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The 'Fundamental Freedoms' and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework*

Sacha Garben

I. Introduction

For provisions so longstanding and central to the project of European integration as those on the free movement of goods, services, workers, capital and the freedom of establishment, the degree of disagreement on their precise meaning and application is somewhat startling. The uncertainty is deep and broad, comprising technical, theoretical and normative issues. This is, of course, because (even) after all this time, we (still) don't know what these provisions, in the bigger scheme of things, are – and should be - *for*. This translates into endless discussion about, for instance, to what extent "rules whose effect is to limit commercial freedom even where such rules are not aimed at products from other Member States"[1] should be caught as a *prima facie* restrictions,[2] what type of justification test should be applied to 'restrictive' public interest rules of all sorts,[3] how the free movement provisions should be interpreted in relation to each other, as well as fundamental human/social rights,[4] and whether their 'negative reach' should correspond to the EU's 'positive' competence to adopt harmonising legislation – opening in turn another can of worms about the limits of Article 114 TFEU and the place of non-market interests in internal market law, and the choice between minimum and maximum harmonization. All this could even be said, only half-jokingly, to translate into uncertainty as to how to actually even call these provisions. Are they 'free movement provisions' - which would suggest an emphasis on equal treatment rather than general economic freedom; 'internal market provisions' - which places them alongside the legal bases for positive integration and suggests an emphasis on their joint contribution to the same project and thus an argument for convergence ; 'four freedoms' – which, apart from arguably miscounting them,[5] suggests an emphasis on economic freedom rather than

* This paper has been published as a chapter in S Garben and I Govaere (eds), *The Internal Market 2.0*, Hart Publishing, 2020, pp 335 – 370.

[1] Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* EU:C:1993:905 para 14.

[2] For an authoritative case to 'restrict restrictions', see C Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68(3) *The Cambridge Law Journal* 575-606.

[3] For a case to adapt proportionality to the nature of the restriction, especially in ethically contentious questions, see F de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 *Common Market Law Review* 1545, 1566.

[4] See S de Vries et al, *Balancing Fundamental Rights with the EU Treaty Freedoms: the European Court of Justice as "tightrope" walker* (The Hague, Eleven International Publishing, 2012).

[5] The four freedoms are considered to be those of goods, persons, services and capital, based on Art 26 para 2, TFEU which defines the internal market as "comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured". In this approach, the freedom of establishment should be considered as comprised by the free movement of persons, however, while there is a partial overlap between the free movement of persons and establishment, so is there with services, and the freedom of establishment is moreover not only a right of self-employed individuals but a right for companies and may not always entail the actual movement of persons. It seems more logical to treat freedom of establishment as separate. 'Persons' could be redefined as 'workers', with the parts of free movement of persons that concerns the self-employed (and posted workers) comprised under establishment (and services). Simply extending the numbering to five in this way (goods, workers, services, establishment and capital) may not be fully satisfactory either, however, if one wants to account for the influence of EU

equal treatment; or 'fundamental freedoms'– which suggests that they are fundamental rights and deserve to be interpreted as such[6] (whatever that means)?

The CJEU, for all its wisdom, has not given us much structured guidance. For each of the above doctrinal questions, there are judgments pointing in different directions. Certainly, to a significant degree, unsettled issues and multiple competing interpretations of core concepts and doctrines are, for anyone except a die-hard positivist, inherent in the indeterminate nature of the law and part of its very method.[7] Yet, a minimum degree of coherence, knowability and predictability of the law, and its limits,[8] are cornerstones of the Rule of Law. And the legitimacy of EU law, and of the judiciary's work within it, is dependent on sound legal methods of interpretation, embedded in a sound legal methodology – which has to comprise a substantive vision of the constitutional order.[9] Here we must note that Weiler's turn-of-the century finding about the vacuity of European constitutionalism still holds true and goes to the core of the problem.[10] He considered that European integration has not produced a European legal order of constitutionalism without a formal constitution, but the opposite: "a constitutional legal order the constitutional theory of which has not been worked out, its long-term, transcendent values not sufficiently elaborated, its ontological elements misunderstood, its social rootedness and legitimacy highly contingent".[11] More concretely still, Cahill points out the "conceptual dissonance" between European integration and constitutionalism, namely that the latter "has a long-established and well developed internal connection to orienting ideals of democracy, self-determination, representation, constituent power, separation of powers and fundamental rights, both as legitimating foundations and as outcomes to be achieved" while the former is not sufficiently oriented to these ideals (but instead mostly to integration itself).[12] The case of the provisions on goods, services, workers, capital and establishment are emblematic thereof. It is common ground that they have been central in the CJEU's constitution-building, yet they operate in a normative and theoretical vacuum – one could even say they have created at least part of that vacuum

Citizenship and its movement rights, which is part of the free movement of persons but extends (precisely) beyond workers and self-employed.

[6] Not to speak of the fact that when they are called, as they often are, '*the* fundamental freedoms' this seems to reflect an approach that places them at the 'center of the EUniverse', suggesting that they are the most important values or at least the most important fundamental rights for the EU project.

[7] D Kennedy, 'A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' (2007) 40/3 *Kritische Justiz* 296-305.

[8] In a Federal order such as the EU, we should add the constitutional concern of respecting the competence and autonomy of the states, enshrined in EU law through the principles of conferral, subsidiarity and national constitutional identity.

[9] See the seminal work of G Conway, *The limits of legal reasoning and the European Court of Justice* (Cambridge, Cambridge University Press, 2012). Conway puts forward an argument for a normative theory of interpretation for the CJEU based on the rule of law and democracy. The approach and argument of this paper concur with that, with as a main difference that human/fundamental rights are formulated alongside the rule of law as the principle of constitutionalism, whereas Conway' approach does not develop a dialectic relationship between constitutionalism and democracy with human rights as an important component, but instead seems to take Waldron's view about the inherently contestable nature of human rights and therefore does not consider them an integral part of the meta-principles of political morality that should dictate judicial interpretation.

[10] J Weiler, *The Constitution of Europe: do the clothes have an emperor and other essays on European integration* (Cambridge, Cambridge University Press, 1999).

[11] ibid, 8.

[12] See M. Cahill, 'European Integration and European Constitutionalism: Consonances and Dissonances' in D Augenstein, '*Integration Through Law' Revisited – The Making of the European Polity* (Surrey, Ashgate, 2012) 11-28, 28.

due to their blunt force combined with, ironically, their effectiveness to integrate – but their inadequacy to *create*.[13]

What does it all matter? Don't we by now know enough: that the free movement of goods, services, workers, capital and the freedom of establishment have a tremendously broad reach in terms of *prima facie* scope of application, catching most rules that are liable to affect economic activity, and that Member States simply have to learn how to defend (and adopt) their rules in an EU-proof and EU-savvy manner? As for those Member States, have they not had the chance, over and over again, to amend the Treaties to alter the interpretation of the CJEU if they disagreed with it? And to the extent that the overriding goal of these provisions was to further integration, have they not been a break-out success, despite – or perhaps thanks to – some of the above concerns? And there is no pleasing everyone anyway. Since one will always find a judgment to disagree with, no matter what 'vision' is adopted, should we not be careful not to let a handful of imperfect rulings (whichever one considers these to be) inform an all-encompassing condemnation of the state of internal market law as a whole? Even if it is clear that a coherent vision, idea or theory is lacking, do we really miss it, and would we really be better off with one? Would that not stifle innovation and adaptability at the Court, prevent it from achieving the right outcomes in individual cases, and overshoot its legitimacy – as a vision is basically another word for ideology and that it something to be left to politics?

This paper argues that what we currently have is *not* enough and that the EU is in dire need of a more coherent theory on the basis of which it could define and improve its legitimacy. It considers that this theory should be based on the two equal principles of democracy and constitutionalism[14] – the latter consisting in the Rule of Law and fundamental rights.[15] The development of this theory is a responsibility of the entire EU legal community, presumably starting in academic writing, but with the aim to persuade the CJEU to adopt it, or for a Treaty change to embrace it explicitly. In Schiek's words: "as the Court must be viewed as a political actor, the preconditions for changes in its case law presuppose the development of a wider discourse on the adequate constitutional frame for the future of EU integration".[16] It is imperative that this frame ensures an appropriate embedding of the internal market,[17] and in particular its directly

[13] Davies has similarly accused EU internal market law of "conceptual poverty", and considers that 'establishing' an internal market entails something more than 'integrating' it: "For what does it mean to establish a functioning internal market? What is required? One can argue that it requires trust between communities, effective communication, perhaps a certain shared understanding and expectations. Cultural and educational similarities can make trade easier, as can a shared language. One can also certainly argue, and indeed it is fiercely argued by many in these days of permanent economic crisis, that a market without redistribution cannot truly work – that it will lead to stresses and inequalities that will ultimately destroy it or the fabric of the societies in which it is embedded. It may be that an internal market requires a high degree of political and economic integration. To 'establish', it may be noted, implies creating a thing in a way that is solid and rooted. An established market is not a disembodied one, but one that is solidly connected with and rooted in its society". G Davies, 'The Competence to Create an Internal Market: Conceptual Poverty and Unbalanced Interests' in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States - Reflections on the Past, the Present and the Future* (Oxford, Hart Publishing, 2017).

