that there was no distinction between 'implementation' and 'scope of application.'[125] The Court confirmed that the Charter did not adopt a narrower threshold for the application of fundamental rights, and that the Charter of Fundamental Rights simply continued the standard established in pre-existing case law.[126] The Court affirmed that 'the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.'[127] Moreover, the Court's judgment in *Pfleger* has clarified that where Member States derogate from the free movement provisions, any such restrictions must be compatible with the fundamental rights guaranteed by the Charter, and Article 15, 16 and 17 of the Charter are particularly likely to be affected.[128] Sarmiento has argued that the Member States are now

[121] Arguing for a wider application of the Charter, see Sara 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(5) *Common Market Law Review* 1565, 1584. See generally, Marek Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?' *EUI Working Paper Law 2012/22* 1, 2.
[122] Gráinne de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26(2) *European Law Review* 126, 137.
[123] Goldsmith (n 4) 1204-1205.
[124] Ibid 1205.
[125] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.
[126] See, Emily Hancox, 'The meaning of 'implementing' EU law under Article 51(1) of the Charter: *Åkerberg Fransson'* (2013) 50 *Common Market Law Review* 1411. See also, Nicole Lazzerini, 'The Scope and Efffects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice' in Giuseppe Palmisano (eds) *Making the Charter of Fundamental Rights a Living Instrument* (Brill 2014) 30, 39-44.
[127] *Åkerberg* (n 125) para 21.
[128] Case C-390/12 *Pfleger* EU:C:2014:281 para 35–36. As Prassl has argued, Article 16 has 'the potential to turn the received role of fundamental rights as a counterbalance to other elements of Union law, such as the provisions

subject to the Charter in instances where they are mandated to implement an aspect of EU law, where they opt to do so, and where national courts are providing remedies to litigants to ensure the effectiveness of EU law.[129] It has also been suggested that the interpretation of Article 51, and what constitutes 'implementing EU law' has varied by subject matter. Spaventa has argued that the Court of Justice has adopted a wider definition of 'implementing EU law' in areas which touches upon the EU internal market.[130] Koukiadaki has noted that in cases involving Article 16, the Court of Justice has adopted a broad interpretation of Article 51 to allow the Court to review national provisions.[131] Citing cases such as *Alemo-Herron,* she noted that the Court was prepared to rely on Article 16 despite the fact that the Directive specifically allowed Member States to go beyond minimum harmonisation and provide additional protection to workers. One need only look to the recent case of *Commission v Hungary,* where the Grand Chamber was prepared to accept that the implementation of the General Agreement on Trade Services ('GATS') formed part of EU law, and that as the national law constituted a derogation from the freedom of establishment, it had to comply with fundamental rights; in particular, the freedom to conduct a business in Article 16.[132] In short, the concept of 'implementing EU law' appears only to cover an ever-increasing breath of situations, even those where Member States might have safely assumed they were acting within their national competences.[133]

Wording of Article 16

If the factors outlined above led to Article 16 being widely under-estimated, it is worth considering some elements of Article 16 that ought to have provoked greater critical reflection on its potential impact. The first issue is that of the wording. As outlined above, most scholars considered the language of Article 16 to be weakly worded, prompting little cause for concern. Ewing was one of the few scholars who was highly critical of the inclusion of the freedom to

on Free Movement, on its head.' Jeremias Prassl, 'Business Freedom and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Law Studies* 189, 191.

[129] Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267, 1280-1285.

[130] Eleanor Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures', PE 556.930 (European Parliament 2016).

[131] Aristea Koukiadaki, 'Application (Article 51) and Limitations (Article 52(1))' in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds) *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Oxford: Hart 2019) 101, 111.

[132] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792 para 212-215. See, Ulla Neergaard and Sybe de Vries, 'The Interaction between Free Movement Law and Fundamental Rights in the (Digital) Internal Market' *Utrecht Centre for Regulation and Enforcement in Europe Working Papers* 5 September 2023 1, 10-11.

[133] Aida Torres Pérez, 'Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?' (2020) 22 *Cambridge Yearbook of European Legal Studies* 279, 283.

conduct a business when the Charter was first published. He was also the first to point to the significance of the fact that the provision was drafted in the passive form – the freedom to conduct a business *is recognised* – rather than a wording that affirmed that 'everyone has the freedom to conduct a business.' Using the former phraseology, Ewing argued, ensured that corporate entities could avail of the provision with relative ease. One might add that the wording of Article 16 is particularly striking given that the formula of 'Everyone has the right to…' is used throughout Title II of the Charter.[134] Article 16 is a deliberate departure from that wording, and suggests a desire to craft an entitlement that is not just limited to human persons, as the use of the term 'everyone' might have suggested. This has been explicitly recognised: most recently, in her Opinion in *MAX7 Design Kft.* Advocate General Kokott noted that 'In view of the fact that Article 16 of the Charter is drafted in impersonal terms…it follows that legal persons such as the applicant also fall within the personal scope of those fundamental rights.'[135] Of course, it may have been that the drafters preferred to use a weaker sounding term – freedom – rather than the more robust 'right'. Yet as Ewing pointed out, had the provision followed the standard formula of Title II, and stated that 'Everyone has the right to conduct a business' a corporate entity or non-legal person might have had to exert some effort to demonstrate that it could rely on the provision.

The choice of the term 'conduct a business' merits consideration. The drafters could have used an alternative, narrower phrasing; for example, that 'the freedom to establish a business is recognised.' This would have protected the freedom to set up and open a business without discrimination or arbitrary restrictions. Indeed, as outlined in Chapter One, during the Convention process, a draft Article 30(2) had provided that 'Every citizen of the Union has the right to set up a business and provide services.' Of course, Article 49 TFEU already provides this form of protection to undertakings seeking to open establishments in other Member States. But such a hypothetical provision could have provided for a protection of this kind without the

[134] Article 6 (liberty), Article 7 (respect for private and family life), Article 8 (protection of personal data), Article 10 (freedom of conscience and religion), Article 11 (freedom of expression), Article 12 (freedom of assembly) Article 14 (education), Article 15 (freedom to choose an occupation) and Article 17 (private property), although there are some exceptions, such as Article 9, which states that 'the right to marry and found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.' This difference in wording has been acknowledged by the Court; see for example Case C-348/12 *Council v Kala Naft* ECLI:EU:C:2013:776 para 123; Case C-566/17 *Związek Gmin Zagłębia Miedziowego w Polkowicach v Szef Krajowej Administracji Skarbowej* Opinion of Advocate General Sharpston ECLI:EU:C:2018:995.

[135] Case C-519/22 *Max7 Design Kft v Nemzeti* Opinion of Advocate General Kokott para. 39. See also Case C-348/12 *Council v Kala Naft* ECLI:EU:C:2013:776 para 123; Case C-566/17 *Związek Gmin Zagłębia Miedziowego w Polkowicach v Szef Krajowej Administracji Skarbowej* Opinion of Advocate General Sharpston ECLI:EU:C:2018:995.

need to demonstrate a cross-border element. However, ultimately the drafters opted to use a wording that was far broader: the freedom to conduct a business. This far goes beyond the entitlement to *open* a business. Instead, protection is afforded to how the business is *conducted.* 'Conduct' has a few slightly different meanings in English. How something is conducted refers to how it is organised or carried out. How one conducts oneself refers to a person's behaviour and actions: 'he conducted himself well under the circumstances.' It need not, of course, only refer to a person. An organisation, for example, may conduct itself in a particular way. 'Conduct' is broad enough to encompass how any form of business activity is directed and administered, and 'a business' immediately afterwards indicates that the broad array of conduct applies to that carried out by a specific commercial entity. Of course, not every commercial operation will have a legal company in existence. However, the provision is certainly conducive to being invoked by non-legal persons. The freedom *to conduct a business* suggests that the protection afforded by Article 16 *prima facie* protection to the daily organisation, management and carrying out of business by commercial entities. This suggests that potentially every decision made in the course of the operation of the business has *prima facie* protection: a far more wide-ranging and malleable entitlement. Anything that is done in furtherance of the business activities is accepted as engaging the freedom to conduct a business, even if the Court has not always accepted that the restrictions constitute a violation of Article 16.

Negative integration

There is another potential explanation for why Article 16 has had a greater impact than was originally supposed. On paper, the freedom to conduct a business did not appear to be more strongly worded than several other provisions, such as the right of workers and their representatives to receive information in Article 27 or the right to negotiate and take industrial action in Article 28. Yet Article 16 has proved to be more robust than either of these rights, and this may be due to the fact that the latter right fits comfortably within the European Union's existing dominant economic and legal framework; the former rights do not. Articles 27 to 31 of the Charter face an uphill battle, as multiple forces seek to limit the establishment and development of these rights, as the dominant framework seeks to counteract any entitlement that clashes with it. By contrast, the freedom to conduct a business is a seamless continuation of the EU's pro-market orientation. Article 16 is a broad, far-reaching right to conduct a business, without the constraints of other, pre-existing economic rights within the EU legal order, as there is no need to demonstrate the existence of a cross-border element to trigger its

jurisdiction. As Usai wrote, the application of Article 16 is unconditional, and available to all, provided that Union law is at stake.[136] Another example is the scope of activity brought within the remit of Article 16, as there does not appear to be any constraint on what types of economic activity come within the *prima facie* scope of the freedom to conduct a business. There is no requirement that the decision or activity in question possess any degree of weight or significance: provided that the business wishes the activity to be carried out in a particular way.

As outlined in Chapter One, Article 16 may be classified as a negatively orientated right. But it could also be considered to be 'negative' in a another sense. Fritz Scharpf famously described the European Union's pro-market orientation as one that was aided by the process of 'negative integration.'[137] This was the process whereby barriers to cross-border economic activity were removed or struck down by the Court of Justice. Market integration was achieved, in other words, by eradicating national laws and regulations, which aided the spread of economic liberalism. Positive integration, in the form of redistributive social policies, could not counterbalance the effects of negative integration because it required a degree of political co-operation that the European Union lacked. These factors worked in tandem to undermine social policies at a national level, and stymied attempts to recreate similar policies in the EU. Consequently, the EU was persistently market-orientated. Obstacles to the free flow of cross-border economic activity were eradicated, leading to increased liberalisation of market activity. The Court of Justice played a critical role in advancing integration by law, once the doctrines of direct effect and of EU law supremacy had been established in *Van Gen den Loos* and *Costa v ENEL.*[138] Since the decision in *Dassonville,* any national law or regulation that affected trade was considered to be a restriction on cross-border trade.[139] Unlike the decisions of national courts, the judgments of the Court of Justice were almost impossible to reverse by means other than the Court itself altering its position in a later cases. To reverse the effect of an unpopular judgment, Member States would have to result to amending the Treaties, which in practice was nearly impossible. For Member States that wished to remain a part of the Union, there was no plausible means for the Member States to avoid or resist the process of integration through law. Over time, the scope of the influence of the Court of Justice expanded until there was 'no area

[136] Andrea Usai, 'Private autonomy at Union level: on Article 16 CFREU and Free Movement Rights' (2016) 53 *Common Market Law Review* 979, 988. See also, Giubboni (n 52) 183.
[137] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).
[138] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1; Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.
[139] Fritz Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'' (2010) 8 *Socio-Economic Review* 211, 217. Case 8/74 *Dassonville* ECLI:EU:C:1974:82.

of national law, institutions and practices' that 'remained immune to the potential reach of European economic liberties and the rules of undistorted market competition.'[140]

For Scharpf, integration through law had been possible because, since *Van Gend en Loos,* the Court had transformed the commitment of the Member States to a common market into free-standing rights exercisable by individuals and corporations against the Member States. Several significant consequences flowed from this. Scharpf pointed out that the Court of Justice receives a 'skewed sample' as it mainly hears cases from parties who have a significant interest in challenging existing laws. There is an inevitable bias, in other words, towards pro-liberalisation.[141] There will always be the 'persistent push of liberalising interests searching for new obstacles to remove.'[142] This is exacerbated by the fact that parties with both the resources and access to high quality legal advice are usually larger economic actors, whose incentive to bring any legal challenge will usually be the promise of greater profitability if a particular law or practice can be successfully challenged. The dominance of economic actors as litigators before the Court of Justice has been widely documented.[143] As Morvillo and Weimer have written, 'litigation is an increasingly appealing strategy' for these actors, as a successful challenge not only removes the offending measure altogether, but deter future regulatory action way of a chilling effect.[144] Scharpf's negative integration thesis helps us to understand why Article 16 may have had a greater impact than was originally anticipated. The protection of the freedom to conduct a business in the Charter is another legal mechanism that can be used by economic actors to challenge inconvenient laws and regulation, and thus contribute to the broader drive towards market liberalisation. Article 16, when introduced into that environment, has had a degree of success because it fits comfortably within that context, and can be used as a tool of negative integration.

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[140] Scharpf (n 137) 220.
[141] Ibid 221.
[142] Scharpf (n 137) 222.
[143] See, Carol Harlow 'Access to Justice as a Human Right: The European Convention and the European Union' in in Philip Alston (ed) *The EU and Human Rights* (Oxford University Press 1999) 187, 195–197. See also, Christopher Harding, 'Who goes to court in Europe: An analysis of litigation against the European community' (1992) 19(2) *European Law Review* 105. See also, Vittorio Olgiati, 'The EU Charter of Fundamental Rights. Text and context to the rise of a 'public interest' EU- oriented European lawyer' (2002) 9(3) *International Journal of the Legal Profession* 235, 243-246.
[144] Marta Morvillo and Maria Weimer, 'Who shapes the CJEU regulatory jurisprudence? On the epistemic power of economic actors and ways to counter it' (2022) 1 *European Law Open* 510, 518. See also, Konstantinos Alexandris Polomarkakis, 'Social policy and the judicial making of Europe: capital, social mobilisation and minority social influence' (2022) 1 *European Law Open* 257, 268.

Why should Article 16 be a fundamental right, and who can rely on it?

Why should conducting a business be classified as a fundamental right? Both instrumental and intrinsic rationales have been offered by commentators for the recognition of Article 16 in the Charter. The instrumental justifications are that Article 16 demonstrates a commitment to the free market economy, which in turn produces benefits for wider society. The European Union Agency for Fundamental Rights, for example, wrote that the recognition of the freedom to conduct a business was vital for 'sustainable social and economic development.'[145] Usai considered that Article 16 ensured the protection of 'all economic and social benefits deriving from the free market..[and] a single and competitive free market always brings benefits to consumers.'[146] The suggestion that a free market brings with it automatic benefits is, of course, highly contested, but one might point out that, in any event, the economic structure of the single market has been long established in the Treaties. However, in practice, Article 16 carries significantly more impact when it is relied on as an individually justiciable right. One of the presumptions underpinning the theoretical justification for the existence of a freedom to conduct business is that it is intrinsically valuable, as it represents an exercise of human autonomy that is vital for individual self-actualisation. More than a socially desirable good, it is described in the same terms as an act that is crucial to human development: the same justifications that are often given for the right to free speech, for example, or the freedom of religion. As outlined above, Article 16 was welcomed by some commentators for its protection of autonomy in private economic activity. In its extended report on the provisions of Article 16, the EU Agency for Fundamental Rights wrote that: 'The essence of the freedom to conduct a business is to enable individual aspirations and expression to flourish, and to promote entrepreneurship and innovation.'[147] Its primary aim, the EU Agency wrote, is 'to safeguard the right of each person in the EU to pursue a business without being subject to either discrimination or disproportionate restrictions.'[148] Advocate General Nils Wahl argued that 'its purposive role as a normative source is to safeguard individuals' liberty to express their own interests, free will and rational choices in business endeavours….[A]rt. 16 protects this form of liberty as an end in itself.'[149]

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[145] European Union Agency for Fundamental Rights, *Freedom to conduct a business: exploring the dimensions of a fundamental right* (Publications Office of the European Union 2015) 4.

[146] Andrea Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration' (2013) 14(9) *German Law Journal* 1867, 1870.

[147] European Union Agency for Fundamental Rights, *Freedom to conduct a business: exploring the dimensions of a fundamental right* (Publications Office of the European Union 2015) 4.

[148] Ibid 21.

[149] Wahl (n 30) 273, 276.

The text of Article 16, as Oliver notes, does not tell us what entities are entitled to invoke it. Natural persons can, and he suggests it is clearly the case that legal persons can as well.[150] But limiting Article 16 to natural persons, he acknowledges, would render the provision 'largely ineffective.'[151] This rather remarkable admission exposes the contradiction at play here. Even though one of the justifications provided for Article 16 is that of individual freedom, in reality it is overwhelmingly legal persons – in particular, profit-making corporate entities - that are reaping the benefit of those provisions.[152] Oliver's suggestion that the recognition of the freedom to conduct a business is essential for companies to operate is difficult to square with the fact Article 16, along with the rest of the Charter, only became legally enforceable in 2009.[153] It could scarcely be seriously suggested that undertakings struggled to operate in the EU before that time. Oliver has further argued that the fundamental rights of companies ought to be protected 'not merely in their own interest but in the public interest.'[154] Oliver gave the example of the Yukos Oil and Gas Company, which was forcibly targeted and acquired by the Russian government in 2003. It would, of course, be highly undesirable if a company's assets could be arbitrarily plundered at random by those in authority. However, it is not at all clear that the recognition of the freedom to conduct a business is necessary to avoid such scenarios. First, such acts of forcible acquisition in the absence of fair procedures would clearly be prohibited by other provisions of the Charter, such as Article 17 (right to property) and Article 47 (right to an effective remedy). This is underscored by the fact that the freedom to conduct a business is not a right that has been recognised by other international human rights instruments or national constitutions. As previously outlined, the European Convention on Human Rights, for example, does not protect any equivalent right, but does contain protections for private property rights, as well as extensive procedural rights, and of course, Yukos successfully relied on those rights in its proceedings against Russia before the Strasbourg Court.[155]

Second, it should be noted that Oliver extrapolated from a very unusual example to conclude that it is in the interests of the wider public to protect the fundamental rights of companies. Yet the very opposite is more likely to be the case: the interests of companies and the interests of

[150] Oliver (n 24) 296.
[151] Ibid 297.
[152] See, Figure 1 of the Appendix.
[153] Oliver (n 117) 695.
[154] Ibid 662.
[155] *Yukos v Russian Federation* (2014) 54 EHRR 19.

the wider public are often radically at odds. When it comes to the use of freedom to conduct a business before the Court of Justice, as outlined in Figure 1 in the Appendix, Article 16 is not regularly employed to defend against arbitrary or indiscriminate state interference or acquisition. Rather, the common pattern that emerges from the case law involves legal persons challenging a legislature or regulatory measure that affects how their business operations will be carried out. The regulatory measures that companies have attempted to classify as violations of their rights under Article 16 have been introduced to benefit the wider public.[156] The only means that this justification and practice can be reconciled is if regulation of economic activity is characterised *as* interference. This is a highly contestable characterisation, and one that belies the concerted efforts the state, or indeed, the European Union, must engage in to facilitate the continued operation of a 'free' market.[157] This understanding of the freedom to conduct a business draws from concepts of economic liberty that views the marketplace as the site of freedom and opportunity, where minimal regulation or intervention is the epitome of economic liberty. From this perspective, the marketplace is the ultimate guarantor of liberty.[158] Little wonder, then, that the Court of Justice begins from a premise of viewing social rights as 'restrictions' and economic activity as 'freedom' in its judgments.[159] But even more significantly, the vision of 'economic liberty' advanced is divorced from the realities of the capitalist system, where, as Piketty has compellingly argued, those who depend on assets for their wealth will always be wealthier than wage earners.[160] Conceptualising 'liberty' as minimal restrictions on market activity does not take account of immense inequality of bargaining power between market actors. As O'Shea has pointed out, advocates for economic liberty fail to explain why there is less economic freedom in a system where, for example, minimum standards are stipulated in a contract of employment than one in which workers do not receive any basic standards of protection. Such a vision of economic liberty is perfectly compatible with precarious work, poverty, and domination by the economic might of others. In effect, it

[156] As Chapter Two outlined, the majority of the constitutions of the Member States acknowledge private economic activity with the express purpose of ensuring that its operation is subject to the wider public interest.
[157] As Hesselink writes, '…modern markets generally depend on law. This is the case not only for 'regulated' markets but also for so-called "free" markets.' See, Martijn W. Hesselink, 'Alienation commodification: a critique of the role of EU consumer law' (2023) 2 *European Law Open* 405, 407.
[158] Jed Purdy, 'Neoliberal Constitutionalism: Lochnerism for a new Economy' (2014) 77 *Law and Contemporary Problems* 195, 203. Emberland notes that international human rights law owes a debt to classic liberalism insofar as 'economic freedom in terms of private ownership is a premise for liberty.' See, Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006) 2.
[159] See, Simon Deakin, 'In search of the EU's Social Constitution: Using the Charter to Recalibrate Social and Economic Rights' in Filip Dorssement, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds) *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 74.
[160] Thomas Piketty, *Capital in the 21st Century* (Harvard University Press 2014).

means greater economic freedom for one, more powerful set of actors and not for the larger, and comparatively weaker group.[161]

Nik de Boer, adopting a Rawlsian conception of justice, argues that some forms of market activity must be characterised as fundamental rights in order satisfy the formal grant of equality demanded by a Rawlsian conception of justice.[162] He justifies the exercise of fundamental freedoms to corporations on the basis that legal persons, he concludes, are no more than groups of individuals.[163] Consequently, any discrimination against companies, he states, inevitably means discrimination against individuals. But this perspective fails to address several pertinent issues. It also fails to acknowledge the specific reality of how modern companies are organised. One could argue that the fundamental right being exercised by the company is, in reality, the right belonging to the shareholders.[164] But the shareholders do not own the company: they own individual factions of the company. Moreover, shareholders do not control the day-to-day management of the company, which is the responsibility of the directors. As a result, it is difficult to categorise the shareholders as the exercisers of the company's freedom, since they have little involvement with any aspect of the company's ordinary activities. As Gill-Pedro has argued, how can they hold the freedom to conduct a business when they do not 'conduct' any of the companies normal activities?[165]

There are also important differences why we might wish to treat companies and human persons differently, particularly when it comes to the exercise of fundamental rights.[166] The vision of corporations as voluntary associations of natural persons is a relatively recent invention. The history of the legal corporation has seen it morph from a government entity to a 'private actor' as constituted by liberal legal doctrine.[167] The vision of a corporation as no more than a group of equal individuals is a simplistic characterisation that underpins the logic of decisions such

[161] Thomas O'Shea, 'What is Economic Liberty?' 48(2) (2020) *Philosophical Topics* 203, 206-0.
[162] Nik de Boer, 'Fundamental Rights and the EU Internal Market: Just How Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy' (2013) 9 *Utrecht Law Review* 148.
[163] Ibid 156.
[164] See, Martijn W. Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law' in Hugh Collins (ed) *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 167, 194.
[165] Eduardo Gill-Pedro, 'Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law' (2022) 18 *European Constitutional Law Review* 183,
[166] For a defence of extending fundamental rights to legal persons, see the comments of Advocate General Bot in Case C-194/16 *Bolagsupplysningen OÜ Ingrid Ilsjan* ECLI:EU:C:2017:554 para 48-60.
[167] David Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 *American Political Science Review* 139, 154.

as *Citizens United,*[168] and it obscures the complexity and hierarchy of the corporate form, as well as its artificial origins.[169] Corporations, unlike other group formations – families, voluntary associations, religious groups, social movements – cannot be constituted without legal recognition and backing.[170] As one group of scholars have argued, the concept of legal personality embeds corporations as 'hierarchical organisations' as it is 'the act of incorporation and creation of personhood separate from the economic capital that forms the economic actor as a legal entity.'[171] Gill-Pedro has argued that there may be occasions where the freedom of a corporate entity could be justified in order to advance the freedom of human beings: for example, protecting a religious organisation as a legal entity may be necessary to protect the freedom of its members. Yet this is not the kind of issue that tends to arise in the case law in Article 16; the undertaking is usually defending its interests as a corporate entity, not shielding any individual human beings.[172] Greater freedom for corporate entities does not necessarily entail greater freedom for human persons. Hesselink is one of the few scholars who has questioned the normative basis of the freedom to conduct a business as a right. Hesselink does not dispute the recognition of the freedom to conduct a business *per se* as a fundamental right, but rather the extension of such a right to non-natural persons. He pointed to the Explanations to the Charter, which explicitly state that 'the dignity of the human persons is part of the substance of the rights laid down in this Charter.' Article 16 could contain a human right to conduct a business, but such a right could not be exercised by a legal entity, such as a company. Alternatively, Article 16 did not protect a human right, meaning that 'its status and normative weight is (or should be) much lower.'[173]

Empirical evidence suggests that it is, overwhelmingly, legal persons that have successfully relied on Article 16. It has long been acknowledged that these entities are best placed to bring expensive, time-consuming litigation,[174] and that individuals can be at a disadvantage during

[168] Ibid 155.
[169] Ibid 140.
[170] Ibid.
[171] Anna Beckers, Klaas Hendrik Eller and Poul F. Kjaer, 'The transformative law of political economy in Europe' (2022) 1 *European Law Open* 749, 753.
[172] Ibid 201.
[173] Hesselink (n 164) 194.
[174] See, Louisa Boulaziz, Silje Synnøve Lyder Hermansen, and Tommaso Pavone, 'Instrument of Power or Weapon of the Weak? Judicial Entrepreneurship and Party Capability at the European Court of Justice' *Draft Paper Presented at the ECPR's Pre-Conference Workshop, 'European Legal Mobilization'*, 7 June 2022, Rome 18-21; Carol Harlow 'Access to Justice as a Human Right: The European Convention and the European Union' in Philip Alston (ed) *The EU and Human Rights* (Oxford University Press 1999) 187, 195–197; Christopher Harding, 'Who goes to court in Europe: An analysis of litigation against the European community' (1992) 19(2) *European Law Review* 105; Vittorio Olgiati, 'The EU Charter of Fundamental Rights. Text and context to the rise

preliminary reference proceedings.[175] Writing in 2022, Gill-Pedro wrote that of 102 relevant cases that included discussion of the 'freedom to conduct a business', 97 of those cases were taken by companies or corporate entities.[176] Figure 1 of the Appendix illustrates the high portion of cases involving Article 16 that were taken by legal persons, rather than by individuals. Moreover, a provision as broad as Article 16 is useful insofar as it can be regularly pleaded by economic actors, either independently or in conjunction with the freedom of establishment or other free movement provisions. This ensures that the Court of Justice has greater opportunities to consider and analyse the freedom to conduct a business. In 2016, the last year in which this analysis was carried out by the European Commission, Article 16 was found to make up 4% of the references to the Charter in decisions of the Court of Justice.[177] In the abstract, this figure may sound relatively low, but some context helps to demonstrate its popularity. In 2016, Article 47 (the right to an effective remedy - 20%) was the most commonly cited provision of the Charter, followed by Article 41 (the right to good administration – 17%), Article 21 (non-discrimination – 9%) Article 17 (the right to private property – 7%) and Article 48 (the presumption of innocence – 6%) and Article 51 (jurisdiction of Charter). The most commonly-cited rights are effectively rights of fair procedure (Article 47, Article 41, Article 21) and criminal process (Article 48). Yet Article 16 is one of the most popular substantive rights, surpassed only by another economic right, the right to private property. These percentages, it should also be noted, have been relatively consistent over time. In 2013, Article 16 made up 3% of the Court's reference to particular rights within the Charter, while Article 47, Article 41 and Article 17 were the three most commonly cited rights.[178] In 2015, Article 16 made up 2% of the Court's reference to particular rights, while Article 47, Article 41 and Article 52 (scope and interpretation of Charter rights) were three most-referenced rights.[179]

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of a 'public interest' EU- oriented European lawyer' (2002) 9(3) *International Journal of the Legal Profession* 235, 243-246.

[175] Virginia Passalacqua and Francesco Costamagna, 'The law and facts of the preliminary reference procedure: a critical assessment of the EU Court of Justice's source of knowledge' (2023) 2 *European Law Open* 322, 337. It should be noted, however, that while companies may be more capable of engaging in litigation, cases involving individuals have a high rate of success before the Court of Justice; see Louisa Boulaziz, Silje Synnøve Lyder Hermansen, and Tommaso Pavone, 'Instrument of Power or Weapon of the Weak? Judicial Entrepreneurship and Party Capability at the European Court of Justice' *Draft Paper Presented at the ECPR's Pre-Conference Workshop, 'European Legal Mobilization'* (7 June 2022) 21-24.

[176] See, Eduardo Gill-Pedro, 'Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law' (2022) 18 *European Constitutional Law Review* 183, 190, fn. 38.

[177] European Commission, *2016 Report on the Application of the EU Charter of Fundamental Rights* (Publications Office of the EU 2017) 27.

[178] European Commission, *2013 Report on the Application of the EU Charter of Fundamental Rights* (Publications Office of the EU 2014) 25.

[179] European Commission, *2015 Report on the Application of the EU Charter of Fundamental Rights* (Publications Office of the EU 2016) 27.

Conclusion

The protection of the freedom to conduct a business in Article 16 did not provoke a strong reaction from the academic community when the Charter was first published. Scholars either considered that it was a welcome recognition of the value of private enterprise, or that even if its normative premise was questionable, it was unlikely to have any significant impact. However, in recent years, there has been mounting concern about the impact of Article 16, in particular in the area of worker protection. The purported limits on Article 16, such as its weaker wording and the qualification that it must be 'in accordance with Union laws and national laws and practices', have done little to meaningfully constrain the interpretation of Article 16 by the Court of Justice, as outlined in Chapters Four, Five and Six. Early and contemporary scholarship may have underestimated Article 16's capacity to be used as a tool of negative integration, exacerbated by the fact that, as an open-ended right to engage in business activity, it can be regularly invoked by economic actors before the Court of Justice. The continued use of Article 16 to challenge a broad array of regulatory measures is likely to produce only increasing economic domination by powerful market actors. In addition to their considerable economic might, these corporate actors now have the additional weight of fundamental rights language on their side. They can now employ their considerable resources towards challenging any domestic and EU laws which they consider to pose a threat to their profitable economic activity; a process that has occurred with some success.

CHAPTER FOUR

Article 16 in the Case Law of the Court of Justice

Introduction

Initially, Article 16 made barely a ripple on the surface of EU law. The Charter itself did not become binding until nearly a decade after it had first been drafted, when the Lisbon Treaty came into effect in 2009. In what should have, perhaps, presaged what was to come, the Court was often prepared to accept that various legislative measures constituted a *prima facie* infringement of the freedom to conduct a business. However, the Court usually went on to hold that the freedom to conduct a business was not absolute, and that the freedom had to be considered in light of its social function, and that the measures adopted were proportionate restrictions on the exercise of the freedom to conduct a business. There are, however, noticeable differences in how the Court dealt with incursions on Article 16 depending on the countervailing interests at stake. For example, cases where Article 16 has been relied on to mount challenges to restrictive measures levied by the European Union have been largely unsuccessful, as the Court tends to conclude that any interference with Article 16 is proportionately justified in light of the objectives of EU foreign policy, such as the promotion of peace, territorial sovereignty or the rule of law.[1] Similarly, the willingness of the Court of Justice to defend the objectives of consumer protection and public health has helped to create the misleading impression that Article 16 cannot be used as an effective deregulatory mechanism for market interests in other contexts.

[1] See, for example, Case C-729/18 P *VTB Bank v Council of the European Union* ECLI:EU:C:2020:499 para 82; Case C-72/15 *Rosneft v HM Treasury* ECLI:EU:C:2017:236 para 150; T-154/15 *Jaber v Council of European Union* ECLI:EU:T:2016:629 para 122; Case T-215/15 *Mykola Yanovych Azarov v Council of the European Union* ECLI:EU:T:2017:479, para 88-96; Case T-732/14 *Sberbank of Russia OAO v Council of the European Union* ECLI:EU:T:2018:541 para 156; Case T-798/14 *DenizBank A.Ş v Council of the European Union* ECLI:EU:T:2018:546 para 130; Case T-720/14 *Arkady Romanovich Rotenberg v Council of the European Union* ECLI:EU:T:2016:689 para 163-188; Case T-190/12 *Johannes Tomana v Council of the European Union* ECLI:EU:T:2015:222 para 288-302; T-200/14 *Ben Ali* v *Council* ECLI:EU:T:2016:216 para 253-8; Case T-256/11 *Ezz v Council of the European Union* ECLI:EU:T:2014:93 para 218-233.

