Developments

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

By Andrea Usai[*]

A. Introduction

This paper examines the role and importance of the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights of the European Union (CFR).[1] With the entry into force of the Lisbon Treaty, the CFR became legally binding, gaining the same legal value as the Treaties.[2] It will be argued here that Article 16 CFR, which recognizes the right to economic initiative, can be an important force for European integration by acting as a new engine of European social, economic, and political integration. That said, Article 16 should be read bearing its limitations in mind.

The first part of the discussion will briefly examine the definition and the scope of application that the fundamental right to conduct a business receives under the CFR and the case law. The second part then analyzes the limits found to apply to the freedom to conduct a business: Those deriving from the internal market rules and those from competition law. In the third part, it will be argued that the freedom to conduct a business, through its social function, may be used to foster social, economic, and political integration and to protect consumers. Thus, emphasis will be laid on what are deemed to be the intolerable situations that should be overcome through the application of the

[*] Ph.D. Researcher in EU law, Universities of Bologna and Strasbourg; LL.M. in Competition Law at King's College London.

[1] Charter of Fundamental Rights of the European Union art. 16, Oct. 26, 2012, 2912 O.J. (C326) 399 [hereinafter CFR] ("The freedom to conduct a business in accordance with Community law and national laws and practices is recognized.").

[2] *See* Consolidated Version of the Treaty on European Union art 6(1), Oct. 26, 2012, 2012 O.J. (C326) 19 [hereinafter Consolidated TEU] ("The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.").

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

right to economic initiative, namely, reverse discrimination and the lack of a horizontal direct effect of directives. It will accordingly be argued that Article 16 CFR should be read in light of citizenship provisions and in light of the convergence of fundamental freedoms. Finally, this article will explore whether, according to the latest developments in the case law, it may be possible to extrapolate two new fundamental rights: The right to an unhindered pursuit of trade within the Member States and the right to a single, competitive, and properly functioning market.

B. The Scope of Application of the Freedom to Conduct a Business and Its Definition in the CFR

It might seem odd that the CFR is the first legally binding document to explicitly recognize the freedom to conduct a business in the EU legal order. Neither the European Convention on Human Rights (ECHR) nor the Treaties mention this as a fundamental right. This right is a novelty even with respect to the catalogue of fundamental rights compiled by the *Simitis* Commission. It would thus seem that such an approach should be perceived as quite inconsistent and quite at odds with the aims of the EU legal order.[3] In fact, especially at the beginning, the aim was mainly economic in nature.[4] However, the European Court of Justice (ECJ), the European Commission, and the European Court of Human Rights (ECtHR) have used Article 1 of the Additional Protocol to the ECHR—on the protection of private property—as a basis for inferring the principles protecting the right to economic initiative.[5] This right is also recognized by the

[3] *See id.* at art. 3(3).

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Id.; Consolidated Version of the Treaty on the Functioning of the European Union art. 26(1), Oct. 26, 2012 O.J. (C 326) 59 [hereinafter Consolidated TFEU] ("The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.").

[4] As it will be explained below, the fundamental freedoms must be read in light of European citizenship.

[5] *See generally* HUMAN RIGHTS IN EUROPE: COMMENTARY ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (William B.T. Mock & Gianmario Demuro eds., 2010); Lucia Serena Rossi, *How Fundamental Are Fundamental Principles? Primacy of the EU Law, Principles of the National Constitutions and Fundamental Rights after Lisbon*, *in* *DIRITTI INDIVIDUALI E GIUSTIZIA INTERNAZIONALE: LIBER FAUSTO POCAR* 801–22 (G. Venturini & S. Bariatti eds., 2009); Lucia Serena Rossi, *I principi enunciati dalla sentenza della Corte Costituzionale tedesca sul Trattato di Lisbona: Un'ipoteca sul futuro dell'integrazione europea?*, *in* RIVISTA DI DIRITTO INTERNAZIONALE 993–1020 (2009).

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

constitutions of a few of the Member States, such as Spain, Luxembourg, Italy, Finland, Ireland, and Portugal. [6]

According to the CFR, the freedom to conduct a business is to be exercised without prejudice to EU law and to national laws and practices. In other words, while the innovation lies in the explicit recognition of that "new" fundamental right,[7] the function of the limits is to balance the same right with each Member State's economic constitution. The CFR is not meant to affect the autonomy of the different constitutional models. In fact, the CFR was drafted in order to give greater visibility to fundamental rights and to underscore the importance of protecting those rights.[8] The Treaty of Maastricht, which entered into force in 1993, formally stated that the EU respects fundamental rights as guaranteed by the ECHR, in accordance with the Member States' constitutional traditions.[9] Therefore, the real novelty of the CFR was that, for the first time, civil and political rights were embedded in a single charter along with economic and social rights.

This discussion will not address every aspect of the CFR. It will be stressed, however, that the reason why the right to economic initiative falls in Chapter II CFR—under the heading "Freedoms"—is that it is seen as stemming from the concept of personal freedom.[10] At the same time, it will be argued that although the right to economic initiative is an individual right that must be read according to its social function, it also serves a "socially useful" purpose, as it helps to preserve the system of competition. According to some commentators,[11] the right to economic initiative is a safeguard not only of individual freedom but also of any benefits that may derive from the free market. Indeed, as it will be explained below, Article 16 CFR does not protect the subjective positions of individuals.

---

[6] *See id.*

[7] It should be noted that the CFR does not create any new rights but simply recognizes pre-existing rights. Even so, the impact of the official recognition of the right of economic initiative is significant.

[8] *See generally* Marco Gestri, *Regolamentazione del mercato e libertà d'iniziativa privata: L'incidenza del diritto comunitario sulla costituzione económica*, *in* ISTITUZIONI E DINAMICHE DEL DIRITTO: MERCATO, AMMINISTRAZIONE, DIRITTI 141–76 (A. Vignudelli ed., 2006).

[9] Treaty on European Union (Maastricht Text) art. F(2), July 29, 1992, 1992 O.J. (C 191) 5 [hereinafter Maastricht] ("The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.").