[14] See J Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204.

[15] See S Garben, 'The Principle of Legality and the EU's Legitimacy as a Constitutional Democracy: A Research Agenda', in S Garben, I Govaere and P Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Oxford, Hart Publishing, 2019).

[16] D Schiek, 'Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611-640.

[17] In this regard, it concurs with the view of Schiek, who has proposed to 'constitutionally condition' the internal market. My approach differs to the extent that in determining the hierarchy and interpretation of the

effective 'negative' provisions on goods, services, workers, establishment and capital. This 'thick constitutional context' should provide the context and *telos* for the interpretation of these provisions, both as regards their individual substantive meaning and in terms of their relationship to other rights. As will become clear, this does mean that there is a legitimate place for the free movement provisions as part of EU fundamental rights and constitutionalism, but only to the extent that they serve human dignity and to foster a robust and well-functioning trans-national democracy. This provides something of a middle-way between the argument to de-constitutionalize the internal market out of a concern for democracy on the one hand,[18] and current approach of internal market-exceptionalism that considers 'the fundamental freedoms' to be the normative apex and constitutional foundation of the European integration process. In order to make this argument, the paper proceeds in the following way: Section II will first consider the 'fundamental' nature of the free movement provisions, asking whether they are currently to be considered as EU fundamental rights, and what is at stake in that qualification and treatment. Section III in turn will set out the integrated democratic interpretation framework within which the free movement provision, as well as other fundamental rights, and the legal order more generally, should operate. Section IV concludes.

II. How Fundamental are the Free Movement Provisions? The Relationship between 'the Fundamental Freedoms' and Fundamental Rights

A. Are the Free Movement Provisions Fundamental Rights?

It is a rather axiomatic statement that the free movement provisions are part of the foundations of the EU project and that they are among the fundamental principles of the Treaty. It is much less obvious to state that they are 'fundamental rights', which would suggest a moral imperative for constitutional protection against majoritarian decision-making that, at least initially, could not be deduced from the text of the Treaties, nor - at face value - seems necessitated by human dignity[19] (or entailed by "what it means to be a person")[20] or democracy.[21] Yet, since the 1980s, it is commonplace in EU circles to speak of the free movement provisions as "fundamental freedoms", a term not found in the Treaties but which had circulated in this context in German legal literature before the CJEU adopted it[22] in 1981, stating that "the free movement of capital constitutes, alongside that of persons and services, one of the fundamental freedoms of the

various constitutional rights in the Charter and the Treaties, it argues to use the principle of democracy rather than infer that hierarchy from a (social) reading of the Charter itself. See Schiek, op cit.

[18] D Grimm, *The Constitution of European Democracy* (Oxford, Oxford University Press, 2017).

[19] Human dignity is considered the source of all human rights.

[20] For Hoffman, there are three factors to weigh in the question whether a right is fundamental: (i) is the right specifically identified as fundamental by a controlling text or authority or logically entailed by a right to recognized (ii) is the right empirically necessary to the realization of a recognized fundamental rights (iii) is possession of the right entailed by what it means to be a person, so that no person devoted to human dignity could reasonably prefer to live in a society where the right was not recognized. D Hoffman, 'What Makes a Right Fundamental' in D Hoffman, *Our Elusive Constitution – Silences, Paradoxes, Priorities* (State University of New York Press, 1942) 191.

[21] It is argued that fundamental rights should not be conceptualized to constrain democracy (*contra* J Waldron) but instead as necessary to ensure the well-functioning of an inclusive and robust democracy in the long term. See also C Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2004) 88.

[22] The first mention appears to be by AG Mayras in Case 2/74 Reyners, referring to the freedom of establishment as a "fundamental freedom for the benefit of nationals of Member States". See also C Walter, 'History and Development of European Fundamental Rights and Freedoms' in D Ehlers (ed), *European fundamental rights and freedoms* (Berlin, Dec Gruyter Recht, 2007).

Community".[23] And indeed, as such, the term 'fundamental freedom' does not denote something different from 'fundamental right' or, for that matter, 'human right'.[24] The CJEU has furthermore specifically used the term 'fundamental *right*' for the free movement of workers,[25] and for the free movement of goods.[26] This, together with the privileged status in EU primary law afforded to the free movement provisions and the limited scope accorded to derogations from these provisions, would therefore suggest that indeed, the free movement provisions are – in the EU legal order – treated as fundamental rights.

Some would however consider that these are just semantics, and that for the purposes of EU law, the fundamental freedoms are clearly distinct from fundamental rights, their parallels notwithstanding.[27] De Cecco considers that "nothing appears to turn on this form of words, except the fundamental importance of free movement in the scheme of the Treaty, and the emphasis on the narrow interpretation to be given to derogations/justifications".[28] The former President of the CJEU has argued that despite their similarities in name, application, interpretation and effect, the fundamental freedoms and fundamental rights are different for three main reasons: (i) the fundamental freedoms are enumerated while fundamental rights are not, (ii) the fundamental freedoms only apply in economic, cross-border circumstances, and (iii) fundamental rights are typically human rights, while the fundamental freedoms are less based on the individual (except the free movement of persons).[29] With the comprehensive bill of rights that is the EU Charter becoming part of primary law since Lisbon, the first argument loses most of its force, if it ever constituted an analytically relevant difference to begin with. One may however counterargue that with the Charter, fundamental rights have indeed also become enumerated, but that that enumeration excludes most aspects of the free movement provisions. Only Article 15(2) of the EU Charter provides that "every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State", leaving most notably the free movement of capital and goods outside the Charter's scope – and thus outside the EU's body of fundamental rights.[30] Yet, apart from the fact that nothing seems to prevent the treatment of the EU Charter as non-exhaustive and thus to allow the recognition of other fundamental rights, it has been argued that various EU Charter provisions – most notably Article 21 on non-discrimination on grounds of nationality, Article 16 on the freedom to conduct a business and Article 17 on the right to property, can be interpreted/reconstructed to encompass most aspects of the free movement provisions.[31]

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[23] Case 203/80 *Criminal proceedings against Guerrino Casati* EU:C:1981:261 para 8.
[24] Up until the moment that the CJEU claimed the free movement provisions to be 'fundamental freedoms', that term had been used by the ECtHR in reference to the set of human rights guarantees within its purview.
[25] Case 152/82 *Forcheri v Belgium* EU:C:1983:205 para 11; see also Case 222/86 *UNCTEF v Heylens* EU:C:1987:442 para 14; Case C-415/93 *UEFA v Bosman* EU:C:1995:463.
[26] Case C-228/98 *Dounias v Minister for Economic Affairs* EU:C:2000:65 para 64. It could be argued, as de Cecco has, that this is "is an isolated and dubious reference point". F de Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law' (2014) 15/3 *German Law Journal* 383-40, at 391.
[27] T Kingreen, 'Fundamental Freedoms', in J Bast, A von Bogdandy (eds), *Principles of European Constitutional Law* (2011) 519; W Frenz, 'Grundfreiheiten und Grundrechte' (2002) 37 *Europarecht* 606–7. See for a nuanced discussion of the issue: P Oliver and W Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 410.
[28] de Cecco, op cit, 390.
[29] V Skouris, 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance' (2006) *European Business Law Review* 234-235.
[30] de Cecco, op cit, 392.
[31] Oliver and Roth argue, as regards the free movement of goods, that the right to import and export goods between Member States could be regarded as part of the freedom to conduct a business or of the right to

As to the second argument, it is true that the scope of application of the free movement provisions is determined on the basis of the respective Treaty provisions, which require a (potential) cross-border element. Article 51 EU Charter on the other hand, the reference point for EU fundamental rights, provides that the "provisions of this Charter are addressed (…) to the Member States only when they are implementing Union law", which may not always require a cross-border element, nor does a cross-border element automatically mean the situation is in the 'scope of EU law'. Yet, this should not distract from the fact that these are basically two different operationalizations of the same criterion: a connecting factor to the EU. For the Charter rights this is determined by the 'scope of EU law', and for the fundamental freedoms by a cross-border element. Indeed, the cross-border element could be considered the way to establish that we are in the scope of EU law for the purposes of the fundamental freedoms. One might object that the free movement provisions *are* the scope of EU law in a very direct sense, while the fundamental freedoms come into play only indirectly. Although there is some truth to that, there are several fundamental rights that also have a legal basis in the Treaties and some, even if not all,[32] Charter provisions have been afforded direct effect,[33] meaning that fundamental rights can also constitute a very 'direct' part of EU law. On balance, all this does not seem to provide a valid reason to categorically differentiate the fundamental freedoms and the fundamental rights.

