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CORE ANALYSIS

The origins and development of Article 16 of the Charter of fundamental rights

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Abstract
When the Charter of Fundamental Rights was published in 2000, it was the first time that an international human rights instrument had recognised the freedom to conduct a business. 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 in Section 2. Early drafts protected the freedom to pursue an occupation, before the freedom to conduct a business eventually became a freestanding entitlement. This was thanks to the influence of Convention members associated with the European People's Party who were instrumental in ensuring Article 16 was added to the draft Charter. In Section 3, I critically assess the claim contained in the 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 Section 4, I examine the impact of Article 16 Many of the limitations that constrain the scope of Article 16 have been weakened, or have not proved to be the limitations that were originally envisaged. The Court of Justice's defence of select areas, such as consumer protection, has shielded the deregulatory potential of Article 16 from view. Yet Article 16 has had a real and damaging impact on workers' rights across the Union. Protecting the freedom to conduct a business in Article 16 means that a remarkably broad range of actions taken in the course of running a business are now accepted as the exercise of a fundamental right.

Keywords: European constitutional law; Charter of Fundamental Rights of the European Union; Article 16; freedom to conduct a business; fundamental rights

1. Introduction

> **Article 16**
>
> The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

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 instrument had recognised the freedom to conduct a business. 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 in Section 2. Early drafts 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 Convention members from the European People's Party who were instrumental in ensuring Article 16 was added to the draft Charter. In Section 3, I 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, beginning with the 1974 judgement in *Nold*.[1] In Section 4, I examine the impact of Article 16 through the case law of the Court of Justice. Many of the limitations that constrained the scope of Article 16 have been weakened, or have not proved to be the limitations that were originally envisaged. The Court of Justice's defence of particular subject matters, such as consumer protection, has shielded the deregulatory potential of Article 16 from view. Yet Article 16 has had a real and damaging impact on workers' rights across the Union. Protecting the freedom to conduct a business means that a broad range of actions taken in the course of running a business are now accepted as the exercise of a fundamental right. Any measure that affects how a business is conducted is a *prima facie* infringement that must be proportionately justified. In this respect, it is akin to a general right to behave autonomously in all aspects of business activities.

2. Drafting Article 16

For a fundamental rights document that was drafted less than 25 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.'[2] There has been some excellent academic interrogation of various facets of the drafting process,[3] but the most significant treatise which documents the contemporary debates and discussions is available only in German, and it has not been translated into other major European languages.[4] 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.[5] 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.'[6] Another discussion mentions that Article 16 appears to have ultimately come about by way of compromise stemming from hotly contested disputes from the ideological factions in the European Parliament.[7] 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

[1]Case 4-73 *Nold* ECLI:EU:C:1974:51.

[2]J Bering Liisberg, 'Does the EU Charter of Fundamental Rights threaten the Supremacy of Community Law?' 38 (2001) Common Market Law Review 1171, 1182.

[3]See, for example: J Schönlau, *Drafting the EU Charter: Rights, Legitimacy and Process* (Palgrave 2005); G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' 26 (2) (2001) European Law Review 126; F Deloche-Gaudez, 'The Convention on a Charter of Fundamental Rights: A Method for the Future?' Research and Policy Paper No. 15 (Notre Europe, November 2001); E Eriksen, J Fossum and A Menéndez (eds), *The Chartering of Europe: The European Charter of Fundamental Rights and its Constitutional Implications* (Nomos 2003); R Bellamy and J Schönlau, 'Constitution Making as Normal Politics: Disagreement and Compromise in the Drafting of the EU Charter of Fundamental Rights' in R Bellamy and D Castiglione (eds), *From Maastricht to Brexit* (Rowman 2019); D Castiglione (ed), *Constitutional Politics in the European Union: The Convention Moment and its Aftermath* (Palgrave 2007) 63–6.

[4]N Bernsdorff and M Borowsky, *Die Charta der Grundrechte der Europäischen Union Handreichungen und Sitzungsprotokolle* (Nomos 2002); N Bernsdorff and M Borowsky, *Der Grundrechtekonvent – Unveröffentlichte Arbeitsdokumente – Band 2* (Hannover 2003).

[5]N Coghlan and M Steiert (eds), *The Charter of Fundamental Rights of the European Union: The 'travaux préparatoires' and Selected Documents* (EUI Cadmus 2020).

[6]F Deloche-Gaudez (n 3) 28. This is a reference to the support shown for the provision by the UK representatives.

[7]R Bellamy and J Schönlau, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights' 11 (3) (2004) Constellations 412, 422.

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tasked with codifying pre-existing fundamental rights.[8] To date, the critical role played by the grouping 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.

A. The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union 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. 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.'[9] The Convention tasked with drafting the Charter was comprised of sixty-two members, which included representatives from each national parliament, fifteen representatives of Heads of State and national governments, a representative from the European Commission President, and a host of MEPs.[10] Roman Herzog, a former president of the German Constitutional Court, was elected chairman.[11]

The Charter was drafted with the explicit intention of increasing the legitimacy of the European project, 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. On the basis of the Cologne Mandate, the European Charter was designed to codify existing fundamental rights that had long received protection in other human rights documents, including national constitutions and 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.[12] 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.[13] Herzog served as Chair of the Praesidium. There were three Vice Chair positions: two were elected by the representatives of the Member States and the European Parliament respectively, and the third position corresponded to the presidency of the European Council. Antónino Vitorino, the European Commissioner for Justice and Home Affairs, served as the fifth member of the Praesidium. The Praesidium were assisted by a General Secretariat who, in addition to secretariat services, also were responsible for drafting the early outlines and amendments for the Convention.[14]

[8]J Schönlau (n 3) 82–3.

[9]J Schönlau (n 3) 108.

[10]The members were entitled to substitute in alternative representatives throughout the Convention process.

[11]Coghlan and Steiert (n 5) 757. There were also two representatives each from the Court of Justice and the Council of Europe present to observe proceedings. The European Council was tasked with casting the ultimate vote of approval once the Charter had been completed.

[12]J Schönlau (n 3) 4; G de Búrca (n 3) 130–1.

[13]Coghlan and Steiert (n 5) 17; F Deloche-Gaudez (n 3) 13.

[14]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. It was agreed that the third position of Vice Chairman would correspond with the Council Presidency. In theory this allowed Finland, Portugal and France each to 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. Bacelar de Vasconcellos also remained a member of the Praesidium once the EU presidency moved to France in June. See, F Deloche-Gaudez (n 3) 13–14.

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B. 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 'freedom to choose and engage in an occupation.'[15] 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 new Finnish Constitution.[16] It remains a rare example of a national constitution that explicitly protects such a right.[17] As Finland held the presidency of the European Council, Nikula was at that time serving as one of the Vice Chairs of the Praesidium. 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.[18]

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* judgement, the freedom was never characterised in absolute terms.[19] The Greek representative, Georgios Papadimitriou, suggested that the removal of the term 'business' should be considered.[20] By May, any mention of business freedom had vanished, and the revised wording read: 'Everyone has the right to choose and engage in an occupation.' The accompanying statement noted that the Court of Justice had recognised the freedom to pursue an occupation in its 1974 judgement in *Nold*.[21]

There were extensive suggestions for amendment. One French MEP 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.'[22] The UK representative, Lord Goldsmith QC, proposed an amendment including the addition of the freedom 'to set up in business' arguing that 'the right of establishment (ie to set up in business) is a very important right, but it is not included.'[23] The Swedish MEP Charlotte Cederschiöld 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.[24] The 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,[25] he stressed, by the Court of Justice in *SpA Eridania*.[26] Based on these amendments, by 23 June 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.[27]

[15]It cited Art 127 EC, Art 1 Social Charter and Point 4 of the Community Charter of Social Rights as the origins. Coghlan and Steiert (n 5) 1077.
[16]Coghlan and Steiert (n 5) 1099.
[17]J Husa, *The Constitution of Finland: A Contextual Analysis* (Bloomsbury 2010) 187–8.
[18]Coghlan and Steiert (n 5) 1353–5.
[19]Ibid., 1430.
[20]Ibid., 1441.
[21](n 1).
[22]Coghlan and Steiert (n 5) 2499.
[23]Ibid., 2507.
[24]Ibid., 2508.
[25]Ibid., 2518.
[26]Case C-230-78 *SpA Eridania* ECLI:EU:C:1979:216.
[27]Coghlan and Steiert (n 5) 2945.