[10] *See id*.

[11] *See supra* note 5.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

The argument presented here is that Article 16 CFR protects all economic and social benefits deriving from the free market. In other words, a single and competitive free market always brings benefits to consumers. This is the reason why the right to economic initiative may be seen as a new engine of economic, social, and political integration. Moreover, the language of the CFR clearly recalls EU case law, and it implicitly refers to the limitations the EU imposes on the freedom of business. Apart from the limitations previously recognized by the ECJ's case law,[12] Article 52 CFR is the big final clause where the general limitations are enshrined.[13] In addition, social usefulness defines the upper limits of Art. 16 CFR. This emphasizes the social dimension of the EU.

Although the single market has officially and formally been completed, it is still an ongoing process. Moreover, in a period of economic crisis, when protectionism is often seen as a silver bullet for unemployment, inflation, and recession, it seems to be essential to reiterate the importance of a properly functioning competitive internal market. Indeed, the right to economic initiative may be used to push the throttle in favor of an even more developed economic union with a common fiscal policy and an economic governance capable of standing up to the power of the markets. Obviously, a stronger economic union should mean more competitiveness and efficiency. Which in turn would mean that situations such as reverse discrimination could be solved. In addition, more economic freedom would lead to greater consumer welfare. As concerns social integration, it is argued that a more competitive system can lead to higher employment, greater benefits for consumers, and stronger solidarity. At the same time, the right to economic initiative may also serve to foster political integration. The European model is increasingly being imitated. To begin with, the Russian Federation, Belarus, and Kazakhstan announced in 2010 the creation of a customs union, which will soon see the inclusion of Tajikistan, Kyrgyzstan, and New Zealand. China, Japan, and Korea have recently announced that they too will enter into a free-trade agreement. Moreover, negotiations for the creation of a transatlantic free-trade union between the

[12] *See infra* Section 2.

[13] CFR*, supra* note 1, at art. 52(1).

> Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Id.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

United States and the EU have recently been launched. All these economic-cooperation models will likely lead to a more integrated stage at a certain point. It follows that free-market areas will necessarily need greater political union at a certain stage of the process if they are to survive.

I. The Right to Economic Initiative as a Limitation on EU Competences and on Member States

Generally speaking, the protection of fundamental rights has always been viewed as a safeguard against EU law. Indeed, it was created precisely to counterbalance the principle of primacy of EU law.[14] As it has been pointed out in the literature,[15] the right to economic initiative has always been understood as a limit on the competences of what was then the European Community. This paper argues that this approach is still good law, but that Article 16 CFR, especially after Lisbon, should be read in light of the European citizenship provisions,[16] as well as in light of the convergence of the fundamental freedoms.[17] Thus, the Article may serve to solve the problem of reverse discrimination, foster the protection of the fundamental rights, and strengthen economic and political integration.[18] In other words, together with the other fundamental rights, which are now enshrined in the CFR, the Article may also be used as a limitation on Member States and not only on EU competences.[19] It may be argued that the CFR must not extend the competences or the powers of the EU, or that the CFR is applicable to the EU institutions and to Member States only when implementing EU law. As it has already been pointed out, however, the right to economic initiative should be read in light of the

[14] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 197/83, Oct. 22, 1986, 73 BVERFGE 339 [hereinafter *Solange II*].

[15] *See* GESTRI, *supra* note 8.

[16] *See generally* Armin Von Bogdandy et al., *Reverse* Solange*—Protecting the Essence of Fundamental Rights against EU Member States*, 49 COMMON MKT. L. REV. 489 (2012).

[17] For further details on convergence of the fundamental freedoms, see generally Alina Tryfonidou, *Further Steps on the Road to Convergence Among the Market Freedoms*, 35 EUR. L. REV. 36–56 (2010). For further details about the fact that the EU citizenship provisions could trigger the application *ratione personae* of EU law, see generally the case law of the ECJ on the citizenship provisions; David Halberstam*, Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeff Dunoff & Joel Trachtman eds., 2009).

[18] It is arguable that economic and political integration would indeed be fostered if the ECJ exercised an even more active role in the protection of fundamental rights through the application of EU law according to the *ratione personae* criterion embedded in the concept of EU citizenship.

[19] *See* GESTRI*, supra* note 8.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

European citizenship provisions and as a general principle of EU law. It can thus be understood to have a horizontal direct effect.[20]

II. Limitations on the Right to Economic Initiative

It follows from the foregoing remarks that the right to economic initiative has some limitations. The first case where the European courts recognized this was *Nold*.[21] In this case, the plaintiff alleged a violation of the right to private property and the right to economic initiative by the then European Coal and Steel Community (ECSC). Through the ECSC, the Commission of the European Communities had approved new rules that had to be respected by the plaintiff in selling coal. These rules were aimed at prohibiting wholesalers from buying from undertakings unless the value of the entire order exceeded 6,000 tons of coal per year for at least two years. As the plaintiff was a medium-sized wholesaler, it claimed that these rules would have driven it out the market. This was the first occasion in which the ECJ ruled that the right to economic initiative was to be protected as a limit restricting the then Community's competences. However, this right could not be construed as absolute but had to be read in light of its social function. Which is to say that the first limitation to restrict the right to economic initiative was the public interest. Nonetheless, if it is true that the public interest can constitute a limit on the right to economic initiative, it is also true that the substance of the right must not be hindered.