General principles of EU law

At first, Article 16, much like other provisions of the Charter, was mentioned as an afterthought in pleadings before the Court of Justice: more for the sake of completeness, it seemed, than for any real expectation of results.[2] Early references to Article 16 often viewed the freedom to conduct a business as a subset of the freedom to pursue an occupation. For example, the characterisation offered by Advocate General Trstenjak in 2010 was that '[t]he freedom to conduct a business constitutes a particular expression of the freedom to pursue a trade or profession which, in itself, has the status of a general principle of Community law.'[3] In *Nycomed Danmark v European Medicines Agency,* the General Court noted that 'the right to pursue a trade or profession freely' was a general principle of EU law, which had been 'enshrined in Article of the Charter of Fundamental Rights.'[4] This approach broadly reflected the understanding that had been adopted by the Court in relation to the general principles of EU law. In that respect, these narrow characterisations are at a remove from how Article 16 was later interpreted by the Court of Justice. However, these mentions of Article 16 occasionally hinted at how the provision could be used by prospective applicants, including as a means to dispute the horizontal application of free movement rights.[5]

Yet even after the Charter was published, the Court of Justice continued to rely on the freedom to pursue an economic activity as a general principle of EU law rather than referring to Article 16.[6] This continued even after the Charter became legally effective in 2009. Cases such as *Association Kokopelli v Graines Baumaux SAS,* for example, made no mention of Article 16 of the Charter.[7] This may be explained simply by judicial preference for established lines of case law, and that it took a period of time for national courts to begin to refer the Charter of Fundamental Rights, including Article 16, in their preliminary references to the Court. However, it may also be due to the fact that the relationship between the Charter and the general

[2] See, for example, Case C-510/10 *DR, TV2 Danmark A/S v NCB — Nordisk Copyright Bureau* ECLI:EU:C:2012:244 para 57.
[3] Case C-316/09 *MSD Sharpe & Dohme* Opinion of Advocate General Trstenjak ECLI:EU:C:2010:712 para 83. She noted that the freedom to conduct a business was protected by the Charter of Fundamental Rights and as a general principle of EU law, para 32.
[4] Case T-52/09 *Nycomed Danmark v European Medicines Agency* ECLI:EU:T:2011:738 para 89.
[5] Rufat Babeyev, 'Private Autonomy at Union Level: On Article 16 CFREU and Free Movement Rights' (2016) *Common Market Law Review* 976, 981.
[6] See, for example, Case C-210/03 *Swedish Match v Secretary of State for Health* ECLI:EU:C:2004:802 para 74; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449 para 126*; Joined Cases C-37/02 and C-38/02 Di Lenardo Adriano Srl v Ministero del Commercio* ECLI:EU:C:2004:443 para 77.
[7] Case C-59/11 *Association Kokopelli v Graines Baumaux SAS* ECLI:EU:C:2012:447.

principles of EU law was not entirely clearcut.[8] This was perhaps underscored by the fact that Article 6(1) TEU gave legal effect to the Charter of Fundamental Rights, yet immediately afterward Article 6(3) TEU acknowledged that fundamental rights guaranteed by the European Convention and the constitutional traditions of Member States shall constitute 'general principles of EU law.' Rather than replacing the 'fundamental rights as general principles of EU law' line of case law with the Charter, the Treaties seemed to envisage two parallel sources of fundamental rights protection. This rather confused state of affairs was replicated by the case law of the Court. For a period, the Court of Justice appeared to reach an accommodation by referring to the freedom to conduct a business both as a fundamental right recognised by Article 16 of the Charter, as well as a general principle of EU law.[9] The most recent references to the freedom to conduct a business, however, tend to refer only to Article 16 of the Charter.

Early appearances of Article 16

When the Charter of Fundamental Rights became binding at the end of 2009, references to the Charter in the Court's case law increased markedly.[10] One early successful use of Article 16 was *Scarlet Extended* which concerned a dispute between SABAM, a Belgian-based association for the protection of intellectual property rights of writers, composers and publishers, and an internet service provider, Scarlet.[11] SABAM had sought an injunction against Scarlet in an effort to prevent breaches of copyright through illegal internet downloads. A reference was subsequently made to the Court of Justice asking whether a number of Directives (the E-Commerce Directive and the Harmonisation of Copyright Directive) read together and interpreted in light of fundamental rights provisions could permit the imposition of an injunction on an internet service provider to filter all electronic communications passing through its services.[12]

While the Opinion of Advocate General Cruz Villalón had made no reference to Article 16, the Third Chamber highlighted the relevance of the freedom to conduct a business.[13] The injunction

[8] Constanze Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19(4) *European Law Journal* 457, 467-468.
[9] C-1/11 *Interseroh Scrap and Metals v Sonderabfall* ECLI:EU:C:2012:194 para 43; Case T-545/11 *Stichting Greenpeace v European Commission* ECLI:EU:T:2018:817 para 44.
[10] See, Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) *Journal of European and Comparative Law* 168.
[11] Case C-70/10 *Scarlet Extended* ECLI:EU:C:2011:771.
[12] Ibid para 29.
[13] Case C-70/10 *Scarlet Extended* Opinion of Advocate General Cruz Villalón ECLI:EU:C:2011:255; *Scarlet Extended* (n 11).

requiring the adoption of the filtering system was designed to protect the intellectual property rights of the copyright holders, but the monitoring was unlimited in scope and designed to protect present and future works.[14] The Court concluded that, first, the E-Commerce Directive included an outright ban on requiring internet service providers to review information transmitted through the network. Such an injunction would require the company to actively monitor the data of its customers, which amounted to a violation of Article 15(1) of Directive 2000/31/EC, the Directive on Electronic Commerce. The Third Chamber held that an injunction would amount to a 'serious infringement' of the internet service provider's ability to conduct its business because it would compel them to 'install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48.'[15]

Similar facts arose in *SABAM v Netlog NV*.[16] In this case, SABAM successfully sought an order from the Belgian courts to compel the plaintiff, Netlog, an internet service provider, to prevent its customers from sending files with works protected by copyright through its service. The Third Chamber noted that national authorities were required to strike a fair balance between intellectual property rights as against the freedom to conduct a business enjoyed by internet service providers, as well as the rights of customers to their personal data.[17] The Court's decision to introduce Article 16 as a relevant consideration shifted the balance of the dispute: it was now a case involving a clash between competing fundamental rights.[18] Much the same reasoning was employed as in *Scarlet Extended;* the Court concluded that a requirement to install a costly, complicated filtering system indefinitely was a violation of the freedom to conduct a business, and it would breach the conditions set down in Article 3(1) Directive 2004/48.[19]

First, it is important to note from the outset that the freedom to conduct a business in Article 16 could not be characterised as forming the operative part of these judgments. The filtering systems at issue in both cases were likely to be found in breach of EU law, given the outright

[14] *Scarlet Extended* (n 11) para 47.
[15] Ibid para 48.
[16] C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* ECLI:EU:C:2012:85.
[17] Ibid para 44.
[18] Eduardo Gill-Pedro, 'Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law' (2022) 18 *European Constitutional Law Review* 183, 191.
[19] *SABAM v Netlog* (n 16) para 46.

prohibition of general data monitoring in the E-Commerce Directive, with or without Article 16.[20] Yet nonetheless, these judgments represented a significant development in several respects. First, the Court of Justice went out of its way to mention the relevance of Article 16 to the case. The reference as formulated by the Belgian national court made no reference to Article 16, nor had it been mentioned in the Opinion of Advocate General Cruz Villalón in *Scarlet Extended*. Second, the Court made it clear that Article 16 is an enforceable, fundamental right on a par with the right to private property, to data protection, and to freedom of information.[21] Any measure in this context was now required to strike a balance between the freedom to conduct a business and other relevant rights. Finally, and most significantly, these are two early examples where the Court of Justice concluded that there had been a violation of the freedom to conduct a business. The installation of the 'complicated, costly, permanent' filtering system at the expense of the internet service providers represented a 'serious infringement' of the freedom to conduct a business.

In *UPC Telekabel Wien,* the Court of Justice declined to follow the Opinion of Advocate General Cruz Villalón, who had concluded that an injunction issued to another internet service provider was a violation of the freedom to conduct a business. [22] UPC Telekabel had been subject to an application to block its customers from accessing a website that allowed users to download or stream films in breach of copyright. The Court of Justice accepted that the injunction constituted an interference with the freedom to conduct a business.[23] The Court noted that the freedom to conduct a business includes 'the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it.'[24] This was to presage a general principle, outlined in later case law, that Article 16 was restricted if an entity was obliged 'to take measures which may represent a significant cost for an economic operator, have a considerable impact on the organisation of his or her activities, or require difficult and complex technical solutions.'[25] However, the Court concluded that 'the very substance' of the freedom to conduct a business was not violated because the injunction allowed the party subject to it to determine what measures to put in

[20] Gill-Pedro (n 18) 192.
[21] Michelle Everson and Rui Correia Gonzales, 'Article 16' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2021) 463, 477.
[22] Case C-314/12 *UPC Telekabel Wien* Opinion of Advocate General Cruz Villalón ECLI:EU:C:2013:781.
[23] Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192 para 48.
[24] Ibid para 49.
[25] Joined Cases C-798/18 and C-799/18 *Anie and Athesia* ECLI:EU:C:2021:280 para 63, citing *UPC Telekabel* (n 24).

place in light of the resources available to them and other constraints, and to avoid legal liability if they can show that they have taken reasonable measures meaning that they were not required to make 'unbearable sacrifices'. This was justified given that they were not responsible for the original infringement.[26] The measures had to be strictly tailored to ensure they did not breach the rights of users of the internet who wanted to access lawful information.[27] Similarly, in *McFadden v Sony Music Entertainment Germany GmbH* the Court of Justice considered that an injunction compelling the applicant to prevent third parties from accessing copyright-protected work, even if he only had one technical means of complying with the injunction, did not constitute an infringement of the freedom to conduct a business.[28]

Onerous or Arbitrary Interferences with Businesses

A significant proportion of cases relying on Article 16 have involved challenges to regulatory requirements in the course of business operations, as distinct from the establishment or opening of a business *per se.* This is despite the fact that one of the justifications regularly employed for the recognition of the freedom to conduct a business is to ensure the elimination of discriminatory or bureaucratic barriers to business activity.[29] There are, however, a handful of cases where the protection of the freedom to conduct a business has been used to challenge what might be described as onerous or arbitrary restrictions that threatened the very existence of the business. *BB construct* is one example, where the Ninth Chamber held that the requirement issued by the tax authorities for particular VAT-liable entities to lodge a deposit of €500,000 with the tax authorities was 'manifestly disproportionate interference with the freedom to conduct a business.'[30] The amount in this particular case was deemed to be necessary because the director of a company who had previously been associated with a company that had considerable VAT arrears. The applicant had argued that the amount required for the guarantee was so high that the company would be required to declare insolvency. While the Court accepted that the guarantee was provided for in national law, and pursued a legitimate objective of tax collection and preventing tax evasion, the Court concluded that the obligation

[26] Ibid para 52-53.
[27] Ibid para 56.
[28] Case C-484/14 *McFadden v Sony Music Entertainment Germany GmbH* ECLI:EU:C:2016:689 para 101. This conclusion appeared to have been aided by the fact that the means available to the applicant – introducing a password on his network connection – was a straightforward requirement to comply with the injunction. See also, Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google* ECLI:EU:C:2021:503 para 138-139.
[29] Peter Oliver, 'Companies and their fundamental rights: a comparative perspective' (2015) 64 *International and Comparative Law Quarterly* 661, 695.
[30] Case C-534/16 *Finančné riaditeľstvo Slovenskej republiky v BB construct* ECLI:EU:C:2017:820 para 41.

to pay the guarantee in this case would constitute an unjustified deprivation of the company's resources which would severely interfere with its capacity to develop its economic activities. It was, however, ultimately for the referring court to determine whether the provision of a guarantee of €500,000 went beyond what was necessary to attain the objective of ensuring the correct collection of VAT and the prevention of tax evasion.[31] This would depend on, for example, the national court's assessment of the significance of the director's role in the company with which he had been associated.[32] A case concerning similar, Hungarian legislation is currently awaiting judgment from the Court of Justice in *Max7 Design Kft*. In this case, the relevant Hungarian legislation imposed an obligation on taxable persons to lodge an additional tax guarantee if any of its executive officers had previously been involved in a company that had tax debts in excess of €2,500, which had subsequently been wound up. The guarantee that was due to be lodged was tied to the rate of debt accumulated by the previous, now-defunct company. Given that there was no obligation to establish any corporate link between the two companies, the Opinion of Advocate General Kokott considered that the measure was a disproportionate infringement of Article 16 insofar as it went further than was necessary to achieve the legitimate aim of preventing tax fraud, by affecting the tax liability of individuals who had no connection to a company that had failed to meet its debts.[33]

Another example is to be found in *PI v Landespolizeidirektion Tirol.*[34] In this case, the applicant ran a massage parlour in Austria, which was abruptly shut down by law enforcement one evening on suspicion that it was operating as a brothel. The applicant, who had received only verbal confirmation of the decision, did not receive any formal documentation confirming the closure of the business or the justification for that decision. The local police force subsequently refused to provide any further information either to the applicant, and to the local Austrian court when she challenged the decision. The local administrative court noted that the national legislation did not require the local authorities to provide formal confirmation or justification to affected parties in these scenarios. The Sixth Chamber of the Court of Justice considered whether such legislation was compatible with, *inter alia,* the freedom of establishment in Article 49 TFEU and the freedom to conduct a business in Article 16 of the Charter. The Court noted that the provision of sex work had previously been accepted by the Court of Justice as

[31] Ibid para 42.
[32] Ibid para 28.
[33] Case C-519/22 *Max7 Design Kft v Nemzeti* Opinion of Advocate General Kokott ECLI:EU:C:2023:998 para 45.
[34] Case C-230/18 *PI v Landespolizeidirektion Tirol* ECLI:EU:C:2019:383.

constituting the provision of services for remuneration, and that the operation of a brothel came within the scope of Article 49.[35] As had been previously been established by the Court, any reference to the freedom of establishment required an assessment of its compatibility with the freedom to conduct a business in Article 16. The Court considered that the Austrian national law did amount to a restriction on both Article 49 TFEU and Article 16.[36] While the Austrian authorities argued that the law was necessary for tackling crime related to prostitution and to protect health, the Court noted that prostitution was not banned in Tyrol, but that authorisation was required to ensure sex workers were subject to specific health checks. Both the prevention of crime and the protection of health were, the Court noted, overriding reasons in the public interest that were recognised by EU law.[37] The Court concluded, however, that closing the business with immediate effect without providing any reasons in writing breached the requirements of fair procedures guaranteed by Article 47 and 48 of the Charter and the general principles of EU law, and undermined the effectiveness of judicial review. The Court emphasised that the provision of reasons by the national authorities was vital to assess whether the infringements on the freedom of establishment and the freedom to conduct a business were proportionate.[38]

A further, rather unusual example, can be found in the case of *Commission v Hungary*.[39] The controversy in this case arose from the introduction by the Hungarian government of a law that required international higher education institutes to sign an international agreement with the Hungarian authorities before providing third level education, which was widely considered to be targeted at the Central European University. The European Commission took an action against Hungary, and argued that the measure represented a breach of both EU and international law on a number of fronts, including that the law constituted a violation of the freedom to conduct a business. Hungary, for its part, did not dispute that the law in question constituted a restriction of the freedom to found an educational establishment but argued that the objectives of maintaining public order and the prevention of deceptive practices warranted the introduction of the law.[40] With respect to Article 16, Hungary argued that the right had to be exercised with 'due respect for democratic principles' and within the legal framework

[35] Ibid para 47.
[36] Ibid para 65.
[37] Ibid para 70-72.
[38] Ibid para 81.
[39] Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792.
[40] Ibid para 152.

established to regulate an economic activity. The Grand Chamber concluded that the law had placed substantial limitations on several fundamental rights protected by the Charter, including on the freedom to conduct a business.[41] The requirements of the Hungarian national law at issue were so stringent that they would imperil or at the very least, risk the possibility that it would be impossible to open or to continue to operate a higher education institution in Hungary.[42] Consequently, there was a violation of the applicant's freedom to conduct a business under Article 16.

These cases are notable different from the fact patterns evident in a significant number of cases involving Article 16. Other cases involve corporate entities who are arguing, in effect, that any legislative measure that affects the autonomy of the operation of the business is an interference with their freedom to conduct a business. They are invariably challenging laws or regulations that affect how a certain aspect of their activities are carried out. The cases outlined above, however, are distinct in at least two ways. First, they concern measures that serve as barriers to the creation or continued existence of the business in question. In *BB construct* for example, it was indicated that the deposit required by the tax authorities for the business to be registered as tax-compliant was so high that it would force the business to declare insolvency.[43] The applicant in *PI* had her business suddenly closed down by the authorities without notice. When the new Hungarian law was introduced, the CEU was the only institution that was unable to fulfil the law's requirements and it closed its campus in Hungary, and re-opened in Austria, which ultimately prompted the European Commission to take action against Hungary.[44]

Second, these cases concerned what were, indisputably, very far-reaching limitations on their businesses. The applicant in *BB construct* was required to pay a prohibitively expensive guarantee in order to establish his company. In the second case, the applicant's business had been forcibly closed, and as the authorities failed to provide her with any reasons, it made it particularly challenging for her to dispute the basis for the closure. The Hungarian law introduced a number of bureaucratic requirements, including the existence of an international

[41] *Hungary v Commission* (n 39) para 237.
[42] Ibid para 233.
[43] *BB construct* (n 30) para 40.
[44] This case should be viewed in light of the long-running tension between the European Union and the Fidesz regime in Hungary, which has been subject to sustained criticism since Viktor Orbán assumed office over a decade ago. It has been observed that, in general, the Court tends to side with Commission in infringement proceedings; see Konstantinos Alexandris Polomarkakis, 'The Court of Justice of the European Union as a legal field' (2023) 2 *European Law Open* 244, 266.

agreement between the institution and the Hungarian authorities, the stipulation that foreign higher education institutes had to provide education in their countries of origin, and a work permit requirement for their staff. These judgments might be most accurately characterised as cases involving what are, in reality, complaints of irrationality, arbitrariness and lack of fair procedures by the relevant state authorities. These cases are genuine challenges to the harshness of how particular regulations were implemented by the authorities, rather than challenges to the existence of the regulations *per se*. As Albors-Llorens has pointed out, individual applicants who can point to a penalty they personally have suffered – rather than a measure of general application - tend to have a higher rate of success.[45] These cases are useful examples of how Article 16 can be used to challenge measures that are excessively arbitrary or punitive. The judgment in *BB construct* had found that neither Article 49 or 50 of the Charter were applicable as the measure did not constitute a criminal penalty, and placed considerable emphasis on the protection of the freedom to conduct a business as a result.[46] However, it is important to note that most measures that involve genuinely arbitrary interferences with business activity will come under the other rights guaranteed by the Charter, such as the right to property or the various procedural rights guaranteed by the Charter. It is perfectly possible for a Court to rely on such provisions in similar cases, and indeed in *MAX7 Design,* the Advocate General accepted that the measure constituted an interference with private property rights.[47] In *PI v Tirol,* the Sixth Chamber made extensive reference to, *inter alia,* the duty to give reasons and the right to be heard guaranteed by Article 47 and Article 48 of the Charter.[48]

Restrictive measures and Article 16

Article 16 has regularly been referenced in cases involving challenges to restrictive measures, although these have largely been unsuccessful, as the Court regularly concludes that any interference with Article 16 is minimal, or proportionately justified in light of the objectives of EU foreign policy, such as the promotion of peace, territorial sovereignty or the rule of law.[49] As outlined, Article 16 has, overwhelmingly, been invoked by legal persons, and by companies in particular. However, individual applicants make up the vast majority of challenges to

[45] Albertina Albors-Llorens 'Edging Towards Closer Scrutiny? The Court of Justice and its Review of the Compatibility of General Measures with the Protection of Economic Rights and Freedoms' in Anthony Arnull, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds) *A Constitutional Order of States?* (Hart 2011) 245, 260.
[46] *BB construct* (n 30) para 32-33.
[47] Case C-519/22 *Max7 Design Kft v Nemzeti* ECLI:EU:C:2023:998 para 40.
[48] *PI v Landespolizeidirektion* (n 34) para 78.
[49] (n 1).

restrictive measures, as outlined in Figure 1 of the Appendix. This is consistent with the observation that most actions for annulments tend to be taken by private individuals.[50]

However, one recent example where a legal person invoked Article 16 in this context arose in *Bank Melli Iran v Telekom Deutschland GmbH.* [51] In this case a dispute arose concerning the correct interpretation of Regulation 2271/96 ('the Blocking Regulation') which prohibited EU-based entities from complying with foreign extra-territorial sanctions. Telekom had terminated all contracts between itself and Bank Melli, and Bank Melli argued that this was due to Telekom's desire to comply with the US-levied sanctions against Iran, given that Telekom had substantial business interests in the US. The judgment of the Grand Chamber noted that if the termination notice issued by Bank Melli was carried out in breach of Article 5 of the Blocking Regulation, the purported act of termination would be void. That kind of annulment, the Court accepted, constituted a limitation on the freedom to conduct a business.[52] The limitation on the freedom to conduct a business was provided for in law, insofar as it was contained in Article 5 of the Regulation.[53] However, the Court went on to note that the essence of the freedom to conduct a business was potentially affected where an entity 'is deprived of the opportunity to assert its interests effectively in a contractual process.'[54] The Court considered that annulling the termination notice of the contracts would have the effect of limiting – rather than depriving - Telekom from asserting its interests in the contractual relationship.[55] The Grand Chamber went on to note that it was for the referring court to reach a balance between the pursuit of the Regulation's objectives and 'the probability that Telekom would be exposed to economic losses' and the scope of those losses if an entity could not sever the contractual relationship between them and an entity that was subject to sanctions.[56] For the purposes of the proportionality assessment, the fact that Telekom had not applied to the Commission for a derogation from Article 5, and had consequently forgone the opportunity to avoid the restriction

[50] Konstantinos Alexandris Polomarkakis, 'The Court of Justice of the European Union as a legal field' (2023) 2 *European Law Open* 244, 264.
[51] C-124/20 *Bank Melli Iran v Telekom Deutschland GmbH* ECLI:EU:C:2021:1035. The Regulation had been introduced in 1996, but had fallen into disuse after the United States and the European Union had reached a political settlement on the matter, but the Regulation had been revived in 2018 after President Trump left the Iran Nuclear Agreement and reinstated sanctions against Iran. Historically, the European Union has been critical of sanctions imposed by US legislation which frequently imposes penalties on third-country entities that trade with a sanctioned state, or prohibits the entities from trading with the United States.
[52] Ibid para 77.
[53] Ibid para 86.
[54] Ibid para 87.
[55] Ibid para 88.
[56] Ibid para 92.

on its freedom to conduct a business, was considered to be significant.[57] In short, the Court of Justice considered that there were instances where economic operators should not be subject to the provisions of Article 5 of the Blocking Regulation, depending on the scope of the loss they were liable to face.

A few factors are worth noting at this juncture. First, the Grand Chamber did not specify what scale of losses would constitute a disproportionate infringement of the freedom to conduct a business: the Court did not, for example, outline a threshold of 'significant' or 'unsustainable' levels of losses. Given that the referring court is obliged to conduct a proportionality test, it seems reasonable to assume that an entity would have to be facing significant economic repercussions. Yet that is not specified; it is simply part of the balancing exercise that the referring court is obliged to conduct. Second, it is notable that the Grand Chamber paved a way for economic operators to avoid the impact of a very clear EU law purely on the basis that they would be subject to economic loss.[58] The Grand Chamber identified the particular interest at stake as the freedom of contract, protected as a facet of Article 16. The automatic annulment of any termination notice on the basis of Article 5 of the Regulation would constitute an infringement of the freedom of contract of the undertaking. However, at its core, the logic of the judgment seems to turn on the potential economic loss faced by Telekom Deutschland if it could not terminate its contract with Bank Melli, and thus be subject to sanctions that would mean it could no longer operate in the United States. It is the scale of economic losses that the undertaking would be subject to that affects whether the measure is proportionate or not. This seems to suggest that the freedom to conduct a business includes protection for the financial well-being of the entity, particularly given that the precise scale of the losses the entity might face were not specified by the Court. One commentator suggested that the implications of the judgment were relatively narrow, given that the Court clearly gave weight to the fact that Telekom Deutschland had failed to apply for an exemption from the Commission.[59] Yet the very existence of the exemption within the Regulation makes this logic even more strange: the Court did not consider that the allowance for an exemption was sufficient to meet the

[57] Ibid para 93.
[58] On the obligation of economic operators to maintain stocks of different types of petroleum product, Advocate General Rantos noted in his Opinion in Joined Cases C-395/22 and C-428/22 '*Trade Express-L' OOD* and *'DEVNIA TSIMENT' Ad* ECLI:EU:C:2023:798 para. 84 that the '…obligation should not represent a disproportionate or excessive financial burden in relation to the turnover generated in the course of its commercial activity.'
[59] Cedric Ryngaert, 'Interpreting an unsatisfactory EU Blocking Statute: *Bank Melli Iran*' (2023) 60 *Common Market Law Review* 517, 518.

requirements of the proportionality test. The Court obviously envisaged that there would be cases where the measure would be disproportionate, even where an entity had failed to apply for an exemption.[60]

Accepted limitations on Article 16

Cases involving Article 16 have usually consisted of a challenge to some regulatory measure that affected a business which the Court was, notably, prepared to accept constituted a *prima facie* infringement of the freedom to conduct a business, even if the Court routinely determines that a particular regulatory measure constituted an acceptable interference with Article 16. The challenged measures were not restrictions on how the business was conducted in a strict sense: for example, they were not laws that affected entry into a particular industry. Rather, the Court has been prepared to accept that nearly any law or measure that potentially impacted how a business conducted its operations fell within the scope of Article 16. It is rare that the Court rejects the assertion out of hand that a particular law or measure constitutes an infringement on the freedom to conduct a business.[61] This should have been an indicator of what was to come: the mere fact that the Court was prepared to accept that nearly any measure that affected any economic actor amounted to a restriction to conduct a business was an exceptionally broad understanding of Article 16. Any national law, regulation, Directive or legal provision that affected any kind of business organisation was potentially an interference with Article 16. This demonstrated the exceptionally wide scope of Article 16.

Nearly every law of every kind is bound to affect a business, somewhere, much like every law is bound to affect an individual person. The difference is that individual people must usually identify a particular, specific fundamental right that has been affected, such as the right to privacy or freedom of expression, before they can mount a legal challenge. There is no broad,

[60] Ibid 524.

[61] One such example is the judgment of the Second Chamber in Case T-235/15 *Pari Pharma GmbH v European Medicines Agency* ECLI:EU:T:2018:65 where the applicant sought an annulment of a decision of the EMA to grant access to one of its competitors to documents that it had submitted for marketing authorisation of a medicinal product. The applicant claimed, *inter alia,* that it had suffered a violation of its rights under Article 16. The Court noted at para 1071-108 that: 'The applicant cannot… invoke in a general manner an infringement of Article 339 TFEU, Articles 7, 16 and 17 of the Charter of Fundamental Rights and Article 8 of the ECHR, since it does not appear that all the data to which it refers are confidential. It is thus for the applicant to identify and show which information, in its submission, falls within the scope of commercial interests within the meaning of 4(2) of Regulation No 1049/2001. Thus, the applicant cannot merely plead the existence of inherent confidentiality, or merely allege infringement of fundamental rights in abstract terms. It is for the applicant to describe in specific terms the professional and commercial importance for it of the information and the utility of that information for other undertakings which are liable to examine and use it subsequently.'

open-ended fundamental right to autonomy or behave exactly as one pleases: the rule-making authority is usually entitled to make laws, provided that they do not violate specific rights.[62] But Article 16 grants companies such an exceptionally wide sphere of protection that the paradigm has shifted. Under the banner of the freedom to conduct a business, any behaviour, activity, or decision the individual or company engages in is *per se* protected as an exercise of fundamental right, suggesting that any legal restriction affecting their operation must be proportionately justified.

General objectives of EU law

What constitutes an objective of general interest recognised by EU law will have a significant bearing on whether a particular measure that infringes Article 16 will be considered to be justified in the eyes of the Court. Once the Court is prepared to accept that a particular objective is valuable, it is prepared to impose wide-ranging regulations on the exercise of the freedom to conduct a business. The best means to anticipate whether an infringement of Article 16 will be accepted as justified depends on the importance the Court attaches to that objective. This, in turn, seems to depend on whether the objective is recognised and valued by EU law and whether it serves the purpose of furthering the integration of the single market. While objectives of the EU no longer define the EU in the way they once did, the general objectives of EU law 'remain a cardinal interpretative device' for the Court of Justice.[63] The general objectives are scattered throughout the Treaties, such as the commitment to the protection of the environment in Article 191 TFEU, to promoting a high level of protection both for human health in Article 168 TFEU, and consumer protection in Article 169 TFEU. The Treaties do contain objectives that have a social lens, and recognition for the interests of workers can be discerned in the Treaties. Article 9 TFEU commits the European Union to the 'promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion.' Article 153 TFEU lists 'the promotion of employment' as one of the objectives of the EU and its Member States, as well as 'proper social protection, dialogue between management and labour.' Article 153(1) TFEU explicitly states that the Union will support and complement Member States in protecting workers who have been made redundant, as well as consulting and informing workers. The Court of Justice has acknowledged the importance of

[62] Some constitutions do contain such rights, although they are rare: see, for example, Article 2 of the German Constitution, as discussed in Chapter Two.
[63] Joris Larik, 'From Speciality to a constitutional sense of purpose: on the changing role of the objectives of the European Union' (2014) 63 *International and Comparative Law Quarterly* 935, 953.

worker protection; namely, a high standard of working conditions. However, Barnard has highlighted that, in the context of derogations from the free movement provisions, national laws involving worker protection are often unsuccessful.[64] She argued that, based on empirical evidence, the Court tended to favour stripping away national protections for workers in the interests of the broader free movement of workers.[65]

What limitations have been accepted on the freedom to conduct a business? When it comes to the Charter of Fundamental Rights, Article 52(1) states that any limitation on the exercise of a Charter right must be provided for by law and respect the essence of those rights. Limitations can only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. This effectively incorporates a proportionality test into Article 52(1). The proportionality test purports to be a neutral and demanding assessor of legality. In reality, the test is vague, circuitous and applied inconsistently across different contexts and jurisdictions. While often characterised as a test of legality, it is in practice a means of resolving conflicting interests that relies heavily on factual circumstances to make what is part-technocratic, part-normative assessment of the particular law.[66] Outcomes can vary widely depending on what weight and analysis a court affords to each limb of the test. The Court of Justice has repeatedly affirmed the importance of proportionality in EU law; it is both a general principle of EU law, and a mechanism that the Court frequently employs to assess the compatibility of various actions and measures with EU law, as well as national law with EU law.[67] It is, of course, also evident in Article 52(1) of the Charter when assessing limitations on Charter rights. Aside from the general commentary that proportionality as a method of judicial reasoning has attracted, there are specific criticisms that have been levelled at the use of proportionality in EU law by the

[64] Catherine Barnard 'The Worker Protection Justification: Lessons from Consumer Law' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law* (Hart 2016) 108.
[65] Barnard drew a distinction between *worker welfare* and *worker protection.* Worker welfare is the suggestion that the welfare of workers is enhanced by the opportunity to work in whatever Member State they wish 'on the terms dictated by the market.' Worker protection encompassed traditional metrics such as fair working conditions. The classification as the former interest as 'worker welfare' seems distinctly questionable, particularly given that these are situations where the Court of Justice opts to strike down national worker protection laws in favour of the former. Catherine Barnard 'The Worker Protection Justification: Lessons from Consumer Law' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds) *Exceptions from EU Free Movement Law* (Hart 2016) 108.
[66] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd ed, Clarus 2019) 276.
[67] Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13(1) *Yearbook of European Law* 106.

