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The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (IV): The role of the European Court of Justice in balancing economic freedoms and fundamental rights,

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The Monitoring of Fundamental Rights in the Union as a contribution to the European legal space (IV): The role of the European Court of Justice in balancing economic freedoms and fundamental rights

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Introduction:

It is a truism of EU law scholarship that the European Court of Justice has played an ambivalent role in promoting or protecting fundamental human rights when controversies concerning the 'market freedoms' established by EC law were involved. In a much-cited article published in 1992, Jason Coppel and Aidan O'Neill argued that the Court did not 'take rights seriously', and that it deliberately conflated the language of economic freedoms enshrined in the treaty with that of 'fundamental rights',¹ thereby promoting market integration and EC economic objectives by appropriating the discourse of rights.² Along similar lines it was argued that the ECJ relegated other genuine human rights claims to the status of exceptions to fundamental market freedoms, which had to be strictly justified where they impeded or restricted these market freedoms.³

While not many may have agreed with the strongest version of the 'taking-rights-insufficiently-seriously' critique, most would accept that the Court seemed to embrace the idea of protection for human rights as part of the EU legal order not through any initially strong commitment to these as foundational values, but primarily in order to fend off domestic constitutional challenges to the supremacy and autonomy of EC law.⁴ Many would also agree that the Court has not often given real bite to a claim based on human rights, and that it has seemed inclined in many situations to accord

¹ See case 240/83 *Procureur de la Republique v. ADBHU*, [1985] ECR 520, 531: 'the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.'

² J. Coppel and A. O'Neill: *The European Court of Justice: Taking Rights Seriously?* (1992) 12 *Legal Studies* 227; They were later accused of mendacity by Joseph Weiler, who in a detailed jointly-authored response challenged the accuracy of their account of the relevant ECJ jurisprudence: see J.H.H. Weiler and N. Lockhart: "Taking rights seriously, seriously" (1995) 32 *CMLRev* 51, 579 and also Weiler "A Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Area of Political Integration", *Journal of Common Market Studies*, 31(1993), 417-446.

³ D.R. Phelan 'Right to Life v Promotion of Trade in Services' (1992) 55 *Modern Law Review* 670, discussing the famous *Grogan* case on abortion. For some examples of the ECJ requiring the applicability of a proportionality test to restrictions on market freedoms adopted by states in the interest of promoting particular rights, see case 5/88, *Wachauf v. Germany* [1989] ECR 2609, and C-20/00 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers*, [2003] ECR I-7411

⁴ The famous trilogy of cases arising in Germany in which the Court began to acknowledge a place for general principles of law and fundamental human rights in the EC legal order were cases 4/73, *Nold v. Commission* [1974] ECR 491, 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125 and 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

priority to market freedoms. Many of the cases in which fundamental rights have been most successfully invoked have been those involving the due process rights of corporate actors in antitrust proceedings brought against them by the Commission, or cases where the pursuit of a market freedom (e.g. freedom to provide services, freedom to move to and reside in a state for the purposes of employment, or the free movement of goods) happened to coincide with a human right such as the right to family life or freedom of expression,⁵ or where freedom from discrimination could be considered both as a human right and as a labour-market-friendly⁶ or integration-friendly policy.⁷

In recent years however, a number of cases have been decided by the ECJ in which EC market freedoms appeared to come directly into conflict with specific instances of national or local protection for particular human rights – the right to public protest as against the freedom to trade across borders in *Schmidberger*,⁸ and the right to human dignity as against the freedom to supply commercial services in *Omega Spielhallen*⁹ - in which the Court did not stipulate that economic freedoms must be given priority, but accepted the possibility that states could choose to prioritize protection for fundamental human rights in diverse ways. Similarly in cases involving potential friction between the logic of EC competition rules and national conceptions of solidarity in social rights protection, such as *Poucet and Pistre*,¹⁰ *Albany*¹¹ and *AOK Bundesverband*,¹² the ECJ did not insist on the primacy of competition law. While some may see the trend of these decisions as evidence of a changed approach, suggesting that the Court is taking rights more seriously, or rather that the Court is accepting that the states are entitled in their different ways to take particular rights more seriously than particular EU-promoted economic freedoms, others are more sceptical and see them as relatively easy cases in which there was little at stake from the point of view of EC market freedoms, and where the ECJ still conspicuously failed to treat human rights as having a more fundamental and essential status, and thus a higher legal priority than the latter. Whatever the position one may take on this debate, what we know is that both human rights and economic freedoms have acquired significant legal status within EU law, and that they sometimes come into conflict with one another.¹³