[20] *See generally* TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW (2006) (according to which the issue of whether the general principles of EU law may give rise to obligations against private parties acquires importance in the protection of fundamental rights). Indeed, it has already been stressed that the right to economic initiative may be applied both against the EU and against Member States, not only when implementing Union law, but also whenever the genuine substance of a EU citizen's rights is undercut. In other words, according to the "reverse Solange" idea, citizenship may trigger the application of EU law *ratione personae*. Moreover, the right to economic initiative may serve as a tool for solving the problem of reverse discrimination, which could be overcome especially after the case law on EU citizenship and through the general principle of equality. Apart from the discourse on fundamental rights, it should be borne in mind that the right to economic initiative is also a general principle of EU law. General principles are also a source of fundamental rights under Article 6 TEU. According to Tridimas, although the criticism against the horizontal direct effect of general principles in general is that the historical purpose they were recognized for was to protect individuals against public authorities, in a modern and pluralist state, the traditional dichotomy between public and private is no longer valid. It might happen that protecting fundamental rights against the public only, and not also against private parties, may undermine effective protection. Therefore, it may be argued that the right to economic initiative has horizontal direct effect, also in light of the ECJ's case law. See, *inter alia*, the latest judgments on the general principle of age non-discrimination, Case C-144/04, Werner Mangold v. Rudiger Helm, 2005 E.C.R. I-9981; Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG, 2010 E.C.R. I-365.

[21] Case 4/73, Nold, 1974 E.C.R. 491.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

Subsequent cases followed the same approach. Different phrases have been used for the "right to economic initiative," however for instance, it has been called the "right of private initiative," "freedom of enterprise,"[22] "freedom of trade,"[23] "freedom to pursue an occupation,"[24] and a "professional activity."[25] In any case, there is every reason to believe that Advocate General Stix-Hacklis was right to stress that these are differences in name only, [26] and that they do not affect the substance of the right.[27]

The abovementioned case (*Spain and Finland* v. *Parliament and Council*) concerned an action for annulment of Directive 2002/15 of the European Parliament and the Council of the European Union aimed at regulating the organization of the working time of persons performing road-transport activities.[28] The two Member States argued that those rules could not be extended to self-employed persons, as that would have constituted a violation of the right to private initiative and the right to the freedom to pursue an economic activity. The ECJ ruled, however, that these rights are general principles of EU law and must be read in light of their social function.[29] Therefore, limits and restrictions could be applied, provided that two conditions are satisfied: The restriction must protect the general interest proportionately, and it must not impair or hinder the substance of the right. As to the first condition, the Court found that the working-time restrictions could also be extended to self-employed persons, as the aim of the measures was to ensure better safety. This was considered as proportionately in the general interest. Similarly, in other cases,[30] the Court has recognized protection of the environment as a general interest. Other justifications by the ECJ that may be construed as a general interest are consumer protection,[31] competition and the

[22] Case C-161/97, Kernkraftwerke Lippe-Ems v. Comm'n, 1999 E.C.R. I-2057.

[23] Case C-240/83, Procureur de la République v. Assoc. de Défense des Bruleurs d'huiles Usagées, 1985 E.C.R. 531 [hereinafter ADBHU case].

[24] Case C-177/90, Kuehn, 1992 E.C.R. I-35.

[25] Case 44/79, Hauer, 1979 E.C.R. 3727.

[26] *See* Opinion of AG Stix-Hackl, Cases C-184/02 and C-223/02, Spain & Fin. v. Parliament & Council, 2004 E.C.R. I-07789 [hereinafter Opinion of AG Stix,-Hackl]

[27] *See id.* ¶ 51.

[28] Council Directive 2002/15, 2002, O.J. (L 80) 35.

[29] *See* Opinion of AG Stix,-Hackl, ¶ 51.

[30] *See* GESTRI, *supra* note 8.

[31] *See* Case C-234/85, Keller, 1986 E.C.R. I-2897, ¶ 18.

protection of intellectual property rights,[32] the protection of peace and international security.[33]

As to the other condition, as it relates to the case involving persons performing mobile transport activities,[34] either the ECJ or the advocate general should verify whether the application of the directive to self-employed workers could impair the substance of the right to economic initiative. The Court and the Advocate General reached the conclusion that these measures did not affect the substance of the right, as they did not entail exclusion of the self-employed persons from the market. The measures simply affected the way the activity was to be performed.

III. Limitations in the Latest Developments of EU Case Law

Only with the Lisbon Treaty did the CFR become legally binding. As it has already been pointed out, it was previously up to the courts to define the right to economic initiative and set out its limitations. However, the CFR gives more visibility to this fundamental right by codifying the courts' case law. Here, it is argued that the courts' approach contributed to making the protection of this right quite consistent.

In a recent case,[35] the ECJ found that the freedom to pursue a trade or a business is a general principle of EU law. The Court also drew, in part, on its own previous case law.[36] Thus, it seems clear that the right to economic initiative is protected by the CFR and by the Member States' constitutional traditions and as a general principle of EU law.[37] In another recent opinion,[38]

---

[32] *See* Case C-200/96, Metronome Musik GmbH v. Music Point Hokamp GmbH, 1998 E.C.R. I-1953, ¶ 26.

[33] *See* Case C-84/95, Bosphorus, 1996 E.C.R. I-3953, ¶ 26.

[34] *See* Opinion of AG Stix,-Hackl.

[35] Case C-1/11, Interseroh Scrap v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, ¶ 43, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=116103&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2468952.

[36] *See generally* Case C-280/93 Ger. v. Council, 1994 E.C.R. I-4973; Joined Cases C-20/00 & C-64/00, Booker Aquaculture v. Scottish Ministers, 2003 E.C.R. I-7411; Joined Cases C-154/04 & C-155/04, Queen v. Sec'y of State for Health, 2005 E.C.R. I-6451; and Joined Cases C-453/03, C-11/04, C-12/04 & C-194/04, ABNA v. Sec'y of State for Health, 2005 E.C.R. I-10423.