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The summary of the amendments drawn up by the Secretariat of the Convention, however, made no reference to the suggestions for the addition of a freestanding right of freedom of enterprise.[28] This situation 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 given a broadly worded discretion to determine how drafting decisions would be made.[29] The Praesidium had consolidated its power with a series of procedural motions that ensured that it had the final word on proposed changes.[30] 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 presented to the Convention, voting was largely avoided and the Convention sought to proceed 'by consensus.'[31] As a result, it is challenging to determine solely 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 increased tension between members of the Convention, who were predictably split along the lines of their political affiliations. Eventually, a proposal was advanced by Guy Braibant, a representative of the French Government, and Jürgen Meyer, a representative of the German Parliament. 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 the 'right to choose and to engage in an occupation and the right of free access to job-placement services free of charge.'[32] The 15th Convention meeting was held in late 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 People's Party (EPP). The EPP is an affiliate political grouping in the European Parliament, composed of Christian Democratic, conservative and centre-right political parties. The grouping that met regularly to 'agree on common positions'[33] during the drafting of the Convention was composed of Ingo Friedrich (who served as Chair),[34] Heinrich Neisser (A),[35] Lord Bowness (UK),[36] Peter Altmaier (DE),[37] Ernst Hirsch Ballin (NL),[38] Lars Tobisson (SW),[39] Gabriel Cisneros Laborda (ES),[40] Peter Mombaur (DE),[41] and Charlotte Cederschiöld (SW).[42] 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.[43] The proposal praised the 'attractive structure' of the Braibant-Meyer

[28]Ibid., 2949.
[29]Ibid., 745.
[30]Ibid., 20.
[31]J Schönlau (n 3) 111.
[32]Coghlan and Steiert (n 5) 3002.
[33]N Bernsdorff and M Borowsky, *Arbeitsdokumente* (n 4) 1555.
[34]Full member of the Convention, and a member of the European Parliament for Germany under the EPP banner.
[35]Personal Representative of the government of Austria.
[36]Representative of the UK Parliament.
[37]Alternate member of the Convention, representative of the German Bundestag.
[38]Full member of the Convention, representative of the Dutch Parliament.
[39]Full member of the Convention, representative of the Swedish Parliament.
[40]Representative of the Spanish Parliament.
[41]Alternate member, delegation of the European Parliament, member of the European Parliament, EPP grouping.
[42]Full member, delegation of the European Parliament, member of the European Parliament, EPP grouping.
[43]This position paper is available only as an appendix to N Bernsdorff and M Borowsky, *Unveröffentlichte Arbeitsdokumente* (n 4) 1558. As Coghlan and Steiert have previously noted: '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, N Coghlan and M Steiert, 'The Forgotten Birth of the Charter of Fundamental Rights' 40 (5) (2020) *EU Law Live* 5–6.

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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:

(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.

C. First draft of Charter

The first completed draft was issued on 28 July 2000. 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'.[44] 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 Case 230-78 *SpA Eridania*[45] and Case 151/78 *Sukkerfabriken*[46] and Case C-240/97 *Spain v Commission*.[47] 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 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. Several objections to the provisions of Article 16 were raised.[48] The Italian representative noted that the proposed wording actually deviated from domestic constitutional provisions,[49] as he pointed out that in 'none of the European Constitutions is the law of business affirmed in an absolute and unconditional manner.'[50] He suggested that the provision be qualified by reference to sustainable development and in conformance with other fundamental rights in the Charter. By contrast, one of the UK representatives, Lord Goldsmith, suggested that the provision encompass the other economic rights, the four freedoms and freedom of establishment, and suggested strengthening the wording.[51] Ernst Hirsch Ballin, one of the most enthusiastic supporters of Article 16, 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

[44]Coghlan and Steiert (n 5) 3063.
[45](n 26).
[46]Case 151/78 *Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture* ECLI:EU:C:1979:4.
[47]Case C-240/97 *Spain v Commission* ECLI:EU:C:1999:479.
[48]Georgios Papadimitriou, representative of the Greek government suggested that 'the possibility of abrogating the term 'business' should also be examined.' See, Coghlan and Steiert (n 5) 1441.
[49]Coghlan and Steiert (n 5) 3397.
[50]Ibid., 3492–3.
[51]Ibid., 3276–7.

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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.'[52]

The Fifth Heads of State and Government (HOSG) Meeting took place on 11 and 12 September which included, amongst other matters, a debate on the provisions of Article 16.[53] 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.[54] Andrea Manzella, the Italian representative, argued that Article 16 on entrepreneurial freedom should not be unqualified. Caspar Einem, a representative from Austria, endorsed the inclusion of a right to work, and argued that the freedom to 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.[55]

The second full draft was issued on 14 September. Article 16 remained identical to the earlier, first draft, stating that: 'The freedom to conduct a business is recognised'.[56] The 17th Meeting of the Convention was held on 25-26 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. He suggested that Article 16 be subsumed into Article 15, or at the very least, that the same limits as exist for other employees – such as in Article 26 – should apply.[57] 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.[58]

D. EPP insists on freedom of enterprise

The representatives of the European People's Party met on the evening of 25 September, 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'.[59] The group agreed that it was essential that economic rights, namely the freedom to

[52]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*.

[53]While no records remain of the meeting, a contemporary account of the debate is available. See, N Bernsdorff and M Borowsky, *Sitzungsprotokolle* (n 4) 362–8.

[54]Ibid., 364.

[55]Ibid., 366.

[56]Coghlan and Steiert (n 5) 3565. A revised draft was released on 21 September after a review by specialist legal linguistic team. Ibid., 3578.

[57]N Bernsdorff and M Borowsky, *Sitzungsprotokolle* (n 4) 381.

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

[59]"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 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.' N Bernsdorff and M Borowsky, *Arbeitsdokumente* (n 4) 2049.

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conduct a business, be included in the Charter. The document drawn up by the meeting resolved that:

> 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 (art. 16). It may be subject to the limitations provided for in Article 51(1) of the Charter. No other restrictions are needed.[60]

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.[61] 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.

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.'[62] Meyer welcomed the additional caveat on Article 16. However, another member of the Convention, Voggenhuber, voiced his objection to 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.[63] But these criticisms made little impact. The draft finalised on 26 September effectively became the final text of the Charter, and the Praesidium concluded that the draft was ready to be sent to the European Council.[64] The finalised draft Charter was approved in October at Biarritz EUCO, and the solemn proclamation of the Charter took place on 7 December.

3. Analysing the origins of Article 16

A. 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 Article 16. This particular grouping 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

[60]Ibid., 2051.
[61]N Bernsdorff and M Borowsky, *Sitzungsprotokolle* (n 4) 384.
[62]Ibid., 386.
[63]Ibid., 390.
[64]'Community law' later became 'Union law.'