Court of Justice, in particular that it affords excessive weight to economic interests.[68] It has been argued that the Court of Justice has traditionally been slow to submit EU legislative measures to rigorous scrutiny, and have afforded EU legislators a great deal of deference,[69] in particular by comparison to the more searching standards it seems to impose on national measures that restrict the free movement provisions, for example.[70] The Court has been known to take a 'conspicuously light touch' approach in carrying out its proportionality assessments of Union law.[71] This is all the more striking when it is considered that the traditional justification for such deference – namely the strong democratic mandate of the legislature – applies to a much less degree.[72] It has been suggested that the aim of European integration has been an overarching commitment throughout the Court's case law, 'which can dominate the judicial discourse over any personal and policy preferences.'[73] Sauter has argued that there is a 'pro-integration bias in the standard of judicial review' employed by the Court of Justice.[74] He considered that this integration bias is evident in the 'two parallel standards' that are visible in the Court's case law: for example, restrictions introduced by Member States are subject to a more searching proportionality test than those introduced by the European Union.[75]

It should also be pointed out that the pro-integration bias identified by Sauter is arguably evident in Article 52(1) of the Charter which explicitly allows for limitations on Charter rights that are both necessary and 'genuinely meet objectives of general interest recognised by the Union.' The stipulation in Article 52(1) that a proposed limitation 'genuinely meets objectives of general interest recognised by the Union' has important consequences for how infringements on Charter rights will be treated by the Court. It creates a structural preference for legislation that pursues objectives of general interest recognised by the EU. This is, of course, more likely to be legislative measures that have originated within the EU, although it could of course apply

[68] See, for example, Wolfgang Weiß, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?' in Sonia Morano-Foadi and Lucy Vickers (eds) *Fundamental Rights in the EU: A Matter for Two Courts* (Hart 2015) 69, 72-74.
[69] Albors-Llorens (n 45) 264. In the context of the migration crisis for example, see, Anna Wallerman Ghavanini, 'The CJEU's give-and-give relationship with executive actors in times of crisis' (2023) 2 *European Law Open* 284.
[70] Weiß (n 68) 73.
[71] Stephen Weatherill 'Competence Creep and Competence Control' (2004) 23 *Yearbook of European Law* 1, 17.
[72] Christoph Engel, 'The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences' (2001) 7(2) *European Law Journal* 151, 158.
[73] Konstantinos Alexandris Polomarkakis, 'The Court of Justice of the European Union as a legal field' (2023) 2 *European Law Open* 244, 254.
[74] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 *Cambridge Yearbook of European Legal Studies* 439, 452.
[75] Ibid 465.

to legislation instigated by Member States that is implementing EU law. In other jurisdictions, it will usually have to be demonstrated during the application of the proportionality test that the measure is pursuing a legitimate objective. Yet Article 52(1) accepts that any measure that seeks to accomplish an objective recognised by the European Union, the objective is *per se* legitimate. This affords considerable latitude to the EU legislature and executive over that of national legislators, by affording objectives recognised by the EU as *a priori* normative weight. Legislation passed by national authorities that potentially affects Article 16 may be in pursuit of other valuable objectives, such as the protection of workers, of which the Court of Justice tends to be more sceptical.[76] This suggests that legislation that aims to advance the interests of market integration is more likely to survive a challenge on the basis of Article 16. As Williams argued, the Court of Justice has tended to view 'the central objective' as 'closer integration through law.'[77]

For example, in *Schaible v Land Baden-Württemberg,* the Court was asked to consider whether the provisions of Regulation (EC) No 21/2004 which created a system for the individual electronic identification of sheep and goats were compatible with, *inter alia*, Article 15 and Article 16 of the Charter.[78] In the main judgment, the Court of Justice accepted that the Regulation amounted to an interference with the freedom to conduct a business. The EU legislature was required to strike a balance between 'the freedom of keepers of sheep and goats to conduct business and, on the other, the general interest in controlling epizootic disease in sheep and goats.'[79] The control of animal diseases and animal welfare were legitimate objectives in the public interest pursued by EU law,[80] and the disadvantages imposed on the individual were not disproportionate to the objective sought to be achieved by the Regulation.[81] As Agagnostaras has pointed out, the Court of Justice gave considerable weight on the aim of

[76] Catherine Barnard 'The Worker Protection Justification: Lessons from Consumer Law' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds) *Exceptions from EU Free Movement Law* (Hart 2016) 108.
[77] Andrew Williams, 'Human Rights in the EU' in Anthony Arnull and Damian Chalmers (eds) *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 249, 255.
[78] C-101/12 *Schaible v Land Baden-Württemberg* ECLI:EU:C:2013:661.
[79] Ibid para 60.
[80] Ibid para 35.
[81] Ibid para 75. Similarly, in *Nycomed Danmark ApS* (n 4) para 91-92, the Third Chamber was prepared to accept that the refusal by the EMA to grant a waiver that would have exempted the applicant from conducting paediatric testing on a new product for which it sought marketing authorisation amounted to a 'restriction of the right of pharmaceutical companies to conduct their business freely'. The Court was, however, prepared to accept that the restriction was justified for the purposes of improving medical care for children, as one of the objectives of the relevant Regulation No 1901/2006. Moreover, the Court considered that the 'actual substance' of the freedom to conduct a business was not markedly reduced.

advancing an internal agricultural market, and were prepared to accept it as an objective in the public interest.[82]

Similar importance has been attached to the objective of advancing and deepening integration in the media, as outlined by Advocate General Bot in *Sky Österreich*.[83] *Sky Österreich GmbH v Österreichischer Rundfunk* involved Article 15 of Directive 2010/13/EU (the Audiovisual Media Services Directive) which allowed news broadcasters to access the signal from the body that owned the exclusive transmission rights on issues of high public importance. Article 15(6) of the Directive allowed Member States to opt for compensation to be made available, provided it did not outweigh the costs in providing access to the transmission signal. A dispute arose between an Austrian national broadcaster and Sky Austria, when the latter had sought to access short news reports on Europa League games. The Austrian Federal Superior Council for Communication made a reference to the Court of Justice asking whether Article 15(6) of the Directive was compatible with, *inter alia,* Article 16 of the Charter.

In his Opinion, Advocate General Bot referred to Article 16 and noted that, much like the right to property, the right to freely conduct economic activity is one of the 'general principles of law of the Union.'[84] Advocate General Bot accepted that there was an infringement of the freedom to conduct a business insofar as the compensation was compulsorily limited to the providers.[85] The infringement was justified in this case because the Directive pursued objectives of general interest recognised by the Union: namely to the freedom to receive information and protect media pluralism. They were also connected to a more general objective: the creation of a single European information space.[86] The freedom to conduct a business (and the right to freedom of expression and property) were proportionately restricted because the legislature enjoyed a wide margin of appreciation to choose the means best suited to achieve those aims.[87] In this case, the particular provision allowed poorer, less established broadcasters to access the same content, and allows for the emergence of 'a European opinion and information area' where freedom of information and media pluralism is safeguarded.[88]

[82] Georgios Anagnostaras, 'Balancing conflicting fundamental rights: the *Sky Österreich* paradigm' (2014) 39(1) *European Law Review* 111, 123.
[83] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk,* Opinion of Advocate General Bot ECLI:EU:C:2012:341.
[84] Ibid para 29.
[85] Ibid para 37.
[86] Ibid para 42.
[87] Ibid para 48.
[88] Ibid para 54.

Capping the amount of compensation puts all broadcasters 'on an equal footing' and prevented extortionate charges for the news items.[89] As Anagnostaras has pointed out, the Opinion of the Advocate General in *Sky Österreich* is not purely concerned with the intrinsic value of the freedom of information.[90] The Opinion grants considerable weight to the broader goal of establishing a single information market, suggesting that where various fundamental rights are at stake, 'the specific interests of the European Union and the particularities of its legal order' can be taken into account.[91]

The Grand Chamber outlined that Article 16 encompassed the freedom to exercise an economic or commercial activity, the freedom of contract and free competition. The freedom of contract, the Court considered, included the freedom to choose with whom to do business, as well as the freedom to determine the price of a service.[92] Article 15(6) of the Directive did amount to an interference with the freedom to conduct a business, because the provider could not decide with whom to do business or the price to be charged.[93] The Court's use of the proportionality test in this case has come in for praise as being rather more robust than usual, for example, that the Court placed particular emphasis on the fact that a less intrusive alternative measure would be correspondingly less effective.[94] The Court accepted that Article 16 could be subject to a 'broad range of interventions' in the public interest,[95] and that the provision was a proportionate means of achieving objectives of general interest recognised by the Union: namely to the freedom to receive information and protect media pluralism.[96] The judgment in *Sky Österreich* was an early indicator that infringements on the freedom to conduct a business can be justified in the eyes of the Court if these legislative measures are done in pursuit of objectives that the Court seems to attach particular weight to, such as the general objectives recognised by EU law.

Consumer protection tempers Article 16

The Court of Justice has shown little desire to jettison its famously robust case law on consumer protection. In a series of cases, the Court has been prepared to accept that regulations on businesses were proportionate infringements on Article 16, and justified in the interests of

[89] Ibid para 56.
[90] Anagnostaras (n 82) 121.
[91] Ibid 122.
[92] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28 para 43.
[93] Ibid para 44.
[94] Weiß (n 68) 79; Anagnostaras (n 82) 117.
[95] C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* ECLI:EU:C:2012:526 para 46.
[96] Ibid para 51-52.

consumer protection.[97] A typical example of this reasoning is evident from the case of *Deutsches Weintor*, where the German state authorities had objected to a wine producer labelling a bottle of wine as 'easily digestible.'[98] The referral to the Court of Justice asked, inter alia, if an absolute prohibition on advertising health claims in alcoholic beverages was compatible with the freedom to conduct a business. The Court considered that the freedom to conduct a business was 'assured in the essential respects.'[99] The legislation did not halt the production or marketing of alcohol: it simply controlled the labelling and advertising of alcoholic beverages.

A similar approach was taken in *Ryanair v McDonagh*.[100] Here, the question was whether a volcanic eruption which led to airline disruption exempted Ryanair from having to provide care in the form of meals and accommodation to a passenger who was left stranded in Portugal for a week. Regulation 261/2004 provided that, absent exceptional circumstances, compensation had to be provided to passengers who suffered travel disruption. Ryanair argued that an obligation to provide care to passengers in such circumstances would effectively deprive airlines of 'part of the fruits of their labour and of their investments.'[101] The Third Chamber considered that freedom to conduct a business was not absolute, but had to be considered in light of its social function.[102] Even though the measure had major financial implications for airlines, this was not disproportionate to the aim of ensuring a high level of protection for passengers.[103] Much the same approach was taken in *Irish Ferries,* which concerned the right of passengers to compensation for cancelled ferry sailings.[104] Moreover, the Court has emphasised the importance of striking the right balance between a high level of consumer protection and the need to preserve the competitiveness of businesses.[105] The importance of the objective of consumer protection, including protecting air passengers, could 'justify even substantial negative economic consequences for certain economic operators.'[106] Most recently, in *Skyes v Ryanair,* the Third Chamber noted that any entitlement of airlines to operate within

[97] Consumer protection is itself protected by Article 38 of the Charter of Fundamental Rights.
[98] *Deutsches Weintor* (n 95) para 91.
[99] Ibid para 56.
[100] C-12/11 *McDonagh v Ryanair Ltd* ECLI:EU:C:2013:43.
[101] Ibid para 59.
[102] Ibid para 60.
[103] Ibid para 47.
[104] Case C-570/19 *Irish Ferries Ltd v National Transport Authority* ECLI:EU:C:2021:664 para 70-73.
[105] Case C-179/21 *absolut bikes v the trading company GmbH* ECLI:EU:C:2022:353 para 39; C-649/17 *Amazon EU* EU:C:2019:576 para 44; Case C-249/21 *Fuhrmann 2 GmbH* ECLI:EU:C:2022:269 para 31.
[106] Ibid para 48.

EU airspace was subject to safety requirements in light of the 'objective of establishing and maintaining a high uniform level of civil aviation safety in Europe'.[107]

The Court of Justice has rejected similar challenges on the basis of the freedom to conduct a business to regulations compelling the provision of information to consumers,[108] introducing individual electronic identification of sheep and goats,[109] the disclosure of business information on waste shipment,[110] and the labelling of sparkling water[111] and fresh poultry.[112] Advocate General Szpunar wrote in one recent Opinion that far-reaching restrictions on the freedom to conduct a business, particularly the freedom of contract, would be particularly necessary in the context of 'regulated markets and transactions conducted with consumers.'[113]The Court has continued to stress the importance of consumer protection when justifying infringements on the freedom to conduct a business, including restrictions on the marketing of e-cigarettes,[114] compensation for ferry passengers who have suffered delays,[115]and the requirement on an mobile services operator to update its rates annually and provide justification for those rates to a national regulator.[116] One might note that this is all the more striking in light of the fact that the Court has accepted that commercial advertising, labelling and packaging is accepted as an exercise of freedom of expression.[117] By contrast, the US Supreme Court's acceptance that

[107] Case 353/20 *Skeyes v Ryanair* ECLI:EU:C:2022:423 para 67.
[108] Case C-430/17 *Walbusch Walter Busch GmbH* EU:C:2019:47 para 42.
[109] C-101/12 *Schaible v Land Baden-Württemberg* ECLI:EU:C:2013:661.
[110] C-1/11 *Interseroh Scrap v Sonderabfall (SAM)* ECLI:EU:C:2012:194.
[111] C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823.
[112] C-134/15 *Lidl GmbH & Co. KG v Freistaat Sachsen* ECLI:EU:C:2016:498.
[113] Case C-261/20 *Thelen Technopark Berlin GmbH v MN* Opinion of Advocate General Szpunar ECLI:EU:C:2021:620 para 90.
[114] Case C-477/14 *Pillbox 38 (UK) Ltd v The Secretary of State for Health* ECLI:EU:C:2016:324 para 161-162..
[115] Case C-570/19 *Irish Ferries Ltd v National Transport Authority* ECLI:EU:C:2021:664 para 170-175. See also, Case C-430/17 *Walbusch Walter Busch GmbH* ECLI:EU:C:2019:47 para 42; Case C-649/17 *Bundesverband* ECLI:EU:C:2019:576 para 44. See also, Case C-304/16 *American Express Co. v The Lords Commissioners of Her Majesty's Treasury* Opinion of Advocate General Campos Sánchez-Bordona ECLI:EU:C:2017:524 para 134-136.
[116] In Case C-277/16 *Polkomtel* ECLI:EU:C:2017:989 the Second Chamber of the Court of Justice considered that the decision of the Polish regulator was adopted in line with national laws that aimed to transpose the Access Directive, that the imposition of this requirement did not violate the essence of the freedom to conduct a business, given that the service could still be provided after the imposition of the reporting obligation, and that the national legislation sought to achieve objectives of general interest recognised by the EU, namely the promotion of competition and the interests of EU citizens, given that operators should be restrained from keeping prices at a very high level to the detriment of consumers.
[117] See, for example, C-157/14 *Neptune Distribution* EU:C:2015:823 para 64- 65; C-547/14 *Philip Morris Brands* EU:C:2016:325 para 147; Case C-430/17 *Walbusch Walter Busch GmbH & Co. KG* Opinion of Advocate General Tanchev ECLI:EU:C:2018:759 para 59.

commercial advertising comes within the scope of the First Amendment has made consumer protection significantly more challenging.[118]

Instrumental value of consumer protection

To many, the Court's willingness to uphold various regulatory measures under challenge from Article 16 is evidence that its deregulatory potential is minimal. Weatherill has argued that decisions such as *Deutsches Weintor* demonstrate that the Charter of Fundamental Rights had not meaningfully altered the reasoning of the Court.[119] The protection of Article 16 was 'neither subversive nor revolutionary.' The Court of Justice, he argued, 'does not aggressively defend commercial freedom from EU legislative intervention. It never has done.'[120] He argued that the introduction of the Lisbon Treaty has not led to any new shift in the Court's direction; the balancing exercise it carries out is largely replicated with reliance on new provisions. The form may have altered, but the substance, he concluded, was much the same as before. Those judgments, Weatherill argued elsewhere, did not indicate that the Court was prepared to use 'the Charter as a weapon to use aggressively in curtailing legislative options for the regulation of the internal market.'[121] As Prassl pointed out, 'Article 16 CFR has only rarely won the day, despite its increasingly frequent use in a range of cases.'[122]

Yet the Court's defence of areas such as consumer protection from challenges based on Article 16 does not mean its impact is negligible. For one thing, the objective of advancing and securing consumer protection has always been a core part of the European Union's market order, and consequently, its legal system.[123] Comprehensive consumer protection law is designed to bolster the wider aim of a single European market. We need only look to how the Court's scepticism of national measures aimed at ensuring high levels of consumer protection versus its robust defensive of European Union measures that aim to achieve the very same goal.

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[118] See, for example, Robert Post and Amanda Shanor, 'Adam Smith's First Amendment' (2015) 128(5) *Harvard Law Review Forum* 165; Amanda Shanor, 'The New Lochner' (2016) 1 *Wisconsin Law Review* 133.
[119] Stephen Weatherill, 'Protecting the Internal Market from the Charter' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing 2015) 213, 231.
[120] Ibid 232.
[121] Stephen Weatherill 'Use and abuse of the EU's Charter of Fundamental Rights: On the improper veneration of 'freedom of contract' 10 (2014) *European Review of Contract Law* 167, 178
[122] Jeremias Prassl, 'Business Freedom and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Law Studies* 189, 196.
[123] Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law - Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*' (2013) 42 *Industrial Law Journal* 434, 442.

The Court's approach, as one set of commentators remarked, 'could not be more different.'[124] Consumption is necessary for the EU single market: for the successful free movement of goods, services and capital, there must be demand. Consumer protection has long been prioritised to encourage public confidence in the internal market; it is valuable, therefore, insofar as it ensures that 'consumers are enabled to participate uninhibited in the market.'[125] One might make the same point about measures that seek to protect public health, of which the Court is similarly protective.[126] The need for consumer protection is explained by Everson and Joerges, who describe the 'counter-current' for consumer health and protection as a necessary means of boosting consumer confidence.[127] Ensuring a high level of consumer protection is considered to be the necessary price to pay for a flourishing internal market, achieved through the free movement of goods, services, capital and people. As Davies wrote:

> If one sees the internal market as a project to maximise the capacities of both businesses and consumers to do business with each other across borders, then the right to movement and the right of states to restrict it for consumer protection reasons are simply two girders in the same construction.[128]

Unlike the free movement provisions, Article 16 operates without the necessity of the cross-border element. But much the same logic applies: the internal market is a project to maximise the ability of both consumers and businesses to transact; consumer protection is equally necessary in this equation. Consumer protection is one of the interests that will constrain the unbridled operation of the four freedoms, in the wider pursuit of establishing the liberalised single market. We should not be surprised to find the same pattern emerging in relation to Article 16. Second, it should be noted that the Court's willingness to accept that a variety of regulatory measures and laws constituted a *prima facie* infringement of the freedom to conduct a business paved the way for later findings. While the Court was often prepared to find that infringements that served the objective of consumer protection were justified restrictions on Article 16, this anticipated an occasion where the Court would find that other regulatory

[124] Hannes Unberath and Angus Johnston, 'The Double Headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 *Common Market Law Review* 1237, 1238.
[125] Ibid 1244.
[126] See, for example, Case C-128/22 *Nordic Info BV v Belgische Staat* ECLI:EU:C:2023:951 para 95.
[127] Michelle Everson and Christian Joerges, 'Consumer Citizenship in Postnational Constellations?' *EUI Working Papers Law No. 2006/47* 1, 16.
[128] Gareth Davies, 'The Consumer, the Citizen, and the Human Being' in Dorota Leczykiewicz and Stephen Weatherill (eds) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart Publishing 2016) 325, 328.

measures constituted unjustified infringements: the Court had already taken the important first step of labelling regulatory measures as 'infringements.' It seems that the stringency of the proportionality test applied by the Court in this particular context often seems to depend on the objectives pursued by the offending measure.

Conclusion

It should not be assumed that the Court's defensiveness of the aims of consumer protection, or human health are indicative of a broader willingness to prioritise the wider public interest and other fundamental rights over the freedom to conduct to business. Rather, it is indicative that it will defend the general objectives of EU law, which in turn help the construction of the single market. The Court's robust attitude to consumer protection stems from the belief that consumer protection is a vital building block to securing a liberalised internal market. It has certainly been prepared to adopt a similar approach to other objectives of general interest of the Union, as it did in *Sky Österreich* with respect to freedom of information. Yet other competing interests, such as worker protection, do not appear to carry the same instrumental value. The Court of Justice has accepted a wide range of measures as *prima facie* infringements of the freedom to conduct a business. Whether it considers those infringements to be proportionately justified tends to depend, not on the severity of the breach, but whether the measure in question pursues an objective of general interest that is recognised under EU law, such as consumer protection.

CHAPTER FIVE

Article 16 and Worker Protection

Introduction

The widespread belief that the protection of the freedom to conduct a business did not pose a threat to regulatory measures was shaken with the decision of the Court of Justice in *Alemo-Herron.*[1] The judgment was widely criticised, but several commentators were quick to point out that it was simply one decision, and not necessarily an indicator of trends to come.[2] Until that point, commentators seemed to have assumed – not unreasonably – that labour protection was unlikely to fall afoul of Article 16.[3] After all, Article 16 acknowledged the freedom to conduct a business 'in accordance' with EU law and national law. The Charter of Fundamental Rights included the right to inform and consult workers in Article 27, the right of collective bargaining and industrial action in Article 28, the right to protection in the event of unjust dismissal in Article 30 and the right to fair working conditions in Article 31. [4] Moreover, in previous case law, the Court of Justice had stressed that freedom to conduct a business was not absolute, and that it had to be considered in light of its social function. The Court had previously upheld regulations that imposed expensive and time-consuming requirements on businesses, on the basis that the business activity was not prevented from being carried out. Yet these limitations were strikingly absent in the cases involving working protection. The acceptance that the Court had demonstrated for imposing onerous or expensive requirements in cases

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[1] Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521.

[2] Marija Bartl and Candida Leone, 'Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for Social Legislation?' in Hugh Collins (ed) *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 113, 121.

[3] Jeremias Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *Cambridge Year Book of European Legal Studies* 1.

[4] See, for example, Pacheco, who considered that Article 16 would face unavoidable limitations, both in other rights protected by the Charter of Fundamental Rights, EU law and the domestic law of Member States. See, Pedro Mercado Pacheco, 'Libertades económicas y derechos fundamentales. La libertad de empresa en el ordenamiento multinivel europeo' (2012) 26 *CEFD* 341, 348-350.

involving consumer protection, for example, was absent. It highlighted the limits of assessing Article 16's impact on the basis of case law which had revolved around consumer protection, which the Court of Justice has staunchly defended as a key building block for the establishment of the single market.

Alemo-Herron and the expansion of Article 16

In 2002, a local authority in London opted to contract out its leisure services to a private undertaking, CCL.[5] As part of this arrangement, the publicly employed staff became private sector employees. CCL then sold the business to Parkwood, another private sector operator, in 2004. Mr Alemo-Herron and his colleagues had originally been employed as public sector workers by the local authority, and their employment contracts stated that the terms and conditions were to be determined by reference to collective agreements negotiated by the local government collective bargaining group, the National Joint Council for Local Government Services. Under UK national law, it was possible for a contract to incorporate a provision that an employee's pay could be determined by a third party, such as a trade union.[6] Parkwood argued that it was not bound by the wage recommendations made by the National Joint Council, given that it was not represented within the group, and refused to implement the pay increases. The case eventually made its way to the UK Supreme Court, who considered that if it had only been a question of UK law, Parkwood would clearly have been bound by the provision, as it was 'entirely consistent with the common law principle of freedom of contract.'[7] Given the impact of EU law, the Supreme Court made a reference to the Court of Justice on whether a Member State was forbidden from extending 'dynamic protection' to employees. This is where an employer is bound, not just by worker collective agreements in force at the time of the transfer of the company, but also those made subsequent to the transfer.

In his Opinion, Advocate General Cruz Villalón concluded that Article 3(3) of Council Directive 2001/23/EC ('the Acquired Rights Directive') did not preclude Member States from allowing dynamic clauses relating to collective bargaining, and in particular, the terms of Article 16 did not prevent the transfer of an undertaking from accepting previously negotiated

[5] *Parkwood Leisure Ltd v Alemo-Herron* [2011] UKSC 26 para 1.
[6] The Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794). This was later replaced by the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246, which implemented Directive 2001/23/EC, although this took place after the transfers at issue in this case. The Acquired Rights Directive is sometimes described as the Transfer of Undertakings Directive.
[7] *Parkwood* (n 5) para 7-9.

collective bargains, provided the terms were not irreversible.[8] The fundamental right at issue, the Advocate General concluded, was in fact Article 16, the freedom to conduct a business. Notably, the Advocate General described Article 16 as the fundamental *right* to conduct a business rather than a freedom.[9] He went on to state that while the right to conduct a business in accordance with EU and national law is recognised, and while UK law allows 'dynamic clauses', this could not operate in a manner contrary to fundamental rights, including those protected in the Charter. The Explanations provided by the Charter, he noted, recognised contractual freedom and the principle of free competition. He concluded that the fact that the new employer was now bound by the terms and conditions negotiated by the previous employer was such a 'draconian requirement' that it resembled an interference with the freedom to contract, which was protected as a facet of Article 16.[10] In its judgment, the Third Chamber of the Court of Justice accepted that the Acquired Rights Directive did not preclude Member States from introducing measures that were more favourable to employees.[11] Nonetheless, the Court considered, the interpretation of the Directive had to comply with the freedom to conduct a business.[12] The problem, the Court concluded, was that the employer in such cases was constrained in its ability to determine the working conditions of its employees and could not effectively assert its interests, because it was not able to join in the collective bargaining process.[13] Consequently, 'the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.'[14]

Response to *Alemo-Herron*

Writing extra-judicially, Advocate General Wahl welcomed the outcome in *Alemo-Herron* as 'well balanced,' arguing that provisions such as the UK national laws in question risked the continued operation of the business as an entirety, which would jeopardise the overall employment of workers.[15] This was, however, one of the few positive responses to the

[8] Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd* Opinion of Advocate General Cruz Villalón ECLI:EU:C:2013:82 para 59.
[9] Ibid para 46.
[10] Ibid para 54.
[11] *Alemo-Herron* (n 1) para 23.
[12] Ibid para 31.
[13] *Alemo-Herron* (n 1) para 34.
[14] Ibid para 35.
[15] Nils Wahl, 'The Freedom to Conduct a Business' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds) *The Internal Market and Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 273, 285-286.

judgment, which was roundly criticised. Weatherill memorably wrote that the judgment was 'so downright odd that it deserves to be locked into a secure container, plunged into the icy waters of a deep lake and forgotten about.'[16] More than one commentator draw a comparison to the infamous decision of the US Supreme Court in *Lochner v New York.*[17] Others pointed out the far-reaching ramifications of the judgment: for example, that it seemed to bestow Article 16 with horizontal application, rendering it enforceable between private parties.[18] The judgment demonstrated that the Charter was not necessarily an unqualified force for good: *Alemo-Herron* showed that it could be 'outright destructive for the protection of workers' rights.'[19]

Weatherill pointed out that, first, the Court of Justice largely ignored the wording of the Directive which left open the option for Member States to go further than the Directive and provide additional protection to employees.[20] Second, he noted that the Court of Justice had asserted, with little explanation, that the clause in the particular agreement was 'liable to undermine the fair balance' between employer and employee.[21] The Court had then turned to examine the provisions of Article 16 of the Charter, which the Court considered encompassed freedom of contract, referencing the judgment in *Sky Österreich.* But *Sky Österreich*, as Weatherill has pointed out, was authority for the proposition that freedom of contract can be limited to take account of other interests: precisely the opposite conclusion to *Alemo-Herron.*[22] The Court of Justice's interpretation of Article 16, he wrote, offered 'an aggressive protection of the constitutional value of freedom of contract which is frankly breath-taking….it is as if it is the employer that is the vulnerable party.'[23] Preventing State intervention in such interactions, he noted, simply consolidates existing pre-imbalances in a variety of private transactions 'in a way that makes a mockery of any notion of true freedom in practice.' This

[16] Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract'(2014) 10 *European Review of Contract Law* 167; Stephen Weatherill, 'Protecting the Internal Market from the Charter' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford University Press 2015) 213.
[17] Martijn W. Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law' in Hugh Collins (ed) *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 167, 189; Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 189-190.
[18] Michelle Everson and Rui Correia Gonçalvez, 'Article 16' in Steve Peers and Tamara Hervey (eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart 2014) 438, 476.
[19] Jeremias Prassl, 'Book Review: Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds) *The Lisbon Treaty and Social Europe'* (2015) 52 *Common Market Law Review* 310, 311.
[20] Weatherill 'Use and Abuse' (n 16) 169.
[21] Ibid 170.
[22] Ibid 171.
[23] Ibid 172.

was not to suggest that employer's interests should count for nothing, he wrote. Rather, 'claiming to pursue a fair balance but not articulating what weightings apply on that balance where employee and employer interests collide, it has in fact preferred a distinctively pro-employer interpretation of an ambiguous text.'[24] Bartl and Leone argued that the logic of the Court was difficult to sustain on several levels: not least that Parkwood could have exercised its entitlement to negotiate when it had acquired the leisure centre in the full knowledge that a collective agreement was already in place.[25] But even if the dynamic clause had been upheld, Parkwood could have negotiated directly with its employees in the wake of the transfer. Could it seriously be said, as one set of commentators pointed out, that the company were prevented from re-negotiating the collective agreement?[26] Bartl and Leone point out that another glaring issue that the Court failed to address was whether EU law was even relevant to the issue at hand. Unlike the European Convention on Human Rights, the Charter of Fundamental Rights is supposed to be invoked only where there is a pre-existing question of European Union law at stake. In *Alemo-Herron,* as the authors note, the UK was relying on the minimum harmonisation clause, and it was not self-evident that EU law applied.[27]

Babeyev, similarly, wrote that the outline of freedom of contract offered by the CJEU in this case meant that the weight of protecting employee interests vanished, with the emphasis almost entirely on the potential negative financial repercussions for employers.[28] On the basis of the logic of the judgment, freedom of contract formed part of the 'essence' of the freedom to conduct a business. It had effectively been cast as an absolute right that precluded any limitation or restriction.[29] This is, one might add, entirely at odds with the widespread recognition by national courts that parties to a contract are frequently unequal bargaining partners.[30] The Court

[24] Weatherill 'Use and Abuse' (n 16) 174.
[25] Bartl and Leone (n 2) 151-152.
[26] Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak Right, Strong Court – the freedom to conduct a business and the EU Charter of Fundamental Rights' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* (Elgar 2017) 326, 341.
[27] Bartl and Leone (n 2) 117. In his Opinion in Joined Cases C-609/17 and C-610/17 *Terveys-ja* ECLI:EU:C:2019:459 Advocate General Bot at para 82-84 considered that EU law applied in such scenarios insofar as Member States were exercising an option available to them under a particular Directive to grant additional protection, 'which should be treated as an implementation of that directive.'
[28] Rufat Babayev, 'Duality of economic freedom protection in the interplay of article 16 CFR and article 102 TFEU' (2020) 45(5) *European Law Review* 694, 710.
[29] Ibid 711-712. A similar argument was made in Xavier Groussot and Gunnar Thor Pétursson, 'The EU Charter of Fundamental Rights Five Years on: The Emergence of a New Constitutional Framework?' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing 2015) 135, 144. See also, Groussot et al (n 26) 341.
[30] See, for example, Aurelia Colombi Ciacchi, 'Party Autonomy as a Fundamental Right in the European Union' (2010) 6 *ERCL* 303.

made no reference to the suggestion that the worker might enjoy a 'substantive freedom of contract' vis-à-vis their employer.[31] Hesselink wrote that, in the wake of *Alemo-Herron,* it seemed as though a corporation was entitled to a protected sphere of decision-making in how it conducted its business, including the free formation of contracts, free from the interference of national or EU law.[32] Giubboni wrote that the judgment understood the freedom to conduct a business as prohibiting any regulatory measure that would 'negatively affect the profitability of the economic activity.'[33] Gill-Pedro argued that the case marked a departure, both from the Court's existing interpretation of Article 16 through its previous case law , and the text of the provision itself. There was a key difference, he argued, between freedom as non-interference and freedom as non-domination. Freedom was not solely confined to having one's choices overruled, but it also entailed the capacity to be free from the control of others when exercising choice.[34] Properly understood, he argued, Article 16 recognised freedom to conduct a business as non-domination, instead of non-interference. Yet on the basis of the judgment in *Alemo-Herron,* he suggested, employers will be in the dominant position and can exert control over their workers – on the basis of non-domination, employees are left with no freedom in this instance. The identification of an 'essence' of the freedom to conduct a business, he wrote, presupposed that there was an objective essence to that freedom that could be objectively identified.[35] But by purporting to do precisely that, the Court of Justice had, in fact, enshrined a distinctive vision of freedom: one which views freedom from regulation as the apex of Article 16. By failing to acknowledge the contested nature of the right at stake, and the need for political resolution (which had been done via a democratic mechanism) the Court risked becoming an agent of domination itself.[36] He wrote that:

> By constitutionalizing the right of participants in the market to be free of regulatory interference, except to the extent that this can be justified, the CJEU is making a

[31] Max Fabian Starke, 'Fundamental Rights before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm?' *European Contract Law and the Charter of Fundamental Rights* (Cambridge University Press 2018) 93, 103.
[32] Hesselink wrote that, '…it seems that, according to the Court, a business has a fundamental right to conduct its business which covers, inter alia, freedom of contract, the essence of which neither the EU legislature nor the national legislature, when transposing a minimum harmonisation directive, is allowed to interfere with..' See, Hesselink (n 17) 169.
[33] Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 184.
[34] Eduardo Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination' (2017) 9 *European Journal of Legal Studies* 103, 130.
[35] Ibid 132.
[36] Ibid 134.

particular determination of the relationship between the market and the state, and the role of the state in regulating the market.[37]

'In accordance' with Union and national law and practices

The Opinion of the Advocate General, and the Court's subsequent acceptance of the Opinion's logic in *Alemo-Herron*, marked the beginning of a noticeable shift. On the face of the text, Article 16 acknowledges the freedom to conduct a business in accordance with EU law and national law. This had been previously understood as the freedom to conduct a business *in line* with European Union law and national law. In *Ryanair* and previous cases, the freedom to conduct a business had been acknowledged as a protected freedom under the Charter, but the Court had always stressed that the text of Article 16 itself recognised that the freedom had to be conducted according to and within the confines of with existing law. The 'social function' had been emphasised, and inevitably this meant that Article 16 did not trump the regulation of business or other area of law. It was Article 16, in other words, that had to capitulate to pre-existing national or EU law. This is the interpretation given to Article 16 by some scholars,[38] and indeed, one recent Opinion by an Advocate General.[39] In *Alemo-Herron,* however, the logic was rapidly inverted: national law has to be altered and adjusted to take account of Article 16. The national regulations at issue in *Alemo-Herron,* it should be remembered, were implementing the Acquired Rights Directive which expressly permitted Member States to provide greater protection to employees. It should, then, have been considered to have been a lawful limit on the exercise of the freedom to conduct a business.[40] When Article 16 had been drafted, the caveat of 'in accordance with Union law and national law' had been added precisely to ensure that the remit of the provision was limited. As it turned out, it was a fairly ineffective limitation. As noted in Chapter Three, this was an entirely predictable development: laws are nearly always subject to being assessed by their compatibility with fundamental rights and freedoms, rather than the other way around.