Also the third alleged difference can be mitigated. There is no clear-cut difference between the fundamental freedoms that would concern economic operators, on the one hand, and the Charter rights which would concern individual citizens, on the other hand. For one, the free movement of persons, which entails not just the free movement of workers but also aspects of the freedom of establishment and the freedom to provide services, places the rights of the individual citizen central. To reiterate, this aspect of the free movement provisions is explicitly included in the EU Charter in Article 15(2). Furthermore, a range of fundamental rights under the EU Charter can be enjoyed by businesses, both substantively (right to property, freedom to conduct a business) and procedurally (right to an effective remedy, presumption of innocence, rights of defence).[34] Especially Article 16 of the EU Charter, concerning the freedom to conduct a business, shows that the Charter is not only concerned with traditional human rights, and it potentially overlaps with the fundamental freedoms to some extent.[35] This is not to say that the position of the individual is not important in the qualification of a right as

property. P Oliver and W Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 409. V Trstenjak and E Beysen note that "the substantive guarantees inherent in fundamental freedoms can be formulated in terms of fundamental rights which protect economic activity". V Trstenjak and E Beysen, 'The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU' (2013) 38(3) *European Law Review* 293-315, referring to V Skouris, 'Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht' (2006) 59 *Die Öffentliche Verwaltung* 89, 93–96. For the argument that the principle of equality can be used to anchor a fundamental rights' approach to the free movement provisions see Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn*. For a general discussion see de Cecco, op cit, 392 ff. *Nota bene* an 'integrated' approach that treats (aspects of) the free movement provisions as fundamental rights can be used to determine the appropriate scope of application of the free movement provisions, as will be argued in Section III below. As will be seen, that does not necessarily have to lead to a further expansion of the free movement provisions and can rather be a method of limiting their constitutional scope and reach.

[32] Eg Judgment of 15 January 2014, C-176/12 *Association de médiation sociale* EU:C:2014:2.

[33] See recently Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257.

[34] See P Oliver, 'Companies and Their Fundamental Rights, International and Comparative Law' (2015) *Quarterly* 681.

[35] See generally R Babayev, 'Private autonomy at Union level: On Article 16 CFREU and free movement rights' (2016) 53/4 *Common Market Law Review* 979-1005.

fundamental, or that it is uncontroversial to afford fundamental rights protection to companies. These are arguments that however need to be treated separate from the question whether in the current state of interpretation of EU law the free movement rights are treated as fundamental rights. In subsection B, as well as Section III, we will consider what criteria should be used to determine the fundamental status of a right and its scope and interpretation.

Beyond the above arguments of the former CJEU President, a remaining reason to distinguish the fundamental freedoms from fundamental rights could be that they serve different purposes in the EU constitutional settlement. In the words of Kingreen, the

> "functional differences between fundamental freedoms and rights can be condensed into the terms of 'transnational integration versus supranational legitimation' (…). In short, what the fundamental freedoms created the fundamental rights must now seek to legitimate".[36]

It is of course true that the free movement provisions have been used in functional ways, serving to propel the project of the internal market - and therewith European integration more generally – onwards and upwards. They have been the oil that has powered the motor of European union. Fundamental rights, by contrast, ostensibly do not have that same integrative aim, and are seen instead as a check on that power, thereby legitimizing it. They place limits on the action of the EU Institutions, and they are not intended as self-standing obligations that constrain the powers of the Member States outside the scope of EU law. Yet, such a description does not do justice to the 'unsettling nature' of EU fundamental rights' competence.[37] Fundamental rights do also empower the EU Legislator, as several of them are coupled to a legal basis in the Treaties,[38] or can inform the content of EU legislation more indirectly.[39] The CJEU has furthermore interpreted the scope of EU law generously,[40] and while fundamental rights may sometimes curb the fundamental freedoms, sometimes it is the other way around, and furthermore, sometimes they compound each other in further empowering the EU vis-à-vis the Member States.[41] Muir notes in this regard that it is precisely because fundamental rights share with the fundamental freedoms their capacity to seriously limit Member State regulatory choice and capacity, that they are often contested by the Member States.[42] Fundamental rights thus also lead to further integration and are instrumental in the project of EU-building, in ways that again do not seem categorically different from the fundamental freedoms. The functional nature of fundamental rights is underlined by the Court itself, where is says that "the reason for pursuing (the objective of protecting fundamental rights in EU law) is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in

[36] Kingreen, op cit, 531- 532.
[37] E Muir, 'Fundamental rights: an unsettling EU competence' (2014) 15(1) *Human Rights Review* 25-37.
[38] Beyond the often-cited Arts 17 and 19 TFEU on data protection and non-discrimination, we could consider the legal bases relating to social policy (Art 153 TFEU), the environment (Art 192 TFEU) and health (Art 168 TFEU) and their respective mainstreaming clauses as legal competence to 'implement' the fundamental rights contained in the EU Charter, and thus as 'fundamental rights competences'.
[39] Muir, op cit.
[40] As Trstenjak and Beysen note: "A common trait of the CJEU case law on fundamental freedoms and rights is the gradual expansion of their respective scope of application. Not only have the fundamental freedoms been applied in the most diverse fields of law, but the CJEU has also widened the circle of the parties to whom they are addressed and it has extended the obligations which flow from those provisions. A similar, though more tentative, evolution can be observed in the CJEU's case law on EU fundamental rights, especially with regard to the determination of the areas of law in which those rights must be observed." Trstenjak and Beysen, op cit.
[41] Eg Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* EU:C:2002:434.
[42] Muir, op cit.

such a way as to undermine the unity, primacy and effectiveness of EU law."[43] There is ground to worry about this "parochial" view of the CJEU,[44] but for the purposes of our discussion it illustrates how EU law sees fundamental rights and fundamental freedoms as agents of integration (surely as well as inherently valuable).

At the same time, like fundamental rights, the fundamental freedoms as interpreted by the Court do not only empower the EU, they also circumscribe it – especially the discretion of the EU Legislator, which is held by the Court's interpretation of the free movement provisions by the hierarchy of norms. The fundamental freedoms function as constitutional checks on all public power, both at national and EU level, like fundamental rights do. To the extent that fundamental freedoms primarily bind the Member States and fundamental right primarily the EU, this seems, in light of the foregoing analysis, a difference of degrees rather than a categorical distinction.

Finally, Kingreen's more implicit point seems to be that the fundamental freedoms are ultimately closer to the EU's *raison d'être* than fundamental rights are. While true, this is a historical approach that certainly explains why EU legal scholars tend to distinguish the four freedoms and fundamental rights, but does not point at a decisive analytical difference, especially not from a more forward-looking perspective. It should be noted that recent years have clearly shifted the EU's self-perception and political commitment from a project of market integration to a project of values,[45] and this is likely to become an even more important steer of European integration in the future, presumably with fundamental rights as a spearhead. Of course, as Augenstein argues, it remains to be seen whether the EU will succeed in evolving into a polity "with a robust value-based 'institutional ethos' that transcends the narrow confines of economic and technocratic rationality".[46] He warns that the conception of fundamental rights in the EU polity to date has been conditioned by the fundamental freedoms, and that this will be difficult to overcome.[47] That, however, is an argument to be treated in relation to the question of hierarchy between different fundamental rights (subsection C below) and in the development of an integrated interpretation framework (Section III further below). It does not deny the argument of the present inquiry that fundamental freedoms are - by virtue of EU law – treated as fundamental rights.[48]

B. Should they be?

Considering the foregoing, it thus seems that little stands in the way of considering the free movement provisions as EU fundamental rights, because for all relevant aspects (application, interpretation and effect), they function largely the same, and even if they have a different legacy in the process of European integration to date, there does not seem to be a convincing categorical analytical difference between them. That finding, however, does not pertain to the distinct question of whether the free movement

[43] Case C-206/13 *Siragusa* EU:C:2014:126 para 32.
[44] E Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures, Study for the European Parliament PETI Committee' (2016) 21, https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf.
[45] See T von Danwitz, 'Values and the rule of law: Foundations of the European Union –an inside perspective from the ECJ', https://www.kcl.ac.uk/law/research/centres/european/KingsCollege-London-TVD-k-def-Verteilung.pdf.
[46] D Augenstein, 'Engaging the Fundamentals: on the Autonomous Substance of EU Fundamental Rights Law' (2013) 14 *German Law Journal*, referring to A Williams, *The Ethos of Europe* (2010).
[47] ibid.
[48] Indeed, Augenstein's assessment confirms that finding. D Augenstein, op cit: "With the adoption of the EU Charter, the fundamental market freedoms have become incorporated into the body of EU fundamental rights law".