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and with enough geopolitical capital to sink the project entirely, if they chose to.[65] 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.[66] Previous analyses of the drafting of the Charter have noted that while individual Government representatives at the Convention 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.'[67] 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 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 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 such insistence that the provision be included in the Charter. Yet proponents of the provision managed to introduce 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 experience suggests that it matters whether a proposed right 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. Nor was the novelty of the freedom to conduct a business objected to by any other body.[68] Moreover, the last-minute addition of the qualifying phrase 'in accordance with Community law and national law and practices' seems to have won over some of the more sceptical elements of the Convention, such as Guy Braibant.[69] Yet, as we will see, the suggestion that the freedom to conduct to business could be 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

[65]D Anderson and C Murphy, 'The Charter of Fundamental Rights' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012) 154, 156.

[66]F Deloche-Gaudez (n 3) 10; 26.

[67]J Schönlau (n 3) 113.

[68]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. See, Coghlan and Steiert (n 5) 3762.

[69]This phrase was used elsewhere in the Charter, in particular for social and labour rights in Arts 27, 28, 30, 34, 35 and 36. This qualification came about partly due to the insistence of Lord Goldsmith QC in the interests of limiting the impact of these rights; see Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles' 38 (2001) Common Market Law Review 1201, 1213.

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were to become the height of fundamental rights protection, the Charter's additional value would be negligible.[70] 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 any law.

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. Much the same approach was taken by members of the academy. Several scholars accepted Article 16 as a codification of the Court of Justice's pre-existing case law,[71] and while a few scholars noted the novelty of Article 16 in the immediate aftermath of the Charter's publication, there is little evidence of any concern.[72] Later, scholars largely concluded 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.[73] Even the scholarship that broadly welcomed the protection of economic liberty in Article 16 as normatively desirable anticipated that the impact of Article 16 would be limited by its qualified wording.[74] 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.

B. The Explanations to Article 16 and Nold

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 Eridiana,* 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.[75] 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. 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.

[70]B Bercusson, *European Labour Law* (Cambridge University Press 2009) 209–10.

[71]S Parmar, 'International Human Rights and the EU Charter' 8 (4) (2001) Maastricht Journal of European and Comparative Law 351, 356.

[72]A Lester, 'The EU Charter of Fundamental Rights: Its Purpose and Effectiveness' in F Butler (ed), *Human Rights Protection: Methods and Effectiveness* (Kluwer 2002) 197, 200; G Sacerdoti, 'The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizen's Europe' 8 (2002) Columbia Journal of European Law 37, 45; C Attucci, 'An Institutional Dialogue on common principles: reflections on the significance of the EU Charter of Fundamental Rights' in L Dobson and A Follesdal (eds), *Political Theory and the European Constitution* (Routledge 2004) 151, 154.

[73]S 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 167–82; E Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination' 9 (2017) European Journal of Legal Studies 103; compare J Prassl, 'Business Freedoms and Employment Rights in the European Union' 17 (2015) Cambridge Yearbook of European Legal Studies 189, 191.

[74]D Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 171; A 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' 14 (9) (2013) German Law Journal 1867; N Wahl, 'The Freedom to Conduct a Business' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 275.

[75]N Coghlan and M Steiert (n 43) 5–6.

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In *Nold,* the applicant unsuccessfully argued that the imposition of new trading rules by the European Commission had damaged its coal business, and by reducing sales had threatened the profitability of the business, violating its proprietary rights over the business, and 'the free development of its business activity.'[76] 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.'[77]

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 freedoms. 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 challenge the Community's regulation of the common market.[78] Nonetheless, that was not the prevailing understanding of the case at the time.[79] 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, and even that finding has been subject to criticism.[80] 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 freedom in *Nold*, which should be reflected in the body of the Charter. *Nold* continues to be cited as the definitive example of the

[76]*Nold* (n 1) para 12.

[77]Ibid., para 14.

[78]G de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 (4) The American Journal of International Law 649, 667–668.

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

[80]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 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.' M Kumm, '*Internationale Handelsgesellschaft*, *Nold* and the New Human Rights Paradigm' in M Maduro and L 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.

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recognition of the freedom to conduct a business as a fundamental right, in clear defiance of the text of the judgement.[81]

C. Spa Eridania *and* Sukkerfabriken

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 that ought to be guaranteed as part of the fundamental rights protected by Community law.[82] 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, and as a result the reduction in the quota was not 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 on did refer 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.[83] 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.[84]

The Explanations state that the freedom of contract is encompassed within Article 16, and cite *Sukkerfabriken* and *Spain v Commission* as instances where such a right 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.[85] When Denmark joined the EEC, the new Community quotas exceeded the quantities that could be produced at guaranteed prices under Danish legislation.[86] 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.[87] 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

[81]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.' N O'Connor, 'Whose Autonomy Is It Anyway? Freedom of Contract, the Right to Work and the General Principles of EU Law' 49 (3) (2020) Industrial Law Journal 285, 291. Similarly, Groussot et al 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.' X Groussot, G Pétursson and J Pierce, 'Weak Right, Strong Court – the Freedom to Conduct a Business and the EU Charter of Fundamental Rights' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Elgar 2017) 326, n 5.

[82](n 26) para 20.

[83]Ibid., para 31.

[84]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.' G Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2010) 123.

[85]*Sukkerfabriken* (n 46).

[86]Ibid., para 11.

[87]*Sukkerfabriken* (n 46) para 8.

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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.'[88]

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 of the judgement, makes no reference whatsoever to the freedom to contract.[89] As Prassl has pointed out, the subsequent paragraph 20 'merely speaks of freedom to contract.'[90] With respect to *Commission v Spain*, the final case mentioned in the Explanations, the cited paragraph simply states 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.[91] Taken at its height, this case simply states that any restrictions on the freedom of contract must be clearly laid out.[92]

D. General principles case 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.[93] 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.[94] There are, however, subtle and important differences between this line of cases and those that followed under Article 16. First, the freedom to pursue an economic activity was usually described as a facet of the freedom to pursue a trade or occupation.[95] The Court did occasionally reference 'the freedom to pursue an economic activity' or the 'right to carry on an economic activity.'[96] Only on a handful of occasions did the Court refer to the 'freedom to conduct a business.'[97]

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.[98] Several scholars have, however, pointed out that this is difficult to square with some of the Court's more far-reaching interpretations of Article 16.[99] While the 'general principles' case law used a variety of shifting

[88]Ibid. (n 46) para 20.

[89]J 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*' 42 (2013) Industrial Law Journal 434, 442 n 49.

[90]Ibid., 442.

[91](n 47) para 99.

[92]G Comparato and H Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU' in U Bernitz and X Groussot (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) 121, 126.

[93]R Alonso Garcia, 'The General Provisions of the Charter of Fundamental Rights of the European Union' 8 (2002) European Law Journal 492, 493; M Kumm (n 80).

[94]Case 44/79 *Hauer* ECLI:EU:C:1979:290 para 32.

[95]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.

[96]Cases C-154/04 and C-155/04 *Alliance for Natural Health* ECLI:EU:C:2005:449 para 120; 126.

[97]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.

[98]See, for example, T Sasse, 'Die Grundrechtsberechtigung juristischer Personen durch die unternehmerische Freiheit gemäß Art 16 der Europäischen Grundrechtecharta' 6 (2012) *Europarecht* 628, 629.

[99]See, for example, E Gill-Pedro, 'Whose Freedom Is It Anyway? The Fundamental Rights of Companies in EU Law' 18 (2) (2022) European Constitutional Law Review 183, 190; M Everson and R Correia Gonçalvez, 'Article 16' in S Peers, T Hervey,

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terms to describe a variation of the same principle,[100] it was consistent in one crucial respect: it described a far more limited entitlement than that which was to follow in the Charter.[101] 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 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 are scarcely any cases where the Court of Justice held that any EU or national measure constituted a breach of this principle, either the freedom to pursue a trade or business or the freedom to pursue economic activity.[102] It proved impossible for economic actors to overturn inconvenient legislative measures purely on the basis that they constituted an interference with the general principles.