Gill-Pedro has previously argued that Article 16 should be interpreted to mean that a person or legal persons has the freedom to conduct a business in line with, or subject to the parameters

[37] Ibid 133.
[38] Eduardo Gill-Pedro, 'Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law' (2022) 18 *European Constitutional Law Review* 183, 191.
[39] Joined Cases C-798/18 and C-799/18 *Anie v Ministero dello Sviluppo Economico,* Opinion of Advocate General Saugmandsgaard Øe ECLI:EU:C:2020:876 para 30 fn. 19.
[40] Gill-Pedro (n 38) 192-193.

of EU and national law. This would allow unlawful restrictions on their operations to be challenged as a violation of the freedom to conduct a business, but those unlawful practices could be challenged without the need to invoke a fundamental right. On the basis of the interpretation advanced by Gill-Pedro, there would be little point in possessing a fundamental right if it could be overridden by any law. This is precisely the problem with enshrining a 'fundamental freedom' to conduct a business in the first place: it always had the capacity to be interpreted in a way that could bulldoze regulatory constraints on businesses. By now, two of the drafting features intended to constrain the operation of Article 16 had vanished: the weaker 'freedom' had become a more robust-sounding 'right', and Union and national laws now had to be exercised in accordance with Article 16, rather than the other way around. As Gill-Pedro wrote, Article 16 now granted 'the right to challenge national laws which unduly restrict the freedom of manoeuvre of a market actor.'[41] Any legislative measure that affected the autonomy of the business would have to be justified.[42]

Reshaping the Acquired Rights Directive

The Acquired Rights Directive had been introduced with the specific aim of protecting employees attached to a company that was subsequently purchased.[43] The original understanding and interpretation of the Directive was to provide additional protection to employees in such circumstances. Rainone has argued that, in the past twenty years, the Court has steadily downgraded the protection offered to employees under the Directive.[44] The Court's contemporary attitude can be contrasted with the reasoning displayed in *d'Urso.*[45] Here, the defendants argued that the automatic continuation of the employee's contracts with the transferee as a result of the transfer undermined their freedom to conduct a business. This 'restrictive effect' was, the Court observed, 'inherent in the very purpose of Directive.'[46] Yet the Court of Justice soon began to interpret the Acquired Rights Directive as one that needed to accommodate the interests of employees and transferees, rather than to correct the natural imbalance between workers and their employers. Article 16 has proved to be an effective

[41] Gill-Pedro (n 38) 193.
[42] Niall O'Connor, 'The Impact of EU Fundamental Rights on the Employment Relationship' (PhD thesis, University of Cambridge 2018) 164.
[43] Originally Council Directive 77/187; amended by Directive 98/59/EC, and subsequently consolidated as Directive 2001/23.
[44] Silvia Rainone, 'Labour rights in the making of the EU and in the CJEU case law: A case study on the Transfer of Undertakings Directive' (2018) 9(3) *European Labour Law Journal* 299, 321-322.
[45] Case C-362/89 *d'Urso* ECLI: EU: C:1991:326.
[46] Ibid para 15.

mechanism to bolster the interests of transferees and to steadily undermine the impact of the Acquired Rights Directive. [47] In fact, the Court's 'valorisation of the freedom of contract and to conduct a business of the transferee began since the adoption of the [Charter] and has intensified since the [Charter] acquired binding force.'[48] Thus, when the Directive came to be interpreted by the Court of Justice in *Alemo-Herron,* the Court noted that aim of the Directive was not simply to protect employees but to ensure a 'fair balance' between the employees and the transferee. As Bartl and Leone put it, the Court locates the 'fair balance' to be struck not in the external labour market but rather '*within* the Directive itself.'[49] The insight that the Court has demonstrated in the field of consumer protection – namely the stark imbalance of power between the respective parties – is markedly absent when it comes to the protection of workers.[50]

The judgment of the Court in *Asklepios Kliniken Langen-Seligenstadt GmbH* provides an insight into the current interpretation of the Acquired Rights Directive.[51] The Third Chamber affirmed that the Directive aimed to ensure a 'fair balance' between the interests of the workers and the transferee, and that the latter had to be able to make changes in order to continue its operations.[52] In particular, Article 3 of the Acquired Rights Directive had to be interpreted in light of Article 16 to ensure that the transferee was 'able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.'[53] Given that the national German law at issue allowed for the transferee to make amendments to the employment contracts both on a 'consensual and unilateral' basis, the Court was satisfied that the law at issue appeared to meet those requirements.[54] The Directive may have begun from the starting premise that the rights and entitlements of employees will be preserved in the event of a transfer. Yet given that the Directive must now be read 'in light' of Article 16 of the Charter,

[47] Silvia Rainone, 'Labour rights in the making of the EU and in the CJEU case law: A case study on the Transfer of Undertakings Directive' (2018) 9(3) *European Labour Law Journal* 299, 322.
[48] Ibid.
[49] Bartl and Leone (n 2) 116.
[50] See, for example, the comments of the Court in C-208/19 - *NK (Individual house project)* ECLI:EU:C:2020:382 at para 39, where the Sixth Chamber noted that: '…[I]n EU policies, the protection of consumers – who are in a weaker position in relation to sellers or suppliers, inasmuch as they must be deemed to be less informed, economically weaker and legally less experienced than the opposite party.'
[51] Joined Cases C-680/15 and C-681/15 *Asklepios Kliniken Langen-Seligenstadt GmbH v Ivan Felja and Asklepios Dienstleistungsgesellschaft mbH v Vittoria Graf* ECLI:EU:C:2017:317
[52] Ibid para 22, citing Case 426/11 *Alemo-Herron* and C-328/13 *Österreicherischer Gewekschaftsbund* ECLI:EU:C:2014:2197.
[53] *Asklepios* (n 50) para 23.
[54] Ibid para 24.

the end result in the eyes of the Court appears to be that employer must have the option to unilaterally alter the employment contracts of its workers. In that respect, *Asklepios* reaffirms the logic of *Alemo-Herron.*[55] Hesselink concluded recently that the decision in *Alemo-Herron* was 'a one-off aberration' which the Court has 'never repeated…or even referred to it.'[56] Yet this is difficult to square with the fact that the Court expressly referred to and reaffirmed the logic of *Alemo-Herron* in *Asklepios*.[57]

Failure to challenge the normative basis of Article 16

Yet even in the wake of *Alemo-Herron,* commentators largely tended to blame the Court of Justice's misapplication of the proportionality test, rather than challenge the normative interests shielded by Article 16.[58] The Court had used the Charter in an 'asymmetrical way' without citing any other relevant rights protected by the Charter, such as the right to fair working conditions in Article 31.[59] The previous decisions involving Article 16 had been relatively innocuous, and it was simply the case that 'something might have gone wrong with the decision in *Alemo-Herron*.'[60] Giubboni argued that the 'new theology of free markets' adopted by the Court was underpinned by the 'totally unprecedented – and fully unacceptable – reinterpretation of the freedom to conduct a business.'[61] In a similar vein, Davies, Bogg and Costello remarked that the decision in *Alemo-Herron* was a reminder that the use of fundamental rights 'is an ideologically contested and open-textured legal technique' that can reflect the political preferences of the judiciary. The Court's judgment amounted to 'a step beyond even *Viking* and *Laval*' and they concluded that 'it would be very difficult in these circumstances to maintain the fiction that the outcomes of such a balancing exercise were politically innocent and simply dictated by legal logic.'[62] To Prassl, the problem was the Court's

[55] Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 185.
[56] Martijn W. Hesselink, 'Alienation commodification: a critique of the role of EU consumer law' (2023) 2 *European Law Open* 405, 408.
[57] *Asklepios* (n 50) para 23. See also, Case C-328/13 *Österreichischer Gewerkschaftsbund* ECLI:EU:C:2014:2197 para 29.
[58] Weatherill, 'Protecting the Internal Market from the Charter' (n 16) 213.
[59] Catherine Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill*, The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing 2015) 173, 183; Babayev (n 28).
[60] Bartl and Leone (n 2) 121.
[61] Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 173.
[62]A.C.L. Davies, Alan Bogg and Cathryn Costello*,* 'The role of the Court of Justice in labour law' *Research Handbook on EU Labour Law* (Elgar 2016) 114, 133.

'aggressive interpretation' of Article 16.[63] Gill-Pedro argued that Article 16 should instead be interpreted in line with the textual limitations intended by the drafters: namely that the freedom to conduct a business ought to be subject to EU and domestic law.[64] In these cases, the Court continuously stressed that any such principle had to be interpreted in light of its social function, and scarcely ever trumped social policy. Both Gill-Pedro and O'Connor have, in essence, argued that the Court of Justice should interpret Article 16 in the most limited way possible to ensure that other policy objectives are not undermined. This approach would effectively strip Article 16 of any real weight.

But if one is arguing that the freedom to conduct a business should never trump social interests, why acknowledge it as a right at all? This perspective stops short of directly challenging the normative worldview shielded by the recognition of business activity as a fundamental right. It does not critique the shift Article 16 necessitates, by requiring the State to justify any measures that may affect the operation of a business. Bartl and Leone have suggested that such an interest should 'arguably not be open for constitutionalisation.' But the justification they offer for why Article 16 ought not to be constitutionalised is not because of the nature of the interest it protects, or because it is likely to lead to economic domination. They suggested, rather, that it was virtually impossible to have a universal definition of freedom of contract or the right to conduct a business, because the 'essence' of that right will be heavily shaped by local contextual factors.[65] These perspectives indicate an implicit refusal to consider whether enshrining an open-ended freedom to conduct a business as a fundamental right in the Charter was always likely to conflict with at least some aspect of labour protection and social policy, and threaten to undermine them altogether. Arguably, the primary fault lay with the drafters of the Charter rather than with the Court of Justice *per se.* Once the freedom to conduct a business was enshrined in the Charter of Fundamental Rights, the task of the Court of Justice was to interpret and apply Article 16. Once an entitlement as broad as the freedom to conduct a business was recognised as a fundamental right, its potential to undermine social objectives was considerable. After all, the entire purpose of Article 16 is to support and empower private

[63] Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42(4) *Industrial Law Journal* 434, 441.
[64] Eduardo Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination' (2017) 9 *European Journal of Legal Studies* 103, 112-113. O'Connor argued that the Court of Justice should return to the approach it adopted where freedom to pursue an economic activity was considered merely to be a general principle of EU law; see Niall O'Connor, 'Whose autonomy is it anyway? Freedom of contract, the right to work and general principles of EU law' (2020) 49(3) *Industrial Law Journal* 285, 287.
[65] Bartl and Leone (n 2)123.

enterprise; in the words of Advocate General Wahl, it is to ensure that 'private operators and persons can conduct a business without undue interference from the state.'[66] The instigators of Article 16, the representatives of the European People's Party at the Convention, would not have insisted on its inclusion otherwise. For so long as Article 16 is recognised as a fundamental right in the Charter, economic operators are perfectly entitled to invoke it to challenge laws and measures that they considered unduly hamper their freedom of action in conducting their business.

The continued expansion of Article 16: *AGET Iraklis*

Writing in 2015 in the wake of *Alemo-Herron*, Jeremias Prassl had considered whether Article 16 posed a threat to various aspects of EU labour law, including the Collective Redundancies Directive.[67] The Collective Redundancies Directive provides that employers should notify the relevant public authority of the details of any collective redundancies, which should also be communicated to the workers' representatives. While some Member States had adopted legislation that allowed authorities to refuse to authorise mass redundancies, he concluded that it was 'unlikely that a challenge under Article 16 CFR would succeed.'[68] This prediction would be undermined by the decision of the Grand Chamber in *AGET Iraklis*.[69] In this case, AGET Iraklis, a cement producer operating in Greece, sought to close a cement plant which would cause over 200 redundancies. The national legislation implementing the Collective Redundancies Directive compelled businesses to obtain permission from national authorities if they intended to introduce compulsive collective redundancies.[70] The Minister for Labour could refuse to authorise some or all of the redundancies, on the basis of the interests of the national economy, labour market conditions or the state of the company. Workers representatives failed to attend consultations with the company to discuss the anticipated layoffs, and the company later unsuccessfully sought permission from the Minister to give effect to the redundancies. The question of whether the Greek law was compatible with the Collective Redundancies Directive and Article 49 and Article 63 TFEU was eventually referred to the Court of Justice.

[66] Nils Wahl, 'The Freedom to Conduct a Business' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds) *The Internal Market and Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 273, 275.
[67] Prassl 'Business Freedoms' (n 3) 200-204.
[68] Ibid 203.
[69] Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.
[70] (GR) Law No. 1387/1983 on the Control of Collective Redundancies and Other Provisions.

Advocate General Wahl considered that the Collective Redundancies Directive did not prevent the operation of the national law at issue. However, he found that the legislation breached the freedom of establishment in Article 49 TFEU, which was of relevance as there was a 'clear cross-border element' as AGET Iraklis was the subsidiary of LafargeHolcim, a company that had subsidiaries throughout the European Union.[71] The most 'decisive' element was that the freedom of establishment could not be limited to the right of businesses to establish subsidiaries in the other Member States, including the right to 'scale down' or shut down an establishment.[72] Moreover, as the Greek national law compelled employers to seek Ministerial authorisation before implementing collective redundancies, it constituted an infringement of the freedom to conduct a business in Article 16 of the Charter. Advocate General Wahl noted that Directive 98/59 represented an EU-level compromise on the balance between the interests of worker protection and employer's interests. The unilateral imposition of further obligations on employers by the Greek law – which he noted, disincentivised workers from engaging with their employers – put that balance at risk. A similar conclusion, he noted, had been reached in *Alemo-Herron,* where it had been found that the essence of freedom of contract had been infringed.[73]

As a purely economic objective, he concluded that the interests of the national economy were insufficient to justify a refusal to enact collective redundancies.[74] The other two factors related to labour market conditions and the condition of the business, which he accepted as valid conditions. But, he considered that the measure at issue went further than necessary for the objective it sought to achieve.[75] The Advocate General noted that the law could, in fact, damage the interests of workers because if the redundancies were not made, the business would be incentivised to dissolve the business entirely and could potentially not have sufficient funds to give compensation to the workers, and endanger the livelihoods of all workers, not just those who had been made redundant. Thus, it would not help to meaningfully tackle unemployment.[76] He found it to be a 'remarkable' contention that local Member State authorities would be better suited to determine the needs of the organisation than the business itself, and found it inappropriate to seek to advance worker interests through this mechanism.

[71] Case C-201/15 *AGET Iraklis* Opinion of Advocate General Wahl ECLI:EU:C:2016:429 para 48.
[72] Ibid 65.
[73] Ibid para 64.
[74] Ibid para 66.
[75] Ibid para 67.
[76] Ibid para 68; para 73.

He noted that the requirements were not particularly clear, and granted a wide berth of discretion to employers – and disincentivised employees from engaging in negotiations.[77] He noted finally, that it was important to reduce measures that disincentivised new businesses and entrepreneurship. Remarkably, Advocate General Wahl even made reference to the conditions adopted by the Greek government under the European Stability Mechanism, whereby the Greek government had agreed to reform its laws on collective bargaining, industrial action and labour market policies.[78]

In its judgment, the Grand Chamber noted first, that if a Member State required anticipated collective redundancies to be notified to the local authorities, that did not entail a breach of the freedom to conduct a business or freedom of establishment protected Article 49 TFEU *per se.* The purpose of the Directive was to ensure a minimum protection for workers by harmonising the rules on collective redundancies, and under the Directive, Member States were free to introduce greater protections for workers and go further than provided for in the Directive.[79] A mechanism that created a framework to regulate collective redundancies did not, in and of itself, affect the core of the freedom to conduct a business, but any such framework would have to 'strike a fair balance' between the interests of preserving employment as against freedom of establishment and the freedom to conduct a business.[80] However, the power granted to the Minister to prohibit imposing collective redundancies were very broadly drafted objectives. This was particularly the case as the decisions at stake were of a 'fundamental nature' to the life of the company.[81] Given that the criteria that could be relied on to object to the redundancies were so general, and did not outline any specific occasion on when the powers could be validly used, it constituted a profound interference with both Article 49 TFEU and Article 16, as it would not be clear to the employer when the power to block the redundancies could be exercised by the national authorities. This is one of the features of the judgment that was welcomed by commentators. Antonaki pointed out that, unlike the Advocate General, the Grand Chamber had accepted in principle that Member States could create a system of authorisation for collective redundancies, provided the criteria were sufficiently specific.[82] Yet it is not self-evident that an outline of precise reasons and circumstances would have solved

[77] Ibid para 71.
[78] Ibid para 80.
[79] *AGET Iraklis* (n 69) para 32.
[80] Ibid para 90.
[81] Ibid para 99.
[82] Ilektra Antonaki, 'Collective Redundancies in Greece: *AGET Iraklis'* (2017) 54 *Common Market Law Review* 1513, 1522.

the problem as identified by the Court: a more detailed list of circumstances might leave an undertaking equally unable to anticipate whether the collective layoffs would be authorised or not. It is hard not to suspect that what the Court of Justice really meant was not only that criteria had to be more precise, but that it had to be more narrowly drawn: there could only be limited and specific circumstances where this mechanism could be triggered.

Reaction to *AGET Iraklis*

Nonetheless, the judgment of the Court of Justice in *AGET Iraklis* was largely welcomed as a more sympathetic approach to social interests.[83] Some seemed to view the judgment as having corrected the imbalance left by *Alemo-Herron*, or at the very least, indicated a change in direction that placed greater value on labour rights.[84] Gerstenberg welcomed the ruling as paving the ground for an appropriate balancing between the relevant stakeholders: the Greek authorities, trade unions and economic operators.[85] But one might note in response that that balance had already been struck in the Greek national legislation: the interests of each party had already been considered, only to be overridden by the Court of Justice. As Davies has pointed out, one of the most concerning aspects of the decision in *Alemo-Herron* was that it set a precedent for Article 16 to be used by employers to trump the fundamental rights of workers.[86] EU labour law has long acknowledged that its purpose is to redress the inevitable imbalance in the relationship between employer and employee. The introduction of Article 16 upset that equilibrium, by establishing a paradigm of two rights in conflict that had to be resolved by the Court. This presupposes that these interests began from an equal premise. As Davies wrote, *AGET Iraklis* suggested a continuation of a trend of 'a supposed 'clash of rights' in every

[83] See, for example: Menelaos Markakis, 'The New *Viking Laval*? AG Wahl argues that requirement for prior authorization of collective redundancies breaches Article 49 TFEU' *EU Law Analysis* 8 July 2016 http://eulawanalysis.blogspot.cz/2016/07/the- new-vikinglaval-ag-wahl-argues-that.html; Menelaos Markakis, 'Can Governments Control Mass Layoffs by Employers: Economic Freedoms vs Labour Rights in Case C-201/15 *AGET Iraklis'* 13 (2017) 1 *European Constitutional Law Review* 724, 734; Konstantinos Polomarkakis, 'A Tale of Two Approaches to Social Europe: The CJEU and the Advocate General drifting apart in Case C-201/15 *AGET Iraklis*' (2017) 24(3) *Maastricht Journal of European and Comparative Law* 424, 427; Nicola Countouris and Aristea Koukiadaki, 'Greek Glass Half-Full: The CJEU And Europe's 'Highly Competitive Social Market' Economy' *Social Europe,* 13 February 2017, https://www.socialeurope. eu/glass-half-full-cjeu-europes-highly-competitive-social-market-economy.

[84] Antonaki (n 82) 1521; Václav Šmejkal 'Ten Years after the *Viking* Judgment: EU Court of Justice Still in Search of Balance between Market Freedoms and Social Rights' (2017) *Charles University in Prague Faculty of Law Research Paper* No. 2017/II/1.

[85] Oliver Gerstenberg, 'Fundamental Rights and Democratic Sovereignty in the EU: The Role of the Charter of Fundamental Rights of the EU (CFREU) in Regulating the European Social Market Economy' (2020) 39 *Yearbook of European Law* 199, 209.

[86] A.C.L. Davies, 'Has the Court of Justice changed its management and approach towards the social acquis?' 14 (2018) *European Constitutional Law Review* 154, 164.

case.'[87] She pointed out that while the Greek national law did significantly qualify the capacity of the employers to implement mass redundancies, the decision nonetheless demonstrated in acute terms the potential reach of Article 16. On the basis of the logic in *AGET Iraklis*, she concluded, 'almost any national labour law is potentially open to the charge that it infringes the rights of employers.'[88]

Much as Marzal wrote in the wake of the Court's decisions in *Viking* and *Laval,* 'the solemn proclamation of the EU's commitment to the protection of workers did not alter the assessment of proportionality by the Court.'[89] The balancing exercise carried out by the Grand Chamber failed to take out of several relevant contextual factors. First, it should have been pointed out that the applicant in *AGET Iraklis* had opted to establish their subsidiary in Greece in the full knowledge of the existence of the Greek law which dated from 1989. An existing Greek cement plant had merged with AGET Iraklis in 2001, and shortly afterwards became part of the French multi-national company, Lafarge.[90] In other words, the applicant had made a commercial decision to locate to Greece, and freely adopted the risk that they would be subject to national legislation on mass redundancies. Moreover, in adopting this law, the Greek authorities had effectively made a policy trade-off which anticipated that there may be less local employment in the immediate future, but that long-term employment would be more secured. Much as in *Alemo-Herron,* the applicant had opted to enter into a commercial transaction which contained stipulations for worker protection which they later sought to challenge as an unacceptable constraint on their freedom to conduct a business, after having freely assumed the risk in the first place. Had the Greek legislation survived, doubtless the employer would have enjoyed economic 'compensation' through other means had the legislation not existed, such as lower operating costs. The decision in *AGET Iraklis* is a prime example of a judicial ruling that undermines robust labour protection, all while stressing its importance.[91]

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[87] Ibid 168.
[88] Ibid 169-170. In a similar vein, Prassl warned of further challenges to worker protection, noting that: 'As nearly all of employment law can be seen as an interference with employers' freedoms, Article 16 CFR will easily be engaged, with the conceptual apparatus of fundamental rights protection thus providing the basis for challenges to employment legislation.' Prassl (n 3) 191.
[89] Toni Marzal, 'From Hercules to Pareto: Of bathos, proportionality, and EU law' (2017) 15(3) *International Journal of Constitutional Law* 621, 632.
[90] Polomarkakis (n 83) 425.
[91] Femke Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction? The Clash between the European Business Freedoms and the National level of Workers' Protection' 9 (2018) *European Labour Law Journal* 50,70. See also, Dagmar Schiek, 'Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market' 13 (2017) *European Constitutional Law Review* 611, 635.

Finally, it is worth noting the Court of Justice's reliance on well-established case law that economic objections cannot justify infringements on fundamental freedoms protected by the Treaties.[92] This would be commendable but for the fact that both the freedom to conduct a business and the freedom of establishment are both purely economic interests that have been reformulated as fundamental rights.[93] It is not that economic objectives are not considered valuable. Rather, it is a question of whose economic wellbeing is valued. The economic well-being of the workers, the Greek national economy and the wider Greek public cannot be privileged over that of an individual company. On this basis, *AGET Iraklis* is not a departure from *Alemo-Herron*, it is a continuation of the same legacy.[94]

Article 49 TFEU v Article 16 CFR

Most commentators also drew attention the prominent role of Article 49 TFEU, the freedom of establishment, had played in this judgment. Yet it should first be noted that on the basis of the Collective Redundancies Directive and the national legislation at issue, it was not self-evident that EU law applied.[95] Given that Directive sought only to partially harmonise the protection of employees in instances of collective redundancies, it did not govern the criteria under which Member States authorities could approve or refuse to authorise collective redundancies.[96] Nor was it clear, as Nic Shuibhne has argued, that the legislation in question posed a 'serious obstacle' to the freedom of establishment.[97] The Grand Chamber was only able to assess the substantive criteria set out in the Greek legislation on the basis that it constituted an interference with the freedom of establishment in Article 49 TFEU and the freedom to conduct a business in Article 16 of the Charter.[98] Ratti has described the form of minimal harmonisation in labour law epitomised by the Collective Redundancies Directive as 'frequently frustrated by the existence of superior EU values or interests.'[99] In this case, it was the freedom of establishment and the freedom to conduct a business that constituted those 'superior EU values' that were used as the external metric to assess the national legislation. It has also been suggested that the

[92] *AGET Iraklis* (n 69) para 72.
[93] Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 180.
[94] Ibid 188.
[95] Antonaki (n 82) 1527.
[96] Luca Ratti, 'The European Economic Constitution and the constitution of a social Europe: gleanings from the CJEU's collective redundancies cases' in Herwig C.H. Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds) *The Metamorphosis of the European Economic Constitution* (Elgar 2019) 154, 156.
[97] Niamh Nic Shuibhne, 'The Social Market Economy and Restriction of Free Movement Rights: Plus c'est la meme chose' (2019) 57 *Journal of Common Market Studies* 111, 121.
[98] Antonaki (n 82) 1527-1528.
[99] Ratti (n 96) 156.

outcome of the case would have been much the same if Article 16 had not been implicated.[100] On the facts of the case, that may well be true: Article 49 certainly did most of the heavy lifting in the analysis offered by the Grand Chamber. The Court of Justice concluded that the proportionality assessment for whether a violation of Article 49 and Article 16 had occurred were, in this case, identical. In fact, *AGET Iraklis* involved a new development of the freedom of establishment, as the Court noted that Article 49 encompassed the right to dispel or scale down one's economic activity, as well as establishing and expanding a business.[101] The premise of the logic is that '…*any* domestic regulation is a barrier to economic freedom and that the right of establishment is synonymous with business freedom.'[102]

Yet the Court's reliance on Article 49 TFEU is somewhat tenuous. The freedom of establishment was considered to be relevant simply because AGET Iraklis happened to be a subsidiarity of a French corporation that had subsidiaries throughout Europe.[103] This was despite the fact that, as Laagland has pointed out, all the parties to the litigation were Greek, the French parent company were not party to the dispute, and the freedom of establishment was not initially invoked by the undertaking.[104] Yet the Court and the Advocate General both supplemented their reliance on Article 49 TFEU with the use of Article 16. Previous judgments and Opinions have indicated that in some situations where Article 49 TFEU is implicated, there is no need for an additional analysis on the basis of Article 16.[105] However, the additional benefit of Article 16 is that it can be relied upon even if there is no cross-border element to trigger Article 49.[106] Ratti, for example, has been highly sceptical of the reliance on Article 49 in the first place, arguing that 'the issue was never about a foreign enterprise's access to a particular national market.' The real issue, he argued, concerned the capacity of the Greek authorities 'to regulate business activity' once the company had been established.[107] As it happens, decisions such as *AGET Iraklis* and other controversial judgments such as *Viking/Laval* have involved multi-national corporations who are seeking to expand their

[100] Menelaos Markakis, 'Can Governments Control Mass Layoffs by Employers: Economic Freedoms vs Labour Rights in Case C-201/15 *AGET Iraklis'* (2017) 13 *European Constitutional Law Review* 724.
[101] Antonaki (n 82) 1522-1523.
[102] Ibid 1524.
[103] *AGET Iraklis* (n 68) para 49.
[104] Laagland (n 91) 57.
[105] See, for example, C-322/16 *Global Starnet* EU:C:2017:985, para 50; Case C-465/18 *AV, BU v Comune di Bernareggio, joined parties/ CT* Opinion of Advocate General Hogan ECLI:EU:C:2019:1125 para 35-36; Case C-391/20 *Cilevičs* ECLI:EU:C:2022:638 para 56.
[106] Antonaki (n 81) 1526. See also, European Union Agency for Fundamental Rights, *Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right* (Publications Office of the European Union 2015)
[107] Ratti (n 96) 172-173.

economic activity in other Member States. The reference to Article 16 in *AGET Iraklis* demonstrates that the same logic can be availed of by a company that is operating internally within a Member State, which was precisely what had transpired in *Alemo-Herron*.