[37] *See* GESTRI, *supra* note 8.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

AG Mazàk considered whether the prohibition against making health claims on alcoholic beverages—a prohibition contained in Regulation No 1924/2006, as amended by Regulation No 116/2010—was compatible with Article 16 CFR. After recalling that the freedom to conduct a business is indeed a general principle,[39] and that it coincides with the freedom to pursue an occupation,[40] he stressed that the prohibition at stake was likely to have an impact on the freedom to conduct a business. In Paragraph 66 of his opinion, AG Mazàk underscored that "fundamental rights such as those are not absolute rights but must be considered in relation to their social function." He conceded that this was a restriction to Article 16 CFR and that the restriction could have been justified provided that it responded to objectives of general interest. Therefore, it was not disproportionate to the aim pursued, and did not constitute an intolerable interference undermining the very substance of those rights.[41]

He then went on to cite Article 52(1) CFR, stating that limitations must be provided for by law, must respect the essence of the rights and freedoms in question, must be necessary, and genuinely meet the EU's objectives of general interest. He thus argued that in this case the aim of the regulation was to have a high level of consumer and public-health protection. This should necessarily be taken to mean that any positive association between health and the consumption of alcoholic beverages is ruled out, regardless of whether or not the health claims are scientifically sound. The Court also held that the seriousness of the objectives pursued in public health may justify restrictions having adverse consequences, even substantial ones.[42]

---

[38] Opinion of AG Mazàk, Case C-544/10, Deutsches Weintor eG v. Land Rheinland-Pfalz, ¶ 29, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=121155&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2469251.

[39] *See* Case C-184/02, Spain v. Parliament & Council, 2004 E.C.R. I-7789, ¶ 51 [hereinafter Spain case].

[40] *See* joined Cases C-143/88 & C-92/89, Zuckerfabrik Süderdithmarschen & Zuckerfabrik Soest, 1991 E.C.R. I-415, ¶¶ 72–77.

[41] *See* Joined Cases C-20/00 & C-64/00, Booker Aquaculture v. Scottish Ministers, 2003 E.C.R. I-7411, ¶ 68; Joined Cases C-37/02 & C-38/02, Di Lenardo v. Ministero del Commercio, 2004 E.C.R. I-6911, ¶ 82; Case C-22/94, The Irish Farmers Ass'n v. Minister of Agriculture, 1997 E.C.R. I-1809, ¶ 27.

[42] *See* Joined Cases C-570/07 & C-571/07, Blanco Pérez v. Consejería de Salud y Servicios Sanitarios, 2012 E.C.R. I-0000, ¶ 90; *See* also Case C-183/95, Affish BV v. Rijksdienst voor keuring van Vee en Vlees, 1997 E.C.R. I-4315, ¶¶ 42–43.

In an another recent case,[43] AG Trstenjak argued that the prohibition against advertising medicinal products has an impact on the freedom to conduct a business, as is recognized in Article 16 CFR and in the case law. Moreover, he recalled that the freedom to conduct a business is a specific expression of freedom to pursue a trade or profession. Indeed, commercial communication is linked to the freedom to conduct a business. In fact, this is the *typical* expression of the fundamental freedom to conduct a business. However, he pointed out that the Court has ruled in settled case law that, although this freedom must be considered a general principle, it is not absolute and it must be evaluated in relation to its social function.

IV. Are There Other Limitations?

Under Article 16 CFR, the only limitations on the freedom to conduct a business are Union law and national laws and practices. It was previously observed here that case law has made it clear that the real limitation to this fundamental right lies in its social function. But as many commentators have argued,[44] another influential limitation comes from competition law. Although it is not the aim of this paper to analyze the whole of competition law, it is argued here that it would be incorrect to consider competition law as a limitation on Article 16 CFR. At least this is so if it is assumed that competition law is not designed to protect competitors but competition itself. To be sure, scholars take different points of view on this question.[45] But this paper argues that the main aim of competition law is to protect consumers and consumer welfare, and hence to foster efficiency in the market.

Although it would be off-topic here to enter into a discussion of the scope of the application of competition law, it does bear recalling that the purpose of Article 101 TFEU is to prohibit agreements, decisions by associations of undertakings, and concerted practices that prevent, restrict, or distort competition within the European market. By the same token, Article 102 TFEU sanctions an undertaking's abuse of a dominant position within the internal

[43] Opinion of AG Trstenjak, Case C-316/09, MSD Sharp v. Merckle GmbH, 2011 E.C.R. I-nyr, ¶ 83, http://curia.europa.eu/juris/document/document.jsf?text=&docid=79732&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2472626.

[44] *See generally* LUIGI FERRARI BRAVO, FRANCESCO M. DI MAJO & ALFREDO RIZZO, CARTA DEI DIRITTI FONDAMENTALI DELL'UNIONE EUROPEA, COMMENTATA CON LA GIURISPRUDENZA DELLA CORTE DI GIUSTIZIA CE E DELLA CORTE EUROPEA DEI DIRITTI DELL'UOMO E CON I DOCUMENTI RILEVANTI (2001).

[45] *See generally* RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (2012). The EU courts and the European Commission have taken differing approaches to enforcement priorities in Article 102 TFEU cases: the Commission is more efficiency-oriented, while the courts tend to protect competitors as such.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

market.[46] As it was previously stressed, the right to economic initiative does not protect a trader's subjective position. Rather, it protects the economic and social benefits directly or indirectly deriving from a free, single, competitive, and properly functioning market. Here it is argued that the aim of Article 16 CFR *coincides with* the aim of competition law. It follows that competition law is not a limitation on the right to economic initiative. Rather, it is a tool designed to *foster* the right to economic initiative. In fact, it is a protection. Without competition law, a free and competitive market would not last very long. One can appreciate that there would be no real right to economic initiative without competition law.

What about the internal market rules? Do they constitute a limit on the right to economic initiative? Again, the focus is not to dive deep into internal market laws, but still, there is a case to be made that the substantive law of the internal market cannot constitute a limitation on the right to economic initiative. Indeed, the fundamental freedoms are tools that can support the freedom to conduct a business and can make that freedom more effective and more efficiently implemented. There would certainly be no meaningful right to economic initiative in the EU legal order without an internal market within which to exercise that right. Moreover, the fundamental rights are increasingly understood to be as important as the fundamental freedoms. In the past, the chief aim of the EU was market integration, but now that the CFR is legally binding, and the implementation of the concept of European citizenship is perceived to be as vital to the integration process, fundamental rights and fundamental freedoms are recognized as having an equal standing: They are placed on the same footing, and the EU courts seek to strike a fair balance between them.[47]

For instance, in a recent opinion,[48] AG Trstenjak stressed that the EU courts have used fundamental social rights as overriding reasons of public interest in order to derogate from the fundamental freedoms.[49] The courts have always avoided the question of whether fundamental social rights may be regarded as derogations from the fundamental freedoms. They simply state that in order for a fundamental social right to prevail over a fundamental freedom, it must pass a proportionality test. In other words, so long as fundamental social rights

[46] *See id.*

[47] *See* Case C-438/05, Int'l Transp. Workers' Fed. v. Viking Line, 2007 E.C.R. I-10779; Case C-341/05, Laval un Partneri v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767.