E. 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.

One of the presumptions underpinning the theoretical justification for the existence of a freedom to conduct business is that 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. 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.'[103] 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.'[104] 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.[105] While sympathetic to the Anglo-American economic liberalism that re-emerged in the 1980s, there are important distinctions between ordoliberalism and classic

J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2014) 438; J Prassl (n 89) 443.

[100]Opinion of Advocate General Stix-Hackl, Joined Cases C-37/02 and C-38/02 *Di Lenardo Adriano Srl v Ministero del Commercio* ECLI:EU:C:2004:38 para 110.

[101]Case T-521/93 *Atlanta v European Community* ECLI:EU:T:1996:184 para 62; T Tridimas, *The General Principles of EC Law* (Oxford University Press 2006) 218.

[102]T Tridimas (n 101) 217.

One exception is Joined Cases C 90/90 and C 91/90 *Jean Neu* ECLI:EU:C:1991:303 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.' (para 13).

[103]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.

[104]Ibid., 21.

[105]M Ryner, 'The Authoritarian Neoliberalism of the EU' in E Nanopolous and F Vergis (eds), *The Crisis Behind the Eurocrisis* (Cambridge University Press 2019) 81.

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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.[106] 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.[107] Ordoliberalism accepts the premise of economic liberalism; namely that 'economic freedom is an essential concomitant of political freedom.'[108] 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.[109] In fact, the freedom to conduct a business is far closer to the concepts of economic liberty theorised by Hayek, and later Tomasi and Nickel.[110] 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. But even more significantly, the vision of 'economic liberty' advanced is divorced from the realities of the capitalist system, where, as Piketty has pointed out, those who depend on assets for their wealth will always be wealthier than wage earners.[111] 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 means greater economic freedom for one, more powerful set of actors and not for the larger, and comparatively weaker group.[112]

4. The impact of Article 16

A. The CJEU and Article 16

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. The Court's early interpretations of Article 16 reflected the constrained language of the provision: the Court usually repeated that the freedom to conduct a business in accordance with EU and national law and practices was recognised in the Charter. In what should have, perhaps, presaged what was to come, the Court was often prepared to accept that various

[106]See generally, C Joerges, 'The Overburdening of Law by Ordoliberalism and the Integration Project' in J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Oxford University Press 2017) 182; M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 66.

[107]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.' N Wahl, 'The Freedom to Conduct a Business: A Right of Fundamental Importance to the Future of the European Union' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019) 273, 276.

[108]D Gerber, 'Constitutionalising the Economy: German Neoliberalism, Competition Law and the "New Europe"' 42 (1994) American Journal of Comparative Law 25, 36.

[109]Ibid., 36–7.

[110]F Hayek, *The Constitution of Liberty* (Routledge 1960) 104–6; J von Pletz and J Tomasi, 'Liberalism and Economic Liberty' in S Wall (ed), *The Cambridge Companion to Liberalism* (Cambridge University Press 2015) 261; J Nickel, 'Economic Liberties' in V Davion and C Wolf (eds), *The Idea of Political Liberalism* (Rowman and Littlefield 2000) 155.

[111]T Piketty, *Capital in the 21st Century* (Harvard University Press 2014).

[112]T O'Shea, 'What Is Economic Liberty?' 48 (2) (2020) Philosophical Topics 203, 206.

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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. One early successful use of Article 16 arose in *Scarlet Extended,* where the Court of Justice held that the imposition of an injunction on an internet service provider to filter all electronic communications passing through its services constituted a violation of Article 16. Any such 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.'[113] Much the same reasoning was employed later in *SABAM v Netlog*.[114] In recent years, Article 16 has become one of the most commonly cited substantive rights by the Court of Justice.[115]

There are, however, noticeable differences in how the Court dealt with incursions on Article 16 depending on the countervailing interests at stake. For example, Article 16 has regularly been referenced in cases involving challenges to economic sanctions and, more recently, in what might loosely be categorised as 'rule of law' cases.[116] Yet the cases where Article 16 has been relied on to mount challenges to sanctions levied by the European Union have been largely unsuccessful, as the Court tends to conclude 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.[117] The uneven impact of Article 16 can be illustrated by contrasting the Court's approach to case law involving consumer protection, as against its case law involving worker protection. In cases involving challenges to EU laws that purport to protect consumers, the Court has nearly always been prepared to accept that any infringements to the freedom to conduct a business are proportionately justified.[118] By contrast, the Court has been increasingly sceptical of

[113]Case C-70/10 *Scarlet Extended* ECLI:EU:C:2011:771 para 48.

[114]Case C-360/10 *SABAM v Netlog* ECLI:EU:C:2012:85. The Court was, however, prepared to accept that a less onerous injunction imposed on an internet service provider in Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192 did not violate 'the very substance' of the freedom to conduct a business.

[115]The most recent data indicates that the most commonly cited rights are rights of fair procedure (Art 47, Art 41, Art 21) and criminal process (Art 48). Yet Art 16 is one of the most popular substantive rights, surpassed only by another economic right, the right to private property. In 2016, Art 16 was found to make up 4 per cent of the references to the Charter in decisions of the Court of Justice. In the abstract, this figure may sound relatively low, but some context helps to demonstrate its popularity. In 2016, Art 47 (the right to an effective remedy – 20 per cent) was the most commonly cited provision of the Charter, followed by Art 41 (the right to good administration – 17 per cent), Art 21 (non-discrimination – 9 per cent) Art 17 (the right to private property – 7 per cent) and Art 48 (the presumption of innocence – 6 per cent) and Art 51 (jurisdiction of the Charter – 6 per cent). See, European Commission, *2016 Report on the Application of the EU Charter of Fundamental Rights* (Publications Office of the EU 2017) 27.

[116]See generally, A 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 A Arnull, C Barnard, M Dougan and E Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 245.

[117]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; Case T-154/15 *Jaber v Council of European Union* ECLI:EU:T:2016:629 para 122; Case T-155/15 *Kaddour v Council of the European Union* ECLI:EU:T:2016:628 para 120; 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; Case T-200/14 *Ben Ali* v *Council* ECLI:EU:T:2016:216 para 253–258; Case T-256/11 *Ezz v Council of the European Union* ECLI:EU:T:2014:93 para 218–233.

[118]See for example, Case C-12/11 *McDonagh v Ryanair Ltd* ECLI:EU:C:2013:43; Case C-134/15 *Lidl GmbH & Co. KG v Freistaat Sachsen* ECLI:EU:C:2016:498; Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823.

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constraints on business activities when such measures are in pursuit of other interests, such as worker protection.[119]

B. Consumer protection

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 consumer protection.[120] 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.'[121] 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.'[122] 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*.[123] 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.'[124] The Third Chamber considered that freedom to conduct a business was not absolute, but had to be considered in light of its social function.[125] 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.[126] The importance of the objective of consumer protection, including protecting air passengers, could 'justify even substantial negative economic consequences for certain economic operators.'[127] The Court of Justice has rejected similar challenges on the basis of the freedom to conduct a business to regulations introducing individual electronic identification of sheep and goats,[128] the disclosure of business information on waste shipment,[129] and the labelling of sparkling water[130] and fresh poultry.[131]

C. Worker protection: Alemo-Herron

The widespread belief that the protection of the freedom to conduct a business did not pose a threat to regulatory measures was shaken with a series of cases on worker protection, beginning with the Grand Chamber's decision in *Alemo-Herron*.[132] These cases demonstrate the provision's stark deregulatory potential. In this case, a local authority in London had opted to contract out its

[119]Case C-426/11 *Alemo-Herron and others v Parkwood Leisure* ECLI:EU:C:2013:521; Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

[120]Consumer protection is itself protected by Art 38 of the Charter of Fundamental Rights.