The influence of consumer protection in *Airhelp*

In *Airhelp Ltd v Scandinavian Airlines Systems*, the Swedish District Court sought a preliminary ruling on whether a strike could come within the scope of 'extraordinary circumstances' in Regulation (EC) No 261/2004, which exempts airlines from the payment of compensation.[108] In his Opinion, Advocate General Pikamäe concluded that both these conditions were satisfied, as the strikes were called by trade unions and thus, outside the control of the airline. He distinguished the case of *Krüsemann,* where the Court of Justice had previously held that a strike was 'inherent' in the normal exercise of the airliner's activity.[109] In this case, he noted that SAS had not announced any new measure that had prompted the industrial action; rather the strike had been called by the trade unions due to their belief that negotiations had been unsuccessful, and the collective agreement had been 'prematurely terminated.'[110] The Advocate General considered that, as a result, 'a strike called by the trade union, without it being possible to criticised the employer in any respect, is a factor "external" to the air carrier's activities.'[111] This is a questionable finding; not least in that it opts to depart from the logic of previous decision of the Court of Justice on this very question. More pertinently, it fails to take account of the fact pattern on the case before it: quite clearly, industrial action was taken on the basis that the airline had failed to meet the demands of the unions in the negotiation process. Opting for industrial action due to faltering negotiations with an employer is a common pattern in labour disputes. The Opinion did not consider whether co-operation and negotiation with the trade union might have prevented the strike. Strikes are not called at random; they are precipitated by calls for particular outcomes, such as pay increases or improvements in working conditions. Viewing the occurrence as entirely divorced and unrelated to the actions or inaction of the company – as bad luck, as a storm might be – is in itself a highly contestable characterisation of the situation. There are several other overtly

[108] Case C-28/20 *Airhelp Lyd v Scandinavian Airlines Systems* ECLI:EU:C:2021:226. See generally, Cezary Banasinski, 'Protection of Consumers in the Sphere of an Air Carrier's Responsibility in the Event of a Flight Cancellation due to a Strike of the Air Carrier's Employees. Case Comment to the Judgement of the EU Court of Justice of 23 March *Airhelp* (C-28/20)' 23 (2021) *Yearbook of Antitrust and Regulatory Studies* 153.
[109] Case C-195/17 *Krüsemann and Others v TUIfly GmbH* ECLI:EU:C:2018:258.
[110] Case C-28/20 *Airhelp Lyd v Scandinavian Airlines Systems* Opinion of Advocate General Pikamäe ECLI:EU:C:2021:203 para 57.
[111] Ibid para 58.

normative statements littered throughout the Opinion: for example, the Advocate General described this situation as one 'where it is not possible to identify a single reason for the strike being called.' He noted that given the impact of inflation, 'the employer cannot be reasonably be held responsible for the deterioration in the employees' situation.'[112]

The Advocate General further noted that the right to take industrial action protected by Article 28 of the Charter was subject to compliance with EU law, including other rights contained in the Charter. The Advocate General concluded that 'the right to strike could be limited so as protect the freedom to conduct a business.'[113] The Advocate General wrote that this 'balancing exercise' successfully 'reconciles the respective interests.'[114] But, of course, Article 16 also states that the freedom to conduct a business must be 'in accordance with Union law and national law and practices.' Why, then, is it Article 28 that has to be limited to take account of the freedom to conduct a business and consumer protection? It could just as easily have been said that the freedom to conduct a business ought to be limited in order to protect the right to negotiate and take industrial action. The aim of the Regulation No 261/2004, the Advocate General concluded, was to protect the interests of consumers. Were consumers entitled to compensation due to cancellation from air strikes, the Advocate General wrote, there would be a considerable danger that such a scenario would be exploited by trade unions. The claims for compensation would bring about 'considerable financial burden' on the airline.[115]

Unlike Advocate General Pikamäe, the Grand Chamber was not prepared to classify a lawful strike as independent of the airline's actions. Nor did the Court endorse the Advocate General's rather dire warnings that consumer compensation would be the means by which disgruntled employees would exert their revenge.[116]An 'extraordinary circumstance' for the purposes of the Regulation, referred to events which were both not inherent in the normal activity of the air carrier, and are beyond the airline's actual control.[117] The Grand Chamber concluded that a strike was a key manifestation of collective bargaining and had to be regarded as an intrinsic occurrence in the normal course of events for an employer.[118] The strike in this case could not constitute an 'extraordinary circumstance' within the meaning of Article 5(3) of the Regulation

[112] Ibid para 69.
[113] Ibid para 74.
[114] Ibid para 75.
[115] Opinion of Advocate General Pikamäe (n 109) para 84.
[116] Ibid.
[117] *Airhelp* (n 108) para 23.
[118] Ibid para 28.

and that SAS was liable to pay compensation to consumers. This does not mean, however, that *Airhelp* represents a rollback from the Court's previous jurisprudence in *Alemo-Herron* or *AGET Iraklis*. The critical difference in *Airhelp* is that the Court of Justice considered that the conflict was between the freedom to conduct a business and consumer protection, rather than worker protection. The Grand Chamber noted that the freedom to conduct a business was not an absolute right, and, in this context, it had to be reconciled with the high level of protection afforded to consumers in Article 38 of the Charter and Article 169 TFEU.[119] The priority afforded to consumer protection, the Court noted, could justify 'even substantial negative economic consequences for certain economic operators.'[120] Thus, when the Court ultimately came to perform a balancing exercise between the conflicting rights at stake, the there is no reference to worker protection.[121] It is the freedom to conduct a business that is proportionally limited solely in light of the interests of consumer protection. The driving force in the Court's reasoning is the importance of consumer protection, rather than any greater inclination to safeguard the right to strike.[122] In the absence of a clear consumer protection interest, it is doubtful whether the same conclusion would have been reached.

'Essence' of the freedom to conduct a business

The cases involving workers' right raise pressing questions about the weight the Court affords to infringements on Article 16. One need only look to how the Court of Justice has previously marked out the 'core' of the freedom to conduct a business, which has varied dramatically depending on context. The 'essence' or the 'core' of the right is what the Court considers to be the most important, fundamental manifestation of the right.[123] This is echoed in the wording of Article 52(1) of the Charter, which provides that any limitation on Charter rights must 'be provided for by law and respect the essence of those rights and freedoms.' The greater the 'essence' of the right, more activity is immune from regulation and oversight, and other interests – even fundamental rights – must buckle.[124] Yet leaving aside the question of whether it is even possible to satisfactorily identify the 'essence' or the 'core' of any right, it is evident

[119] Ibid para 49.
[120] Ibid para 50.
[121] Ibid para 49.
[122] Wouter Verheyen and Pieter Pecinovsky, 'Strike as an extraordinary circumstance' (2022) 13(2) *European Labour Law Journal* 323, 331-2.
[123] See generally, Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 *German Law Journal* 779.
[124] Wouter Hins, 'The freedom to conduct a business and the right to receive information for free: *Sky Österreich*' (2014) 51 *Common Market Law Review* 665, 675.

that there is significant inconsistency on the topic within the Court of Justice's case law on Article 16. The answer the Court has provided as to what constitutes the 'core' of the freedom to conduct a business has fluctuated considerably.[125] For example, in *Sky Österreich GmbH,* the Court of Justice addressed the question of what amounts to the 'core' of the freedom to conduct a business for the first time. The Court of Justice concluded that allowing news broadcasters to access video clips without compensation did not affect the 'core content' of the freedom to conduct a business. It did not stop business activity from occurring, or from allowing the holder of the transmission rights to broadcast the event or by granting the right to broadcast the event to another economic operator.[126] The freedom to conduct a business was not an absolute right and had to be considered in light of its social function. This is the logic the Court has employed on multiple occasions to justify why the 'essence' of the freedom to conduct a business was not affected.[127] The relevant measures did not prevent the business activity occurring: they simply controlled how an aspect of the business was to be carried out.

Yet much the same might be said about the restrictions on internet service providers in *Scarlet Extended* or *Netlog,* or the various employers in *Alemo-Herron* and *AGET Iraklis.* In *Alemo-Herron,* the Court considered that a new employer would not have sufficient input into the terms and conditions of its new employees, as it could not partake in the collective bargaining framework. Accordingly, it could not 'assert its interests effectively in a contractual process' to influence alterations to the working conditions of its staff members.[128] The Court did not explain why the 'core' of the freedom of contract was affected, or indeed, what the 'core' of the freedom of contract might be. Identifying the 'essence' of the freedom of contract, it has been suggested, might prove to be a particularly challenging task 'given the many divergent meanings hiding behind a beguilingly simple term.'[129] However, one might point out that the employer had, in fact, freely entered into this particular contract when it took over the undertaking in the full knowledge that the employment contracts of the existing employees were governed by this proviso. Moreover, one might point out that by analogy with the Court's

[125] See, for example, Mark Dawson, Orla Lynskey and Elise Muir, 'What is the added value of the concept of the "essence" of EU fundamental rights?' (2019) 20 *German Law Journal* 763, 771.
[126] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28 para 49. See also, Case C-157/14 *Neptune Distribution v Minister for Economic Affairs and Finance* ECLI:EU:C:2015:823.para 71.
[127] See, for example, Case C-686/18 *OC v Banca d'Italia* ECLI:EU:C:2020:567 para 89.
[128] *Alemo-Herron* (n 1) para 33.
[129] Prassl (n 3)195. Whittaker noted that 'in EU law as in the laws of the Member States, freedom of contract is no more than a starting-point (if an important one), given the range of modern social and political considerations which require its qualification.' Simon Whittaker, 'The Optional Instrument of European Contract Law and Freedom of Contract (2011) 7 *ERCL* 371, 373.

previous cases, there was nothing to indicate that the dynamic clauses were preventing the employer's business activity from taking place, or that in light of the social function of Article 16, this measure could be justified. As O'Connor has pointed out, the suggestion that the freedom of contract has a 'social function' has never been considered by the Court of Justice.[130] As a result, the Court's logic is challenging to square with judgments such as *Sky Österreich.*[131]

In *AGET Iraklis,* the Grand Chamber considered that the conditions under which the Minister for Labour could refuse to authorise mass redundancies were formulated in such broad terms that it could have 'the effect…of excluding [the freedom to conduct a business] altogether.'[132] This was exacerbated by the fact that the decision to implement collective redundancies was one of a 'fundamental nature', akin to a winding up or a merger.[133] This logic was reaffirmed in *Asklepios Kliniken Langen-Seligenstadt GmbH,* where the Court noted that Article 3 of the Acquired Rights Directive had to be interpreted in light of Article 16 to ensure that the transferee was 'able to assert its interests effectively' in contractual negotiations, including altering the working conditions of its employees'[134] Given that the German law at issue allowed for the transferee to make amendments to the employment contracts both on a 'consensual and unilateral' basis, the Court considered that the law at issue appeared to meet those requirements.[135] Once again, the Court did not speculate on whether business activity would be prevented from occurring by such measures, or whether the freedom to conduct a business should be interpreted in light of its social function. The irony is, of course, that the great weight the Court attaches to consumer protection is precisely about reconfiguring the standard contractual process between two parties. In theory, two parties to a contract freely and independently determine the terms and conditions of their agreement, and adopt it only if both parties are content with the contents. Yet in the context of consumer goods, the Court is keenly aware that the traditional vision of two autonomous agents making an agreement is a fiction. By contrast, when it comes to the question of worker protection, the Court opts to overlook the well-established gulf of power that exists between workers and employers.[136] Indeed, in both

[130] Niall O'Connor, 'Whose autonomy is it anyway? Freedom of contract, the right to work and the general principles of EU law' (2020) 49(3) *Industrial Law Journal* 285, 298.
[131] Prassl, 'Business Freedom' (n 3) 199.
[132] *Airhelp Ltd* (n 108) para 99.
[133] Ibid para 54.
[134] Joined Cases C-680/15 and C-681/15 *Asklepios Kliniken Langen-Seligenstadt GmbH v Ivan Felja and Asklepios Dienstleistungsgesellschaft mbH v Vittoria Graf* ECLI:EU:C:2017:317 para 23.
[135] Ibid para 24.
[136] See, for example, Lawrence Mishel, 'The Persistent Absence of Full Employment: A Critical Flaw in the Legal "Freedom of Contract" Framework' (2022) 3(1) *Journal of Law and Political Economy* 72.

Alemo-Herron and *AGET Iraklis,* it chooses to characterise both parties as agents of equal standing, and on occasion even strays into characterising the employer as the weaker party.[137]

Negative economic consequences

Everson and Correia Gonçalves, surveying the case law, concluded that one of the two emerging principles on the application of Article 16 is that companies should not be subject to 'undue or unfair business costs.'[138] This principle is certainly visible in *some* cases. The Court has repeatedly made the significant finding that Article 16 encompasses 'the right for any business to be able freely to use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it.'[139] In *Anie and Athesia,* the Fifth Chamber outlined that:

> A restriction of that right is, inter alia, the obligation to take measures which may represent a significant cost for an economic operator, have a considerable impact on the organisation of his or her activities, or require difficult and complex technical solutions.[140]

A further example is evident in the recent Opinion of Advocate General Rantos in *Trade Express-L* where he considered whether the obligation on energy providers to build up emergency stocks of petroleum products, even if they did not use that particular type of product was, *inter alia,* compatible with Article 16. He considered that while such a requirement was lawful, any such '…obligation should not represent a disproportionate or excessive financial burden in relation to the turnover generated in the course of its commercial activity.'[141] The obligation could not 'put the operator concerned at a disproportionate disadvantage, in particular compared with its turnover and compared with other competing economic operators.'[142]

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[137] Weatherill 'Use and Abuse' (n 16) 172.
[138] Everson and Correia Goncalves (n 18) 479.
[139] See, Joined Cases C-798/18 and C-799/18 *Anie and Athesia* ECLI:EU:C:2021:280 para 62; C-134/15 *Lidl GmbH & Co. KG v Freistaat Sachsen* ECLI:EU:C:2016:498 para 27; Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192 para 49.
[140] *Anie and Athesia* (n 139) para 63.
[141] Joined Cases C-395/22 and C-428/22 '*Trade Express-L' OOD* and *'DEVNIA TSIMENT' Ad* Opinion of Advocate General Rantos ECLI:EU:C:2023:798 para 84.
[142] Ibid para 86.

This is a remarkable and far-reaching principle: the natural result of this logic is that any measure or regulation which pose high administrative or economic costs on a business could constitute a violation of the freedom to conduct a business. Yet on the other hand the Court has elsewhere accepted that sufficiently important objectives can justify measures which result in 'even substantial negative consequences for certain economic operators' usually on the basis that it does not prevent the business activity from being carried out.[143] In *Pillbox,* for example, the Court pointed out that a directive that strictly regulated the advertising of e-cigarettes did not prevent the applicants from manufacturing and marketing their product, and consequently did 'not affect the essence of the freedom to conduct a business.'[144] The line of case law that has repeatedly affirmed that economic operators may have to bear serious costs in the interests of consumer protection is entirely absent in cases involving worker protection.[145] At times, the Court has even emphasised that the comparatively weaker wording of Article 16 justifies greater infringements on its exercise.[146] One might wonder what exactly is the difference between the 'complicated, costly, permanent' filtering system that was rejected in *Scarlet Extended* and *Netlog*, and the other regulatory measures at issue in the cases outlined above: packaging and labelling in *Lidl* and *Neptune*, electronic identification of animals in *Schaible*, or compensation for customers due to airline disruption in *Ryanair*. Are these too not complicated, costly and permanent measures that the businesses have to abide by? To be clear, this is not a normative argument against this later case law. Rather, it is simply to point out that the doctrinal test the Court employs seems to vary radically depending on the subject-matter. Once the Court is prepared to accept that a particular objective is valuable, it is prepared to

[143] C-12/11 *McDonagh v Ryanair Ltd* ECLI:EU:C:2013:43 para 48.
[144] Case C-477/14 *Pillbox 38 (UK) Ltd v The Secretary of State for Health* ECLI:EU:C:2016:324 para 161.
[145] Xavier Groussot and Gunnar Thor Pétursson 'The EU Charter of Fundamental Rights Five Years on: The Emergence of a New Constitutional Framework?' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing 2015) 142.
[146] See for example Case T-324/21 *Harley-Davidson Europe Ltd* ECLI:EU:T:2023:101 para 180; Case C-348/12 *Council v Kala Naft* ECLI:EU:C:2013:776 para 123; Opinion of Advocate General Sharpston in Case C-566/17 *Związek Gmin Zagłębia Miedziowego w Polkowicach v Szef Krajowej Administracji Skarbowej* ECLI identifier: ECLI:EU:C:2018:995. This contrasts with the approach of Advocate General Emiliou in Case C-307/22 *FT v DW* ECLI:EU:C:2023:315 where he noted at para 48 that:

> Fundamental rights of an economic nature cannot be regarded as being 'children of a lesser god', in comparison with other (civil, social or political) rights. There is no need to be familiar with the writings of Ludwig von Mises to appreciate that all those rights are inextricably linked: their enjoyment cannot but go hand-in-hand since taking away economic rights would inevitably affect the individuals' ability to enjoy fully their civil, social and political rights and vice-versa.

impose wide-ranging regulations on those companies. The best means to anticipate whether an infringement of Article 16 will be accepted as justified depends on the importance the Court attaches to that objective. This, in turn, seems to depend on whether the objective is recognised and valued by EU law and, in the case of consumer protection, whether it serves the teleological purpose of furthering the integration of the single market. In 2015, Prassl wrote that what the Court of Justice considered to be the 'core' of Art. 16 would be hugely important.[147] On this he was entirely correct. The problem is that the Court's definition of what shielding the "core" entails turned out to be far broader than anticipated, and seemed to stretch, and at times, deny the textual limitations placed upon it.

Conclusion

This chapter outlines the Court's varying approach to cases involving the freedom to conduct a business in Article 16 of the Charter; in particular the clash between Article 16 and the protection of workers. In both *Alemo-Herron* and *AGET Iraklis,* the Court of Justice adopted a robust approach to the freedom to conduct a business, demonstrating limited tolerance for any measure that affected the absolute autonomy of the business owner. The irony is, of course, that to protect interests such as consumer protection, the Court has been prepared to accept incursions on the freedom of action of businesses, as the Court seems to be alive to the profound imbalance of power that exists in that context. As outlined in Chapter Four, the Court of Justice seems predisposed to accept infringements on Article 16 if they pursue objectives of general interest recognised by EU law. Yet the despite the stated commitment in the Treaties to protecting the rights of workers, the Court appears to adopt a markedly different approach in practice.

[147] Prassl (n 3) 9.

CHAPTER SIX

Indirect Discrimination and the Freedom to Conduct a Business

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Introduction

The reach of Article 16 is highlighted by a series of cases involving employees who have dismissed or sanctioned by their employer for wearing Islamic headscarves in the workplace. These are not cases where an economic actor has sought to argue that there has been a violation of their rights under Article 16. Instead, Article 16 has been used defensively, to bolster the claim that prohibiting religious dress and symbols in the workplace are not discriminatory under EU law. The employees have sought to rely on the provisions of Directive 2000/78 ('the Employment Equality Directive') which prohibits discrimination, *inter alia,* on the basis of religious belief in employment settings.[1] Under Article 2(2)(b)(i) of the Employment Equality Directive, a difference of treatment that would normally constitute indirect discrimination can be justified if it is in pursuit of a legitimate aim. Beginning with the case of *G4S v Achbita,* the Court of Justice have been prepared to accept that an employer's preference for neutral dress code policy is a legitimate aim, given that it stems from the freedom to conduct a business in Article 16.[2] In later cases, the Court of Justice has added the stipulation that the employer must have a 'genuine need' to introduce such a policy. These cases demonstrate how Article 16 can be used to shape the interpretation of secondary EU law, although much as we have seen before, the impact of Article 16 has been unevenly felt.

'*Laïcité* by the back door'

In recent years, a series of cases have come before the Court of Justice concerning the question of whether prohibitions on religious dress in the workplace constitute discrimination under the Employment Equality Directive. The Court of Justice has accepted that such rules derive from

[1] Council Directive 2000/78/EC.
[2] Case C-157/15 *G4S v Achbita* ECLI:EU:C:2017:203.

the employer's freedom to conduct a business protected by Article 16, and as such can be classified as a 'legitimate aim' that can be justify behaviour that would otherwise constitute indirect discrimination. It is important to situate this case law in the long-running efforts by certain European states to heavily regulate displays of religious belief; in particular, the Islamic headscarf. France, for example, introduced a ban on religious dress in public schools in 2004 and a public ban on facial veiling in 2010.[3] The concept of *laicité* has a long and established history in France, while countries such as Belgium have a more limited commitment to state neutrality in certain contexts.[4] *Laicité* has been subject to extensive criticism, not least on the basis that the state's commitment to 'neutrality' disproportionately affects those from minority religions, particularly Muslims, as the headscarf tends to be a mainstream religious requirement for Muslim women. It has been suggested that supra-national courts ought to be deferential to Member States in how best to strike a balance between religious freedom and competing interests, such as *laicité*.[5] Yet regardless of the merits of that approach, as a concept that embraces the separation of church and state, *laicité* has no relevance to instances where general prohibitions on religious dress are introduced in the private sector.

One means to view the impact of Article 16, I suggest, is that it has played much the same role that *laicité* has played in other cases, insofar as it has legitimised the imposition of neutral dress codes in the private work space. As *laicité* demands the separation of religion from the state, it is a concept that is rooted in the public sphere, and justified the introduction of purportedly neutral dress codes in state spaces, such as public schools.[6] Attempts to extend *laicité* to the private sphere have faltered, as in *Baby-Loup,* a French case where the applicant was working as a childcare assistant and was dismissed for wearing a hijab.[7] Ultimately, the case came before the Court de Cassation, who concluded that *laicité* applied only to the state, rather than publicly-funded organisations.[8] Daly wrote that 'restrictions on religious expression would have to be justified with reference to specific, narrow considerations…*laïcité* as such, or a

[3] This was the law that was later challenged unsuccessfully before the European Court of Human Rights as a violation of Article 9 in *SAS v France* (2015) 60 EHRR 11.
[4] Stjn Smet, 'The Impossibility of Neutrality? How Courts Engage with the Neutrality Argument' (2022) 11 *Oxford Journal of Law and Religion* 47, 60-61.
[5] Ronan McCrea, 'Regulating the Role of Religion in Society in an Era of Change and Secularist Self-doubt: Why European Courts Have Been Right to Adopt a Hands-Off Approach' (2022) 75 *Current Legal Problems* 111.
[6] Eoin Daly, 'Laïcité in the Private Sphere? French Religious Liberty after the Baby-Loup Affair' (2016) 5(2) *Oxford Journal of Law and Religion* 211.
[7] CC Décision No. 11-28.845 *Mme Fatima X, epouse Y v Association Baby Loup* of 19 March 2013.
[8] This was not the end of the matter: the case was remitted back to the Court of Appeal in Paris and subsequently came before the Court de Cassation again on the question of whether the crèche's actions could be characterised as defending its own philosophical or religious convictions. See, Daly (n 6) 218.

generic interest in 'neutrality', could not be invoked.'[9] However, if a general interest in 'neutrality' could not relied on, a *specific* interest in neutrality, deriving from the fundamental right to conduct a business, has proven to be significantly more successful. The cases of *G4S v Achbita* and *IX v WABE,* outlined below, demonstrate that the protection of the freedom to conduct a business is useful tool to extend the logic of *laicité* to the private sphere.[10] *IX v WABE* has near-identical facts to that of *Baby-Loup.* At the very least, the Court of Justice can now point to two competing rights which the Charter of Fundamental Rights bestows with equal weight. As Giles wrote, these judgments created 'a form of *laïcité* by the back door, ultimately allowing business to dictate the conditions of constitutional settlement to government.'[11]

The Court of Justice has, however, been alive to the fact that the issue of religious dress is one where the perspective of the Member States differs considerably. This is expressly reflected in its decisions in *WABE* and *Commune d'Ans,* where the Court of Justice emphasised that the Employment Equality Directive simply established a framework for the protection of equality in employment, and that each Member State had a margin of discretion in applying the Directive, and could in theory, impose more stringent justifications for indirect discrimination.[12] The Court is, in effect, affording latitude for Member States to choose different approaches. The Court acknowledged that the *Bundesverfassungsgericht,* the German Constitutional Court, had previously held that due the protection of the freedom of religion in Article 4(1) of the *Grundgesetz,* an employer had to demonstrate an established and specific risk to its business when introducing such a prohibition. Thus, in the case before it, the Court considered that it was for the national court to establish whether there was a risk of 'specific disturbances within the undertaking or the specific risk of a loss of income.'[13] In the case of *IX v WABE,* the case was settled in the applicant's favour before the Hamburg Labour Court could give a ruling.[14] In *Comune d'Ans,* the Court noted that the policy of neutrality in the public service was derived from the express commitment to state neutrality in the Belgian

[9] Daly (n 6) 219.
[10] *Achbita* (n 2); Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Muller Handels GmbH v MJ* ECLI:EU:C:2021:594.
[11] Jessica Giles, 'Neutrality in the Business Sphere – An Encroachment on Rights Protection and State Sovereignty?' (2018) 7 *Oxford Journal of Law and Religion* 339, 344.
[12] *WABE* (n 10) para 85-89; Case C-148/22 *OP v Commune d'Ans* ECLI:EU:C:2023:924 para 34-36.
[13] *WABE* (n 10) para 85.
[14] 'Kopftuch wird geduldet' *taz.de* 22 October 2021. Available: < https://taz-de.translate.goog/Rechtsstreit-in-Hamburg-beendet/!5806145/?_x_tr_sl=de&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc>; 'Hamburg: Erzieherin darf nun doch mit Kopftuch arbeiten' *Islamische Zeitung* 12 October 2021. Available: https://islamische-zeitung.de/hamburg-erzieherin-darf-nun-doch-mit-kopftuch-arbeiten/

Constitution.[15] Thus, the provision adopted by the municipal authority, which prohibited employees from wearing any overt sign which would reveal, *inter alia,* their religious beliefs to the public or their colleagues, amounted to a legitimate aim within the meaning of the Directive.[16] Yet the suggestion that the protection of the freedom to conduct a business in Article 16 is a means of 'laïcité by the back door' is reinforced by the Opinion of Advocate General Collins in *OP v Commune d'Ans.*[17] In this case, a public sector employee had been prohibited from wearing a headscarf in her workplace, and given that the employer was a public authority, the Advocate General concluded that its wish to adopt a neutral dress could not be derived from the freedom to conduct a business in Article 16. This suggests that the Court's tolerance of neutral dress codes in the workplace does not depend totally on the existence of Article 16. The Advocate General was, at least, prepared to reach for another, much broader basis to assert that the desire to adopt a neutral dress code constitutes a legitimate aim: namely the desire to protect the rights and freedoms of others.[18] The judgment of the Grand Chamber did not reference the freedom to conduct a business in Article 16, but the Court accepted that the policy of neutrality for public employees could be justified as a legitimate aim, given that it ultimately derived from the principle of state neutrality in the Belgian Constitution.[19]

Eweida v United Kingdom

The Court of Justice's case law in this area is sometimes unfavourably compared with that of the European Court of Human Rights in the case of *Eweida v United Kingdom.*[20] Although the Court of Justice cited *Eweida v United Kingdom* in *Achbita* and *WABE,* there are several differences between the decisions, not least that the freedom to conduct a business is not recognised as a fundamental right under the European Convention on Human Rights. In *Eweida v United Kingdom,* a member of the British Airlines check-in staff had been placed on unpaid leave by her employer for visibly wearing a Christian cross, citing the airline's neutrality policy. The Strasbourg Court concluded that an absolute ban was a disproportionate interference with her right to freely practise her religion under Article 9 of the Convention. Too much weight had been afforded to the company's desire to protect its corporate image, and that there was no evidence that religious clothing had any adverse impact on the company's brand or image, or

[15] *Commune d'Ans* (n 12) para 32.
[16] Ibid para 36.
[17] Case C-148/22 *OP v Commune d'Ans* Opinion of Advocate General Collins ECLI:EU:C:2023:378.
[18] Ibid para 64.
[19] *Commune d'Ans* (n 12) para 32.
[20] [2013] ECHR 37. See, for example, Schona Jolly, 'Religious discrimination in the workplace: the European Court of Justice confronts a challenge' (2017) 3 *European Human Rights Law Review* 308, 309.

that it affected the applicant's ability to carry out her job.[21] The Court had, however, accepted that a ban on jewellery for employees in a public hospital was justified. An item dangling around the neck could pose a risk to staff when working with disturbed or volatile patients. This kind of health and safety objective, the Court found, was 'inherently of a greater magnitude than that which applied in respect of Ms Eweida.'[22] While the judgment in *Eweida* was broadly welcomed for striking an appropriate balance between the competing interests at stake, it is worth pointing out that cases involving the Islamic headscarf have a poor rate of success before the European Court of Human Rights.[23] *Eweida,* notably, did not involve a headscarf. While McCrea has argued that neither the Court of Justice or the European Court of Human Rights have been particularly interventionist in cases involving religious symbols, [24] it is nonetheless important to note that cases involving Christian religious symbols have fared better before the Strasbourg Court.[25]

G4S v Achbita

Samira Achbita had been working for three years for a company called G4S in Belgium when she informed her line managers that she would be wearing an Islamic headscarf to work.[26] G4S is a large multi-national corporation that provides a variety of services to corporate clients, and Samira Achbita worked as a receptionist in their office in Belgium. Ms Achbita already wore the headscarf outside of work hours. The management told Ms Achbita that the company had a (as yet, unwritten) policy of corporate neutrality and that visible religious dress or symbols would not be tolerated. After a period of sick leave, Ms Achbita informed her employer that she would be returning to work on 15 May 2006 and that she would be wearing a headscarf. On 29 May 2006, the company work council promptly introduced an amendment to the company regulations that prohibited its employees from wearing any overtly political, religious, or philosophical symbols in the workplace. The regulations came into force on 13

[21] No breach of Article 9 was found in the case of a nurse who wanted to wear a similar item. Given the nature of her workplace environment, the ECtHR held that there were legitimate, pressing concerns relating to her safety if she was wearing an item around her neck.
[22] *Eweida v United Kingdom* (2013) 57 EHRR 8 para 99.
[23] See, for example, *Dahlab v Switzerland* (App No 42393/98) (judgment of 15 February 2001); *Dogru v France* (2009) 49 EHRR 8; *Ranjit Singh v France* (App No 27561/08) (judgment of 30 June 2009); *Aktas v France* (App No 43563/08) (judgment of 30 June 2009); *Sahin v Turkey* (2007) 44 EHRR 5 (Grand Chamber); *Ebrahimian v France* (App No 64846/11) (judgment of 26 November 2015); *SAS v France* (2015) 60 EHRR 11.
[24] McCrea (n 5) 122.
[25] See for example, the Grand Chamber's finding in *Lautsi v Italy* [2011] ECHR 2412 that a Christian crucifix constituted a passive symbol, and overturning a Chamber of the Second Section's finding that it constituted a powerful external symbol equivalent to the Islamic headscarf, per *Dahlab v Switzerland* (App No 42393/98) (judgment of 15 February 2001) *cf Lachiri v Belgium* (App No 3413/09) (judgment of 18 September 2018).
[26] *Achbita* (n 2) para 12.

June 2006. However, Ms Achbita had already been dismissed the day before, on 12 June, after she refused to rescind her statement that she would be wearing the headscarf to work.[27] Ms Achbita challenged her dismissal. The Higher Labour Court in Antwerp made a request to the Court of Justice for a preliminary ruling seeking clarification of whether the company's neutral dress code policy amounted to a breach of the Employment Equality Directive which prohibits workplace discrimination, *inter alia,* on the grounds of religion.

Advocate General Kokott accepted that the company's policy could constitute indirect discrimination for the purposes of the Equality Directive, but indirect discrimination could be justified by a legitimate aim.[28] A 'legitimate aim' for the purposes of Article 2(2)(b)(i) of the Equality Directive encompassed the occupational requirements set out in Article 4(1) of the Directive and the rights and freedoms of others in Article 2(5) of the Directive.[29] Article 4(1) of the Directive provides that a difference in treatment based on any of the protected characteristics, such as religion, will not constitute discrimination if by reason of the 'particular occupational activities' or their context, the characteristic constituted 'a genuine and determining occupational requirement' so long as it was in pursuit of a legitimate objective and the requirement was proportionate. Regardless of whether the occupational requirements stemmed from the nature of work activities or the context in which the work was being carried out, the critical question was whether the occupational requirements were genuine. Yet she went on to state that:

> …the employer must be allowed a degree of discretion in the pursuit of its business, the basis for which lies ultimately in the fundamental right of freedom to conduct a business…Part of that freedom is the employer's right, in principle, to determine how and under what conditions the roles within its organisation are organised and performed and in what form its products and services are offered.[30]

[27] Ibid para 16.
[28] Case C-157/15 *G4S v Achbita* Opinion of Advocate General Kokott ECLI:EU:C:2016:382 para 57.
[29] Ibid para 60. Article 2(5) states that: 'This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.' Advocate General Kokott later concluded that the question of whether the dress code was justified should be assessed only by reference to Article 4(1). See, ibid para 136-140.
[30] Ibid para 81.