[48] Opinion of AG Trstenjak, Case C-271/08, Comm'n v. Ger., 2010 E.C.R. I-07091, ¶ 178.

[49] *See* Spain, *supra* note 39.

are proportionally exercised, even if not explicitly so, they could work as limitations on fundamental rights. On the other hand, fundamental freedoms could not in the past constitute a derogation from fundamental social rights because a perception of hierarchical relationship was perceived to exist between them. AG Trstenjak went on to point out that there is no hierarchical relationship between fundamental freedoms and fundamental rights.[50] Indeed, fundamental freedoms and fundamental rights are characterized by a convergence as to both structure and content.[51] It follows that a conflict between a fundamental right and a fundamental freedom should be handled by balancing them fairly. The principle of proportionality should be applied by considering whether the restriction in question is (1) appropriate, (2) necessary, and (3) reasonable.

In an even more recent case,[52] AG Trstenjak confirmed this approach by stating that in order to justify a restriction on the free movement of goods a registered association under German law can rely in the first place on derogations, in the second place on overriding reasons of public interest, and in the third place on objective considerations. Further, it can rely on its private nature, claiming a collision between a fundamental freedom and the right to economic initiative. This conflict should always be solved through a fair balance and a proportionality test. Considering that fundamental freedoms and fundamental rights stand on the same level, one might be prompted to ask: Can internal market rules be regarded as limitations on the rights to economic initiative? Arguably, that is not the case, for they protect the *same* interests. A private party could rely on *both* against a Member State. On the other hand, as it concerns derogations and overriding reasons of public interest in the internal market, internal market rules do constitute a limitation on the right to economic initiative in the same way as they constitute a limitation on the fundamental freedoms.

---

[50] *See* Opinion of AG Mengozzi, Case C-341/05, Laval un Partneri, 2007 E.C.R. I-11767, ¶ 84, *available at* http://curia.europa.eu/juris/showPdf.jsf?text=&docid=62532&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2474777; Opinion of AG Mengozzi, Case C-354/04, Gestoras Pro Amnistía v. Council, 2007 E.C.R. I-1579, ¶ 177; Case C-355/04, Segi v. Council, 2007 E.C.R. I-1657, ¶ 177.

[51] *See* v. Skouris, *Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht*, 3 DIE ÖFFENTLICHE VERWALTUNG 59, 89–97 (2006); S. Prechal & S.A. De Vries, *Viking/Laval en de grondslagen van het internemarktrecht*, *in* 1 SOCIAAL-ECONOMISCHE WETGEVING: TIJDSCHRIFT VOOR EUROPEES EN ECONOMISCH RECHT 425, 434–35 (2008) (pointing out that a conflict between fundamental rights and fundamental freedoms can often be reformulated as a conflict between two fundamental rights).

[52] *See* Case C-171/11 Fra.bo SpA v. Deutsche Vereinigung des Gas und Wasserfaches, ¶¶ 56 & 57, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=121104&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2480352 [hereinafter DVGW].

V. Should Social Rights Be Construed as Limitations on the Right to Economic Initiative?

As it has been correctly pointed out by some commentators,[53] at the beginning of the European integration process, all moral and social considerations were set aside so that the then ECSC would not intrude into national systems. Indeed, Member States were, and for some reasons still are, very jealous of their competences on social issues. European integration was thus set up to mean only *market* integration—a twofold safeguard designed to protect, on the one hand, against the potential loss of state sovereignty on social schemes and, on the other, against the risk of so-called "social dumping." Indeed, the initial approach was a functional one. The founding fathers felt it was important to prioritize market integration. At first they were not concerned with fundamental rights and even less concerned with social rights. In fact, there was no reason to entrust the then European Community with the task of protecting and promoting fundamental rights. That was regarded as a useless duplication of functions already entrusted to other international bodies. Fundamental rights were thus subsumed under the market-integration process. This was certainly true until the 1970s, when the perception began to form of Europe as something more than a common market. The idea of a politically united Europe, capable of going beyond economic aims to also address the social-rights deficit, gradually began to gain more and more ground.

It has been argued by some that social issues did not come into focus until the need emerged to offset the risk that the internal market would trigger a "race to the bottom."[54] That is certainly true. This line of reasoning served a useful purpose in emphasizing the importance of protecting fundamental rights, especially economic and social ones. Be that as it may, it is also true that fundamental rights, and fundamental social rights in particular, can no longer justifiably be perceived as an obstacle to economic integration. In fact, as was discussed earlier, if fundamental rights and fundamental freedoms should come into conflict, the problem should be solved by striking a fair balance between the two and referring to a principle of proportionality. This is all the more true if the conflict involves two fundamental rights, such as the right to conduct a business versus any of the fundamental social rights. The reason why this suggests itself as the correct approach is not just that fundamental rights are

[53] *See supra* note 5.