[121]Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526 para 91.

[122]Ibid., para 56.

[123]Case C-12/11 *McDonagh v Ryanair Ltd* ECLI:EU:C:2013:43.

[124]Ibid., para 59.

[125]Ibid., para 60.

[126]Ibid., para 47.

[127]Ibid., para 48.

[128]Case C-101/12 *Schaible v Land Baden-Württemberg* ECLI:EU:C:2013:661.

[129]Case C-1/11 *Interseroh Scrap v Sonderabfall (SAM)* ECLI:EU:C:2012:194.

[130]Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823.

[131]Case C-134/15 *Lidl GmbH & Co. KG v Freistaat Sachsen* ECLI:EU:C:2016:498.

[132]*Alemo-Herron* (n 119).

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leisure services to a private undertaking, CCL, which was subsequently sold to another private sector operator, Parkwood. Parkwood argued that it was not bound by a provision of the existing employment contracts which linked wage increases to collective bargaining agreements. The case eventually made its way to the UK Supreme Court, who made a reference to the Court of Justice on whether a Member State was precluded 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. The Third Chamber of the Court of Justice accepted that the relevant Acquired Rights Directive 2001/23 did not preclude Member States from introducing measures that were more favourable to employees.[133] Nonetheless, the Court considered that the interpretation of the Directive had to comply with the freedom to conduct a business.[134] 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.[135] 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.'[136]

The judgement in *Alemo-Herron* was widely criticised: Weatherill memorably wrote that the judgement is '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.'[137] He pointed out that the Court of Justice largely ignored the wording of the Directive which left it open for Member States to provide additional protection to employees.[138] The characterisation of the freedom of contract was also subject to criticism, given that the emphasis was almost entirely on the potential negative financial repercussions for employers, with little consideration given to the interests of employees. It had effectively been cast as an absolute right that precluded any limitation.[139] Could it seriously be said, as one set of commentators pointed out, that the company was prevented from re-negotiating the collective agreement?[140] Moreover, the Directive in question had been introduced with the specific aim of protecting employees attached to a company that was subsequently purchased. Yet when it came to be interpreted by the Court of Justice, 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.[141] 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.'[142]

[133] *Alemo-Herron* (n 119) para 23.

[134] Ibid., para 31.

[135] Ibid., para 34.

[136] Ibid., para 35.

[137] S Weatherill (n 73) 167; S Weatherill, 'Protecting the Internal Market from the Charter' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 213.

[138] S Weatherill (n 73) 169.

[139] R Babayev, 'Duality of Economic Freedom Protection in the Interplay of Article 16 CFR and Article 102 TFEU' 45 (5) (2020) *European Law Review* 694, 710–2. A similar argument was made in X Groussot and G Pétursson, 'The EU Charter of Fundamental Rights Five Years on: The Emergence of a New Constitutional Framework?' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing 2015) 135, 144; X Groussot et al (n 81) 341.

[140] X Groussot et al (n 81) 341. Bartl and Leone pointed out that the Court had failed to address the question of whether EU law was even relevant to the issue at hand. See, M Bartl and C Leone, 'Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for Social Legislation?' in H Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 113, 114.

[141] J Prassl (n 89) 439.

[142] M Bartl and C Leone (n 140), 116.

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Yet even in the wake of *Alemo-Herron*, commentators tended to blame the Court of Justice's misapplication of the proportionality test, rather than the existence of Article 16 *per se*.[143] 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.[144] 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*.'[145] This perspective stops short of directly challenging the recognition of business activity as a fundamental right. It does not critique the shift Article 16 necessitates, by requiring public authorities to demonstrate that any measures that may affect the operation of a business meets the requirements of the proportionality test. Bartl and Leone do suggest that such an interest protected by Article 16 should 'arguably not be open for constitutionalisation.' But the justification they offer is not because of the nature of the interest it protects, or because it is likely to lead to economic domination by private market actors. They suggest, rather, that it is 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.[146]

It might be tempting to characterise *Alemo-Herron* as an outlier from previous decisions on Article 16. After all, has the Court of Justice not steadfastly refused to consider a variety of restrictions on commercial activity as violations of Article 16? But, in fact, the previous decisions of the Court of Justice have laid the groundwork for decisions such as *Alemo-Herron*, and other future judgements on Article 16. The Court of Justice had been prepared to take the important first step of accepting that a series of restrictions – regulations on advertising, trading and so on – constitute *prima facie* infringements of the freedom to conduct a business. 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.[147] Little wonder, then, that the Court of Justice begins from a premise of viewing regulations as 'restrictions' and economic activity as 'freedom' in its judgements.

An important feature of the judgement in *Alemo-Herron* was that it demonstrated how purported limitations on Article 16 could be whittled away with relative ease, which affected how the provision would be interpreted in the future. Initially, it was anticipated that the use of the term 'freedom' in Article 16 suggested 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.[148] Yet the weaker language used in Article 16 does not seem to have affected its interpretation: in *Alemo-Herron* and in other case law the Court of Justice has treated it in much the same way as any other fundamental right contained in the Charter.[149] The decision in *Alemo-Herron* marked the beginning of a noticeable shift in the interpretation of the last-minute caveat that had been added by the drafters to Article 16. On the face of the text, Article 16 acknowledges the freedom to

[143]S Weatherill (n 137) 213.

[144]C Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 173, 183.

[145]M Bartl and C Leone (n 139), 121.

[146]Ibid., 123.

[147]J Purdy, 'Neoliberal Constitutionalism: Lochnerism for a New Economy' 77 (2014) Law and Contemporary Problems 195, 203.

[148]M Everson and R Correia Gonçalves (n 98) 469. In drawing this distinction between rights and principles contained in the Charter, Everson and Correia Gonçalves place weight on the perspective of Lord Goldsmith Q.C., who had played a significant role in influencing the drafting of the Charter at the Convention (and indeed, the inclusion of Art 16). Yet it is worth noting that Lord Goldsmith described Art 16 as a 'fundamental right' in 2001. See, L Goldsmith, 'A Charter of Rights, Freedoms and Principles' 38 (2001) Common Market Law Review 1201, 1213.

[149]In para 46 of his Opinion in *Alemo-Herron*, Advocate General Cruz Villalón described Art 16 as the 'fundamental right to conduct a business' rather than a freedom. See, Opinion of Advocate General Cruz Villalón, Case C-426/11 *Alemo-Herron v Parkwood Leisure* ECLI:EU:C:2013:82.

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conduct a business in accordance with EU law and national law. In 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 provisions of Article 16 itself recognised that the freedom had to be conducted according to and within the confines of with existing law. It was Article 16, in other words, that had to capitulate to pre-existing national or EU law.[150] But in *Alemo-Herron*, 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* were implementing a 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.[151] 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 has proved to be a fairly ineffective limitation. This was a predictable development: laws are nearly always subject to being assessed by their compatibility with fundamental rights, rather than the other way around. 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.

D. 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.[152] 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.'[153] This prediction would be undermined by the decision of the Grand Chamber in *AGET Iraklis*.[154] 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.[155] 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 was eventually referred to the Court of Justice.