An employer could require its employees to adopt a dress code for reasons of health and safety, but it could also validly demand that its employees present themselves a certain way at work, particularly in their interactions with customers. On an objective assessment of the circumstances, and in light of an employer's 'discretion in pursuit of its business' it was perfectly reasonable, the Advocate General concluded, for Ms Achbita to be obliged to comply with her employer's dress code. Consequently, the company's prohibition on religious symbols could constitute a genuine and determining occupational requirement under Article 4(1) of the Directive.[31] She further found that it was proportionate requirement as, in the present case, the dress code was 'absolutely crucial' given the diverse range of clients and the particular work done by G4S employees which often involved direct customer interaction, all of which affected the image of G4S as well as the image of its customers.[32] Alternative arrangements, such as providing Ms Achbita with a uniform and headscarf in company colours, would undermine the employer's desire for outward neutrality.

In its relatively brief, eight-page judgement, the Court of Justice was prepared to accept that an employer's desire for neutral dress policy constituted a legitimate aim that justified indirect discrimination under the Directive, given that it stemmed from the freedom to conduct a business protected by Article 16. This was legitimate in principle, particularly in a situation where the employer's policy is only targeted at workers who 'are required to come into contact with the employer's customers.'[33] The Court of Justice noted that the European Court of Human Rights had accepted that the freedom of religion could be limited in the interests of the pursuit of corporate neutrality.[34] Second, a general blanket ban on visible manifestations of political, philosophical or religious convictions was permitted, provided the policy is 'genuinely pursued in a consistent and systematic manner.'[35] The Court of Justice added that the lower court would have to determine whether this neutrality policy was, in fact, enforced equally across its workforce prior to Ms Achbita's dismissal.[36] Third, that the policy could only apply insofar as it was 'strictly necessary', and it should be ascertained whether she could have been offered a job where she was out of sight of customers.[37]

[31] Ibid para 84.
[32] Ibid para 94.
[33] Ibid para 38.
[34] *Achbita* (n 2) para 39, referencing *Eweida v United Kingdom* [2013] ECHR 37.
[35] Ibid para 40.
[36] *Achbita* (n 2) para 41.
[37] Ibid para 43.

Bougnaoui

In *Bougnaoui and ADDH v Micropole*, which was released on the same day, much the same occurred as in *Achbita*.[38] Here, Asma Bougnaoui was employed as an engineer by an IT consultancy company in France. Following a complaint from one of those clients that the applicant's headscarf had 'embarrassed' its employees and requesting that 'there should be no veil next time', she was asked to confirm that she would comply with that request. She refused to do so and was dismissed. The Court of Justice was asked whether a requirement not to wear an Islamic headscarf when providing IT consultancy services to clients could be regarded as a 'genuine and determining occupational requirement' that fell outside of the scope of the prohibition on discrimination on the grounds of religion provided for by Directive 2000/78. In her Opinion, Advocate General Sharpston noted that the freedom to manifest one's religion had to be delicately balanced with the employer's right to conduct a business.[39] She accepted that there were legitimate rules that could be imposed by employers, such as a ban on proselytising in the workplace. Wearing religious symbols, the Advocate General concluded, could not be considered proselytising: it was clearly an aspect of manifesting one's religion.[40] Advocate General Sharpston went on to conclude that Ms Bougnaoui's dismissal amounted to direct discrimination on the grounds of religion.[41] The dismissal would have been lawful only if one of the derogations provided for in the Directive applied. One such derogation is Article 4(1) which, as outlined above in the context of *Achbita,* allows for a difference in treatment if there is a 'genuine and determining occupational requirement' by reference to the occupational activities carried out or the context in which they occur, as well as constituting a legitimate objective and the requirement is proportionate.[42]

Unlike Advocate General Kokott, she was not prepared to accept that 'the commercial interests' of the company could justify the use of Article 4(1).[43] Given that the provision had to be interpreted strictly, it could only apply 'in the most limited of circumstances'[44] and had to be construed to mean factors that were 'absolutely necessary' to perform the work.[45] It might be

[38] Case C-188/15 *Bougnaoui and ADDH v Micropole* ECLI:EU:C:2017:204.
[39] Case C-188/15 *Bougnaoui and ADDH v Micropole* Opinion of Advocate General Sharpston ECLI:EU:C:2016:553 para 73.
[40] She was particularly critical of the 'pernicious' suggestion that simply because an employee was dressed in an Islamic headscarf that they were automatically behaving inappropriately before clients. Ibid para 74.
[41] Ibid para 88.
[42] Ibid para 94.
[43] Ibid para 100.
[44] Ibid para 101.
[45] Ibid para 96.

possible, for example, to forbid the wearing of headscarves when working with dangerous machinery.[46] The freedom to conduct a business was not absolute, and as the Court had outlined in the past, it had to be considered in light of its social function.[47] The derogation could not apply in the present case, as there was nothing to suggest that Ms Bougnaoui was unable to perform her duties as a design engineer simply because she wore an Islamic headscarf.[48] The Grand Chamber adopted a distinctly more opaque analysis, and it did not mention the freedom to conduct a business in Article 16 in its judgment at all.[49] Unlike the Advocate General, the Court did not consider that Ms Bougnaoui had been subject to direct rather than indirect discrimination. The Court simply stated that if the employer did not have an company policy of neutrality in the workplace, then it could not rely on the Article 4(1) in the present circumstances. The genuine occupational requirement exception was only to be deployed in narrow circumstances and the requirement must be 'objectively dictated' by the nature of the occupational activities, or context in which they are carried out. Subjective considerations – such as the willingness of the employer to take account of customer preferences – would not suffice. Thus, the Court stopped short of accepting that employers could rely on the 'occupational requirement' defence to fire their religious employees at will.

Reaction to *Achbita* and *Bougnaoui*

It is difficult to find many commentators who are prepared to defend the outcome in *Achbita.* Both *Achbita* and its companion judgment *Bougnaoui,* which was released on the same day, 'sent shockwaves through European legal academia.'[50] The Opinion of Advocate General Sharpston alone came in for some degree of praise.[51] There are vast number of criticisms that can and have been directed at *Achbita*,[52] including the Court and Advocate General Kokott's

[46] Ibid para 99.
[47] Ibid para 100.
[48] Opinion of Advocate General Sharpston (n 39) para 102.
[49] *Bougnaoui* (n 38).
[50] Jule Mulder, 'Religious neutrality at the workplace: tangling the concept of direct and indirect religious discrimination, WABE and Müller' (2022) 59 *Common Market Law Review* 1501.
[51] Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8(3) *European Labour Law Journal* 232, 248. The Opinion of Advocate General Sharpston was also was subject to some critical commentary, in particular for her remarks on proselytism. See, for example, Andrew Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from *Achbita* and *Bougnaoui*' (2018) 47 *Industrial Law Journal* 149, 159.
[52] For criticism, see for example: on the weakness of the comparator test, Raphaële Xenidis, 'Polysemy of Anti-Discrimination Law' (2021) 58 *Common Market Law Review* 1649, 1658. For critical commentary on the CJEU's approach to 'headscarf' decisions, see Raphaële Xenidis, 'Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of 'neutral dress codes' (2022) 2 *European Equality Law Review* 21; Eleanor Sharpston, 'Shadow Opinion in Joined Cases C-804/18 and C-341/19I *X v WABE e.V and MH Müller Handels GmbH v MJ' EU Law Analysis,* 23 March 2021. Available at <eulawanalysis.

contestable finding that the appropriate comparator for Ms Achbita was another individual who wanted to manifest their religion, rather than an individual who opted not to manifest any belief.[53] On this basis, provided a measure discriminates equally against persons of all religious faiths, it does not constitute direct discrimination in the eyes of the Court.[54] Other objects of criticism for the judgment in *Achbita* include the rather artificial distinction drawn between the manifestation and practise of religion,[55] or the idea that 'neutrality' is a desirable or even an achievable goal.[56] What is neutrality, and why in this decision, does neutrality appear very much like *laïcité,* or at the very least, Western norms?[57] The rather meagre catch-safe at the end of the Court's reasoning that employees should be able be permitted to wear religious symbols provided they are out of sight of customers provides little comfort to the vast segment of workers – particularly in the more precarious services industry - who have no such option. The impact of the decision allows for a legitimate difference in treatment by employers towards Muslim women, who are already subject to long-standing suspicion and discrimination in Europe; precisely the kind of group the Directive was presumably intended to protect.[58]

Freedom to conduct a business v freedom of religion

blogspot.com/2021/03/shadow-opinion-of-former-advocate.html>. The discretion offered to the national court in such cases, Laagland argued, is 'non-existent.' See, Femke Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction? The Clash between the European Business Freedoms and the National level of Workers' Protection' (2018) 9 *European Labour Law Journal* 50, 71; Stéphanie Hennette-Vauchez, 'Equality and the Market: the unhappy fate of religious discrimination in Europe' (2017) 13 *European Constitutional Law Review* 744; Giles (n 11); Schona Jolly, 'Achbita & Bougnaoui: A Strange kind of Equality', available at www.cloisters. com/blogs/achbita-bougnaoui-a-strange-kind-of-equality; Saïla Ouald Chaib and Valeska David, 'European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights could Close it', *Strasbourg Observers* (2017) https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/.

[53] *Achbita* (n 2) para 28-32. See also, Elke Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? *Achbita* and *Bougnaoui'* (2018) 55 *Common Market Law Review* 589, 601; Chaib and David (n 52).

[54] See, for example: Eleanor Spaventa, 'What is the point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case' *EU Law Analysis* (21 March 2017), http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-har monization.html; Eva Brems, 'European Court of Justice Allows Bans on Religious Dress in the Workplace' *IACL-AIDC Blog* (26 March 2017) <https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/>.

[55] Joseph H.H. Weiler, 'Je Suis Achbita!' (2017) 28(4) *European Journal of International Law* 989, 992. See also, Gautier Busschaert and Stéphanie De Somer 'You Can Leave Your Hat on, but Not Your Headscarf: No Direct Discrimination on the Basis of Religion' (2017) 33(4) *International Journal of Comparative Labour Law and Industrial Relations* 553, 559.

[56] Smet (n 4) 58.

[57] Weiler (n 55) 1003; Mulder (n 50) 1511.

[58] As Brems points out, it is striking that there is no reference in the judgment to the widespread prejudice Muslims, and Muslim women in particular, are subject to in Europe; see Brems (n 54).

In *Achbita,* the Court identified two competing rights at stake: the right to freedom of religion, and the freedom to conduct a business.[59] The company's decision to portray a 'neutral image' to its clients by requiring its employees not to wear religious dress is considered to derive from Article 16. Thus, Article 16 helped to legitimise an action that would otherwise constitute indirect discrimination. This is not to deny that employers have a legitimate interest in the appearance and presentation of their employees in the workplace.[60] Employers may require that their employees conform to a particular dress code that conforms with the professional image of the firm, such as the requirement to adopt business dress. However, it is generally recognised that to meaningfully respect the right to freedom of religion, any such interest on behalf of the employer will be outweighed in circumstances where the beliefs of religious adherents require the adoption of a particular form of religious dress. The reason for this is simple: the right to freely manifest and practice one's religious belief is considerably to be normatively more significant than the interests of an employer in portraying a particular corporate image. An individual's religious faith is core to their sense of identity. To many religious adherents, abiding by their religious creed is a requirement, not an option. Of course, the right to freely manifest and practise one's religion is not absolute. Restrictions on the exercise of the right have been accepted by courts around the world in the interests of the wider public, or the health and safety of the individual.[61] It may be dangerous, for example, to operate certain types of machinery whilst wearing a headscarf, give the risk that this may pose to the employee.[62]

However, given the centrality of the freedom of religion, restrictions have generally been narrowly construed. The protection for freedom of religion exists to ensure that more powerful entities – traditionally the State – will protect the interests of religious minorities and avoid discrimination. There is no reason that this protection should not be extended to the private sphere, such as the workplaces of private companies. In other contexts, for example, it is

[59] It would perhaps have been more accurate for the Court to speak of the right to protection against discrimination on the grounds of religion given that this was the particular interest shielded by the Equality Directive, although this is certainly an aspect of the right to freely practice and manifest one's religion. Mulder points out in relation to *WABE* that non-discrimination, protected by Directive 2000/78, should not be conflated with the freedom of religion as the Court seems to do, but accepts that the right not to be discriminated against falls within the broader ambit of freedom of religion. See, Mulder (n 50) 1519.

[60] Zoe Adams and John Olusegun Adenitire, 'Ideological Neutrality in the Workplace' (2018) 81 *Modern Law Review* 348, 357.

[61] See the judgment of the European Court of Human Rights in *Eweida v United Kingdom* [2013] ECHR 37 para 98-100.

[62] As Advocate General Sharpston noted in her Opinion in *Bougnaoui* (n 39) para 99.

envisaged that an employer will have to make reasonable accommodations to ensure that those with disabilities can be included in the workplace. Under Article 5 of the Employment Equality Directive a duty of reasonable accommodation is imposed on employers for workers with disabilities, although notably this does not extend to religious belief. By contrast to the right to freedom of religion, the freedom to conduct a business in Article 16 has only very recently been elevated to the status of a fundamental right in the Charter, and is described only as a 'freedom' that should be subject to European Union and national law and practices. This textual gap did not prompt the Court in *Achbita* to consider whether proportionate restrictions should be placed on the freedom to conduct a business to ensure that Ms Achbita's right to freedom of religion was respected in the workplace. Instead, the Court of Justice held that the right to freedom of religion was not absolute and could be limited in the interests of a legitimate aim, such as a corporate neutrality policy, which stemmed from the freedom to conduct a business. The Court of Justice cited *Eweida* as grounds for the proposition that a neutral corporate image was a legitimate basis for restricting an employee's freedom of religion, neglecting to mention the lesser regard the European Court had attached to that objective.[63] The Court did not consider whether the freedom of religion might be of greater normative weight than the freedom to conduct a business. Instead, the Court simply concluded that the freedom of religion should buckle and adapt to facilitate the freedom to conduct a business. The proportionality analysis is strikingly superficial: it can scarcely properly be called that.

As noted, the Court of Justice did not acknowledge that the European Court of Human Rights had criticised the high value that had been placed on British Airway's desire for a neutral corporate image.[64] It is, of course, undeniable that both the European Court of Human Rights and the Court of Justice were both prepared to accept that the pursuit of presenting a corporate neutrality was *prima facie* a legitimate objective, with no further interrogation.[65] The European

[63] *Achbita* (n 2) para 39. See also, Gautier Busschaert and Stéphanie De Somer 'You Can Leave Your Hat on, but Not Your Headscarf: No Direct Discrimination on the Basis of Religion' (2017) 33(4) *International Journal of Comparative Labour Law and Industrial Relations* 553, 562.

[64] *Eweida v United Kingdom* [2013] ECHR 37. The Strasbourg Court noted at para 94 that, as against Ms Eweida's desire to manifest her religion:

> …was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.

[65] Ibid 563.

Court, in accepting the goal of 'corporate neutrality' as a valid basis for restricting the freedom of religion, paved the way for the Court of Justice to do likewise. While it might be argued that the Strasbourg Court had never intended – or could not have foreseen- that the objective of corporative neutrality would be relied upon to trump fundamental rights, this overlooks the distinct context of the Charter of Fundamental Rights. Unlike the European Convention on Human Rights, the Charter explicitly protects the 'freedom to conduct a business.' By framing the pursuit of a neutral corporate image as the exercise of a *fundamental right* rather than merely a general course of action one of the parties wished to pursue, the Court of Justice could present the conflict in *Achbita* as one between two competing fundamental rights. The Strasbourg Court, in accepting the pursuit of a 'neutral corporate image' as a legitimate objective in *Eweida,* posed little risk for the fundamental rights of those relying on the European Convention on Human Rights. But given the protection of the freedom to conduct a business in Article 16, the Charter of Fundamental Rights presents an entirely different landscape. The true distinction between the Courts, Smet has suggested, is that 'the ECtHR defers to states, the CJEU defers to private corporations.'[66] One might add that the protection of the freedom to conduct a business in Article 16 is what enables the CJEU to do so, at least in this context.

The Court did not consider whether, even if a corporate policy of neutral dress pursued a legitimate aim, it went further than necessary in achieving that aim. There was no discussion of whether G4S were likely to suffer any loss, disruption, or any negative effects whatsoever if Ms Achbita wore her headscarf to work. For Ms Achbita, the curtailment of her freedom of religion meant that she could be lawfully dismissed for wearing an item of clothing that is considered mandatory to many adherents of Islam. The Court did not consider whether this would have the effect of *de facto* exclusion of Muslim women from the workforce. In fact, Advocate General Kokott had explicitly warned against making such a 'sweeping assertion' that a ban on headscarves posed a particular difficulty for Muslim women, pointing out that Ms Achbita had worked without difficulty for several years for G4S when she had not worn a headscarf, and that it was only when Ms Achbita expressed a desire to wear a headscarf that she had lost her job.[67] With respect, this misses the point entirely: Ms Achbita worked without difficulty only when she was not outwardly identifiable as a Muslim woman. It is the fact that

[66] Smet (n 4) 58.
[67] Opinion of Advocate General Kokott (n 28) para 124.

she expressed that facet of her identity that caused her to lose her job. One could make much the same argument with respect to a gay worker who lost his position once he publicly disclosed his sexual orientation: it would be no answer at all to say that he had worked without difficulty before he had come out.[68]

On one interpretation, the Court's logic in *Achbita* is the prioritisation of one fundamental right over another. Karayigit adopted this approach, arguing that fundamental rights are subjugated to market-orientated freedoms. He concluded that the right to conduct a business was elevated to 'previously unforeseen heights' to the detriment of the right to religious freedom, as the latter is subordinated 'both to the economic interests of employers and the prejudices of customers.'[69] But this does not fully capture the process at hand. If the Court was simply prioritising one right over another, there would, at least, be some attempt to balance the rights against one another, to assess which should come first and explain why the freedom to conduct a business should carry greater weight before the right to freedom of religion. Instead, this is automatically what occurs, as the freedom to conduct a business is accepted as the predominant default interest that must be shielded. As Karayigit points out, the 'vulnerable party' that must be shielded in the eyes of the Court is the company, rather than the employee.[70] This is even though the burden of proof, in the Directive, is squarely placed on the defendant. Characterising it as two competing 'rights' is a rhetorical device that distracts from the fact that, in the eyes of the Court, these are not two rights that begin on the same footing.

Neutral image as a legitimate aim derives from Article 16

The judgment in *Achbita* demonstrates how the freedom to conduct a business protected by Article 16 can shape the interpretation of secondary EU law; in this case, the Employment Equality Directive.[71] First, the Court accepted that a corporate policy that banned religious

[68] In Case C-356/21 *JK v TP S.A* ECLI:EU:C:2023:9 the applicant successfully argued that there had been a breach of the Equality Directive, after his contract failed to be renewed by his employer after he made his sexuality publicly known. The Court did not suggest in this case that the applicant had worked without difficulty before he publicly came out.

[69] Mustafa T. Karayigit, 'Prevalence of an Economic Right/Freedom Over a Social Right in a Horizontal Litigation Once Again' (2021) 4 *European Public Law* 733, 750. See also, Xenidis, 'Polysemy' (n 52) 1687.

[70] Karayigit (n 69) 747.

[71] In her Opinion in Case C-356/21 *JK v TP S.A.* ECLI:EU:C:2022:653 Advocate General Ćapeta noted at fn. 47 'It is worth noting that freedom of contract has also been recognised by the EU legal order as one of the fundamental rights, as part of the freedom to conduct a business guaranteed by Article 16 of the Charter…That, in the first place, means that the EU legislature is under an obligation to take that freedom into consideration when enacting anti-discrimination legislation' although she went on to note that: '…freedom of contract is not absolute. Quite to the contrary, the Court has held that the freedom to conduct a business, as provided for in Article 16 of

symbols in the workplace did not constitute direct discrimination, as it affects all religious persons equally.[72] Yet the Court of Justice accepted that the requirement of a neutral dress code could, hypothetically, constitute indirect discrimination for the purposes of the Employment Equality Directive. In this context, indirect discrimination occurs where an apparently neutral policy would place a religious adherent at a particular disadvantage.[73] The Directive envisages that such a difference in treatment will not constitute indirect discrimination if the difference in treatment is 'objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.'[74] The Court then went on to state, without any further elaboration, that a company's desire to display a neutral image in interactions with its customers 'must be considered legitimate.'[75] But why does a company's desire to display a neutral image constitute a legitimate aim? The Court does not give us a reason beyond stating that such a desire relates to the freedom to conduct a business protected by Article 16 of the Charter. The Court repeats again that the employer's wish is 'in principle, legitimate' particularly when this applies to employees who are required to interact with customers. But why is 'neutrality' a necessary precondition to protect the freedom to conduct a business?[76] As Howard has written, the Court made it clear that it would police how such a policy was enforced when it was introduced, and whether it was enforced fairly between all its workers.[77] But the Court did not scrutinise *why* a company might want to introduce such a policy, or if it genuinely needed to.

Why might it be considered a legitimate aim for a company to want to display a neutral corporate image, without any evidence of religious symbols or dress by its employees? The Court does not tell us why that might be, but we can hypothesise. One reason might stem from

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the Charter, 'may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest'.

[72] As an aside, one might point out that such a dress code is much more like to disproportionately affect an adherent of a religion that has strict dress code requirements, i.e., a Muslim, a Hindu, a Sikh or an orthodox Jew. Strict dress codes and overt religious symbols are not normally a foundational requirement for practising Christians, although this is the case for a number of Christian denominations, such as the plaintiff in *Eweida* for example, who was a Coptic Christian.

[73] *Achbita* (n 2) para 34.

[74] Ibid para 35.

[75] Ibid para 37.

[76] Robin Bankel, 'A Critical Commentary on the ECJ's judgment in *GS4 v Achbita' EJIL Talk!* 5 April 2017. Available: < https://www.ejiltalk.org/a-critical-commentary-on-the-ecjs-judgment-in-g4s-v-achbita/>. See also, Gautier Busschaert and Stéphanie De Somer 'You Can Leave Your Hat on, but Not Your Headscarf: No Direct Discrimination on the Basis of Religion' (2017) 33(4) *International Journal of Comparative Labour Law and Industrial Relations* 553, 561.

[77] Colm O'Cinneide, 'Uniformity or Variation: Should the CJEU 'Carry Over' its Gender Equality Approach to the Post-2000 Equality Grounds?' in Thomas Giegerich (ed) *The European Union as Protector and Promoter of Equality* (Springer 2020) 115, 126; Erica Howard, 'Islamic Headscarves and the CJEU: Achbita and Bougnaoui' (2017) 24 *Maastricht Journal of European and Comparative Law* 348.

concerns that an employee's display of religious symbols might be mistaken as an implicit endorsement or reflection of the company's beliefs, which could alienate existing or potential customers, as Advocate General Kokott suggested.[78] One might characterise this as 'expressive' right stemming from the company's desire to project a 'neutral' corporate image through its employees, akin to case law on the First Amendment of the United States Constitution.[79] Yet was there any real risk that a company's neutrality as a legal entity would be undermined by its employees' religious dress? In other words, was there any realistic prospect that customers who interact with a female employee wearing a headscarf would conclude that her headscarf reflected the religious commitment of her employer, a private corporate entity? It is difficult to see how wearing an Islamic headscarf could be mistaken for anything other than an expression of the individual's own, intensely personal, religious beliefs. Moreover, the Court's logic envisages that there may be customers who are alienated from the company simply by encountering a woman at reception wearing an Islamic headscarf, and it implicitly accepts that the company is entitled to cater to those customers. It is not clear why the Court should implicitly give credence to individuals who opt to take their business elsewhere simply because they do not want to interact with a receptionist who is wearing an Islamic headscarf. This undermines what is, presumably, supposed to be the whole point of anti-discrimination law.[80]

Development of employer's desire for neutrality as legitimate aim

Further guidance was provided by the Court of Justice on when prohibitions on religious dress could constitute a legitimate aim for the purposes of the Equality Directive in *IX v WABE; MH Müller Handels v MJ*.[81] Here, both the applicants had been sanctioned by their employers after they had started wearing the headscarf to work. IX was a childcare worker, employed by WABE, a German childcare provider with a non-denominational ethos, and MJ was employed as a sales assistant for MH Müller Handels, a large chemist chain. The Court emphasised that the 'concept of a legitimate aim' and the means employed to achieve that aim had to be strictly interpreted.[82] An employer's desire to display 'an image of neutrality towards its customers' stemmed from Article 16 of the Charter, and was, 'in principle, legitimate' particularly for

[78] This was the justification advanced by Advocate General Kokott (n 28) in para 95 of her Opinion.
[79] Elke Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? *Achbita* and *Bougnaoui'* (2018) 55 *Common Market Law Review* 589, 614.
[80] Martijn van den Brink, 'The Protected Grounds of Religion and Belief: Lessons for EU Non-Discrimination Law' (2023) 24(5) *German Law Journal* 1, 21.
[81] *WABE* (n 10)
[82] Ibid para 61.

customer-facing employees.[83] Displaying a neutral image could be justified if, first, it corresponded to 'a genuine need on the part of the employer' which the employer was required to demonstrate.[84] To establish whether the employer had a genuine need to adopt such a policy, the Court was entitled to take account of the 'rights and legitimate wishes of customers or users' and any 'adverse consequences' that the employer would suffer without the policy, in light of its business activities and context. The mere wish to pursue a policy of neutrality was insufficient to objectively justify a difference in treatment based on religion. Second, any such policy had to be consistently applied, and third, the prohibition had to be restricted to what was strictly necessary in light of the 'actual scale and severity of adverse consequences' that the employer was 'seeking to avoid.'[85]At first glance, this test appears to offer a more stringent set of criteria than *Achbita,* and it is certainly the case that the Court now requires the employer to demonstrate that the policy is 'genuinely necessary' which was absent in *Achbita.*[86] However, it is not clear that it will prove a particularly demanding standard for employers to meet. In fact, the Court provided a wide range of justifications that employers could rely on, from the legitimate rights and wishes of its customers, the desire to avoid conflict between its employees, and any adverse consequences it might be able to point to in the absence of the policy.

In the case of *IX v WABE,* the Court suggested that the legitimate rights and wishes of customers could encompass the rights of parents to ensure the education of their children in accordance with their beliefs, or their desire to ensure their children were cared for by persons who did not manifest their religion whilst caring for the children with the aim of ensuring the free development of the child's religion and beliefs.[87] Yet is difficult to see how having one's child cared for in a crèche by a special needs assistant wearing an Islamic headscarf compromises any such parental right, unless one is to make the distinctly questionable assumption that mere exposure to a woman in an Islamic headscarf has a proselytising effect on a child.[88] Nor did the Court consider whether the commitment to diversity expressed in WABE's ethos would be enhanced by exposing the children to persons of different faiths. Moreover, as Mulder pointed

[83] *WABE* (n 10) para 63.
[84] Ibid para 64.
[85] Ibid para 70.
[86] This aspect of the Court's reasoning was welcomed by some commentators as seemingly more demanding of employers; see for example Myriam Hunter-Henin 'Religious Neutrality at Europe's Highest Courts: Shifting Strategies' (2022) 11 *Oxford Journal of Law and Religion* 23, 34-37.
[87] *WABE* (n 10) 65.
[88] This is, remarkably, a conclusion that has previously been reached by the European Court of Human Rights in *Dahlab v Switzerland* (App No 42393/98) (judgment of 15 February 2001).

out, this was a private childcare facility, which was by no means compulsory for any child to attend.[89] The Court stressed that such situations were distinct from cases such as *Bougnaoui,* where the applicant had been dismissed after a client had complained about her headscarf where there was no internal rule prohibiting such dress, or *Feryn,* where an employer had publicly clarified that he would not hire 'immigrants' as his customer base would object.[90] Yet as Smet has argued, complying with the wishes of those customers in that context was previously accepted by the Court as a clear case of direct discrimination.[91] One set of commentators suggested that the Court of Justice was drawing a distinction between the legitimate expectations of customers as against the prejudices of customers.[92] But prejudiced consumers and parents are not necessarily separate categories: parents are not immune from the prejudices that may influence the wider public. It is not clear how legitimate wishes of customers could be meaningfully separated from those which are illegitimate, or indeed how these two categories are to be identified in the first place. If the implicit understanding is that open prejudice or sectarianism is illegitimate, such attitudes can easily be covert and be presented under the guise of more palatable perspectives – such as the desire to have one's child educated in a 'neutral' environment.

Second, the Court added that weight should be attached to whether the employer had produced evidence to show that its freedom to conduct a business would be undermined insofar as it would suffer 'adverse consequences' in light of the nature of its business without such a policy.[93] Any such rule should be applied consistently, and should be limited to what was strictly necessary in light of the 'actual scale and severity of adverse consequences' the employer was 'seeking to avoid' in implementing the policy. Given that the Court explicitly accepted that employers can considered the legitimate rights and wishes of their consumers, it seems this requirement of 'real need' is satisfied if a company can show that they anticipate backlash from their customer base as a result of an employee's headscarf. As Mulder has pointed out, this continues to allow employers to prioritise their own financial interests at the expense of their religious employees.[94] One might add that employers do not even need to

[89] Mulder (n 50) 1516.
[90] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397
[91] Smet (n 4) 59.
[92] Anissa Djelassi, Romain Mertens and Stephanie Wattier, 'Principe de neutralité dans les entreprises privées : la Cour de justice étoffe sa jurisprudence relative à l'interdiction des signes religieux' (2022) 130(2) *Revue Trimestrielle des Droits de l'Homme* 373, 387.
[93] *WABE* (n 10) para 67.
[94] Mulder (n 50) 1508.

demonstrate that they have actually suffered any actual economic hardship. The references to 'seeking to avoid' and the consequences that an employer 'would suffer in the absence of that policy' suggests that any adverse consequences do not need to have actually taken place; merely that the employer *anticipates* that actual adverse consequences could arise for the business.[95] The employer is presumably being invited to speculate on how a person wearing a headscarf in the workplace would damage his business. For all the Court's discussion of the requirement to show a 'genuine need' on behalf of employers, crucially, it still remains the case that the preferences of customers can be the sole reason that such a policy is formulated.

The result of this logic is that the Court is protecting the company's wish to freely respond to client preferences in order to preserve and improve profits.[96] As Weiler has noted, the Court of Justice failed to consider, 'whether the concern of the company to maintain 'neutrality' in contact with clients is not just driven by a concern for professionalism (such as a legitimate insistence on dressing neatly) but a way of accommodating the prejudices of clients.' The goal of 'neutrality', Weiler argued, imbued the policy 'with a gravitas' that makes the conclusion more palatable.[97] Van den Brink is one of the few scholars to directly challenge this aspect of the reasoning of the Court of Justice. He considered that the 'main deficiency' in the so-called 'headscarf' judgments is that 'the concept of a legitimate aim was construed so broadly' as to encompass workplace neutral dress code policies.[98] He argued that Article 16 of the Charter 'should not be applied to license prejudicial practices.'[99] But even van den Brink accepted that 'business interests' could constitute a legitimate aim that could justify indirect discrimination, and that some neutrality policies in certain contexts could be justified, such as a ban on teachers in public schools from wearing religious dress 'to provide pupils with a learning environment free from religious influence.'[100] From his perspective, the problem with the neutral workplace dress codes were that the companies were seeking to prioritise their financial interests by responding to biased customers. This is certainly true, but the suggestion that a judge or a teacher wearing a religious symbol inevitably compromises the rights and entitlements of those

[95] *WABE* (n 10) para 69-70.
[96] Weiler (n 55) 161; Elke Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? *Achbita* and *Bougnaoui'* (2018) 55 *Common Market Law Review* 589, 613; Frederik Zuiderveen Borgesius, 'Price Discrimination, Algorithmic Decision-Making, and European Non-Discrimination Law' (2020) 31(3) *European Business Law Review* 401, 415-418.
[97] Weiler (n 55) 1003.
[98] Van den Brink (n 80) 23.
[99] Ibid 24.
[100] Ibid 23.

around them is precisely the questionable logic that Advocate General Collins employed in the later case of *OP v Commune d'Ans.*[101]

The Court offered a further reason in *WABE* as to why displaying a neutral image to its customers could amount to a 'legitimate aim' that could justify indirect discrimination. This was to 'avoid social conflicts within the undertaking' in light of historical tensions over religious or political beliefs.[102] This new justification suggests that the employer may impose a neutral dress policy to avoid infighting within workforce. Such policies do not prevent members of a particular group from entering a workplace, but ensures that they must abandon and conceal those identifiers that mark them out as different in the workplace.[103] In other words, such policies compel individuals to hide core aspects of their identity, and in doing so legitimises and facilitates the continuation of discriminatory beliefs by their colleagues. It problematises the individual, rather than prejudicial attitudes they may encounter. Moreover, it extends the scope of the previous case law: the Court has now accepted that it would be legitimate for a corporate neutral dress policy to be enforced when employees are in contact both with customers and with other workers. If a religious employee cannot wear religious apparel in front of customers or colleagues in the workplace, where exactly can they do so?