[54] *See generally* Catherine Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?*, 25 EUR. L. REV. 57 (2000).

framed in the CFR as indivisible,[55] but also because the right to economic initiative and the fundamental freedoms must be read in light of European citizenship and in light of their social function.[56]

But the seventh recital of the Preamble to the CFR seems problematic. It refers to the Charter as a collection of "rights, freedoms and principles." This suggests that not everything in the Charter can be viewed as a fundamental right. Lord Goldsmith argues that economic and social rights are principles that will be exercisable rights only "to the extent that they are implemented by national law or, in those areas where there is such competence, by EU Law."[57] He thus takes the view that economic and social rights are by implication different from, and less important than, civil and political rights because they are not justiciable.[58] However, the argument presented here is that the right to economic initiative can be used to foster social integration. Indeed, the CFR is now legally binding and has the same legal values as the Treaties. This shows an earnest commitment to fundamental rights by helping to make them more visible than they were before and by providing for their indivisibility.[59] Although it may be that some rights are more enforceable than others, it is argued that this is due to the political nature the Charter had at the outset.[60]

---

[55] The Cologne European Council of June 1999 resolved to establish a charter of fundamental rights in order to make the overriding importance and relevance of these rights more visible to EU citizens. Indeed, as Lord Goldsmith brilliantly emphasized, the work of the convention—a novel EU body composed of representatives of governments, the European Commission, the European Parliament, and national parliaments—was steered by national governments in such a way as to ensure that discussions were not about "minting new rights but rather an exercise in increasing the visibility of existing rights." Lord Goldsmith, *A Charter of Rights, Freedoms and Principles*, 38 COMMON MKT L. REV. 1201 (2001).

As concerns indivisibility, the CFR invokes solidarity, dignity, equality, and freedom in its preamble. In this case, the EU institutions are bound to respect the more elevated position of economic and social rights. Moreover, the CFR stresses that the common values it invokes are universally applicable.

[56] *See infra* Section 1.

[57] Lord Goldsmith, *The Charter of Rights: A Brake Not an Accelerator*, 5 EUR. HUM. RTS. L. REV. 473 (2004).

[58] *See generally* Jeff Kenner, *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS: A LEGAL PERSPECTIVE (Tamara Hervey & Jeff Kenner eds., 2003).

[59] The argument, then, is that social rights are more enforceable now that the CFR is legally binding. But it is also important to bear in mind that although social considerations are not applied as fundamental rights, they are in fact applied as internal market derogations and overriding reasons. What the CFR essentially does is to conceptualize social considerations as fundamental rights.

[60] *See generally* S. Deakin & Jude Browne, *Social Rights and Market Order: Adapting the Capability Approach*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS: A LEGAL PERSPECTIVE (Tamara Hervey & Jeff Kenner eds., 2003) (commenting that the CFR's provisions on solidarity are not as strong as they might be, since

The Charter was a compromise between the EU powers and national systems, and it was also a compromise between two different legal approaches.[61] Even so, citizenship provisions could help a great deal in giving fundamental social rights greater visibility. Moreover, the right to economic initiative, if read in light of citizenship provisions and in light of its social function, could paradoxically help make social rights more enforceable.

C. How the Right to Economic Initiative Can Be Used to Foster Economic, Social, and Political Integration

It is argued in this paper that the right to economic initiative is quite important, for it can be used as a new tool with which to foster economic, social, and political integration in the EU. Stated otherwise, if the development of the freedom to conduct a business is traced, it will be shown that it can be a safeguard in two ways. At the beginning of the European integration process it was perceived as a safeguard against the potential encroachment of the then Community on the competences of Member States; now it seems that it could also be used as a further safeguard against barriers the Member States may want to put up in the single market.[62]

With regard to economic integration, Article 16 CFR can be used to support competition law.[63] For instance, it can help speed up the process toward a full

---

they were watered down in the process leading to the agreement on the text of the CFR; there is no attempt to subordinate social rights to civil, political, and economic rights).

[61] The difference the CFR assumes between rights and principles reflects the common law approach.

[62] Charter of Fundamental Rights of the European Union art. 51, Dec. 13, 2007 reads as follows:

> The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Although it is clear from that text what limits the CFR's scope of application, one can read a good deal of vagueness into the phrase "when they are implementing Union law." *Id.* However, the fundamental right enshrined in Article 16 CFR can be used as a brake on the tendency of Member States to put up trade barriers. Obviously, this is so only in the case of Member States implementing Union law. Still, it is important to bear in mind that the right to economic initiative predates the CFR. Indeed, it is a general principle of EU law and is therefore directly applicable.

[63] *See infra* Section 2.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

implementation of the private enforcement of competition law.[64] It is argued that it can be the legal basis on which to introduce an Amnesty Plus program,[65] and that it can foster leniency procedures by supporting the policy of introducing fines and hence leniency procedures for individuals.[66] In the end, the full implementation of the right to economic initiative could be a good argument for introducing criminal sanctions in competition law, especially in cartel cases. On the other hand, competition law can serve as a basis upon which to read the right to economic initiative in light of its social function. In other words, considering that the main aim of competition law is to protect consumers and consumer welfare, the freedom to conduct a business protects not the subjective positions of players in the market but the benefits either directly or indirectly deriving from a single, free, and properly functioning market. It can therefore be argued that competition law and the right to economic initiative share the same aim.[67]

Secondly, Article 16 can be used to reform state aid law to make it more market-oriented. The concern here is not with state aid law, except to stress that, unlike competition law, it does constitute a limitation on the right to economic initiative, and it can also constitute a limitation on economic integration. In this regard, it is argued that the right to economic initiative can be used to improve the rules on state aid. Indeed, if the right enshrined in Article 16 CFR is to be fully and completely implemented, in such a way as to increase deterrence, fines could be provided instead of, or in addition to, recovery of the illegal aid. In fact, it seems clear that nothing more than illegal aid can jeopardize the right to economic initiative.

With regard to the internal market rules, this paper argues that the right to economic initiative could foster European economic integration by reinforcing

[64] On the question of private enforcement, a detailed analysis of the debate about the Amnesty Plus program and leniency procedures is offered, see generally CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES (Katalin J. Cseres, Maarten-Pieter Schinkel & Floris O. W. Vogelaar eds., 2006). The view I present in this paper—that the right to economic initiative can be used to foster and further implement the system for enforcing competition law—is to the best of my knowledge a fresh idea never before considered.

[65] *See id*.

[66] *See id*.