⁵ Eg cases C-368/95, *Vereinigte Familienpress Zeitungsverlags-und Vertriebs-GmbH v. Heinrich Bauer Verlag* [1997] ECR, Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, C-60/00, *Carpenter v Home Secretary*, [2002] ECR I-6279 C-109/01, *Home Secretary v Akrich*, 23 September 2003, and C-482/01 and C-493/01 *Orphanopoulos and Others*, 29 April 2004.

⁶ C-13/94, *P v S* [1996] ECR I-2143, C-117/01, *K v NHS Pensions Agency*, 7 January 2004; See C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743 for the priority of the 'social aim' of equal treatment over the 'economic aim'.

⁷ E.g. the citizenship case law, including Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern* [1998] ECR I-2691, C-184/99, *Rudy Grzelczyk v. Centre Public D'Aide Sociale d'Ottignies-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193, C-138/02 *Collins*, judgment of 23rd March, 2004, C-209/03 *Bidar*, judgment of 15 March, 2005.

⁸ Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659

⁹ C-36/02 *Omega Spielhallen*, judgment of 14 October 2004.

¹⁰ Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637

¹¹ C-67/96 *Albany v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751

¹² C-355/01 *AOK Bundesverband*, judgment of 22 May 2003

¹³ AG Stix-Hackl in C-36/02 *Omega Spielhallen*, opinion of 18 March 2004 referred to these respectively as 'fundamental freedoms and fundamental laws' para. 44. The question whether EC market freedoms, and in particular the free movement of persons, are also "fundamental rights" is not addressed.

The aim of this brief paper is not to revisit the old debates, nor to repeat what has already been written about the role of the ECJ in relation to fundamental rights,¹⁴ nor to provide a comprehensive survey of the case-law, but rather it is to provide an overview of recent jurisprudence in which the Court has been called on to balance economic freedoms and fundamental rights, with a view to reflecting on its possible implications for the regulatory or coordinating capacity of the EU in relation to fundamental rights.

The canonical paragraphs which have come to define the approach of the ECJ to the position of fundamental rights in EU law were restated some years ago in the *Schmidberger* judgment. In these passages the sources of EU human rights law, the status of that law, and its primacy over ‘incompatible’ national and EU measures are asserted by the ECJ:

“According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25).

The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union That provision states that “[t]he 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.’

It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, inter alia, ERT, cited above, paragraph 41, and Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 14).¹⁵

The status of human rights gained further significance following the drafting and political proclamation of the Charter of Fundamental Rights,¹⁶ and despite the uncertainty surrounding the status of that instrument while the treaty establishing a Constitution for Europe remains suspended,¹⁷ it remains for now an important (albeit ‘soft’, insofar as Member States are concerned) source of the EU’s fundamental rights commitments. The Charter articulates the relevance of these commitments for both the EU and for the Member States, declaring that they are binding comprehensively on the EU, and on the member states when they are implementing EU law. The tentative nature of many of the rights provisions, however, renders their potential impact in influencing or reorienting economic laws adopted either by the EU or by the Member States uncertain, and this doubt will remain until such time as the Court of Justice is in a position to rule specifically on the impact of the Charter. Nonetheless, even without the Charter, the Court for many years now has had occasion to consider challenges to national economically-inspired measures, and to

¹⁴ For an excellent account up until the late 1990s, see Bruno de Witte “The Past and Future Role of the European Court of Justice in the Protection of Human Rights” P. Alston et al (eds), *The EU and Human Rights* (OUP, 1998)

¹⁵ Case C-112/00 *Schmidberger v. Austria* [2003] ECR I-5659, paras 71-73.