provisions *should* be considered 'real' fundamental rights, in other words, whether such a label and treatment is appropriate. The CJEU, in its judgments constitutionalizing[49] the free movement provisions according them primacy and direct effect, including over national constitutional law, has not clarified the normative reasons or justifications for treating them as such. Some would argue that a theoretical vision does implicitly underlie the CJEU's approach, or in any event rationalizes and legitimizes it *post-facto*, namely that of ordo-liberalism.[50] The latter promotes the constitutionalisation of an economic order through provisions of competition and economic freedom as a "political theory of society" providing a "'third way' beyond liberalism and socialism as a permanent and liberal order of peace".[51] While this school of thought naturally favors the Court's treatment of the free movement provisions as fundamental rights, it does not seem to be the 'grand theory' behind the CJEU's case law on the internal market and competition law or European integration more generally, which is instead driven by functionalism more than anything.[52] There are too many judgements like *Keck*,[53] *Albany*,[54] *Altmark*[55] and *AKT*[56], to name a few, that pull in a different direction and cannot be accommodated in a holistic constitutional vision based on ordoliberalism, or neo-liberalism,[57] or *any* coherent vision for that matter[58] – as argued in the introductory section. Such an approach would furthermore be highly problematic from the perspective that Article 3(3) TEU provides that the Union shall "work for the sustainable development of Europe

[49] On the term, see M Loughlin, 'What is Constitutionalisation?' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism: Demise or Transmutation?* (Oxford, Oxford University Press, 2010) 47-69. On EU constitutionalism: M Poiares Maduro, *We The Court. The European Court of Justice and the European Economic Constitution* (Hart, 1998); A Hatje, 'The Economic Constitution within the Internal Market' in A Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Beck & Hart, 2010) 589; Schiek, op cit. It should be noted that 'constitutionalisation' in itself does not have to equate the free movement provisions to 'real' fundamental rights as such. This touches on the related, yet distinct, question of hierarchy or 'balance' between the free movement provisions and fundamental rights as protected national constitutions, the EU Charter and the ECHR. It is one thing for the free movement provisions to have primacy and direct effect in relation to national legislation, another for them to circumscribe the EU legislative process, yet another for them to condition fundamental rights protected at national, at EU and/or at the International level.

[50] PC Müller-Graff, 'Die wettbewerbsverfaßte Marktwirtschaft als gemeineuropäisches Verfassungsprinzip?' (1997) 31 *Europarecht* 422, attempts to establish these principles as a common constitutional core across the European Union. See also PC Müller-Graff and E Riedel (eds), *Gemeinsames Verfassungsrecht in der Europäischen Union* (Baden-Baden, Nomos, 1998).

[51] R Wiethölter, 'Wirtschaftsrecht' in A Görlitz (ed), *Handlexikon zur Rechtswissenschaft* (Ehrenwirth, 1972) 531-538 at 534. On Ordoliberalism in the EU see C Joerges, 'The Market without a State? States without Markets? Two Essays on the Law of the European Economy' *EUI Working Paper Law* 1/96, San Domenico di Fiesole 1996 (http://eiop.or.at/eiop/texte/1997-019 and − 020.htm); *idem*, 'Economic Law, the Nation-State and the Maastricht Treaty' in R Dehousse (ed), *Europe after Maastricht: an Ever Closer Union?* (CH Beck, 1994) 29-62, J Hien and C Joerges, 'Dead Man Walking: Current European Interest in the Ordoliberal Tradition' *EUI Working Paper LAW* 2018/03.

[52] For a comprehensive analysis of the case law of the CJEU on the free movement and competition provisions in relation to the opposing Ordo-Liberal and *Service Public* schools of thought, and the conclusion that what drives the case law is functionalism and neither of these theories: W Sauter and H Schepel, ''State' and 'Market' in the Competition and Free Movement Case Law of the EU Courts' *TILEC Discussion Paper* (2007) 24.

[53] Joined Cases C-267 & 268/91 *Keck and Mithouard* EU:C:1993:905; As Babayev argues, "the Keck line of reasoning has been followed in cases such as Case C-441/04 *A-Punkt Schmuckhandels* EU:C:2006:141; Case C-531/07 *LIBRO* EU:C:2009:276; Case C-483/12 *Pelckmans*; Case C-198/14 *Valev Visnapuu* EU:C:2015:751.

[54] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430.

[55] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* EU:C:2003:415.

[56] Case C-533/13 *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy* EU:C:2015:173.

[57] See however M Wilkinson, 'Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism' (2019) 45/7-8 *Critical Sociology* and 'Authoritarian Liberalism as Authoritarian Constitutionalism' *LSE Law, Society and Economy Working Papers* 18/2018.

[58] R Babayevop cit, 985.

based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress", mentioning in the same paragraph the Union's task to establish an internal market. The EU Constitution simply does not allow the judicial application of a constitutional theory of ordo- or neoliberalism to European integration generally, or the internal market specifically.

But one does not have to subscribe to ordo- or neoliberalism, nor to vacuous integrationism, to support giving (a degree of) constitutional value to (some aspects of) the free movement provisions alongside more traditional fundamental rights. If we consider the common ground of contemporary constitutional democracy to be the commitment to the triptych of democracy, the Rule of Law and fundamental rights, and within that context the latter to be concerned with upholding human dignity and guaranteeing a robust and inclusive democracy,[59] then we can still identify three justifications for the treatment of the free movement provisions as fundamental rights. As we will come to see, however, that treatment can only be defended to a narrower extent than the current interpretation of the free movement provisions.

The first, most persuasive defense of the constitutional treatment of free movement provisions, is the one that Floris de Witte has called "the argument from aspirational justice": that the free movement provisions expand "individual agency beyond the parameters of permissive behaviour in the citizens' own Member State, and as such provides a trampoline for the attainment of the individual's aspirations".[60] This is an individualistic approach, that considers the right to move freely between Member States as a way to foster individual dignity through enhanced agency and self-determination. It could furthermore be considered an essential part of what it means to be a member of a political order: that one has the possibility to pursue one's life in every territorial part of it, on an equal basis as other members. That would therefore also provide the normative ground for the right to equal treatment in relation to the economic opportunities offered in different parts of the federal territory, and ties this argument to citizenship and the general principle of equality and the fundamental right to non-discrimination. A less 'aspirational' and more basic dimension of the argument, but all the more relevant for justice, is that free movement provides an exit from fundamental rights abuses and oppressive regimes within the federal territory – which in turn may act as a disincentive for rulers to oppress and thereby act as a federal bulwark against autocracies.[61] All this provides a strong normative justification for treating free movement provisions as fundamental rights, but only when it comes to the actual movement of individuals in their capacity as citizen, worker or self-employed – which is the dimension of the 'fundamental freedoms' that is indeed already captured in the EU Charter in Article 15(2). It may perhaps be stretched (rather thinly) to apply to the individual investor in the context of the free movement of capital in certain circumstances, but it is certainly less convincing in relation to business' economic rights to "market access" in relation to goods, services, capital and establishment.

A second defense of the constitutionalisation of the free movement provisions is an argument of transnational democracy,[62] also referred to as the argument from

[59] C Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2004) 88.
[60] de Witte, op cit, 1545-1578 at 1152.
[61] For the general argument that federalism acts as a protection against autocracies, see D Halberstam, 'Federalism: A Critical Guide' (2011) *University of Michigan Public Law Working Paper* No 251.
[62] C Joerges, 'European Law as Conflict of Laws' in C Joerges and J Neyer, ''Deliberative Supranationalism' Revisited' (2006) 20 *EUI Working Paper Law* 22.

"transnational effects".[63] Market integration is, to the extent that it de-nationalizes decision-making to ensure that affected interests from other Member States are taken into account, "desirable on account of democracy itself".[64] This transnational democracy argument is undoubtedly very strong in relation to positive market integration through the adoption of EU-level rules regulating the internal market. We would argue that this is an important counterbalance to the often-heard argument that the EU legislative process is not as democratically legitimate as national decision-making, and that it mitigates the concerns of "competence creep" in relation to the use of Article 114 TFEU. Here, we are however concerned with the 'negative' integration dimension of the internal market, through the application of the free movement provisions, and the constitutionalisation thereof. It is in this context that the transnational democracy argument has been most widely used, becoming "a shibboleth for the European pro-attitude,"[65] even if its validity is much less obvious than in relation to positive market integration. The idea is that the fact that individual actors can confront the rules of other Member States that disadvantage them but in which they have had no representation, and to have these rules subjected to a judicial balancing test, is democracy-enhancing because it takes account of those excluded from the decision-making process. Maduro rendered the first comprehensive account of this argument in relation to the free movement provisions, considering that "the representation of the interests of nationals of other Member States within national political processes"[66] argues in favour of a "fundamental rights conception of the free movement rules".[67]

The normative basis for the right to have one's interest to be taken into account that underlies this argument could be that the democratic principle demands that the interests of those that are affected by a decision need to be weighed in that decision somehow. But first of all, there needs to be some qualification as to what it means to be 'affected' to the extent that it triggers the right to be 'represented' or have one's interest weighed. If any theoretical and elusive effect were to be counted, with the inclusion of opportunity costs, everyone should always be represented everywhere, leading to theoretically and practically absurd outcomes. The original democratic idea of 'no representation without taxation' would suggest a much higher threshold: an actual, direct cost needs to be incurred. That it very different from the opportunity cost of potentially having made more money if the rules on economic activity would have been more lenient. Somewhat tongue in cheek, it may be noted that the free movement provisions seem to have been given an interpretation closer to 'representation without taxation' rather than the other way around. It would thus have to be determined which foreign "affected interests" are legitimately so important that they need to be judicially enforced in national democracies.