In its judgement, the Grand Chamber noted 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.[156] Any such framework, however, 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.[157] However, the power granted to the Minister to prohibit imposing collective

[150]This is the interpretation given to Art 16 by some scholars: see, E Gill-Pedro (n 99) 183, 191.
[151]Ibid., 192–3.
[152]Council Directive 98/59 OJ (1998) L 225/16. J Prassl (n 73) 12–16.
[153]Ibid., 15–16.
[154]Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.
[155](GR) Law No. 1387/1983 on the Control of Collective Redundancies and Other Provisions.
[156]*AGET Iraklis* (n 154) para 84.
[157]Ibid., para 90.

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redundancies were very broadly drafted objectives. This was particularly the case as the decisions at stake concerned were of a 'fundamental nature' to the life of the company.[158] 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.

Yet it is not self-evident that an outline of precise reasons and circumstances would have solved 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. Nonetheless, the judgement of the Court of Justice in *AGET Iraklis* was largely welcomed as a more sympathetic approach to social interests.[159] Some seemed to view the judgement 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.[160] Gerstenberg welcomed the ruling as paving the ground for an appropriate balancing between the relevant stakeholders: the Greek authorities, trade unions and economic operators.[161] 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.[162] 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 conflicting rights in tension with one another that must 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 case.'[163] 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.'[164] The decision in *AGET Iraklis* is a prime example of a judicial ruling that

[158]Ibid., para 99.

[159]See, for example: M Markakis, 'The New *Viking Laval*? AG Wahl argues that requirement for prior authorization of collective redundancies breaches Art 49 TFEU' *EU Law Analysis* 8 July 2016 http://eulawanalysis.blogspot.cz/2016/07/the-new-vikinglaval-ag-wahl-argues-that.html; M 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; K Polomarkakis, 'A Tale of Two Approaches to Social Europe: The CJEU and the Advocate General drifting apart in Case C-201/15 *AGET Iraklis*' 24 (3) (2017) Maastricht Journal of European and Comparative Law 424, 427; N Countouris and A 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>.

[160]I Antonaki, 'Collective Redundancies in Greece: *AGET Iraklis*' 54 (2017) Common Market Law Review 1513, 1521; V Šmejkal 'Ten Years after the Viking Judgement: 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.

[161]O 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' 39 (2020) Yearbook of European Law 199, 209.

[162]A Davies, 'Has the Court of Justice Changed Its Management and Approach Towards the Social Acquis?' 14 (2018) European Constitutional Law Review 154, 164.

[163]Ibid., 168.

[164]Ibid., 169.

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undermines robust labour protection, all while stressing its importance.[165] 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.[166] 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. 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.[167]

E. 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 an airline from the payment of compensation.[168] The Opinion of the Advocate General 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. Advocate General Pikamäe concluded that 'the right to strike could be limited so as protect the freedom to conduct a business.'[169] The Advocate General wrote that this 'balancing exercise' successfully 'reconciles the respective interests.'[170] 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.

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.[171]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.[172] 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.[173] The strike in this case could not constitute an 'extraordinary circumstance' within the meaning of Article 5(3) of the Regulation and that SAS was liable to pay compensation to consumers. This does not mean, however, that *Airhelp*

[165]F 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, D Schiek, 'Towards More Resilience for a Social EU – The Constitutionally Conditioned Internal Market' 13 (2017) European Constitutional Law Review 611, 635.

[166]*AGET Iraklis* (n 154) para 72.

[167]S Giubboni, 'Freedom to Conduct a Business and EU Labour Law' 14 (2018) European Constitutional Law Review 172, 188.

[168]Case C-28/20 *Airhelp Lyd v Scandinavian Airlines Systems* ECLI:EU:C:2021:226. See generally, C 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.

[169]Advocate General Pikamäe, Case C-28/20 *Airhelp Lyd v Scandinavian Airlines Systems* ECLI:EU:C:2021:203 para 74.

[170]Ibid., para 75.

[171]Ibid., para 84.

[172]*Airhelp* (n 168) para 23.

[173]Ibid., para 28.

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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. This is not simply a case where workers are pitted against an employer: rather, there are three interests at stake identified by the Court – the rights of workers, the rights of employers, and critically, the rights of consumers. 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.[174] The priority afforded to consumer protection, the Court noted, could justify 'even substantial negative economic consequences for certain economic operators.'[175] Thus, when the Court ultimately came to perform a balancing exercise between the conflicting rights at stake, there is no reference to worker protection.[176] 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.[177] In the absence of a clear consumer protection interest, it is doubtful whether the same conclusion would have been reached.

F. Indirect discrimination and Article 16

The reach of Article 16 is evident from a series of cases involving employees who had been dismissed or sanctioned by their employer for wearing Islamic headscarves in the workplace. 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.[178] However, under the Directive, a difference of treatment that would normally constitute indirect discrimination can be justified if it is in pursuit of a legitimate aim.[179] Samira Achbita, a receptionist for G4S, a large multi-national security company, was dismissed after she informed her line managers that she would be wearing a headscarf to work.[180] A preliminary reference was made to Court of Justice as to whether the company's neutral dress code policy amounted to a breach of the Employment Equality Directive. 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.'[181] The Court noted that the policy had to be applied consistently, and only insofar as it was 'strictly necessary.'[182]

The judgement in *Achbita* demonstrates how the freedom to conduct a business can shape the interpretation of secondary EU law; in this case, the Employment Equality Directive. The Court identified two competing rights at stake: the right to freedom of religion, and the freedom to

[174]Ibid., para 49.
[175]Ibid., para 50.
[176]Ibid., para 49.
[177]W Verheyen and P Pecinovsky, 'Strike as an Extraordinary Circumstance' 13 (2) (2022) European Labour Law Journal 323, 331–2.
[178]Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.
[179]Art 2(2) (b) of Directive 2000/78.
[180]Case C-157/15 *Achbita v G4S Secure Solutions NV* ECLI:EU:C: 2017:203.
[181]Ibid., para 38.
[182]Ibid., 40–3.

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conduct a business.[183] 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. On one interpretation, this is the implicit prioritisation of one fundamental right over another, as the Court opted to prioritise the integrity of the freedom to conduct a business over the right to protection against discrimination on the grounds of religion. Karayigit, for example, 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.'[184] 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 conclude that the freedom to conduct a business should triumph. There should be analysis that explains 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. The Court did not scrutinise why a company might want to introduce such a policy, or if it genuinely needed to.[185] Was there any real risk that a company's neutrality as a legal entity would be undermined by its employees' religious dress, or in other words, is there any serious risk that this would be mistaken as company position? It is difficult to see how wearing an Islamic headscarf could be mistaken for anything other than an expression of Ms Achbita's own, intensely personal, beliefs.

Moreover, the Court did not consider whether, in light of Article 2(2)(b) of Directive 2000/78, the 'legitimate aim' of adopting a neutral corporate dress code was 'objectively justified', nor did the Court consider whether the policy went further than necessary in achieving that aim. 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.[186]

Finally, it is worth drawing attention to the fact that G4S did not even have a clear 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 rule against any religious or political dress or symbols. Many companies 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 rule, 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, but the amendment did not come into effect until 13 June.[187] Ms Achbita was dismissed for breaching the company's code on 12 June – a day before

[183]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 Directive 2000/78, 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, J Mulder, 'Religious Neutrality at the Workplace: Tangling the Concept of Direct and Indirect Religious Discrimination, *WABE* and *Müller*' 59 (2022) Common Market Law Review 1501, 1519.

[184]M Karayigit, 'Prevalence of an Economic Right/Freedom Over a Social Right in a Horizontal Litigation Once Again' 27 (2021) European Public Law 733, 750; R Xenidis, 'Polysemy of Anti-Discrimination Law' 58 (2021) Common Market Law Review 1649, 1687.

[185]C 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 a Protector and Employer of Equality* (Springer 2020) 115, 126.