¹⁶ Charter of Fundamental Rights of the European Union OJ [2000] C 364/01

¹⁷ http://europa.eu/constitution/en/allinone_en.htm

a lesser extent to EU regulatory measures, on the basis that they violate fundamental human rights.

Below, the paper presents an overview of the main strands of that case-law in recent years in order to reflect on the “balance” reached by the Court in cases involving fundamental rights and fundamental economic freedoms: in other words, in cases where Member States face constraints in the way they wish to promote or protect particular fundamental rights on account of the requirements imposed by EC internal market law, or where the existence of EC economic law can be seen in some way to have an impact on the way in which states pursue or protect such rights. The overview is divided into four broad groups of cases: first, cases in which the national conception of a fundamental right appears to conflict directly with an EU economic freedom (particularly free movement rules); secondly cases in which a national measure restricting an EU economic freedom is claimed also to restrict a fundamental right (ie where the market freedom and the fundamental right are not in conflict *inter se*, but both are apparently in conflict with another objective of national public policy); thirdly, cases in which an EU market-regulatory measure is allegedly in conflict with a fundamental right; and fourthly, cases in which a national law pursuing social objectives (even if not necessarily identified as protecting fundamental social rights) is allegedly in conflict with EU internal market or competition law.

1. Adjudicating the tension between EC economic freedoms and national fundamental rights

In two prominent cases in recent years, *Schmidberger*¹⁸ and *Omega Spielhallen*¹⁹ the Court of Justice was asked to adjudicate in a situation in which national understandings of fundamental rights were directly relied on as a justification for restricting EU economic freedoms. Each case concerned an apparent clash between a specific right reflected in the ECHR (or the EU Charter on Fundamental Rights) on the one hand and one of the market freedoms enshrined in the EC Treaty on the other. In each case, the ECJ found that the national authorities had indeed restricted a treaty economic freedom, and considered whether such restriction could be justified by invoking the protection of fundamental rights. *Schmidberger* concerned the balance to be struck between freedom of expression and assembly and the free movement of goods, in a situation where the Austrian authorities had granted permission for the closure of the Brenner motorway to allow for an environmental demonstration against the heavy level of pollution to the Alps caused by the traffic, and where this closure caused economic loss to Mr. Schmidberger by temporarily restricting his commercial freedom to transport heavy goods from Germany to Italy. *Omega Spielhallen* concerned a restriction imposed by German regulation on the cross-border freedom to provide services in the interests of protecting human dignity. More specifically, a German amusement arcade which operated laser games involving the simulated shooting of human beings was prohibited from conducting this kind of business on the ground that the game violated the value of human dignity as enshrined in the German constitution.

¹⁸ Case C-112/00 *Schmidberger v. Austria* [2003] ECR I-5659

¹⁹ C-36/02 *Omega Spielhallen*, judgment of 14 October 2004

In each of the two cases, the ECJ began its reasoning in similar vein, declaring that the protection of fundamental rights can in principle justify restrictions of economic freedoms under Community law:

“Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (par.35 *Omega*) (see, in relation to the free movement of goods, *Schmidberger* , paragraph 74).

In other words, the protection of fundamental rights can constitute public policy or public interest requirements sufficient to justify restrictions on free movement, so long as such restrictions are necessary and proportionate. Interestingly, however, despite the reference to proportionality, the ECJ in *Omega* did not actually go on to discuss the appropriate balance between the protection of human dignity and the freedom to provide commercial services, as it did in *Schmidberger*. Instead, it emphasized the fact that the restrictions on the particular service were not excessive (since they related only to games which simulated homicide), and the language of the judgment implies deference to the extent of protection for human dignity (which was readily accepted by the Court as a general principle of EU law) provided for under the German constitution.²⁰ In other words, it was quickly agreed that the EU-mandated economic freedom could be restricted in order to protect a fundamental right as recognized by German constitutional law, so long as the restriction did not go beyond what was needed to protect human dignity (e.g. by banning games other than those involving simulated homicide.) In *Schmidberger*, by contrast, in the discussion of proportionality the Court was less deferential, adopting a more explicitly balancing approach as though the fundamental right in question (freedom of expression and assembly) and the economic freedom (movement of goods) were concerns of equal weight, rather than assuming the primacy of the fundamental right, which it appeared to do in *Omega Spielhallen*.