Secondly, for the democratic argument to make sense, it needs to be ensured that all the interests are balanced fairly. But what does fairness mean in this context? It would seem to necessitate some proportional weighing of interest, as is done in democratic procedures. *Note bene*: that is a very different exercise from a judicial proportionality test, where interests are weighed in the abstract, detached from the actual democratic weight given in numbers of citizens attached to these interests. And whose excluded interests are we to weigh exactly? Are we speaking of the individual interest of the foreign

[63] A Somek, 'The argument from transnational effects I: Representing outsiders through freedom of movement' (2010) 16 *European Law Journal.*
[64] ibid, 315.
[65] ibid.
[66] M Maduro, 'Article 30 and the European Economic Constitution: Reforming the Market or the State?' in M Maduro *We The Court: The European Court of Justice and The European Economic Constitution* (London, Hart Publishing, 1998) 167.
[67] ibid, 168.

company that has to comply with product composition rules when wanting to sell on the host market? If so, the free movement rules are a rather disproportionate 'counter-balance': they put the interest of, say, some foreign alcohol-producers on par[68] with those of potentially millions of citizens who may favor their specific rules on the production of beer. Giving priority to this foreign minority interest through judicial imposition of 'mutual' recognition amounts to a decisively non-democratic way to 'enhance transnational democracy'. Moreover, this foreign private interest is very difficult to separate from the more general private interest, shared by all alcohol-producers both within and outside the host State, of having a laxer regulatory regime. That particular interest has already been weighed in the national democratic process and has therefore not been really excluded,[69] and therefore does not deserve to be enforced by the constitution. Or are we instead speaking of the 'economic benefit' of other Member States more generally and abstractly? But apart from that fact that is very difficult to determine the due weight that should be attached to such an abstract interest, it is also not entirely true that other Member States are without any representation in national decisions of market-regulation: to the extent that this falls within the EU's legislative competence under 114 TFEU, common rules can be adopted to supersede the national ones. That means that there is a genuinely democratic avenue to have all relevant federal interests taken into account. Objections that this decision-making process is arduous and prone to deadlock do not deny that what matters most for the transnational effects argument is the *existence of a forum of* transnational democratic decision-making in which the relevant interests can be brought to the table, regardless of the result. Furthermore, such objections would sit uneasily with the often-heard complaints about EU over-regulation and competence creep on the basis of Article 114 TFEU: apparently the legislative process is very able, *too* able according to some, to produce output. Finally, it should be noted that to the extent that mutual recognition implies that market actors should be able to export their 'home' regulatory regimes to other Member States, it does not resolve but instead 'flips' the democracy-failure: the people of the host State are forced to accept the rules decided on in another Member State in which they have had no say. That can hardly be a satisfactory solution from the very democratic perspective that lies at the heart of the justification.

All in all, the democratic argument seems to be able to justify the constitutionalisation of the free movement provisions only to the limited extent that it concerns the adoption by a Member State of a rule that *specifically* harms the economic interest of foreign economic actors, i.e. protectionism. It is only that interest that is really excluded from the national democratic process (as general economic interests are not) and may not sufficiently be protected by the EU legislative process. This interest may however still be counterbalanced by other interests: the democratic principle merely authorizes/requires that the foreign actor's interest is weighed in due proportion alongside the (many!) other interests that make up the decision-making process. This suggests a rather broad scope for possible 'justification' of even overtly protectionist measures. As to the argument that we are only able to effectively enforce that rule if we adopt an obstacle-approach rather than an intention-approach, and thereby include also indistinctly applicable measures to trigger the judicial weighting exercise (since Member States will simply cover up their protectionism behind a veneer or impartiality), we need to insist again that there is always an even more transnationally democratic remedy available: the adoption of common EU-

[68] Not to speak of the fact that the free movement provisions in their current interpretation are the rule and all other interests the exception, arguably thereby weighing the former more heavily than the latter, see subsection C below.
[69] Somek, op cit.

level rules. Since the negative application of the free movement provisions is the much less refined, less effective and more contentious method of market integration from a democratic perspective, the democratic argument itself requires that precedence is given in principle to positive market integration. This is a crucial point, because the constitutionalisation of the free movement provisions does not only mean that they trump national legislation, but in some ways more importantly also that they trump EU-level legislation. After all, the free movement provisions are primary law and in the EU's hierarchy of norms they outrank ordinary legislation.

Far from sustaining the current sweeping reach and application of the free movement provisions, the democratic argument can thus only support a rather narrow version of their constitutionalisation, limited to protectionist measures. Not respecting these limits will mean that the democratic argument collapses in on itself, having the free movement provisions create a democratic deficit, not only in relation to national democracy but also in relation specifically to transnational democracy.

Finally, one could consider the protection of individual economic autonomy as a normative justification for the treatment of the free movement provisions as fundamental rights. Babayev has considers that there is an overlap between the freedom to conduct a business, as laid down in Article 16 EU Charter, and the free movement provisions.[70] He argues that Article 16 EU Charter "reflects the customary liberal meaning of individual economic autonomy and protects it as an end in itself. On the other hand, a more specific form of such autonomy appears to be manifested through free movement rights".[71] Seen as such, the free movement provision are still "not aimed to ensure the freedom to carry out an economic activity *per se*", but they would "confer the freedom to access the market in a Member State"[72] in a way that potentially exceeds the justifications under the transnational democracy and aspirational justice arguments. For our purposes, the relevant idea is that the protection of economic entrepreneurship is already part of the fundamental rights catalogue of the EU, and the free movement provisions can therefore legitimately be seen as specific manifestations of that fundamental right in a federal, cross-border context. But that does not yet provide us with the underlying normative justification, from a perspective of democratic constitutionalism, of such a fundamental right to economic autonomy in the first place, and what that underlying value means for the interpretation of that right in general and the specific manifestations in a free movement context.

Article 16 of the EU Charter provides that "[t]he freedom to conduct a business in accordance with Union law and national laws and practices is recognized". The wording indicates that this freedom is inherently relative and can be limited by both regulations and practices, suggesting it is one of the "weaker"[73] rights in the EU Charter.[74] It is widely considered to be "one of the less traditional rights",[75] not generally protected in international human rights instruments. The freedom to conduct a business under Article 16 EU Charter is drawn from the Court's case law and the constitutional traditions common to Member States. To what end and extent does national constitutional law

[70] Babayev, op cit.
[71] ibid.
[72] Babayev, op cit, 981.
[73] X Groussot et al*,* 'Weak right, strong Court - The freedom to conduct business and the EU charter of fundamental rights' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing, 2017) 326-344.
[74] Groussout et al*,* op cit 77.
[75] European Union Agency for Fundamental Rights, 'Freedom to conduct a business: exploring the dimensions of a fundamental right' (2015) Luxembourg, Publications Office of the European Union.

protect this individual autonomy against majoritarian decision-making? It is not traditionally universally present in the national constitutional law of the Member States, with many having only recognized versions this right very recently and some not as a(n enforceable) constitutional right at all.[76] Where the freedom to conduct a business is recognized in national constitutional law, it tends to allow a relatively wide scope of limitation in the public interest and it is generally conceived as a right of individuals to set up an economic activity or join a profession rather than concerning the general exercise of economic activity.[77] As Groussot *et al* state, "[t]hey have in common that they do not constitute unfettered prerogatives and must thus be viewed in the light of their social function".[78]

The EU Fundamental Rights Agency considers that the "freedom to conduct a business is about enabling individual aspirations and expression to flourish, about encouraging entrepreneurship and innovation, and about social and economic development"[79]. Applying the principles of democracy and constitutionalism, the freedom to conduct a business has a certain role in ensuring a robust democracy, to the extent that it helps to empower individuals – especially those who are disadvantaged – through economic activity, to prevent concentrations of (economic) power and equalize societal asymmetries. This would suggest a reading where the right is about fostering the possibility of individual entrepreneurship, in the sense of enabling citizens to set up an economic activity or join a profession, within a broader picture of creating more socio-economic progress and equality in society. This human right would not, upon such a constitutional democratic reading, provide a 'sword' for companies in the operation of their business against workers, citizens and general public interest standards – that would be a perverse result. This brings us very close to the reading of the fundamental right's dimension of the free movement provisions already contained in Article 15(2) EU Charter: that of individual empowerment and agency in a federal context. Especially the idea that the free movement provisions (in their constitutional form) are not only about territorial mobility as an end in itself, but also about creating the possibility for upward *social* mobility, brings us quite firmly within justified fundamental rights territory. But that would reject a reading of Article 16 and the free movement provisions as about businesses' right to contractual freedom or the running of a business (across borders) without interference.