[186]J Weiler, 'Je Suis Achbita!' 28 (4) (2017) European Journal of International Law 989, 1001; E Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? *Achbita* and *Bougnaoui*' 55 (2018) Common Market Law Review 589, 613.

[187]*Achbita* (n 180) para 15.

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the amendment came into force.[188] The significance that the Court attached to the freedom to conduct a business is demonstrated 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 amendment on neutral workplace dress to its code of conduct. Even if one was to accept the policy constituted a legitimate aim, it is nothing short of remarkable that the Court placed so much weight on the existence of a corporate neutral dress policy when the company in question did not even possess one.

Much as in the wake of *Alemo-Herron* and *AGET Iraklis*, it might plausibly have been argued that the headscarf cases were outliers in the Court's jurisprudence that would, in time, be corrected.[189] This impression would be disproved in a case that followed a few years later, in *IX v WABE; MH Müller Handels v MJ*.[190] 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. MJ was employed as a sales assistant for MH Müller Handels, a large chemist chain. The Grand Chamber considered, *inter alia*, whether indirect discrimination could be justified by an employer's desire to pursue a policy of neutrality with its customers 'in order to take account of their legitimate wishes.'[191] Once again, the Court accepted that 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 customer-facing employees.[192] Unlike in *Achbita*, the Court attempted to provide some justification as to why such policies were legitimate for businesses to adopt. Plausibly, displaying a neutral image could correspond to 'a genuine need on the part of the employer' which the employer was required to demonstrate.[193] The mere wish to pursue a policy of neutrality was insufficient to objectively justify a difference in treatment based on religion. The employer should be able to demonstrate that it would suffer 'adverse consequences' in light of the nature of its business.[194]

At first glance, this suggests that employers may have to meet a higher standard than that set out in *Achbita*. The Court's application of the new test of 'real need' to the facts placed before it then suggest that this is not a particularly strenuous standard to satisfy. The Court noted that WABE was entitled to take account of the 'rights and legitimate wishes of customers or users'. This was, namely, the rights of parents to ensure the education of their children in accordance with

[188]Ibid., para 16.

[189]In the *Bougnaoui* decision (which had similar facts to *Achbita*, and was released on the same day) the Grand Chamber did not mention the freedom to conduct a business in Art 16 in its judgement at all. In Case C-188/15 *Bougnaoi* ECLI:EU:C:2017:204, 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 in the Employment Equality Directive. Unlike Advocate General Sharpston, the Court stopped short of concluding that Ms Bougnaoui had been subject to direct rather than indirect discrimination. The Court simply stated that if the employer did not have a rule of neutrality in the workplace, then it could not rely on the genuine occupational requirement exception contained in the Directive, which was only to be deployed in very limited circumstances and the requirement must be 'objectively dictated.' Thus, the Court stopped short of accepting that employers could rely on the 'occupational requirement' defence to fire their religious employees at will. Yet through the decision in *Achbita*, the Court presented a clear pathway to companies in that very situation. All companies needed to do to legitimately dismiss their headscarf wearing employees is to have a strict policy of 'neutrality' in the workplace, particularly for customer-facing roles.

[190]Joined Cases C-804/18 and C-341/19 *IX v WABE eV; MH Müller Handels GmbH v MJ* ECLI:EU:C:2021:594.

[191]Ibid., para 56.

[192]Ibid., para 63.

[193]Ibid., para 64.

[194]Ibid., para 67.

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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.[195] Yet is difficult to see how having one's child cared for in a creche 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.[196] As Mulder pointed out, this was a private childcare facility, which was by no means compulsory for any child to attend.[197] 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.[198] But prejudiced consumers and parents are not necessarily separate categories: parents are not immune from the prejudices that may influence the wider public.

The Court did not consider whether the commitment to diversity expressed in WABE's ethos would be enhanced by exposing the children to persons of different faiths, nor did the Court query whether the creche in this case had suffered adverse consequences in the many years it had operated without a neutral dress code for its employees, or whether Ms IX's indication that she proposed to wear an Islamic headscarf had prompted the creation of the policy. It seems this requirement of 'real need' is satisfied if a company can show that they anticipate backlash or discomfort 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.[199] One might add that employers do not even need to 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 adverse consequences could arise for the business.[200] 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 – even discriminatory preferences – can be the sole reason that such a policy is formulated.[201]

The Court offered a further reason 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.[202] 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 they do ensure that they must abandon and conceal those identifiers that mark them out as different in the workplace.[203] 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

[195]Ibid., para 65.

[196]This is, remarkably, a conclusion that has previously been reached by the European Court of Human Rights in *Dahlab v Switzerland* ECtHR 15 February 2001, no. 42393/98.

[197]J Mulder (n 183) 1516.

[198]A Djelassi, R Mertens and S Wattier, 'Principe de neutralité dans les entreprises privées : la Cour de justice étoffe sa jurisprudence relative à l'interdiction des signes religieux' 130 (2) (2022) *Revue Trimestrielle des Droits de l'Homme* 373, 387.

[199]J Mulder (n 183) 1508.

[200]*WABE* (n 190) para 69.

[201]See also, Case C-344/20 *LF v SCRL* ECLI:EU:C:2022:774, where the Court did not consider whether an organisation that managed the provision of social housing had a 'real need' to adopt a neutral dress code.

[202]*WABE* (n 190) para 76.

[203]E Spitko, 'Don't Ask, Don't Tell: Employment Discrimination as a Means for Social Cleansing' 16 (2012) Employment Rights and Employment Policy Journal 179, 188.

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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?

G. Consumer protection v worker 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.[204] 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.'[205] 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.

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.[206] 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. The Court's approach, as one set of commentators remarked, 'could not be more different'.[207] 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, only insofar as it ensures that 'consumers are enabled to participate uninhibited in the market.'[208] 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.[209] 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.[210]

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

[204]S Weatherill (n 137) 213, 231.

[205]Ibid., 232.

[206]J Prassl (n 89) 442.

[207]H Unberath and A Johnston, 'The Double Headed Approach of the ECJ Concerning Consumer Protection' 44 (2007) Common Market Law Review 1237, 1238.

[208]Ibid., 1244.

[209]M Everson and C Joerges, 'Consumer Citizenship in Postnational Constellations?' EUI Working Papers Law No. 2006/47 1, 16.

[210]G Davies, 'The Consumer, the Citizen, and the Human Being' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford: Hart Publishing 2016) 325, 328.

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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 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. 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 the context. The 'core' or 'essence' of the right is what the Court considers to be the most important, fundamental manifestation of the right.[211] The greater the 'core' of the right, more activity is immune from regulation and oversight, and other interests – even fundamental rights – must buckle.[212] The answer the Court has given to what is the 'core' of the freedom to conduct a business has fluctuated. For example, in *Sky Österreich GmbH,* 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.[213] 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, AGET Iraklis* and *Achbita.*

Similarly, 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.'[214] This principle is certainly visible in *Netlog* and *Scarlet Extended*. But the Court has elsewhere accepted that sufficiently important objectives can justify measures which result in 'even substantial negative consequences for certain economic operators.'[215] 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, electronic identification of animals, or compensation for customers due to airline disruption. 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 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.

[211]See generally, K Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' 20 (2019) German Law Journal 779.

[212]W Hins, 'The Freedom to Conduct a Business and the Right to Receive Information for Free: *Sky Österreich*' 51 (2014) Common Market Law Review 665, 675.

[213]Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28 para 49.

[214]M Everson and R Correia Goncalves (n 99) 479.

[215]Case C-12/11 *McDonagh v Ryanair Ltd* ECLI:EU:C:2013:43 para 48.