Thus in *Schmidberger*, the ECJ stated that ‘the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests’ (paras 79-81). Further – and unlike in the *Omega Spielhallen* case - although both the Austrian constitution and the ECHR were invoked as sources for the fundamental rights in question in the case, the ECJ argued in terms of the ECHR and did not make reference to the national interpretation of freedom of expression and association (paras 76-77). Relying on both its own and ECHR case law concerning freedom of expression, the Court emphasized that “unlike other fundamental rights...which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute”.

Therefore although a similar outcome was ultimately reached in both cases – i.e. that the restriction by national authorities of EC economic freedoms in the interest of protecting fundamental rights was justifiable – the *Omega Spielhallen* case suggests

²⁰ *Omega Spielhallen*, Para 39: “In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany.”

that the invocation of human dignity as a genuine public policy ground of restriction is to be accorded greater deference than some other fundamental rights. In particular, following the wording and reasoning of the ECHR, the ECJ in *Schmidberger* implies that freedom of expression and assembly are not necessarily the same kind of overriding value, but instead are to be weighed 'in the balance' with economic freedoms such as cross-border trade in goods. And even though the Court declared that the Member States have a wide margin of discretion in striking this particular balance, it nevertheless went on to suggest quite a strict "no less restrictive means" test for determining the legitimacy of the Austrian authorities' actions in protecting freedom of speech and assembly.²¹

The two cases are therefore interesting on their own facts, in so far as they show the ECJ in particular situations deeming that the interest in protecting specific fundamental rights should take priority over unrestricted economic freedom, albeit that a careful proportionality test is first to be applied. In each case the national authorities are said by the Court to have discretion in weighing the competing interests against one another, but greater emphasis was clearly placed on protecting the particular national conception of human dignity in *Omega Spielhallen*, than was the case in relation to freedom of expression in *Schmidberger*.

What are the implications of these cases for the desirability or otherwise of EU coordination of fundamental rights? Does it matter that in the UK and in other countries (unlike in Germany) with a different conception of what human dignity requires, laser-games involving simulated homicide were not banned? Clearly the ECJ's argument indicates that the free movement of goods and services do not have primacy in all situations over the protection of human dignity, so that the interference caused to the free movement of services was an acceptable price to pay for respecting the national conception of that shared human right. On the other hand, does the fact that the protection of human dignity is a general principle of EU law shared by all member states not suggest that such laser games ought to be banned EU-wide? A direct answer to this question is not to be found in the judgment, but it seems unlikely that this conclusion could be drawn. Rather the suggestion is that where an important general principle like human dignity is at stake, it is for individual member states to protect it as they see fit,²² even if they do so to differing degrees and in different ways, so long as their restrictions on EC trade do not exceed what is necessary to protect dignity as their legal system understands it. There seems to be no compelling coordination-based (as opposed to a purely fundamental rights-based) reason to argue for a uniform EU conception of human dignity in order to adopt an EU-wide ban on laser games. Similarly, following the *Schmidberger* case, the fact

²¹ *Schmidberger*, paras 92-93. A similar conclusion was reached in the earlier *Familiapress* case involving a restriction on the free movement of goods which was imposed in the interests of maintaining press diversity and protecting freedom of expression, although the ECJ in that case left the decision as to whether or not the balance struck was appropriate, including the assessment of whether there was any 'less restrictive means' of maintaining press diversity etc., to the national court to decide.: C-368/95 26 June 1997 Vereinigte Familiapress Zeitungsverlags [1997] ECR I-03689, paras 18 and 26