Thus, taken together, the arguments from aspirational justice, individual economic autonomy and of transnational democracy (or transnational effects) support the constitutionalisation of the free movement provisions up to a degree: the right to actual physical movement, a degree of economic autonomy/entrepreneurship and a right to equal treatment of individuals in their capacity as citizen, worker or self-employed – which is the dimension of the 'fundamental freedoms' that is already captured in the EU Charter in Articles 15(2), 16 and 17 - and the right to challenge protectionist restrictions on the cross-border activities of companies. Any constitutionalisation beyond this important, but – compared to the status quo deeply internalized by EU law and its community – rather limited dimension, cannot benefit from the arguments from aspirational justice, individual autonomy and transnational democracy even cumulatively

[76] For an overview, see European Union Agency for Fundamental Rights, op cit 79.
[77] ibid.
[78] Groussot et al, op cit 77.
[79] European Union Agency for Fundamental Rights, op cit 79.

applied[80] and seems only justifiable on the basis of a normative commitment to ordo- or neoliberalism. An overly broad approach, such as is currently taken, may not be a conscious choice to support ordo- or neoliberalism, because the legitimate scope of constitutionalisation of free movement combined with a concern for 'effectiveness' can easily 'slip', but the result remains illegitimate despite the intentions.[81] As stated above, ordo- or neoliberalism is not an appropriate constitutional theory for the EU. They are unconvincing theories on the legitimate exercise of authority and the enhancement of public welfare,[82] nor does the text of the Treaties allow the EU constitutional order to be interpreted in line with these theories. Thus, to the extent that the free movement provisions have been given the status of fundamental rights beyond their dignity- and democracy-enhancing role as explained above, the free movement provisions have indeed become *over*-constitutionalized,[83] in favor of a particular view of political economy.

This latter finding in turn feeds into a different but related problem: that of the 'displacement'[84] of 'the social' and of fundamental social rights.[85] The problem from this perspective, which overall finds more traction in the EU legal community than the 'mere' democratic critique against the constitutionalisation of EU economic law, is not so much that the free movement provisions have become 'fundamental', but that they have become too fundamental in relationship to other, mostly social, rights. The EU legal order has upgraded free movement provisions while at the same time downgrading fundamental social rights. This brings us to the question of hierarchy or 'balance' between the fundamental freedoms and (other) fundamental rights.

C. The Hierarchy or 'Balance' between the Fundamental Freedoms and (other) Fundamental Rights: Some are More Equal than Others

Oliver and Roth in a seminal article on the subject remarked that "at the end of the day, the essential issue is not whether the four freedoms are to be categorized as fundamental rights, but rather their relative importance in the Treaty".[86] There is truth to that, but at the same time, it would seem that the question of the relative importance in the EU constitutional settlement accorded to the internal market freedoms and (other) fundamental rights respectively, is – or should be - intimately connected to the question whether they do or do not qualify as such. De Boer argues that "(w)hether the Treaty freedoms are to be seen as fundamental rights and as hierarchically equal should affect the way in which we think they are to be balanced in case of conflict".[87] It could legitimately be argued that fundamental rights are supposed to be the most fundamental norms in a legal order, thus trumping all other rights in hierarchy, and that they are the

[80] *Contra* F de Witte, who considers that the arguments from aspirational justice, transnational effects and a more general argument of constraining democracy to combat minority-rights abuses, can justify the current approach in EU free movement law. See de Witte, op cit.
[81] Somek, op cit, 333.
[82] See also Wilkinson, op cit.
[83] D Grimm, *The Constitution of European Democracy* (Oxford, Oxford University Press, 2017). S Schmidt, *The European Court of Justice and the Policy Process - The Shadow of Case Law* (Oxford, Oxford University Press, 2018).
[84] On 'social displacement' in the EU legal order, see C Kilpatrick, 'The displacement of Social Europe: a productive lens of inquiry' (2018) 14/1 *European Constitutional Law Review.*
[85] M Poiares Maduro, 'The Double Constitutional Life of the Charter' in T Hervey et al, *Economic and Social Rights Under the EU Charter of Fundamental Rights* (Hart Publishing, 2003) 285.
[86] P Oliver and W Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 410.
[87] N de Boer, 'Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms - A Normative Enquire Based on John Rawls' Political Philosophy' (2013) 9 *Utrecht Law Review* 148-149.

only substantive rules that can lead the judiciary to invalidate an act when procedurally validly adopted by the legislator. As to the former point, the *Kadi* ruling of the CJEU lends some credence to the argument that indeed, also in the EU legal order, fundamental rights take pride of place on the highest hierarchical rung,[88] for it is difficult to imagine that the CJEU would have refused to accept the Council's execution of a UN Security Council act if it had been a question of infringement of one of the free movement provisions (although it may be noted that one of the fundamental rights in play was an economic one: the right to property). But whatever the status of fundamental rights in the EU's external dimension, internally they do not seem to enjoy any higher status than the free movement provisions. And the latter are, as we know, used rather relentlessly to circumscribe the legislative process at national and EU level. One could argue, on the basis of a wealth of constitutional and democratic theory considerations, that such a treatment of the free movement provisions is only legitimate if and to the extent that they qualify as fundamental rights.

The EU law approach seems to have this upside down. Probably due to the particular ways in which the EU legal order has developed, it has not been built towards orienting ideals of democracy, self-determination, representation, constituent power, separation of powers and fundamental rights, both as legitimating foundations and as outcomes to be achieved,[89] but instead these primordial concepts of legitimate authority have been attached to the project somewhat ornamentally and incidentally. Fundamental rights have come into play as a side-effect of economic integration on the basis of the free movement provisions, and the latter have been the analytical starting point and driving source of the EU's authority. In traditional EU law, the fundamental status of the free movement provisions goes unquestioned (who cares if they are 'fundamental rights' or not, they are *the* fundamental freedoms!), and it is rather the authority of fundamental rights that is up for discussion. The issue does not seem to be whether fundamental rights rank higher than the free movement provisions, but rather whether they are on par (regardless of the question whether the free movement provisions deserve such a fundamental status) or perhaps even inferior to free movement. In that context, the EU Charter is held up as a celebratory moment as it, post-Lisbon, received formal recognition of having the "same legal value as the Treaties".[90] As Niamh Nic Shuibhne states, this entails "legal equivalence for Treaty freedoms and fundamental rights".[91] She furthermore points out that in accordance with Article 2 TEU, "[t]he Union is *founded on* the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights", which could provide an argument for priority of fundamental rights over free movement provisions.[92] However, there is more than a single judgment available to support the argument that the free movement provisions are given a more forceful protection and higher status in EU law than certain fundamental rights, especially collective rights[93] such as the freedom of assembly and the right to

[88] Cases C-402/05 P and 415/05 P *Kadi and Al Barakaat International Foundation v European Council* EU:C:2008:461.
[89] See Cahill, op cit, 28.
[90] Art 6(1) TEU.
[91] N Nic Shuibhne, 'Fundamental rights and the framework of internal market adjudication: Is the charter making a difference?' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's, Research Handbooks in European Law* (Edward Elgar Publishing, 2017) 215-240.
[92] ibid.
[93] A Lo Faro, 'Toward a de-fundamentalisation of collective labour rights in European social law?' in M Moreau (ed), *Before and After the Economic Crisis, What implications for the European Social Model?* (Edward Elgar, 2011) 203 ff.

strike,[94] the right to collective bargaining[95] and the right to protection in case of collective dismissal.[96] As many fundamental social rights are collective rights, this has led to a certain hierarchy of fundamental rights that generally favours the economic over the social. This applies both to the pre- and post-Charter case law.[97]

The Court's official line is to insist that all are equal.[98] Some are just, it turns out, more equal than others. Of course, in the CJEU's analytical framework, indistinctly applicable restrictions of the free movement provisions can be justified by reference to the protection of fundamental rights.[99] Former CJEU President Skouris considers, citing *Omega*[100] and *Schmidberger*,[101] that "the order in which the Court of Justice looks at fundamental freedoms and fundamental rights is not indicative of a hierarchy between the two. It is no more than the consequence of the fact that the Court has jurisdiction only when fundamental freedoms come in to play. In other words, pertinence to fundamental freedoms is a necessary pre-requisite for Community law to apply. It follows from that that they are to be examined first".[102] While it is of course true that a *prima facie* restriction of the free movement provisions has to be established first, it does not mean that the Court has to follow the analytical framework that it imposes in terms of justification. The Court could, after establishing that there has been a *prima facie* restriction, consider that we are in the scope of EU law for the purposes of *both* the free movement provisions *and* the fundamental right in question as protected by the EU Charter, and conduct a "bi-directional" assessment:[103] considering both the justification of the infringement entailed by the fundamental right on the free movement provision, and the justification of the (potential) infringement entailed by the free movement provision on the fundamental right. In that bi-directional assessment, it could assume the equivalence of all fundamental rights and freedoms, it could determine the "essence" of

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[94] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809.