[67] It is worth mentioning the debate between the European Commission and the European courts as regards the aims of Article 102 TFEU. The courts take a formalistic approach, defending and protecting competitors rather than competition itself. The Commission, by contrast, has made it clear that its enforcement priorities are based on the converse approach, focused on protecting the process of competition rather than competitors. The Commission's approach seems closer to the line of reasoning presented in this article. Indeed, it is argued that even the right to economic initiative ought to be read in light of its social function.

the EU's substantive freedoms. For one thing, this right could reinforce the already existing convergence of fundamental freedoms. Thus, it can give full recognition to the horizontal direct effect of the freedoms. For another thing, it can help solve the problem of reverse discrimination and be the decisive instrument capable of recognizing EU directives as having horizontal direct effect.

Admittedly, the ECJ has been showing a strong determination to achieve convergence among market freedoms.[68] This means, for example, bringing the free movement of goods into line with the other fundamental freedoms, adopting a "market to access" approach, and quietly abandoning the *Keck* approach.[69] This move toward convergence forms part of the broader developments one finds in EU citizenship, and is part of the broader trend toward an understanding of fundamental freedoms as economic rights of EU citizens.[70] There is good reason to believe, then, that Article 16 CFR can be used by the EU courts to move ahead at full throttle toward a fully recognized and accepted convergence of the fundamental freedoms. In this case, the discriminatory approach, so far adopted by the EU courts in deciding on potential restrictions to what is now Article 28 TFEU, could now be fully replaced by a market-access approach. In this case, Article 16 could be used as a limit on the Member States' ability to set up obstacles in the internal market.[71] In this way, economic integration could certainly be fostered.

---

[68] *See generally* Alina Tryfonidou, *Further Steps on the Road to Convergence among the Market Freedoms*, 35 EUR. L. REV. 36 (2010).

[69] *See* Joined Cases C-267/91 & C-298/91, Criminal Proceedings Against Keck & Mithouard, 1993 E.C.R. I-06097; [1995] 1 CMLR 101.

[70] *See supra* note 61.

[71] *See generally* Case C-441/04, A-Punkt Schmuckhandels v. Schmidt, 2006 E.C.R. I-2093. In this case the Court seemed to extend the purview of Article 30 TFEU to cases where it was unsure whether or not there was an interstate movement of goods. What was certain is that it was the trader who was moving within the internal market. Is the Court admitting the possibility of a new freedom, namely, the free movement of traders? Although this approach was not subsequently taken up in similar other cases, I would argue that if it is true that the fundamental freedoms must be reinterpreted in light of European citizenship provisions, as European citizenship is destined to become the fundamental status of the Union, a free movement of traders ought to be recognized. Therefore, the legal basis for this approach can be said to lie in the right to economic initiative and in the citizenship provisions. As regards the market-access test and the debate about it, see generally Jukka Snell, *The Notion of Market Access: a Concept or a Slogan?*, 47 COMMON MKT. L. REV. 437 (2010), where the author strongly criticizes the usefulness of the test. It is not the aim of this article to go deeply into the debate and the notion of market access. However, what is worth mentioning is that the market access approach has been useful in bringing convergence among the fundamental freedoms and it can also be useful in bringing a more economic approach to the internal market rules.

Furthermore, the right to economic initiative could also be the legal basis on which to recognize a full horizontal direct effect for the fundamental freedoms.[72] The entire debate on the horizontal direct effect of the fundamental freedoms cannot be reconstructed here.[73] However, it is submitted that giving full horizontal direct effect to the fundamental freedoms would reinforce economic integration, the *effet utile,* and the uniform application of EU Law. This would not be contrary to the Treaty provisions. Indeed, nowhere in the TFEU is it stated that the fundamental freedoms must be applicable to Member States and not to private parties. The only exception seems to be Article 28 TFEU on the free movement of goods. Still, it can be argued that after *Dassonville*,[74] and after the market-access approach, there should be no doubt about the horizontal direct effect of the free movement of goods.[75]

Regarding the problem of reverse discrimination,[76] the view taken here is that the fundamental right to economic initiative, which is also a general principle of EU law, could be useful in fostering economic integration. Reverse discrimination can be overcome in the EU. There are good reasons why purely internal situations should not be treated differently from comparable situations falling within the scope of EU law. As it has already been pointed out, European citizenship is the fundamental status of the EU,[77] and every EU citizen should be capable of saying, "*Civis Europeus Sum*."[78] Moreover, reverse discrimination should be resolved through EU law because it is created by the application of EU law itself. There are several ways in which to solve the problem of reverse

[72] For a detailed analysis of the case law where the EU courts have recognized a horizontal direct effect for the market freedoms, see generally CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS (2009). *See also* S. Van den Bogaert, *Horizontality: The Court Attacks?, in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 123, 123–53 (Catherine Barnard & Joanne Scott eds., 2002).

[73] *See id*.

[74] Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. I-837, ¶ 5 ("All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.").

[75] *See* Tryfonidou, *supra* note 17. The ECJ's determination to promote convergence among the market freedoms in the name of the citizenship provisions reinforces this position. Moreover, it is argued in this paper that the right to economic initiative could also be a legal basis for this approach and for fully recognize horizontal direct effect to the free movement of goods as well.

[76] *See generally* ALINA TRYFONIDOU, REVERSE DISCRIMINATION IN EC LAW (2009).

[77] *See generally* Case C-184/99, Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve, 2001 E.C.R. I-6193.

[78] Opinion of AG Jacobs, Case C-168/91, Konstantinidis v. Altensteig, 1993 E.C.R.I-1191, ¶ 1211–12.

discrimination.[79] One of these would be to apply the fundamental right to economic initiative, either as expressed in the CFR or as a general principle of EU law. A second one would be to apply the general principle of equality. A third would be to rely on the concept of EU citizenship. In addition, Article 16 could be used to give horizontal direct effect to directives. The ECJ has always refused to recognize the alleged direct effect of directives on individuals. However, many advocates general have argued in favor of it.[80] The view here is that the right to economic initiative could be used by the EU courts to give full horizontal direct effect to directives. This option would certainly bring greater economic integration.