²² See paragraph 31, repeating the famous phrase from the *Van Duyn* and *Bouchereau* cases that "the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty", in a context where the 'public policy' in question was one for the protection of human dignity under the German constitution.

that in some EU states, protests and demonstrations are curtailed in the interests of EC free trade while in others such as Austria they are given constitutional protection would not of itself seem to generate any need for EU-wide coordination of restrictions on freedom of expression and assembly. Unless it might be suggested that there is a risk that states are using EC internal market law as a reason to restrict such civil liberties and rights, it seems difficult to make an EU-law-based argument against leaving each state to determine (subject to the principle of proportionality) its own conception of the appropriate scope of protection for these rights.²³ Nonetheless, it is entirely plausible to assume that the interdependencies of trade in the EU create a context in which Member States may come under pressure to liberalize their protective laws (for rights such as dignity, or freedom of public protest), and that this points to the desirability of careful monitoring of national laws and policies to see whether any such lowering effect can be detected. It need not be the case that a rapid race-to-the-bottom in human rights standards is taking place for there nonetheless to be concern that the imperatives of the EC internal market lead to a more gradual and indirect depression in protection for such rights. Yet however vigilant the Court of Justice may be, and however nuanced the balancing which it advocates between economic freedoms and fundamental human rights, it is nevertheless the case that ad-hoc, case-by-case analysis of particular instances of conflict will not reveal whether such a gradual depression is taking place in particular sectors. Instead, it would only be through regular and ongoing monitoring of protection for human rights standards, and changes in those standards within and across Member States that a fuller and updated picture of the impact of economic freedoms and other EU imperatives on these could be obtained.

2. Adjudicating restrictions on EU economic freedoms which also constitute restrictions on fundamental rights

The second group of cases concerns those in which a national measure which restricts an internal market freedom also impinges on a fundamental human right. Since its ruling in the *ERT* case,²⁴ the Court has indicated that when considering national justifications for restricting internal market freedoms, it will also consider whether any fundamental rights have been affected:

“Reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of the freedom of movement for workers only if the measure in question takes account of such rights.”²⁵

In other words, in these cases there is not necessarily a direct conflict between the EU economic freedom and the right claimed, but instead the economic freedom in

²³ See paras 37-38 “It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.” See to similar effect, cases C-275/92 *Her Majesty’s Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039 and C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português*, [2003] ECR I-08621

²⁴ Case C-260/89 *ERT* [1991] ECR I-2925

²⁵ *ERT*, *ibid.*, para 43, and then for example C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279, par. 40, C-482/01 and C-493/01 *Orphanopoulos and Others*, 29 April 2004 [2004] ECR, par. 97-98.

question coincides with the protection of some other interest which constitutes a fundamental human right. In such cases national public policy is invoked to justify a restriction on both the economic freedom (e.g. the free movement of persons) as well as on some other fundamental right, such as the right to private and family life.

In the *Carpenter* case, for example, the ECJ rejected the decision of UK authorities to deport a woman who was not lawfully resident in the UK, but who was married to a British citizen who provided services to recipients in other Member States while she cared for their children. Once again in such cases, the Court has emphasized the need for the conduct of public authorities to be proportionate, and it has adopted the structure of reasoning of the ECHR:²⁶

*Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif v Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX).*

In these cases, the importance of ‘striking a fair balance between competing interests’ refers to the competing interests of protecting human rights and maintaining public order respectively, rather than between human rights and economic freedoms.²⁷ However, we see that the EU economic freedoms – in this case the free movement of workers – are reinforced by virtue of the fact that they also happen to facilitate or further a fundamental human right, such as the right to family life in *Carpenter*, *Baumbast*²⁸ *Orphanopoulos*²⁹ and *Akrich*³⁰, and the right to privacy in *Rundfunk*.³¹ To this extent, especially in this line of case law on the free movement of workers, there is no tension between two opposing values (economic freedoms on the one hand and fundamental rights on the other) but instead the ECJ is free to underscore the importance of fundamental human rights – drawing in most cases on the text and jurisprudence of the ECHR - without compromising its usual stance of robust enforcement of internal market rules.