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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 case law bears this out: once the freedom to conduct a business has been pitted against the interests of worker protection, for example, it is largely the former that has triumphed. 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.

H. The freedom to conduct a business as an autonomy right

The protection of a fundamental right ordinarily entails the protection of a distinct and limited interest. A right of autonomy, however, establishes an entirely different paradigm. This grants the individual a general right of freedom of action, meaning that any law, regulation or measure that limits the individual's freedom of action is *prima facie* an infringement of a fundamental right. The onus is on the State to justify any measure it takes as a proportionate interference with that right. It is, in other words, a catch-all right. A prominent example is Article 2(1) of the German Basic Law. The protection offered by Article 2 means that the State is compelled to 'provide justification in the form of a legitimate reason each time it intervenes in the freedom of a person.'[216] The protection of the freedom to conduct a business has come to look increasingly like a general right of freedom of action for businesses.

The wording of Article 16 acknowledges 'the freedom to conduct a business.' It is not simply the freedom to open or establish a business without facing excessive barriers to entry (which is, of course, already protected by freedom of establishment in Article 49 TFEU). Nor is it something akin to the freedom of occupation, but is aimed at the self-employed.[217] In national constitutions, the premise that one is entitled to engage in economic activity – or more specifically, to establish a business – is usually followed by the caveat that the right can be restricted in accordance with law or with the public interest. But Article 16 goes beyond ensuring fair entry into the market. As Everson has identified, it has a 'broader performative character.'[218] There does not appear to be any significant conceptual limit on what actions or decisions taken in the course of running a business can come within its scope. Thus, the provision goes further than existing EU law and provides protection to the decisions that determine how a business is organised, managed, and run on a day-to-day basis.[219] The starting point is that any action a business takes in the course of its operations is the exercise of a fundamental rights. This means that any decision or action made in the course of running the business can potentially be shielded under Article 16. This shifts the

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

[217]This is, of course, already protected by Art 15 of the Charter of Fundamental Rights.

[218]M Everson and R Correia Gonçalves (n 99) 464.

[219]As Veneziani has written, Art 16 can encompass any activity in the life cycle of a business, from 'birth (setting up or funding), life (operating and continuing) and death (insolvency or closure) – of the business.' B Veneziani, 'Article 16 – Freedom to Conduct a Business' in F Dorssemont, K Lörcher and I Schömann (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 351, 356.

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burden onto state authorities to justify any action or regulation on those business activities as a proportionate infringement in the pursuit of some objective in the public interest. As one set of commentators acknowledged, 'the potential of Article 16 is simply huge.'[220]

Of course, not every decision will be found to be protected under Article 16, but the mere fact that any business decision could come within its scope demonstrates the provision's remarkably broad potential. As Gill-Pedro puts it, the Court of Justice has interpreted Article 16 'as protecting the *prima facie* freedom of companies to conduct business in the way they see fit.'[221] In turn, the question of whether an infringement of the freedom to conduct a business will be considered to be proportionately justified by the Court of Justice seems to largely depend on the value the Court places on the countervailing objective. Consumer protection, as we have seen, carries significant weight in the eyes of the Court. Yet measures that aim to redress the imbalance between employers and workers appear to be significantly more vulnerable before the Court of Justice. The continued use of Article 16 to challenge a broad array of regulatory measures is likely to produce only increased 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 poses a threat to their profitable economic activity.[222]

Unlike the four fundamental freedoms, Article 16 can be invoked by market actors to challenge inconvenient laws and regulations without the need to identify a cross-border element.[223] Koen Lenaerts, the current President of the Court of Justice, writing along with José Gutierrez-Fons, expressly acknowledged that Article 16 was 'broader in scope' than free movement rights, and that Article 16, much like free movement rights, protected 'the exercise of private autonomy.'[224] If a national measure infringes the free movement provisions, it will be incompatible with Article 16.[225] Until recently, it would have been anticipated that a national measure that was incompatible only with Article 16 would fall outside the jurisdiction of the Court. Under Article 51(1) Member States are bound by the Charter only when they implement EU law.[226] There are, however, indicators that breaches of the Charter may be established even if the substance of free movement rights are not affected. In *Commission v Hungary,*[227] for example, the Court of Justice was prepared to find that a Hungarian law that compelled international higher education institutes to comply with a variety of demanding new terms and conditions constituted a breach of the freedom of establishment and free movement of services.[228] Unlike previous cases where the Court had concluded that a separate analysis of the Charter was unnecessary, the

[220]X Groussot et al (n 81) 342.

[221]E Gill-Pedro (n 99) 183, 204.

[222]K Alter, *Establishing the Supremacy of European Law: The Making of International Rule of Law in Europe* (Oxford University Press 2001) 53. Empirical evidence suggests that it is, overwhelmingly, corporate entities that have successfully relied on Art 16. 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. See, E Gill-Pedro (n 99) 183, 190, n 38. It has long been acknowledged that these entities are best placed to bring expensive, time-consuming litigation. See, C Harlow 'Access to Justice as a Human Right: The European Convention and the European Union' in P Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 187, 195–7.

[223]F Laagland (n 165) 65–6.

[224]K Lenaerts and J Gutiérrez-Fons, 'The EU Internal Market and the EU Charter: Exploring the "Derogation Situation"' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays In Honour of Laurence W. Gormley* (Cambridge University Press 2019) 49, 62.

[225]Art 51(1) of the Charter provides that the provisions of the Charter apply to Member States 'only when they are implementing Union law.'

[226]Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft,* EU:C:1989:321; Case C-260/89 *ERT v Pliroforrisi* EU:C:1991:254; Case C-390/12 *Pfleger* EU:C:2014:281.

[227]Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792.

[228]Protected, respectively, by Art 49 TFEU and Art 56 TFEU, and Art 16(1) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376.

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judgement went on to conclude that the law also violated Article 16.[229] The Court simply held that as the relevant international trade law instrument, the General Agreement on Trade in Service (GATS), formed part of EU law, the jurisdiction of the Charter was triggered.[230] The circumstances in which there is an obligation on Member States to comply with the requirements of Article 16 appear only to be expanding.

5. Conclusion

It is sometimes considered that the Charter has had a modest impact; that no case would be decided differently in the absence of the Charter.[231] However, it seems clear that the Charter did bring with it something new. Thanks to the sustained efforts of the delegates associated with the European People's Party, a freestanding 'freedom to conduct a business' was enshrined in the text of a human rights instrument for the first time. The desire to include the freedom to conduct a business was driven by fears that the draft Charter had 'swung to the left'. Yet as it transpired, the contribution of the EPP delegates to the Charter has been more successful than even that group appeared to anticipate. Article 16 has been firmly established as an individually enforceable right, rather than a general guiding principle. Its purportedly weaker framing as a 'freedom' rather than a 'right' has not affected its interpretation by the Court of Justice, and the limitations within the text have proved ineffective. While the Court's commitment to consumer protection has largely survived the incoming tide of Article 16, if we look beyond the consumer protection case law, and in particular to cases involving workers' rights, a very different picture emerges. 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. 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.[232] 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 economic actors, allowing them to undermine laws that remedy the unequal bargaining power between businesses and workers.

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[229]Act No. CCIV of 2011 on national higher education, amended by Act XXV of 2017 on the amendment of Act No. CCIV of 2011 on national tertiary education.

[230]*Commission v Hungary* (n 227) para 213.

[231]M Kumm (n 80), 115.

[232]S Garben, 'Balancing Fundamental Social and Economic Rights in the EU: In Search of a Better Method' in B Vanhercke, D Ghailani and S Spasova (eds), *Social Policy in the European Union 1999–2019: The Long and Winding Road* (ETU 2020) 62–3.

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