It has already been shown that fundamental social rights receive equal importance in the CFR. This also makes for consistency in the European legal order. Because the fundamental rights all stand on the same level, the fundamental freedoms are treated as fundamental economic rights. Any conflict that may arise among them must be resolved by seeking a fair balance and applying the principle of proportionality. Furthermore, it was shown that the fundamental freedoms ought to be read in light of the citizenship provisions. This means that what was once only a "market citizen" is now a fully-fledged citizen. There are a few ways in which the right to economic initiative could be used to foster social integration. On the face of it, this would seem to be quite an unlikely proposition, considering the economic right that would tend to be on a collision course with a social right.

How, then, is it possible that an economic right should be able to reinforce social integration? Three solutions to this question are considered. To start, if two rights should come into conflict, the EU courts ought to be able to determine whether they are exercised proportionally and should balance them accordingly. So the first way in which the right to economic initiative can foster social integration is by making sure that a social right is not outweighed by an economic one, and vice versa. This kind of judgment, though, is entrusted to the courts' discretion. It does not depend on the essence of the right under consideration.

The second approach, more in the line with the reasoning developed in this paper, would have the right to economic initiative read according to its social function. That means that this right must be subjected to its limitations as

[79] *See supra* note 67.

[80] *See generally* Opinion of AG Lenz, Case C-91/92, Faccini Dori v. Recreb, 1994 E.C.R. I-3340; Opinion of AG Jacobs, Case C-316/93, Vaneetveld v. Le Foyer SA, 1994 E.C.R. I-769; Opinion of AG Van Gerven, Case C-271/91, Marshall v. Southampton & South West Hampshire Area Health Auth., 1993 E.C.R. I-4387.

determined by the courts, and that, as a fundamental right, it can limit the fundamental freedoms and can therefore be limited by them. And in any event, it can be limited by derogations and by overriding reasons of public interest. But this would mean that the right to economic initiative could make for better social integration only when tempered by limitations that would make no sense at all.

The third solution rests on the argument that the right to economic initiative can be used to fortify social integration because it serves a social function *in its own right*. In other words, as was discussed in the first section of this paper, the right to economic initiative is not designed to protect the subjective positions of any market players but rather it is conceived as a tool for protecting the benefits directly or indirectly deriving from a single, free, and competitive market. It follows then, that the right to economic initiative is not absolute at all. In addition, it could also be argued that both the economic integration and the right to economic initiative are in danger. While it may be true that the internal market is a properly functioning reality, it is also true that an economic crisis could unsettle it or even throw it into disarray. The single market is actually still an ongoing process. A crisis could once again prompt a protectionist reaction in Europe;[81] this is a risk that needs to be avoided. It is therefore important that solidarity and social integration be increasingly recognized as playing a key role. And for this reason it can be argued that the freedom to conduct a business can be reinforced by fostering social integration.

Regarding political integration, there is still a long way to go. As it was discussed earlier in the first section, the main aim in past years has been to achieve economic integration. However, the time has now come to work seriously toward political integration. One of the most important achievements, though it has come through international law and not through EU law, is the fiscal compact treaty.[82] It could help a great deal in moving

[81] *See* the debate surrounding the recent proposal by the European Commission to let the EU close its public-procurement market to firms based in countries that exclude European competitors from their own public contracts: Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, Brussels, March 21, 2012, COM (2012) 124 final, 2012/0060 (COD). See *Unfree Trade. The European Commission is flirting dangerously with protectionism*, THE ECONOMIST, Mar. 24, 2012, http://www.economist.com/node/21551064; *See also* Kamala Dawar, *The Proposed 'Buy European' Procurement Regulation: An Analysis*, 11TH GTA REPORT ON PROTECTIONISM, http://www.globaltradealert.org/sites/default/files/.

[82] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Mar. 2, 2012, *available at* http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

toward a strong European economic policy. This would necessarily call for greater political cooperation, and also for greater political integration. Political integration should, in turn, stem from stronger economic and social integration. The more a system is economically and socially integrated, the more political integration will be required to enable the system to survive. Yet the system isn't showing enough solidarity.[83]

It falls outside the scope of this paper to analyze in any depth how the concept of European citizenship has been developed in recent years by the EU courts. The recent case law, however, does point to an effort by the courts to press ahead in the direction of a more integrated Europe. More to the point, the ECJ has shown a greater commitment than before in protecting the fundamental rights and the concept of European citizenship, and if that trend keeps up, it will necessarily lead to a more socially and politically integrated Europe. It stands to reason that apart from civil, political, and social rights, two other fundamental economic rights can stem from the right to economic initiative, namely, the right to an unhindered pursuit of trade in the Member States,[84] and the "right to have a single and properly functioning competitive market."[85] An argument can be made that if the EU courts fully recognize these as two new fundamental rights, then EU citizens will be able to assert their economic rights against both Member States and the EU. This would also be a way in which to foster the single market, and this is how the right to economic initiative could contribute to fostering political integration.

D. Conclusion

The right to economic initiative has been explicitly recognized in the CFR, and it must be applied according to its limitations as determined by the EU courts. These limitations are grounded in the need to protect the general public interest, and they must comply with EU law, as well as with national laws and practices. However, the right to economic initiative, both as a fundamental

[83] As evidence in support of this view, one need only consider the difficulty experienced in setting up a Eurobond system and providing for a true system of solidarity among Member States.

[84] *See* Opinion of AG Tesauro, Case C-292/92, Hünermund v. Landesapothekerkammer Baden-Württemberg, 1993 E.C.R. I-6787 ("Is Article 30 of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?"); Opinion of AG Maduro, Joined Cases C-158/04 and C-159/04, Alfa Vita Vassilopoulos v. Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon, and Carrefour Marinopoulos v. Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon, ACCESS TO EUROPEAN LAW, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0158:EN:HTML.

[85] This right can be derived on the reasoning that once the internal market has been created and established, the main concern of the EU in the single market must be to assure its proper functioning.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press

right and as a general principle of EU law, can play an important new role in the EU legal order by fostering social, economic, and political integration. It will be interesting to see whether the courts will be able to appreciate that fact and use that insight to build a stronger and more integrated Europe. Otherwise, this would just be a missed opportunity.

https://doi.org/10.1017/S2071832200002534 Published online by Cambridge University Press