From these cases, might it be argued that there is a risk that national conceptions of fundamental rights such as family life and private life will be re-interpreted through the lens of economic freedoms? Or that the scope of application of certain rights might be restricted so as to avoid the risk of an expansive effect of EC economic freedoms?³² Once again, as with the first category of cases above, what this points to

²⁶ C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279, paras 42-43;

²⁷ See also C-465/00, C-138/01 & C-139/01, *Neukomm and Joseph Lauerermann v Österreichischer Rundfunk*, and C-482/01 & C-493/01 *Orfanopoulos and Oliveri v Land Baden-Württemberg*, judgment of 29 April, 2004.

²⁸ C-413/99 *Baumbast v Home Secretary* [2002] ECR

²⁹ Case C-482/01, n. 27 above, esp para 100.

³⁰ C-109/01 *Home Secretary v Akrich*, judgment of 23 September 2003

³¹ Case C-465/00 et al, n. 27above.

³² The Irish Minister for Justice cited the *Chen* case before the ECJ as being one of the important factors which prompted the government to seek to restrict Irish citizenship rights: see <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ5Z7CZK-en> and for the ruling of the ECJ,

is the need for ongoing monitoring of national laws and human rights standards in a whole range of potentially affected fields. Whether it also suggests that there is a need for gradually greater coordination of national standards of protection in relation to the rights in question will depend on what is revealed by such a monitoring process.

3. Adjudicating restrictions on fundamental rights imposed by EU regulatory measures

The third category of cases concerns the balance between fundamental rights and EC regulatory measures – the latter usually being contained in more detailed secondary legislation, rather than simply the treaty-based economic freedoms. At least since the early case of *Hauer*³³ the ECJ has on several occasions been asked to adjudicate on the protection of a fundamental human right in the context of an EU regulatory measure, either where a Regulation or Directive regulates some aspect of the market, in certain cases seeking to safeguard ‘objectives of general interest’, such as protection of human health, consumers, the environment or the life and health of animals.³⁴ Most of these cases concern potential restrictions imposed by the regulatory measures in question on the freedom to carry on a business, freedom to pursue a trade or profession, or on property rights. The clear trend in such cases has been for the ECJ to find that the restriction on the fundamental right invoked is proportionate and necessary. On the one hand, it could be said that the ‘balance’ being sought by the Court is between two kinds of broadly economic interest: the general public interest in regulating the EU-wide marketplace on the one hand, and various individual economic rights. However, the public interest in EU-wide regulation often pursues (even if in contested ways) social aims which can be considered as collective rights, such as consumer and health protection. In cases of this kind, the ECJ has generally been more deferential to the EU regulatory measure and more willing to accept restrictions on individual fundamental rights. Viewed from an institutional perspective, it could be said that the ECJ is essentially deferring to the EU legislature, since unlike the cases in categories 1 and 2 above, these do not concern Member State measures but EU measures being challenged for violation of fundamental rights. On the other hand, it is certainly the case that the legal rights claimed in these kinds of cases have tended to be individual economic freedoms in themselves. In that sense the ‘balancing’ carried out by the Court is less between an economic freedom and a fundamental human right, than between a regulatory measure pursuing some kind of collective social right or interest at EU level and a fundamental individual right, generally invoked by a corporate rather than an

see C-200/02 *Chen v Secretary of State for the Home Department*, judgment of 19 October 2004. While citizenship rights are a particular category over which states have more discretion than in other fields, the case nonetheless suggests that the harnessing of EC economic freedoms to national conceptions of fundamental rights may create incentives for Member States to reduce their standards of protection for certain rights.