[95] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* EU:C:2013:521.

[96] Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* EU:C:2016:972.

[97] Nic Shuibhne, op cit.

[98] Skouris, op cit, K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, 392-393. Trstenjak and Beysen, op cit, consider that fundamental rights and free movement provisions should be on par with an exception with regard to Title I of the EU Charter, but that the CJEU has not respected that with regard to the judgments in *Viking* and *Laval*. That view is shared by S Weatherill, who considers the case law to generally show an equality between fundamental rights and the free movement provisions, but states that *Viking* and *Laval* are "the rulings which are most vulnerable to the allegation that, for all the rhetoric of respect for non-economic values, EU free movement law is contaminated by an economic bias" and that "disturbingly, the Court did not follow the model regularly preferred in the case law considered above: it left wholly out of account any margin of appreciation apt to permit recognition of local circumstances" in these rulings. S Weatherill, 'From Economic Rights to Fundamental Rights' in S de Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (London, Hart Publishing, 2013) 27-28. For further criticism on the approach in *Viking* and *Laval,* see literature cited below n 109. The approach has also been condemned internationally as in breach of fundamental rights by the ILO and Council of Europe's European Social Committee.

[99] It is not yet clear whether apart from indistinctly applicable restrictions, also directly discriminatory restrictions can be justified by reference to fundamental rights. On the basis of the Court's general approach, one has reason to expect that the Court will be highly reluctant to allow the justification of directly discriminatory measures on this basis, but that would contradict the assertions that the fundamental freedoms and fundamental rights rank 'equal'. See Trstenjak and Beysen, op cit, 312.

[100] Case C-36/02 *Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn* EU:C:2004:614.

[101] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* EU:C:2003:333.

[102] Skouris, op cit.

[103] Schiek, op cit, 629.

each fundamental right and freedom in isolation, or it could come to an integrated and hierarchical understanding of the meaning of fundamental rights and freedoms in the EU legal order which would inform the interpretation of the substance of each right and their relationships. Alternatively, or in conjunction with the above approach, it could consider that in the case of fundamental rights, the Member State should benefit from a wide margin of appreciation, and thus conduct a very deferential proportionality test.

The Court does not really do any of these things. While it arguably carried out a deferential proportionality test in *Omega*, it clearly did not in other cases such as *Viking* and *Laval*.[104] *Schmidberger* is an interesting example because it is often held up as a good practice of the Court in relation to the fair balancing of fundamental freedoms and rights.[105] While the Court did say that the "Member States enjoy a wide margin of discretion"[106], it did so only to continue that "nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued"[107] and to do the exact opposite of applying a wide margin of discretion with a very detailed assessment of all the extenuating elements that could eventually serve to justify this infringement of what for the Court is clearly a particularly fundamental right: the free movement of goods. Despite appearances, the assessment is unidirectional, and thus inherently *not* "fair"[108]. The Court did consider that "taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case, the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators".[109] That is however very far from the idea to assess *with equivalence* whether the free movement of goods, if interpreted to preclude the demonstration, would not lead to an infringement of the fundamental rights of the demonstrators. It is even further from the idea that, since we are in the scope of EU law and Member States are acting as agents of the EU in this case (all the more since the demonstration was at least partially about the environmental impact of EU transport policy),[110] the assessment should lead to the conclusion that Member States are *obliged* (rather than authorized, through gritted teeth) to allow such demonstrations by virtue of EU fundamental rights. The important point is decisively not that Austria in this case gets away with the measure. This outcome in no way shows that there is equivalence nor that there would even be precedence accorded to the freedom of expression and assembly. In the abstract, the normative framework developed by the Court values free movement more. The unidirectional analytical framework means that the stakes are unfair: the demonstration (and thus the expression of the freedom of expression and assembly) risks to be excluded by order of EU law and can only 'win' that the Member State get permission (but is not obliged) to allow it, while free movement

[104] See J Malmberg and T Sigeman, 'Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice' (2008) 45 *Common Market Law Review* 1115, 1130; de Vries, op cit, 70; Trstenjak and Beyens, op cit, 312; A Davies, 'One step forward, two steps back? Laval and Viking at the ECJ' (2008) 37 *International Law Journal* 126; T Novitz, 'A human rights analysis of the Viking and Laval judgments' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 541; S Sciarra, 'Viking and Laval: collective labour rights and market freedoms in the enlarged EU' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 563; P Syrpis and T Novitz, 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33 *European Law Review* 411.

[105] See Trstenjak and Beysen, op cit, 312.

[106] Para 82 of the judgment.

[107] ibid.

[108] Para 81 of the judgment.

[109] Para 89 of the judgment.

[110] J Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12/1 *European Law Journal* 15-40.

(or, the prohibition of the demonstration) will never be excluded by EU law and thus can still be restricted by the Member States. Concretely, the conditions outlined in paragraphs 83 to 92 of the judgment mean that in many situations, free movement will be given precedence over the right to demonstrate, and there may furthermore be a chilling effect[111] emanating from the judgment in that Member States may choose to interpret the conditions strictly in future situations to exclude the risk of being condemned by the Court (again, because in the Court's analytical framework, the Member States does not risk being condemned for prohibiting the demonstration, even if we are clearly in the scope of EU law).

For all the lofty rhetoric about fair balancing and commitment to fundamental human values, when it comes down to it, the Court applies the free movement provisions as the rule, and fundamental rights as the exception. In determining whether there should be a margin of discretion for national authorities, the approach is not one that looks at the fundamental nature of the right in question and its purpose, but instead, as Weatherill says, "the more sensitive and the more remote from commercial considerations the matters advanced in the context of justification of trade barriers are, the more generous the Court is to the available scope for justification and also to the breadth of the margin of appreciation enjoyed by the regulator".[112] Davies has argued against this framework in relation to all sorts of public interest justification, considering that the Court's approach to restrictions and justification is "substantively nonsense", for when national laws conflict with free movement there is substantive legitimacy on both sides and one can equally argue that respect for national constitutional orders, for substantive subsidiarity, and for democracy entails that free movement must in such a situation be interpreted restrictively.[113] This would apply with all the more force when it concerns fundamental rights that are to be weighed against free movement.

The Charter does not seem to have made a fundamental difference in this regard. As Nic Shuibhne states, "reviewing the post-Lisbon case law on internal market adjudication, neither the methodology nor priorities engaged by the Court have yet adjusted to reflect or to manage more successfully the inevitable tensions that emerge between economic rights and fundamental freedoms".[114] In fact, it appears that in some respects, the coming into force of the Charter has aggravated the problem. In particular, the Court has given a very forceful interpretation of Article 16 EU Charter on the freedom to conduct a business. In *Alemo-Herron*,[115] a judgment so poor that according to Weatherill it deserves to be "consigned to the bottom of an icy lake"[116], the Court used Article 16 to read a minimum harmonization Directive adopted on an internal market basis but intended to protect the interests of workers in the event of a transfer of undertakings in a way that it precluded a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee. The judgment has been widely criticized on a variety of grounds.[117] What is interesting