It is not evident that *WABE* represents a major departure from the logic in *Achbita.* In the wake of *WABE,* the Court addressed the headscarf issue again in *LF v SCRL.* [104] In this case, the applicant had sought to undertake an unpaid internship with SCRL, an organisation that managed the provision of social housing in Belgium. She was informed at her interview that she could partake in an internship with their firm if she agreed to forgo wearing her Islamic headscarf and abide by their neutral dress code policy which prohibited their workers from wearing any visible symbols of political, philosophical or religious belief.[105] She informed them that she could not remove her headscarf, but later offered to attend the internship if she could wear another type of head covering; an offer that was rejected.[106] In her Opinion, Advocate General Medina noted that, given that indirect discrimination could be justified, there would be occasions where the freedom to conduct a business would prevail over the freedom

[101] Case C-148/22 *OP v Commune d'Ans* ECLI:EU:C:2023:924.
[102] *WABE* (n 10) para 76.
[103] E. Gary Spitko, 'Don't Ask, Don't Tell: Employment Discrimination as a Means for Social Cleansing' (2012) 16 *Employment Rights and Employment Policy Journal* 179, 188.
[104] Case C-344/20 *LF v SCRL* ECLI:EU:C:2022:774.
[105] Ibid para 15.
[106] Ibid para 18.

of religion.[107] Describing a rule of neutral dress in the workplace as indirectly discriminatory envisaged that a 'certain degree of prejudice' towards religious employees would be tolerated 'if it is demonstrated that the undertaking concerned could suffer otherwise severe adverse economic consequences.'[108] In its judgment, the Court considered that such a rule could only be seen as objective if there was a 'genuine need' for such a policy by the employer, which the employer was required to illustrate.[109] This interpretation, the Court noted, was to encourage tolerance and respect, and to 'avoid abuse of a policy of neutrality' to the detriment of religious employees.[110] The Court did not give any indication, however, as to whether an organisation that managed the provision of social housing had a 'genuine need' to adopt a neutral dress code policy.

Neutral dress codes in public sector settings

To date, Article 16 has by and large only been considered to be relevant in respect of private undertakings. As outlined above, in *OP v Commune d'Ans,* the applicant was a lawyer in a public body, and Advocate General Collins considered that Article 16 did not apply.[111] However, he accepted that the authority's desire to create a 'neutral administrative environment' was a legitimate aim that could instead be derived from a desire to respect the rights and freedoms of others, namely to ensure respect 'for all the philosophical or religious beliefs of citizens and the non-discriminatory and equal treatment of users of the public service.'[112] One might note that, first, it is not clear how the existence of a neutral dress code safeguards the 'non-discriminatory and equal treatment of users of the public service.' The dress code applies to *employees* within the local authority. How could their dress possibly affect the equal treatment of users of the public service? One could perhaps make the rather implausible claim that a neutral dress code would protect the employees of the local authority from discrimination by members of the public (although in doing so, it concedes that one should cater to those prejudicial beliefs by concealing one's religious convictions). But there is no obvious link whatsoever between the dress of the employees and how the users of the service are treated, unless the Advocate General was making the distinctly objectionable claim that those wearing religious symbols might be more likely to engage in discriminatory

[107] Case C-344/20 *LF v SCRL* Opinion of Advocate General Medina ECLI:EU:C:2022:328 para 58.
[108] Ibid para 59.
[109] (n 104) para 40.
[110] Ibid para 41.
[111] Case C-148/22 *OP v Commune d'Ans* Opinion of Advocate General Collins ECLI:EU:C:2023:378 para 64.
[112] Ibid para 64.

treatment of users of the public service. Regardless, this is a particularly strange justification to offer in circumstances where, it should be noted, the applicant worked as a lawyer 'in the back office' with no day-to-day exposure to users of the service.[113]

Second, the suggestion that a neutral dress code is required to respect the 'religious beliefs of citizens' is somewhat ironic when, thanks to the repeated interventions of the Court of Justice, religious adherents can be legally compelled to choose between their occupation and their faith. Given that Advocate General Collins referred to the 'rights and freedoms of others' presumably he means that the beliefs of other employees are safeguarded by the existence of a neutral dress code. This appears to be based on the implicit assumption that other religious and philosophical beliefs are undermined or threatened by the mere exposure to persons wearing religious symbols. If that is the case, why stop there? Why is such exposure only a threat to the rights and freedoms of others in the workplace? If neutral dress codes are necessary to preserve the rights and freedoms of others, why not impose total prohibitions on religious symbols? One cannot help but suspect that the concept of *laïcité* is playing a powerful, if unspoken, role in this judgment. The contestable assertion that total neutral dress codes are necessary to preserve the rights and freedoms of everyone is an implicit endorsement of core tenets of *laïcité.*

Finally, the Advocate General considered whether the imposition of a neutral dress code could be considered necessary and appropriate to achieve the stated legitimate aim of creating a neutral administrative environment. His assertion that the 'conditions must be interpreted strictly' is at odds with how the Advocate General went on to make that assessment.[114]He noted that the ban was, in theory, generally applicable and enforced 'irrespective of both the nature of the duties carried out by the employee and the context in which those duties are carried out.'[115] The question of whether the rule was 'strictly necessary' he considered, depended on factors such as the existence of 'strong community tensions or serious social problems or, within the actual administration, of proselytising activities or a specific risk of conflicts between employees linked to such beliefs.'[116] This was, again, a task for the referring court. The Advocate General did not consider whether the existence of 'strong community tensions' should merit particularly robust safeguarding of religious minorities, or whether the logic

[113] Ibid para 18.
[114] Ibid para 60.
[115] Ibid para 76.
[116] Ibid para 73-76.

adopted by the Court of Justice had implicitly given credence to one side of that argument. Despite the Advocate General's conclusion that Article 16 did not apply in the public sector, and indeed, the failure by the Court to reference Article 16 in its judgment, there are indicators that Article 16 could be more liberally applied to the public sector. It should be noted however, that in *LF v SCRL,* the Second Chamber noted that an employer's wish to demonstrate an image of neutrality both towards 'public-and private-sector customers…may be regarded as legitimate.'[117] Article 16 was also applied by the Court of Justice in *JK v TP S.A,* despite the fact that that the employer was a public sector broadcaster.[118]

General neutral dress codes

A further factor that should be queried in these cases is the Court's tendency to accept that an employer's desire for workplace dress codes have been genuinely intended to apply in neutral manner, when there are clear indications throughout the case law that the prohibitions on religious dress have been enacted in response to specific employees. Regardless of whether such policies should constitute legitimate aims for the purposes of the Equality Directive, it is worth drawing attention to the fact that in *G4S v Achbita*, G4S did not even have a written corporate policy on neutral dress when Ms Achbita was made redundant. When Ms Achbita informed her employer that she planned to wear the headscarf, G4S then claimed that it had an unwritten code against any religious or political dress or symbols. Many companies, particularly small businesses, may operate informally without a clear written code of conduct or policies for their staff. But G4S clearly *had* a written code of conduct already in place, with no mention of this specific policy, because it then took steps to amend the code of conduct shortly after Ms Achbita's announcement. The amendment to the code of conduct was made on 29 May 2006, but the amendment did not come into effect until 13 June.[119] Ms Achbita was dismissed for breaching the company's code on 12 June - a day before the amendment came into effect.[120] The significance that the Court attached to the freedom to conduct a business underlined by the fact that the Court of Justice took no issue with the fact that Ms Achbita was dismissed from her position *before* GS4 had implemented a valid corporate policy on neutral workplace dress. Even if one was to accept the policy constituted a legitimate aim – and there are many good reasons not to do so – it is nothing short of remarkable that the Court placed so

[117] *LF v SCRL* (n 104).
[118] *JK v TP S.A* (n 68).
[119] *Achbita* (n 2) para 15.
[120] Ibid para 16.

much weight on the existence of a corporate neutrality policy when the company in question did not even possess one.

In a similar vein, in *IX v WABE* the applicant had been wearing an Islamic head scarf for several months in the crèche without incident, and her employer adopted a general rule on neutral dress two months before she was due to return from parental leave.[121] The Court did not suggest that the national court should consider whether Ms IX's anticipated return to work had prompted the creation of the policy. In *OP v Commune d'Ans,* OP had worked as a lawyer for a local authority in Ans in Belgium.[122] On 8 February 2021, she requested permission from her employer to begin wearing an Islamic headscarf to the workplace from 22 February 2021. On 18 February, the municipal authority formally instructed her to refrain from wearing any religious symbols until, much like the employer in *G4S v Achbita,* it promptly adopted general regulations prohibiting the display of any religious symbols.[123] Its initial decision was affirmed on 26 February, after it had allowed OP to make representations, and on 29 March the local authority formally amended its terms of employment to prohibit its workers from wearing any visible religious symbols. This applied both to workers in public-facing roles and those who were in contact with their colleagues.[124] Neither the Advocate General in this case nor the Court of Justice appear to be concerned that workplace policies were swiftly introduced by employers in *Achbita, WABE* and *Commune d'Ans* seemingly in response to the declared intentions of a single member of staff, all of whom happened to be Muslim women. The 'generality' of the rule is distinctly questionable if it is adopted to ensure that that member of staff cannot begin to wear her headscarf in the workplace. It is difficult to see how such rules cannot be seen as targeted at specific individuals, even if the policies are couched in general terms.

Formalistic understanding of discrimination

A further theme throughout these cases is the Court's emphasis on the existence of a prohibition on religious dress or some other formalised dress code policy. The Court has also stressed that such policies must be applied consistently.[125] The Court placed a major emphasis in *Bougnaoui* on the existence of a general ban on religious dress: presumably because it demonstrates that all employees are affected by a clear, formal policy, and that the employer is not

[121] *WABE* (n 10) para 24-25.
[122] Case C-148/22 *OP v Commune d'Ans* ECLI:EU:C:2023:924.
[123] Ibid para 12-13.
[124] Ibid para 14-15.
[125] *Comune d'Ans* (n 122) para 28.

indiscriminately targeting particular employees. This presents a highly formalistic view of equality in failing to take account of the disparate impacts of such a ban on various minority groups, but it also places excessive weight on the existence of a workplace policy, which can be introduced by employers with relative ease. It is a distinction without difference: discrimination can take place through formal, generally implemented rules, not just through indiscriminate and arbitrary behaviour.

Through its judgments, the Court of Justice has presented employers with a clear pathway to lawfully discriminate against their religious workers. All companies must do to legitimately dismiss their headscarf-wearing employees is to have a strict policy of 'neutrality' in the workplace, particularly for customer-facing roles. Even the fact that the employers in *Achbita* and *Commune d'Ans* had – rather hastily, one could imagine - drafted the company's neutrality policy *after* the employees had indicated their desire to wear headscarves did not change the outcome. Dismissing an employee arbitrarily for wearing a headscarf might be discriminatory, but not if the company is simply implementing a written ban on religious dress. All this does is encourage the introduction of general bans on religious dress, which is only likely to further isolate Muslim women and other religious adherents from the workplace. The Grand Chamber stressed in *Bougnaoui* that it was for the referring court to determine, on the facts, if Ms Bougnaoui's employers had implemented a general workplace ban on religious dress. Moreover, while the Court of Justice stated in *Bougnaoui* that an employer cannot characterise the preferences of clients as a genuine occupational requirement, the Court did not consider whether there was any inconsistency in allowing the preferences of customers to dictate the creation of the policy in the first place. The discomfort of customers – surely, the very essence of bias – is permitted to dictate the treatment of employees. What is the point, one might ask, of protection from discrimination in the workplace when the employer has free reign to discriminate through formal company policy?

Article 16 and sexual orientation

These decisions outlined above can be usefully contrasted with other judgments on the Employment Equality Directive. In *JK v TP S.A* the applicant alleged that his contract failed to be renewed by his employer after he made his sexuality publicly known.[126] The Court of Justice

[126] *JK v TP S.A* (n 68). See generally, Antonio Aloisi, 'JK v TP S.A. and the 'Universal' Scope of EU Anti-Discrimination Law at Work: A Paradigm Shift?' (2023) 52(4) *Industrial Law Journal* 977.

was asked to determine whether the scope of the Employment Equality Directive applied to JK, as an independent contractor, and whether it afforded protection against scenarios where a subsequent contract was not concluded on the basis of the sexuality of a party to that contract. With respect to Article 16, the Court acknowledged that it encompassed the freedom of contract, including the freedom to choose with whom to do business.[127] As an aside, it is particularly striking that the Court was prepared to accept that Article 16 was of relevance, given that the employer in this case was a public sector broadcaster, rather than a private commercial entity. The Court considered, however, that permitting the refusal to contract with another on the basis of their sexuality would effectively negate the protection afforded in Article 3(1)(a) of the Equality Directive, given that it specifically banned any discrimination based on sexuality with respect to the self-employed.[128]

This is a curious decision to reconcile with the Court's previous judgments on the interaction between Article 16 and the Employment Equality Directive. On one hand, in *JK,* the Court seems acutely alive to the possibility that an absolutist understanding of the freedom to conduct a business protected by Article 16 could be used to discriminate against marginalised groups that the Equality Directive is intended to protect. Yet on the other hand, the Court has repeatedly affirmed that businesses are entitled to project a particular corporate image, an entitlement that it considers derives from Article 16. It has, in other words, confirmed that such internal business judgments carry the weight of fundamental rights protection behind them. In doing so, it has repeatedly facilitated and provided a roadmap for those who would prefer not to have practising adherents of Islam, or other religions which involve conspicuous symbols, in their workplace. The Court seems blind to the obvious unfairness that brings with it, as neutrality is not a feasible option for some religious groups. Yet, in *JK,* the Court seemed to baulk at relying on Article 16 to justify such an obvious instance of discrimination. Would the Court accept that a corporate policy of neutrality with respect to political and philosophical beliefs would remain legitimate if the status of LGBT persons and families, for example, remained a live political topic in the nation state in question? This is not implausible: same-sex marriage remains illegal in Poland, as well as several other EU Member States.[129] The company could plausibly argue that it wished to remain neutral as to live political topics and any statements in support could undermine their corporate image. Had the circumstances in *JK* been slightly different, the Court

[127] *JK v TP S.A* (n 68) para 74.
[128] Ibid para 77.
[129] Bulgaria, Croatia, Italy, Hungary, Latvia, Lithuania and Slovakia do not allow same-sex couples to marry.

might have been confronted more starkly with the natural continuation of its earlier logic in the headscarf cases.

Conclusion

The cases of *Achbita, Bougnaoui* and *WABE* perfectly encapsulates the broad scope of Article 16: the introduction of corporate neutral dress policies are protected as an exercise of a fundamental right purely because the company has decided that this is the action it wants to take. Any decision, action, policy, or activity by the company is protected as a facet of the freedom to conduct a business. A company's desire to portray a neutral image has been accepted as a 'legitimate objective' that can justify indirect discrimination. As Frantziou has argued, the high priority afforded to Article 16 has allowed the Court to assert the importance of protecting fundamental rights, yet put forward 'an unelaborated vision of commercial choice to limit those rights in practice.' This has allowed the Court of Justice to 'avoid an in-depth examination of the salience of religious neutrality policies.'[130] In *WABE,* the Court attempted to reformulate this requirement on the basis that an employer must show 'genuine need.' But this formulation is misleading: the judgment allows for adverse reactions by customers of the company, actual or anticipated, to justify the introduction of such a policy. It is not clear how the 'legitimate' wishes of the customers could ever meaningfully be differentiated from those that are 'illegitimate'. It also allows the employer a discretion to introduce such a policy on the basis that it necessary to avoid infighting between its workers. Unlike the jurisprudence of the European Court of Human Rights, it does not need to be demonstrated that it affects the capacity of the employee to carry out their functions safely and effectively. This demonstrates that the protection of the freedom to conduct a business continues to be prioritised over the freedom of religion. One need only examine how the Court affords priority to each of the interests of stake. For employees, their religious beliefs are downgraded to optional preferences: religious garments are something that can easily be removed. Yet for employers, their desire to have their employees dress neutrally is unquestionably accepted. The wish of the employer is afforded a reverence which would be appropriate for religious beliefs. For the employee, wearing a headscarf is a preference; for the employer, a neutrally dressed workforce is seen as a requirement. A reversal of these priorities seems needed.

[130] Eleni Frantziou, 'Joined cases C-804/18 and C-341/19, *IX v WABE eV and MH Muller Handels GmbH v MJ:* religious neutrality in a private workplace? Employer friendly and far from neutral' (2021) 46(5) *European Law Review* 674, 683.

While the Court of Justice has attempted to leave the impression that its caselaw in this area is in line with that of the European Court of Human Rights in *Eweida*, most commentators have concluded that the approaches of the two Courts are incompatible. It has been suggested that the decision in *WABE* has brough the Court of Justice closer to, and potentially further than, the Strasbourg Court in *Eweida.*[131] However, that analysis assumes that the Court's mention of an employer's 'genuine need' will require a high evidentiary burden before a neutral corporate dress policy is justified. One commentator concluded that in the wake of *Eweida* that corporate 'neutrality' policies could not be considered to automatically trump the fundamental rights to religion of employees.[132] It is difficult to see how that conclusion could be reached in the wake of *Achbita, Bougnaoui, WABE* and *SCRL.* The Employment Equality Directive was introduced to ensure that discrimination at the workplace, including religious discrimination, would be avoided and ensure equal access to the labour market for religious minorities. But in doing so, the Directive is also designed to advance the development and interests of the single market, to ensure that those from minority groups can freely participate as workers without suffering discriminatory barriers. Much like other positive developments, such as the introduction of equal pay for women, these developments have come about as a consequence of the liberalisation of the European markets, by removing barriers to ensure maximum access and participation in the marketplace.[133] Originally designed to eliminate 'market distortions' these developments happily coincided with a wider drive for equality. As the scope of Article 16 now affects even how EU law should be interpreted, the worthy aims of the Employment Equality Directive have been moulded by market interests.

[131] Ibid 680.
[132] Veit Bader, Katayoun Alidadi and Floris Vermeulen, 'Religious diversity and reasonable accommodation in the workplace in six European countries: An introduction' (2013) 13(2-3) *International Journal of Discrimination and the Law* 54, 73.
[133] Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) *European Law Journal* 293; Xenidis, 'Polysemy' (n 52) 1655-1656.

CONCLUSION

Law is a powerful means of obscuring normative preferences; it provides 'a mask which conceals the way in which the powerful govern in accordance with their own interests.'[1] The Law and Political Economy movement argues for a renewed focus on the role of economic power, and how such power is levied through law.[2] Once we recognise that law is essential for the operation of markets, we can examine how the substantive content of law can serve market actors, and affect their economic power.[3] Law does not only reflect inequalities embedded within society, but it can also act as a mechanism through which the dominance of market actors can be constituted and consolidated. This is, I suggest, how we should view the recognition of the freedom to conduct a business in Article 16 of the Charter, and how it has been interpreted and developed by the Court of Justice. Three questions were asked at the outset of this thesis. First, how did the freedom to conduct a business come to be included in the Charter of Fundamental Rights of the European Union? Second, can the protection of the freedom to conduct a business be said to derive from the case law of the Court of Justice, or the constitutional traditions of the Member States? Third, what has been the impact of the freedom to conduct a business in the case law of the Court of Justice?

Chapter One outlined that the freedom to conduct a business came to be included in the Charter of Fundamental Rights because of the significant influence exerted by a group of members of the Convention who were associated with the European People's Party. They insisted on the inclusion of Article 16 by virtue of their opposition to the redistributive bent of the Charter. This underscores the openly ideological origins of the protection of the freedom to conduct a business in Article 16, which stemmed explicitly from their concern that the document had swung too far 'to the left'. The Explanations to the Charter are a useful example of what

[1] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Bloomsbury 2000) 8.
[2] Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski and K. Sabeel Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 *Yale Law Journal* 1784.
[3] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (first published 1944; Beacon Press 2001) 145-148.

Loughlin calls the 'neutralising effect of law' in action.[4] The clear political and ideological views that gave rise to the protection of the freedom to conduct a business are erased, and instead we are diverted to an alternative, purportedly uncontroversial account of how Article 16 came to be included in the Charter; namely through the case law of the Court of Justice. This is also underscored by the suggestion that the freedom to conduct a business was recognised in the constitutional traditions of the Member States. Again, this deflects from the novelty and the scope of the provision, and dovetails with a broader proclivity towards revisionism in the European legal order.[5] This thesis sought to go beyond the formal Explanations that provide the 'official' account of the history of Article 16, and to squarely confront its ideological origins. This shows that the normative biases of Article 16 are not mere theoretical supposition or a product of projection; they are starkly evident from the primary sources from the drafting of the Charter. The desire to recognise the freedom to conduct a business stemmed from a clear political and philosophical worldview, which sought to empower private economic enterprise to counteract the redistributive bent of the Charter. This crucial context, which has been largely dormant from public view, should inform our understanding of Article 16.

Of course, the interest group bargaining evident in the drafting of the Charter is no different in this respect from the creation of a multitude of other comparable legal documents, such as national constitutions. Such documents are the products of human endeavours that cannot be divorced from the contentious political context in which they are formed. They are not value neutral: they openly or implicitly channel particular political theories and ideologies which inevitably favour particular interests and societal groups.[6] Enshrining a particular entitlement in a higher form of law, such as a constitution, is a useful means of placing the political character of an issue at a remove and leaving it to be resolved via judicial or technocratic expertise.[7] It can serve as effective means of isolating particular issues from the sphere of political debate and democratic influence, leaving it solely for the judicial branches to interpret and technocratic experts to implement. It guarantees the entrenchment of a particular

[4] Loughlin (n 1).
[5] See, for example, Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48(1) *Journal of Common Market Studies* 45.
[6] Ran Hirschl, 'The Strategic Foundations of Constitutions' in Denis J. Galligan and Mila Versteeg (eds) *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 157, 166.
[7] Peter Burnham, 'New Labour and the politics of depoliticisation' (2001) 3(2) *British Journal of Politics and International Relations* 127.

worldview that might be vulnerable to erasure within the confines of the political system.[8] For fear of losing their dominance, 'threatened elites can get through the constitutional domain what they cannot get through the electoral market.'[9] The inclusion of the freedom to conduct a business can be viewed in much the same way. Moreover, unlike many national constitutions, the Charter of Fundamental Rights was not approved by way of an expression of popular sovereignty or participatory democracy from the people who would ultimately be subject to it.

Despite multiple formal commitments to human rights,[10] the European Union has never quite managed to shake off criticism that it is, at its heart, an organisation that is primarily responsive to the market.[11] Of course, the modern-day European Union has long ventured outside the purely economic remit: to take just one example, the Treaty of Lisbon has granted new competences in the field of criminal justice and security. Yet despite its expanding competences, the European Union's overarching, driving force has always been the advancement of the internal market.[12] The four keystones of the European Union – freedom of capital, people, goods and services – are economic in nature. These legal entitlements, known as the 'fundamental freedoms', have served as the foundation for the internal market, and for the most part European integration has been driven by market integration.[13] This rationale is reflected in the European Union's legal order, and more specifically, in its constitutional documents: the Treaties, and since 2009, the Charter of Fundamental Rights.[14] The underlying aim of the EU constitutional order is, as Isiksel has argued, 'the functional imperatives of creating and maintaining an economic union' which includes the creation and protection of the 'single market, monetary union, exhaustive fiscal coordination, and regulatory powers ranging

[8] Ran Hirschl, *On Juristocracy* (Harvard University Press 2004); Ruth Gavison, 'What Belongs in a Constitution?' in Wojciech Sadurski (ed) *Constitutional Theory* (Dartmouth 2005) 15, 24.
[9] Hirschl (n 6) 169.
[10] Philip Alston and J. H.H. Weiler, 'An EU Human Rights Policy' in Philip Alston, Mara R. Bustelo and James Heenan (eds) *The EU and Human Rights* (Oxford University Press 1999).
[11] See, for example, Daniel Augenstein, 'Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law' (2013) 14(10) *German Law Journal* 1917; Danny Nicol, 'Europe's Lochner Moment; (2011) 2 *Public Law* 308; Charlotte O'Brien 'I trade, therefore I am: legal personhood in the European Union' (2013) 50 *Common Market Law Review* 1643, 1677-1678.
[12] J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.
[13] Augenstein (n 11) 1918.
[14] As Maduro writes, 'The process of constitutionalisation of the European Communities has been mainly a functional development from a set of Treaty rules centred on the promotion of a common market. Europe's constitutional dimension has, therefore, been closely linked with the logic of economic integration.' See, Miguel Poiares Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in Tamara Hervey and Jeff Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective* (London: Hart Publishing 2003) 269, 271.

from consumer protection to environmental standards.'[15] The EU's *raison d'être* is to advance an economic union, and thus its constitution is geared towards protecting and advancing that aim.

The European Union began life as a legal order that guaranteed particular economic freedoms and the enforcement of competition through its institutions.[16] Member States lost sovereignty over economic decision-making, but not warfare or welfare. Member States would have the freedom to determine social policy and redistribution but untrammelled economic competition would be guaranteed at a European level, and enforced by the law of the-then European Economic Community. This was the 'economic constitution' of the European Economic Community, which would be free from political interference, and thus, from democratic control.[17] The disillusionment with mass democracy and the desire for political stability facilitated the project of European integration, an elite-driven project with minimal public input.[18] The German ordoliberal tradition, with its preference for rules established through law, coalesced with the interests of other major players, the UK and France, who were unwilling to cede major political power. The demands of the marketplace have not, however, remained constant over time. Even in the wake of the Treaty of Rome, the early years of European integration encompassed an unlikely combination of 'restrained capitalism, bureaucratic planning and transnational market integration.'[19] Yet the era of tempered capitalism did not endure. The collapse of the Soviet Union, and the reunification of Germany, presented powerful geopolitical incentives to move towards the creation of a new European Monetary Union.[20] The persistent crises that erupted after Bretton Woods – volatile currencies, stagflation, and social unrest – fed the urgency for a new approach to economic policy in Europe.[21] Economic incentives played a major role in driving the Single European Act and the Maastricht Treaty, which represented a new political economy for most European nations. The creation of a European Monetary Union promised to stabilise fluctuating currency exchange rates to boost

[15] Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism beyond the State* (Oxford University Press 2016) 7.
[16] Christian Joerges, 'What is left of the European Economic Constitution: A Melancholic Eulogy' (2005) 30(4) *European Law Review* 471.
[17] Ibid 472 .
[18] Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 95-98.
[19] Ibid 127.
[20] Michelle Everson, 'The European Crisis of Economic Liberalism: Can the Law Help?' in *The Crisis Behind the Eurocrisis* (Cambridge University Press 2019) 381.
[21] John Gillingham, *European Integration, 1950-2003: Superstate or New Market Economy?* (Cambridge University Press 2003) 81-83.

trade and investment, and, in short, a more market orientated approach seemed to inevitable. The dynamic resurgence in liberal economic thinking met with limited resistance from national governments who felt they were out of options.[22]

The highly regulated post-War internal European market was different to the unbridled economic liberalism that was to resurge to widespread popularity by the 1980s, mirrored by Reagan on the other side of the Atlantic.[23] This was, in turn, reflected in the development of EU law. The fundamental freedoms – free movement goods, services, capital and people- had developed unevenly and sporadically by the Court of Justice, which can be linked to marketplace trends. The Court of Justice embarked on its efforts to develop its jurisprudence on the free movement of goods when continental Europe was still a major site of manufacturing, and efforts to liberalise intra-European trade had stalled thanks to the requirement of Member State unanimity. The Court's shifting approach is evident in the case law that was discussed throughout this thesis. For instance, *Nold* is widely cited as the judgment where the Court of Justice recognised the freedom to conduct a business for the first time. But, as discussed in Chapter One, the Court did no such thing. Nold failed to persuade the Court of Justice that the new trading regulations on coal introduced by the European Commission constituted an infringement of the company's fundamental rights. Instead, the judgment is clear that any rights to pursue an occupation or trade had to be considered in light of the wider public interest and that, moreover, 'mere commercial interests' could not be shielded as fundamental rights. As Giubboni explained, the judgment in *Nold* is broadly representative of the 'highly regulated and *dirigiste* apparatus' of the early European internal market.[24] For the next thirty years, as outlined in this thesis, the Court of Justice scarcely ever set aside legislation on the basis that it constituted an unjustified infringement of the freedom to engage in business activity, as recognised by the general principles of EU law.

Yet by the turn of the new millennium, the new Charter of Fundamental Rights had recognised the freedom to conduct a business in Article 16. Over time, this was interpreted by the Court of Justice as a free-standing enforceable right to carry out commercial activity. The cross-border requirement, which was a definitive element of the internal market, according to the EU

[22] Wayne Sandholtz and John Zysman, '1992: Recasting the European Bargain' (1989) 42(1) *World Politics* 95, 97.
[23] Wilkinson (n 18) 130-131.
[24] Stefano Giubboni, 'Freedom to conduct a business and EU labour law' (2018) 14 *European Constitutional Law Review* 172, 176

Treaties, was no long required. This sets Article 16 apart from the free movement provisions, the most significant economic entitlements established by EU law. The free movement provisions have always been justified on the basis that they are essential to establishing an internal market, free of any obstacles to inter-Member State trade. Yet there is no such requirement to trigger Article 16. Provided that some provision of EU law is engaged (given its ever-encroaching scope, this is not an insurmountable task) Article 16 can be asserted in opposition to any measures that seek to constrain the actions of business operators. Of course, Article 16 has not served to bulldoze all existing regulatory frameworks. But nor should we expect it to. As outlined in Chapter Four, the goals of consumer protection and public health have always been highly valued within the EU legal order as a means of securing the successful operation of the internal market. The scope for Article 16 to serve as a deregulatory vehicle is most acute in circumstances where the conflicting interest at stake is not considered to advance market integration, such as worker protection.

While the Court of Justice ultimately recognised fundamental rights as 'general principles of EU law', the Court has long been accused of privileging economic freedoms over fundamental human rights.[25] Concerns about the Court of Justice's conception of human rights were raised by O'Neill and Coppel, who noted the Court's tendency to grant weight to market freedoms over that of national constitutional rights. Later, instead of openly prioritising economic interests over fundamental rights, the Court increasingly described market activity *as* 'fundamental freedoms'.[26] Thus, the Court of Justice neatly avoided the criticism that it was privileging market interests over fundamental rights, by elevating market activity to the status of fundamental rights. This had broader implications: as Coppel and O'Neill pointed out, concerns regarding 'fundamental rights' did not carry the same countervailing weight to the market-driven activities of the EU executive, as those interests could now come under the

[25] See, for example, Niamh Nic Shuibhne, 'The Social Market Economy and Restriction of Free Movement Rights: Plus c'est la meme chose' (2019) 57 *Journal of Common Market Studies* 111; Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously' (1992) 12 *Legal Studies* 227. These criticisms became even more pronounced in the wake of the *Viking* and *Laval* decisions, Case C-438/05 *ITF and FSU v Viking Line ABP and OÜ Viking Line Eest* ECLI:EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809. See for example, Verica Trstenjak and Erwin Beysen 'The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU' (2013) 38(3) *European Law Review* 293, 312-314; Václav Šmejkal 'Ten Years after the Viking Judgment: EU Court of Justice Still in Search of Balance between Market Freedoms and Social Rights' (2017) *Prague Law Working Paper Series.*

[26] Jason Coppel and Aidan O'Neill, 'The European Court of Justice: taking rights seriously?' (1992) 12(2) *Legal Studies* 227, 242-243; Sophie Robin-Olivier, 'Fundamental Rights as a New Frame: Displacing the Acquis' (2018) 14 *European Constitutional Law Review* 96, 104.

rubric of advancing 'fundamental rights.'[27] Coppel and O'Neill predicted that the natural result of categorising Community economic freedoms as fundamental rights was that the Court would, with greater ease, prioritise the former over the latter.[28] In a similar vein, Williams later wrote of the Court's 'brilliant sleight of hand' in incorporating 'individuals rights into the very idea of the market.'[29]

The Court's tendency to prioritise economic freedoms over fundamental rights has provoked considerable critical discussion, but few of these commentators take issue with the characterisation of economic activity as a fundamental right in the first place.[30] Petersmann, for example, views market activity as promoting human autonomy and self-determination, and thus deserving of the moniker of 'fundamental rights'.[31] He presumes that free market activity is innately beneficial to human welfare, which overlooks the well-documented possibility that economic liberalism could pose a threat to it.[32] Isiksel, discussing the distinction between human rights and the classification of market freedoms as 'fundamental freedoms' by the Court of Justice, notes that these commercial freedoms do not have the same innate universal character that human rights are supposed to have, given that market freedoms are solely for the internal market within the EU, and cannot be invoked by those outside it. The status accorded to market freedoms, she concludes, is solely because they are instrumental for sustaining the EU's economic union.[33] But even Isiksel stops short of challenging the assertion that markets are automatically welfare enhancing, and does not critically examine what special interests are advanced by elevating market activity to the sphere of human rights.