³³ C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

³⁴ See e.g. C-20/00 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers*, [2003] ECR I-7411, par. 86-88; C-155/04 and C-155/04 R., *Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health and R.; National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales*, judgment of 12 July 2005; C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, 14 December 2004, par. 126-129.

individual actor, which is itself a form of economic freedom. To cite a typical ruling by the ECJ in such a case:

Fundamental rights are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (Case 5/88 Wachauf [1989] ECR 2609, paragraph 18; Case C-177/90 Kühn [1992] ECR I-35, paragraph 16, and Case C-22/94 The Irish Farmers' Association and Others [1997] ECR I-1809, paragraph 27).³⁵

It seems very unlikely that this kind of case law could generate an argument in favour of the need to coordinate or harmonize national-level protection for fundamental economic rights like trade or property. Such an argument would have to assert that EU regulatory measures are systematically impinging on fundamental individual commercial and property rights to the extent that national protection for such rights is undermined (by the supremacy of the EU regulatory measure), and to such an extent that EU-level regulation of protection for these rights is needed. Further, it could be argued to the opposite effect that the existence of regulatory measures at EU level which restrict the untrammelled exercise of such rights seems to indicate that political agreement at EU-level has already been reached on the acceptability and appropriateness of such restrictions. Lastly, even if it were possible to reach political agreement on EU-level protection for individual economic rights such as property and pursuit of a profession, it seems unlikely, in view of the diluted nature of property rights under Protocol 1 of the European Convention on Human Rights and the fact that property rights are so differently protected in different Member states, that it would be anything more than at a very minimal level. What could more plausibly be argued on the basis of this case law, however, is that there should be some way of ensuring adequate procedural involvement at European level for those whose interests and rights are likely to be adversely affected by the EU measure.³⁶ Once again, the task of giving greater substance to the idea of a right to good administration at European points to the desirability of something more systematic and sustained than occasional judicial rulings. This is true not only in relation to the EU level itself, but also to the national level, when EU regulatory measures are subject to implementation by national laws and policies. Even if a code of administrative rights, including the right to be heard, is not likely to be adopted for the EU in the near future,³⁷ an assessment, evaluation and comparison of the way in which the EU itself and the Member States provide for individual procedural rights in the course of making and implementing regulatory policy would be a very important step.

³⁵ Booker Aquaculture, para 68; see also Swedish Match, para 72.

³⁶ See para 86 of the opinion of Advocate General Geelhoed in case C-154/04, R, Alliance for Natural Health, Nutri-Link Ltd v Secretary of State for Health, 5 April 2005.
V Secretary of State for Health 5 April, 2005

³⁷ Although there are already specific policy sectors in which a common body of administrative rights has been developed, such as in the field of environmental decision-making: see in particular the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, as implemented by the EU: <http://ec.europa.eu/environment/aarhus/#eu>

4. Adjudicating between national conceptions of social welfare and internal market rules

There have been a number of cases in which the ECJ has been asked to consider potential conflicts between national measures which protect particular social aims (or collective-type rights such as public health and social welfare) on the one hand, and the application of European competition rules on the other.³⁸

In *Poucet* and *Pistre*, two individuals claimed that the national social security system violated EC competition rules because it required them to be compulsorily affiliated to that system rather than having the choice of purchasing private insurance elsewhere. The ECJ did not discuss the conflict in terms of rights, ruling instead that the fact that such public sickness insurance funds fulfilled an exclusively social function, did not engage in any kind of economic profit-making activity and were based on national solidarity was sufficient to exclude them from the scope of application of competition rules (on the basis that they were not to be considered as “undertakings” for that purpose).³⁹ In this sense the ‘social function’ of national pension funds – serving a collective public welfare function - prevailed over competition rules.⁴⁰ In the later case of *Albany*, the Court changed and narrowed its reasoning, in that it treated a pension fund as an “undertaking” and did not exempt it from the application of competition law rules, but it ruled that Articles 86 and 90 of the Treaty did not preclude public authorities from conferring on a sectoral pension fund the exclusive right to manage a compulsory supplementary pension scheme.⁴¹ What we see in this kind of case, in other words, is that where distortion of competition was arguably caused by certain aspects of national health or welfare systems, the ECJ accorded a degree of priority to the latter by virtue of the fact that they performed an important social function.