While this discussion arose in the context of the free movement provisions, or the 'fundamental freedoms', the inclusion of the freedom to conduct a business in Article 16 of the Charter, I

[27] Coppel and O'Neill (n 26) 243.
[28] Ibid 243.
[29] Andrew Williams, 'Human Rights in the EU' in Anthony Arnull and Damian Chalmers (eds) *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 249, 255.
[30] See, for example, John Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 *European Law Journal* 15; Sacha Garben, 'Balancing fundamental social and economic rights in the EU: in search of a better method' in Bart Vanhercke, Dalila Ghailani and Slavina Spasova, and Philippe Pochet (eds) *Social Policy in the European Union 1999-2019: the Long and Winding Road* (ETU 2020).
[31] Ernst Ulrich Petersmann, 'Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution' in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds) *International Trade and Human Rights* (Oxford University Press 2006).
[32] Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal International Law* 815, 826.
[33] Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism beyond the State* (Oxford University Press 2016) 106-107.

suggest, can be understood in much the same way. Significant advantages come with framing one's interest-claim as a 'right'.[34] Once classified as rights, rights appear 'ahistorical and universal.'[35] As Gray argued, to classify an interest as a fundamental right is to transform a highly contested political issue into a 'non-negotiable' as 'rights…are unconditional entitlements, not susceptible to moderation." [36] Of course, rights are rarely unconditional, and they are often susceptible to moderation. But the gist of Gray's argument is correct: once an interest is framed as a fundamental right, its basic normative value is much harder to contest. The protection of the freedom to conduct a business in Article 16, I suggest, is a prime example of how the language of fundamental rights can be co-opted to advance values and interests that are far from universal; a practice that should be directly challenged. Classifying market activity as a fundamental right equates personal freedom with economic freedom. This is, of course, a highly contested worldview, and fails to take account of the possibility that market liberalisation is often in tension with human welfare. Yet classifying market activity as a right means that it must then be treated as such by the courts and legislators, and balanced alongside other competing rights, which naturally gives it greater weight and significance. In consequence, democratic lawmakers will struggle to constrain the power of economic actors through regulation, to advance interests that are not protected by the market or to counterbalance the economic inequality produced by market behaviour. Framing market behaviour as 'fundamental right' is a highly effective mechanism for corporate actors to resist regulation by placing economic interests at a higher level of protection, and 'to rationalise and insulate structurally produced inequality' as the unavoidable consequence of relations between freely autonomous individuals.[37] This is not to suggest that Article 16 is solely responsible for any pro-market tendencies that run throughout the Court's case law. Rather, Article 16 is a further example of how market interests can be advanced through the vehicle of fundamental rights.

[34] On the susceptibility of rights to misappropriation generally, see Gráinne de Búrca and Katharine G. Young, 'The (mis)appropriation of human rights by the New Global Right' (2023) 21(2) *International Journal of Constitutional Law* 205.
[35] Martti Koskennieni, 'The Effect of Rights upon Political Culture' in Philip Alston (ed) *The EU and Human Rights* (Oxford University Press 1999) 99, 101.
[36] John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (Routledge 1997) 22.
[37] Jed Purdy, 'Neoliberal Constitutionalism: Lochnerism for a new Economy' (2014) 77 *Law and Contemporary Problems* 195, 213.

It was anticipated in some quarters that the adoption of the Charter of Fundamental Rights, even before it became legally binding, marked a break with the EU's market-based order.[38] The creation of a single market would no longer be its dominant meta-value, but 'stand alongside a commitment to a range of fundamental values which transcend purely market goals.'[39] Any preference for market-orientated rights, many commentators argued, would struggle to survive under the new provisions.[40] Schiek wrote that in the wake of the Lisbon Treaty, the Treaties could not be used as a basis for the 'alleged dominance' of economic aspects of European integration.[41] When considered as a whole, she argued, the Charter represented an impressive commitment to human rights.[42] Instead of the traditional prioritisation of economic over social rights, she claimed, that priority has been reversed.[43] A great number of the scholars who welcomed the Charter of Fundamental Rights acknowledged that the text itself was not definitive, but rather that there was a new capacity for the EU to move away from its traditional market-orientated approach.

Yet any assessment on whether the Charter marks a break with the European legal order's market-based orientation is incomplete without reflection on the impact of Article 16 of the Charter. As this thesis has argued, Article 16 has served as a fresh mechanism for those seeking to use EU law as a vehicle for advancing economic interests. Dorssemont, citing Article 16, wrote that '[t]he potential primacy of fundamental rights over market principles [in the Charter was] diminished by the stealthy *upgrading* of a number of economic principles to full-fledged fundamental rights.'[44] Similarly, Robin-Olivier pointed to Article 16 when she argued that the Charter had served to strengthen economic freedoms.[45] It is hard not to escape the conclusion that, despite the introduction of the Charter, the EU legal order has not been prepared to

[38] See for example, Gráinne de Búrca, 'Human Rights: The Charter and Beyond' *Jean Monnet Working Paper No.10/01* 1; Marek Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?' *EUI Working Paper Law 2012/22* 1, 2.
[39] De Búrca (n 38) 5-6.
[40] Sybe de Vries 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon - An Endeavour for More Harmony' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 75.
[41] Dagmar Schiek, 'Re-embedding Economic and Social Constitutionalism: Normative Perspectives for the EU' in Dagmar Schiek, Ulrike Liebert and Hildegard Schneider (eds) *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge University Press 2013) 45.
[42] Dagmar Schiek, 'Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market' (2017) 13 *European Constitutional Law Review* 611, 626.
[43] Ibid 628.
[44] Filip Dorssemont, 'Values and Objectives' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds) *The Lisbon Treaty and Social Europe* (Oxford: Hart Publishing 2012) 45, 54.
[45] Sophie Robin-Olivier, 'Fundamental Rights as a New Frame: Displacing the Acquis' (2018) 14 *European Constitutional Law Review* 96, 99.

meaningfully depart from its founding commitment to economic liberalism.[46] As Starke wrote, 'the market paradigm best explains the vision of society that shines through the CJEU's decisions.'[47]

As this thesis has sought to demonstrate, cases such as *Alemo-Herron* and *AGET Iraklis,* as well as *Achbita* and its progeny, are a stark illustration of the consequences of privileging market activity with the status of a fundamental right. There is serious cause to reflect on whether the freedom to conduct a business deserves inclusion in the Charter of Fundamental Rights. We should be concerned by the proposition that any action taken in the running of a business constitutes the exercise of a fundamental right, and that any regulation or measure that affects a business's operations constitutes a *prima facie* interference with that right. This is particularly the case when accepted limitations on the right appear to be so clearly informed by what the Court itself considers to be normatively valuable. There appears to be little appetite for stripping away consumer protection measures, despite the efforts of private economic enterprise to challenge various measures as onerous and expensive. Much the same could be said about public health, which is considered to be a necessary means of preserving confidence in the internal market, as evidenced by the recent challenges to the pandemic restrictions in *Nordic Info.*[48] On the other hand, the interests of workers has been subject to real damage since the introduction of Article 16, given the absolutist interpretation afforded to the freedom of contract. Moreover, the suggestion that a limitation on the freedom to conduct a business includes measures that may be costly or inconvenient is powerful ammunition in the hands of an economic operator seeking to avoid new forms of regulation.[49] To fully understand the impact of Article 16, we must examine its impact in the Court's case law across a wide range of subject matters, rather than extrapolating from one particular area and concluding that this is indicative of a general approach. Sacha Garben once argued that the freedom to conduct a business was necessary in a robust democracy, to ensure the breakup of monopolies and the concentration of economic power.[50] It is perhaps time to consider whether the characterisation of conducting a business as a fundamental right has, in fact, strengthened the hand of large

[46] Max Fabian Starke, 'Fundamental Rights before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm?' *European Contract Law and the Charter of Fundamental Rights* (Cambridge University Press 2018) 93, 111.
[47] Ibid 112.
[48] Case C-128/22 *Nordic Info BV v Belgische Staat* ECLI:EU:C:2023:951.
[49] Joined Cases C-798/18 and C-799/18 *Anie and Athesia* ECLI:EU:C:2021:280 para 63.
[50] Sacha Garben, 'Balancing fundamental social and economic rights in the EU: in search of a better method' in Bart Vanhercke, Dalila Ghailani and Slavina Spasova, and Philippe Pochet (eds) *Social Policy in the European Union 1999-2019: the Long and Winding Road* (ETU 2020) 62-63.

economic actors, allowing them to undermine laws that remedy the unequal bargaining power between businesses and more vulnerable groups. Framing market activity as the exercise of the 'freedom to conduct a business' is a highly effective means for economic actors to resist regulation by placing their interests at a higher level of protection.

FIGURE 1

Judgments referring to Article 16

Case name	Party raising Article 16	Subject-matter	Outcome
1. Case T-125/22 *RT France*	Legal person (company – publication of specialised TV channels)	Restrictive measures	No breach of Article 16
2. Case C-510/22 *Romaqua*	Legal person (mineral water producer)	Competition law - Exploitation and marketing of mineral water	Inadmissible
3. Case C-133/22 *LACD GmbH*	Legal person (sport and fitness products manufacturer)	Consumer protection – distance contract	Affected interpretation of Consumer Rights Directive (Directive 2011/83)
4. Case 128/22 *BV Nordic Info*	Legal person (travel agent)	Free movement – pandemic restrictions	No breach of Article 16
5. Case C-179/21 *absolut bikes v the trading company GmbH*	Legal person	Consumer protection	Affected interpretation of Consumer Rights Directive (Directive 2011/83)
6. Case C-558/21 P *Global Silicones Council*	Legal person (corporation)	Regulation of chemicals	Inadmissible
7. Case C-356/21 *JK v TP S.A.*	Legal persons	Discrimination	No breach of Article 16
8. Case T-324/21 *Harley-Davidson Europe Ltd v European Commission*	Legal person	Determination of the non-preferential origin of certain motorcycles	No breach of Article 16
9. Case C-249/21 *Fuhrmann v B*	Legal person (company - hotel proprietor)	Consumer protection	Article 16 not affected
10. Case C-344/20 *L.F. v SCRL*	Legal person	Indirect discrimination	Influences interpretation of Directive 2000/78
11. Case C-28/20 *Airhelp Ltd v Scandinavian Airlines Systems*	Legal person (airline company)	Right to compensation for passengers affected by pilot strikes	No breach of Article 16
12. Case C-353/20 *Skyes v Ryanair*	Legal person (airline)	Right of appeal against decision to close air space	No breach of Article 16

13. Case C-124/20 *Bank Melli Iran v Telekom Deutschland*	Legal person	Restrictive measures	Affects interpretation of Regulation No 2271/96
14. Case C-391/20 *Cilevičs & Ors*	Individuals (abstract review of national law by Latvian parliamentarians)	Obligation to provide courses of study in official language in higher education institutions	Article 49 – separate examination not necessary
15. Case C-570/19 *Irish Ferries Ltd*	Legal persons (maritime carriers)	Passenger rights – cancellation of sailing	No breach of Article 16
16. Case C-561/19 *Consorzio Italian Management*	Legal person	Price review in contracts	Not implementing EU law – Charter not applicable
17. Case C-223/19 *YS v NK AG*	Not stated – employer	Occupational pension	No breach of Article 16
18. Joined Cases C-818/19 and C-878/19 *Pastrogor*	Legal person (electricity producer)	Tax on energy production from renewable sources	Not implementing EU law – Charter not applicable
19. Case C-729/18 P *VTB Bank v Council of the European Union*	Legal person (media companies)	Restrictive measures	No breach of Article 16
20. Case T-251/18 *International Forum for Sustainable Underwater Activities (IFSUA)*	Legal persons – manufacturer of fishing equipment Non-profit association for recreational underwater activities & fishing	Regulation of recreational fishing	No breach of Article 16
21. Case T-758/18 *ABLV Bank AS*	Legal persons(bank)	Banking license	No breach of Article 16
22. Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google*	Legal person	Copyright	No breach of Article 16
23. Case C-686/18 *OC v Banca d'Italia*	Legal persons (banks)	Asset threshold on exercise of banking activities	No breach of Article 16
24. Case C-66/18 *Commission v Hungary*	European Commission	National law - higher education	Breach of Article 16

25. Joined Cases C-798/18 and C-799/18 *Anie and Athesia*	Legal persons (electronics companies; solar panel companies)	Alteration of support scheme for installation of solar panels	No breach of Article 16
26. Joined Cases C-804/18 and C-341/19 *WABE; MH Müller v MJ*	Legal person	Discrimination	Article 16 affects interpretation of Directive 2000/78
27. Case C-230/18 *PI v Landespolizeidirektion Tirol*	Individual	Decision to shut down commercial enterprise	Breach of Article 16
28. Case C-430/17 *Walbusch Walter Busch GmbH*	Individual	Consumer protection – right of withdrawal from purchase in mail order coupon	No breach of Article 16
29. Case C-215/17 *Nova Kreditna*	Legal person (bank)	Information to be published by credit institutions and investment firms	No jurisdiction
30. Case T-610/17 *ICL-IP Terneuzen, BV*	Legal person	Registration of chemicals	No breach of Article 16
31. Case T-755/17 *Germany v European Chemicals Agency*	Legal person	ECHA decision requesting further information	No breach of Article 16
32. Case C-649/17 *Amazon EU Sàrl*	Legal persons (Amazon)	Consumer protection - information requirements for distance and off-premises contracts	Referring Court
33. Case C-260/17 *Anodiki Services EPE v G.N.A. O Evangelismos 'GONK'*	Legal person	Public procurement - decisions of public hospitals to conclude fixed-term labour contracts	Not implementing EU law
34. Case T-610/17 *ICL-IP Terneuzen, BV*	Legal person	Classification of substance	No breach of Art 16
35. Case C-277/16 *Polkomtel*	Legal person (telephone networks)	Price control	No breach of Article 16
36. Case T-873/16, *Groupe Canal + SA*	Legal person	Competition	No breach of Article 16
37. Case T-380/17, *HeidelbergCement AG*	Legal person	Competition law	Article 16 complaint inadmissible

38. Case T-865/16, *Fútbol Club Barcelona*	Legal person (Barcelona Football Club)	National law obliging professional sports clubs to convert into public limited companies	Insufficiently precise
39. Joined Cases T-282/16 and T-283/16, *Inpost Paczkomaty sp. z o.o*	Legal person	State aid	No breach of Article 16
40. Case C-380/16 *European Commission v Germany*	Germany	Tax	No breach of Article 16
41. Cases T-274/16 and T-275/16, *Suzanne Saleh Thabet*	Individual	Restrictive measures	No breach of Article 16
42. Case C-322/16 *Global Starnet Ltd*	Legal person	Award of new licences for the online operation of gaming	Decided on basis of Article 49 TFEU
43. Case C-534/16 *Finančné riaditeľstvo Slovenskej republiky*	Individual	VAT registration	Breach of Article 16 – referring court to determine
44. Case C-540/16 *'Spika' UAB*	Legal persons (fishing operators)	Allocation of fishing opportunities	No breach of Article 16
45. Case T-100/15 *Dextro Energy GmbH & Co. KG*	Legal person (glucose producer)	Consumer protection	Insufficiently precise
46. Case T-153/15 *Hamcho*	Individual	Restrictive measures	No breach of Article 16
47. Case T-235/15 *Pari Pharma GmbH v European Medicines Agency*	Legal person (pharmaceutical company)	Access to documents - application for marketing authorisation for the medicinal product	No breach of Article 16
48. Joined Cases T-533/15 and T-264/16 *Il-Su Kim v European Commission*	Individual	Restrictive measures	No breach of Article16
49. Joined Cases C-680/15 and C-681/15 *Asklepios*	Legal person (management company)	Transfer of undertaking	No breach of Article 16

Kliniken Langen-Seligenstadt GmbH			
50. Case T-405/15 *Fulmen*	Legal person (electric equipment company)	Restrictive measures	Unfounded
51. Case T-406/15 *Fereydoun Mahmoudian*	Individual (majority shareholder of company and Chair of Board of Directors)	Restrictive measures	No breach of Art 16
52. Case C-72/15 *Rosneft v HM Treasury*	Legal person (oil company)	Restrictive measures	No breach of Article 16
53. Case T-154/15 *Jaber v Council of European Union*	Individual	Restrictive measures	No breach of Article 16
54. Case T-155/15 *Kaddour*	Individual	Restrictive measures	No breach of Article 16
55. Case C-157/15 *G4S Solutions v Achbita*	Legal person (security company)	Employee dismissal Directive 2000/78/EC	Article 16 affects interpretation of Directive
56. Case T-215/15 *Mykola Yanovych Azarov v Council of the European Union*	Individual	Restrictive measures	No breach of Art 16
57. Case C-134/15 *Lidl*	Legal person (retailer)	Packaging – consumer protection	No breach of Article 16
58. Case C-201/15 *AGET Iraklis*	Legal person	Authorisation from Minister for Labour for collective redundancies	Breach of Article 16
59. Case T-200/14 *Ben Ali v Council*	Individual	Restrictive measures	No breach of Article 16
60. Case C-540/14 *DK Recycling v European Commission*	Legal person	Greenhouse gas emission trading scheme	No breach of Article 16
61. Case T-630/13 *DK Recycling und Roheisen v Commission*	Legal person	Greenhouse gas emission trading scheme	No breach of Article 16
62. Case T-634/13 *Artic Paper Mochenwangen*	Legal person	Scheme for greenhouse gas emission allowance trading	No breach of Article 16

63. Case T-614/13 *Romonta GmbH v European Commission*	Legal person	Scheme for greenhouse gas emission allowance trading	Unfounded
64. Case T-433/13, *Petropars Iran Co*	Legal person	Restrictive measures	No breach of Article 16
65. Case T-631-13 *Raffinerie Heide v Commission*	Legal person	Scheme for greenhouse gas emission allowance trading	No breach of Article 16
66. Case T-734/14 *VTB Bank PAO*	Legal person (bank)	Restrictive measures	No breach of Article 16
67. Case T-737/14 *Bank for Development and Foreign Economic Affairs*	Legal person (bank)	Restrictive measures	No breach of Article 16
68. Case T-739/14 *PSC Prominvestbank*	Legal person (bank)	Restrictive measures	No breach of Article 16
69. Case T-798/14, *DenizBank A.Ş.*	Legal person (bank)	Restrictive measures	No breach of Article 16
70. Case T-735/14 and T-799/14 *Gazprom Neft PAO, anciennement Gazprom Neft OAO v Council of the European Union*	Legal person (oil company)	Restrictive measures	No breach of Article 16
71. Case C-484/14 *McFadden v Sony Music Entertainment Germany GmbH*	Individual business owner	Liability for making phonogram available to third parties via wifi	No breach of Article 16
72. Case C-398/13 P *Inuit v European Commission*	Inuit representative body	Ban on seal products	Inadmissible on Article 16
73. Case C-56/13 *Érsekcsanádi*	Legal person (stock farming undertaking)	Compensation for loss of profits	No jurisdiction
74. Case T-614/13 *Romonta*	Legal person	Scheme for greenhouse gas emission allowance trading	No breach of Article 16

75. Case T-429/13 and T-451/13 *Bayer CropScience*	Legal persons	Prohibition of the use and sale of seeds treated with plant protection products	No breach of Article 16
76. Case C-585/13 P *Europäisch-Iranische Handelsbank AG*	Legal person	Restrictive measures	No breach of Article 16
77. Case C-682/13 P - *Andechser Molkerei Scheitz v Commission*	Legal person	List of food additives authorized in foodstuffs	Inadmissible
78. Case T-433/13, *Petropars Iran Co*	Legal person (oil company)	Restrictive measures	No breach of Article 16
79. Case T-545/13 *Al Matri v Council*	Individual	Restrictive measures	No breach of Article 16
80. Case T-629/13 *Molda*	Legal person	Scheme for greenhouse gas emission allowance trading	No breach of Article 16
81. Case T-190/12 *Tomana*	Individual	Restrictive measures	No breach of Article 16
82. Case C-390/12 *Pfleger*	Individual	Licensing for gambling machines	Decided on Article 49 TFEU
83. Case C-483/12 *Pelckmans*	Legal persons (gardening centres)	Trading hours	No jurisdiction
84. Case C-367/12 *Sokoll Seebacher*	Individual	Restriction on establishing pharmacy	Decided on Article 49 TFEU
85. Case C-314/12 *UPC Telekabel*	Internet service provider	Injunction imposing adoption of filtering mechanism	No breach of Art 16
86. Case C-101/12 *Schaible v Land Baden-Württemberg*	Individual	Electronic animal identification system	No breach of Article 16
87. Case T-17/12 *Hagenmeyer*	Individuals	Food health claims	Inadmissible – no specification
88. Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd*	Legal person (leisure company)	Transfer of undertakings	Breach of Article 16

89. Case C-12/11 *McDonagh v Ryanair Ltd*	Legal person (airline)	Compensation – consumer protection	No breach of Article 16
90. Case C-1/11 *Interseroh Scrap v Sonderabfall*	Legal person (waste management)	Provision of commercial information	No breach of Article 16
91. Case T-256/11 *Ahmed Abdelaziz Ezz*	Individual	Restrictive measures	No breach of Article 16
92. Case C-510/10 *DR, TV2 Danmark A/S*	Legal person (broadcasting companies)	Copyright	Affects interpretation of Directive 2001/29
93. Case C-544/10 *Deutsches Weintor eG*	Legal person (wine producers)	Health claim on wine	No breach of Article 16
94. Case C-70/10 *Scarlet Extended*	Legal person (internet service provider)	Injunction imposing adoption of filtering mechanism	Breach of Article 16
95. Case C-360/10 *SABAM v Netlog NV*	Legal person (internet service provider)	Injunction imposing adoption of filtering mechanism	Breach of Article 16
96. Case T-52/09 *Nycomed Danmark ApS v European Medicines Agency (EMA)*	Legal person	Authorisation to place a medicinal product on the market	No breach of Article 16

Opinions of Advocates General referring to Article 16

Case name	Party raising Article 16	Subject matter	Outcome
1. Case C-20/23 *SF v MV*	Individual debtor	Insolvency	No breach of Article 16
2. Case C-519/22 *Max7 Design Kft v Nemzeti*	Legal person	VAT	Breach of Article 16
3. Case C-314/22 *'Consortium Remi Group' AD*	Legal person	VAT	Affects interpretation of VAT Directive
4. Joined Cases C-395/22 and C-428/22 'Trade Express-L' OOD	Legal person	Obligation to build up and maintain stocks of petroleum product	Affects interpretation of Directive 2009/119/EC
5. Case C-133/22 *LACD GmbH*	Legal person	Consumer protection – distance contract	Affected interpretation of Consumer Rights Directive (Directive 2011/83)
6. Case C-128/22 *BV NORDIC INFO*	Legal person	Pandemic restrictions	No breach of Art 16
7. Case C-40/21 *T.A.C.*	Individual	Prohibition on public officer holders	Mentioned in passing
8. Case C-64/21 *Rigall*	Legal person (bank) Public authority (German government)	Commercial agent's right to commission	No restriction on Art 16
9. Case C-356/21 *J.K. v TP S.A.*	Legal persons	Discrimination	No breach of Article 16
10. Case C-391/20 *Boriss Cilevičs*	Legal persons	Requirement for higher education institutions to promote national language	No need to analyse on Art 16 grounds
11. Case C-261/20 *Thelen Technopark Berlin*	Legal person	Architects and engineers fees	Breach of Article 16
12. C-124/20 *Bank Melli Iran v Telekom Deutschland*	Legal person	Restrictive measures	Affects interpretation of Regulation No 2271/96
13. Case C-353/20 *Skyes v Ryanair*	Legal person	Right of appeal against decision to close air space	

14. Case C-614/20 *AS Lux Express Estonia*	Legal person	Duty to provide free transport for certain categories of persons	No breach of Article 16
15. Case C-570/19 *Irish Ferries Ltd*	Legal persons	Passenger rights – cancellation of sailing	No breach of Article 16
16. Case C-223/19 *YS v NK*	Not stated – employer	Occupational pension	No breach of Article 16
17. Joined Cases C-804/18 and C-341/19 *WABE; MH Müller v MJ*	Legal person	Discrimination	Article 16 affects interpretation of Directive 2000/78
18. Case C-401/19 *Republic of Poland v European Parliament*	Legal persons	Copyright	Mentioned in passing
19. Joined Cases C-724/18 and C-727/18 *Cali Apartments*	Legal person	National legislation imposing a prior authorisation scheme for certain specific municipalities	No breach of Article 16
20. Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC*	Legal persons	Copyright	Influence interpretation
21. Case C-60/18 *AS Tallinna Vesi*	Legal person	Waste	Must be considered
22. Joined Cases C-798/18 and C-799/18 *Anie v Ministero dello Sviluppo Economico*	Legal persons	Alteration of support scheme for installation of solar panels	No breach of Article 16
23. Case C-686/18 *OC v Banca d'Italia*	Legal persons	Asset threshold on exercise of banking activities	No breach of Article 16
24. Case C-55/18 CCOO v *Deutsche Bank SAE*	Legal persons	Working time	Not relevant
25. Case C-66/18 *European Commission v Hungary*	European Commission	National law - higher education	No separate analysis needed
26. Case C-446/18 *AGROBET CZ*	Legal persons	VAT	No need to determine Article 16 point

27. Case C-18/18 *Eva Glawischnig-Piesczek*	Individual parliamentarian	Obligation on ISP to delete information	No breach of Article 16
28. Case C-465/18 *AV, BU v Comune di Bernareggio, joined parties/ CT*	Legal person	Transfer of a municipal pharmacy following a tender procedure	Decided on basis of Article 49 TFEU
29. Joined Cases C-609/17 and C-610/17 *Terveys- ja*	Legal person	Substances subject to authorisation	Mentioned in passing
30. Case C-531/17 *Vetsch Int. Transporte GmbH*	Legal person	VAT	Affects interpretation of VAT Directive
31. Joined Cases C-61/17, C-62/17 and C-72/17 *Miriam Bichat*	Legal person	Collective redundancies	No breach of Article 16
32. Case C-235/17 *European Commission v Hungary*	European Commission	Cancellation of rights over land	Mentioned in passing
33. Case C-649/17 *Amazon EU Sàrl*	Legal persons	Consumer protection - information requirements for distance and off-premises contracts	Referring Court
34. Case C-299/17 *VG Media Gesellschaft v Google LLC*	Legal person	Technical regulation – information society services	No breach of Article 16
35. Case C-135/16 *Georgsmarienhütte GmbH*	Legal person	State aid	Insufficiently precise
36. Case C-322/16 *Global Starnet Ltd*	Legal person	Award of new concessions for legal gaming	Separate examination of Article 16 not necessary
37. Case C-194/16 *Bolagsupplysningen OÜ Ingrid Ilsjan*	Legal person	Rights of legal persons	Legal persons should enjoy protection of freedom to conduct a business
38. Case C-277/16 *Polkomtel*	Legal person	Price control measures	
39. Case C-566/17	Public body	Tax	No breach of Article 16

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40. Case C-304/16 *American Express Co.*	Legal person	Card payment transactions	No breach of Article 16
41. Case C-201/15 *AGET Iraklis*	Legal person	Collective redundancies	Breach of Article 16
42. Case C-134/15 *Lidl*	Legal person	Packaging – consumer protection	No breach of Article 16
43. Case C-72/15 *Rosneft v HM Treasury*	Legal person	Restrictive measures	No breach of Article 16
44. Case C-188/15 *Bougnaoui*	Legal person	Discrimination	Affects interpretation of Directive 2000/78
45. Case C-547/14 *Philip Morris Brands SARL*	Legal person	Labelling of tobacco products	Referring Court - only if manifestly disproportionate
46. Case C-358/14 *Republic of Poland v European Parliament*	Poland	Prohibition on sale of menthol cigarettes	No breach of Article 16
47. Case C-484/14 *McFadden v Sony Music Entertainment Germany GmbH*	Individual business owner	Liability for making phonogram available to third parties via wifi	No breach of Article 16
48. Case C-477/14 *Pillbox 38 (UK) Limited*	Legal person	Labelling of e-cigarettes	No breach of Article 16
49. Case C-157/14 *Neptune Distribution v Minister for Economic Affairs and Finance*	Legal person	Labelling of water	No breach of Article 16
50. Case C-56/13 *Érsekcsanádi*	Legal person	Compensation for destruction of animals – avian flu	No jurisdiction for Court of Justice
51. Case C-398/13 P *Inuit Tapiriit Kanatami*	Inuit representative body	Ban on seal products	Inadmissible
52. Case C-170/13 *Huawei Technologies Co. Ltd*	Legal person	Competition (abuse of dominant position)	No breach of Article 16

53. Case C-390/12 *Pfleger*	Individual	Licensing for gambling machines	Article 16 precludes national legislation where only a limited number of licence holders may organise games of chance, unless overriding objective in the public interest
54. Case C-131/12 *Google Spain SL*	Google Spain	Erasure and blocking of data	Mentioned
55. Case C-314/12 *UPC Telekabel*	Internet service provider	Injunction imposing adoption of filtering mechanism	Breach of Art 16
56. C-59/11 *Association Kokopelli v Graines Baumaux*	Legal person (Non-profit association)	Seeds	Breach of Article 16
57. Case C-101/12 *Schaible v Land Baden-Württemberg*	Individual	Electronic animal identification system	No breach of Article 16
58. Case C-348/12 *Kala Naft*	Legal person	Restrictive measures	No breach of Article 16
59. Case 283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*	Legal person	Right of access of broadcasters to audiovisual material	No breach of Article 16
60. Case C-12/11 *McDonagh v Ryanair Ltd*	Legal person	Compensation – consumer protection	No breach of Article 16
61. Case C-521/11 *Amazon v Austro-Mechana Gesellschaft*	Legal person	Copyright	Affects interpretation of Directive 2001/29/EC
62. Case C-136/11 *Westbahn Management GmbH*	Legal person	Obligations of railway infrastructure managers – business secrets	Article 16 not engaged
63. Case C-544/10 *Deutsches Weintor eG*	Legal person	Health claim on wine	No breach of Article 16
64. Case C-360/10 *SABAM v Netlog NV*	Legal person	Injunction imposing adoption of filtering mechanism	Breach of Article 16

65. Case C-316/09 *MSD Sharp & Dohme GmbH*	Legal person	Prohibition on the advertising to the general public of prescription-only medicinal products	No breach of Article 16
66. Case C-216/09 P *ArcelorMittal*	Legal person	Competition	No breach of Article 16
67. Case C-441/07 P *Alrosa*	Legal person	Competition	No breach of Article 16
68. Case C-210/00 *Käserei Champignon Hofmeister*	Legal person	Penalties – export refunds	Speculation on relevance of Article 16 given events pre-dated Charter

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