On the other hand, the series of cases concerning the conflict between the restrictions of national health care systems and the internal market freedom to receive medical services have yielded a somewhat different approach. In the line of case law from *Kohll* to *Watts*, in particular,⁴² the ECJ’s insistence that national health care systems of different kinds should not be sheltered from the internal market rules, and specifically from the individual economic freedom to receive medical services in another member state. While these cases cannot readily be categorized as cases about the conflict between economic freedoms and fundamental rights (since on one reading, just as in the group of cases discussed in category 2 above, some would argue that the economic freedom in question pursues the same goal as an individual right to health-care, namely the delivery of good health-care services to those who

³⁸ For a different sort of situation in which the ECJ was effectively balancing economic and social aims *within* an EC provision, rather than as between EU law and national law, see cases C-270/97 and C-271/97 *Deutsche Post AG v Sievers and Schrage*, in which the social aim of Article 141 EC in improving working and living conditions Art 141 was held by the ECJ to take precedence over its economic aim of equalizing conditions of competition between states.

³⁹ Joined cases C-159/01 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, par. 14-20, in particular 18-19.

⁴⁰ See also Case C-70/95 *Sodemare and Others* [1997] ECR I-3395 on the running of national health-care and social welfare services only by non-profit making operators.

⁴¹ C-67/96 *Albany International* [1999] ECR I-5751. See also

⁴² Cases C-158/96 *Kohll* [1998] ECR I-1931, C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, C-56/01 *Inizan* [2003] ECR I-12403, C-145/03 *Keller* [2005] ECR I-2529, C-372/04 R, *Watts v Bedford Primary Care Trust*, judgment of 16 May 2006.

need them) they are nonetheless controversial in that they pit EC economic freedoms against particular national conceptions of how best to organize rights and entitlements to health-care or welfare services, and they subject the latter to the rigours of EC internal market law.

It is perhaps in this category of cases, of all those discussed above, that the impact of the ECJ case law on national modes of protection for certain social rights is most evident; and in which the incentives for EU-wide coordination in order to prevent the risk of a depression of standards, or at least to monitor the evolution in standards, seem clearest.

Conclusion

What we see from an analysis of recent ECJ case law concerning the balance between economic freedoms and fundamental human rights is that there are numerous contexts in which national conceptions of fundamental rights encounter the requirements of EU economic norms, particularly those of the internal market and competition law. What the Court of Justice has done over time is to confirm the normative status and significance of both sets of norms, without positing any general hierarchy between them. It has stipulated that the process of balancing the requirements of each in any given concrete context should comply with the principle of proportionality. Yet while this broad framework provides a starting point for approaching the question of protection of human rights in the context of EU economic integration, the case law also suggests that much more is needed if the actual impact over time of internal market law on the level of protection of fundamental rights across the twenty-five Member States is to be more clearly discerned and addressed. While the jurisprudence points to the qualified right of Member States to pursue their conception of fundamental rights in the face of the imperatives of market integration, it is clear that occasional litigation cannot be sufficient either to reveal the pressure imposed by European economic integration on the promotion of human rights, or to ensure that the quality of protection for fundamental rights in the various states is not being adversely affected. And while the existence of an array of regional instruments such as the European Convention on Human Rights⁴³ and the EU Charter of Fundamental Rights, alongside those of the international human rights system, together with their specific enforcement mechanisms provide a context which is conducive to detecting and responding to violations of fundamental rights caused by the pressures of European integration, the EU undoubtedly needs its own carefully targeted, systematic and comprehensive monitoring system if it is to have a fuller and more nuanced picture as the basis for its action. It is only with the help of such a system in place that more considered and informed decisions can be taken over time about what kinds of coordination or intervention at EU level are required to ensure that the extent of protection for fundamental rights by Member States severally and jointly is not at risk of being eroded by the project of economic integration.

⁴³ And see most recently the landmark ECtHR case of *Bosphorous v Ireland*, Application no. 45036/98, judgment of 30 June 2005.