[111] L Hayes, T Novitz and H Reed, 'Applying the Laval Quartet in a UK Context: Chilling, ripple and disruptive effects on industrial relations' in A Bücker and W Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Ruffert* (Nomos, 2011) 195-244.
[112] Weatherill, op cit, 25.
[113] G Davies, 'The competence to create an internal market: conceptual poverty and unbalanced interests' in Garben and Govaere, op cit, 74-89.
[114] Nic Shuibhne, op cit.
[115] Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd* EU:C:2013:521.
[116] S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"' (2014) 10 *European Review of Contract Law* 167.
[117] Ibid; X Groussot, GT Pétursson and J Pierce, 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' (2014) *Lund University Legal Research Paper* 01/201;

for our purposes, is – firstly - that Article 16 was given an interpretation that goes very much in the direction advocated by Andrea Usai, namely that it should be used to "push the throttle in favour of an even more developed economic union" by allowing the right to conduct business to be used as a "safeguard against barriers that the member states may want to put up in the internal market" even in purely internal situations.[118] Secondly, the Court does not even mention, let alone fairly balance, the various fundamental social rights that would be relevant to the case, and that should at least have been used to balance Article 16 EU Charter, such as Article 28 EU Charter on collective bargaining and Article 31 EU Charter on fair and just working conditions. Similarly, in *AGET*,[119] the Court practically ignores[120] the fundamental social right in Article 30 EU Charter on protection against unjustified dismissal while rather forcedly drawing Article 16 EU Charter into its assessment of a restriction of the freedom of establishment. The Court in that judgment deploys a language that seems more cognizant of the need for public interest restrictions of Article 16 EU Charter, but the asymmetry in the treatment of economic fundamental rights and fundamental social rights is striking, as is the conflation of the freedom of establishment and the freedom to conduct a business. Taken together, these developments suggest that the Charter is leading to an even more forceful application of the free movement provisions in conjunction with Article 16 EU Charter, moving towards a general 'economic freedom' approach, while it is instead a bit of a "damp squib"[121] for the fundamental social rights contained therein.

III. Towards an Integrated Democratic Interpretation Framework for all EU Fundamental Rights

A. The Need for an Integrated Theory and Interpretation of the Different Parts of the EU Legal Order

As stated above, the EU is in need of a 'thick' constitutional theory to orient and legitimize the exercise of its authority in all areas. This is necessary if the Union is going to successfully carry its own claims of autonomy, both from a normative standpoint and more practically speaking in terms of the continuing/renewed acceptance of these claims especially by Europe's citizens, civil society and national courts. Based on the constitutional traditions of the EU Member States and the post-Lisbon European Union itself, it should be reasonable common ground that fundamental rights need to take a central place therein, together with the principles of democracy and constitutionalism/Rule of Law.[122] As Chalmers and Trotter say in relation to fundamental rights in this respect:

J Prassl, 'Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law' (2013) 42 *Industrial Law Journal* 434; P Syrpis and T Novitz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy' in A Bogg et al (eds), *The Autonomy of Labour Law* (Hart, 2015); M Bartl and C Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review' (2015) 11/1 *European Constitutional Law Review* 140-154.

[118] A Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order' (2013) 14 *German Law Journal* 1871 ff. For discussion see E Gill-Pedro, 'Freedom to conduct a business in EU law: freedom from interference or freedom of domination?' (2017) 9/2 *European Journal of Legal Studies* 103.

[119] Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* EU:C:2016:972.

[120] Art 30 is mentioned once, almost as an afterthought, to indicate that Art 16 may be limited, but is not made an integral, let alone equal, part of any 'balancing'. Para 89 of the judgment.

[121] C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Current Legal Problems* 199-237 at 207. See also N O'Connor, '(Re)constructing the employment law hierarchy of norms: The Charter will not, should not and need not apply?' EU Law Analysis, http://eulawanalysis.blogspot.com/2017/12/reconstructing-employment-law-hierarchy.html.

[122] See in more detail the various contributions in Garben, Govaere and Nemitz, op cit.

> "EU law has been established as a legal order, which carries with it a claim to possess these qualities of coherence, authority and moral pedigree. To meet this claim, a vision of what EU law is about has been established with fundamental rights a constitutive part of it. Interpretation of EU law in the light of this vision allows these claims to be addressed as it relates individual laws to one another, sets out reasons for obeying EU law and sets out what is good and right about the EU."[123]

They highlight that an integrated method is currently missing, both concerning the Charter/EU fundamental rights as such, and their role in the wider EU legal order (and vice versa):

> "A series of discrete doctrines govern methods of interpreting the Charter, the standard of protection secured by it, its relationship to other instruments and its scope of review. These are spliced together to form EU fundamental rights law. Such splicing is thin on how different aspects of EU fundamental rights law relate to each other or to EU law as a whole. Without this, however, fundamental rights do not have the coherence to set out an imaginary of what is good and right, something central to both their moral status and their iconographic appeal."124

The current case-by-case, right-by-right assessment, without a sensible hierarchical structure of EU law's plethora of constitutional values and norms, results in a high measure of unpredictability in the adjudication on the various EU Charter rights, their direct/horizontal applicability, and their interaction or mutual 'balancing'.[125] Furthermore, the absence of a coherent approach to the specific question to what extent the free movement provisions are considered part of EU fundamental rights law, and the equally important related questions what hierarchical status should be accorded to those (aspects of the CJEU's current interpretation of the) free movement provisions that do not qualify as fundamental rights, and the interaction between the fundamental and non-fundamental parts as well as the relationship with social fundamental rights, is unsustainable for the Union going forward. This issue has been the EU legal order's Achilles heel towards national courts and legal communities for a long time, and combined with the (related?) fading of the 'permissive consensus' and rise of a 'constraining dissensus' to European integration,[126] and the failure of the EU Charter and general Lisbon reforms to resolve it, it is high time to address it now, with the potential of a fundamental reform for the future of the EU post-Brexit (and post-COVID) looming on the horizon with the Conference on the Future of Europe.[127]

This is as much a case to establish the normative superiority of fundamental rights in the EU constitutional order, as it is to counter the current approach of internal market exceptionalism, where the free movement provisions float elusively, somehow separate and somehow above, the rest of the legal and political order. As such, it aligns with Dagmar Schiek's proposal to constitutionally embed the internal market by reference to the EU Charter[128] and – as Nic Suibhne has argued – does justice to Article 26(2) TFEU, which by emphasizing that free movement is ensured *in accordance with the provisions*

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[123] D Chalmers and S Trotter, 'Fundamental Rights and Legal Wrongs: The Two Sides of the Same EU Coin' (2016) 22/1 *European Law Journal* 9-39.
[124] Ibid.
[125] As Jonathan Griffiths argues, "despite (its) pedigree, the concept of the "fair balance" is, without further elucidation, vacuous and unhelpful". See Griffiths, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law', *European Law Review* 38 (2013) 65, 74.
[126] L Hooghe and G Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield, 2001).
[127] The Conference on the Future of Europe is currently ongoing and may provide a platform for fundamental constitutional reform in the EU.
[128] Schiek, op cit.

of the Treaties, "suggests that the goal of realising a free movement-driven internal market sits within –and is in fact contained by – the wider structure of the Treaties and the many objectives committed to therein".[129] It also means that any pursuit of coherence between the free movement provisions as such should be abandoned, and that instead we need to embrace the idea that some free movement provisions are to be considered and treated as more fundamental than others. For as the analysis in the previous Section already suggests, and as shall be set out in more detail in the following subsection, the aspects of free movement that place the equality and dignity of the individual citizen central, are the ones that deserve to be fully protected as fundamental rights, whereas for the economic interests of businesses in the internal market, the free movement provisions can only legitimately give constitutional protection in relation to protectionist measures, and not those that impede market access to foreign companies in the same way as new national market entrants. Any further protection one may want to accord to the other aspects of the free movement provisions should be decided in the political, legislative, process, and not on the basis of the direct application of primary law.

B. An Integrated Interpretation Framework rooted in Democratic Constitutionalism applied to the Clash between Economic and Social Rights

In the highly sensitive process of judicial review of democratically enacted norms, the judiciary should be guided not so much by an approach of deference *per se*, but by a clear normative framework within which the fundamental values that it is mandated to uphold are to be accommodated and, importantly, which states how these fundamental values relate to one another, especially in cases of conflict, and how deeply the judiciary is warranted to intervene to uphold them. This would make the adjudication of these values and rights more predictable (a cornerstone of the Rule of Law) and would provide a more legitimate framework for balancing than one pursues the effectiveness EU law and a maximization of the integration of national legal orders. In other words, an ideological meta-framework is needed for constitutional adjudication in the EU legal order.[130] This should not be an ideology of political economy, in reference to either an idea of a liberal market economy or a social market economy (even to for the latter, there is an explicit constitutional commitment), as this can ultimately never result in anything but a subjective and highly political view of socio-economic justice that is not suitable for the judiciary to actively enforce. Instead, as already indicated further above, based on the constitutional traditions of the Member States and the EU's own core values we can consider the common ground of contemporary constitutional democracy to be the commitment to the triptych of democracy, the Rule of Law and fundamental rights,[131] and within that context the latter to be concerned with upholding human dignity and guaranteeing a robust and inclusive democracy.[132] That provides us with the necessary elements of a legitimate interpretation framework. Of course, that does not provide absolute certainty or conclusive answers to each and every case, and it should not. It provides the appropriate terms within which the arguments can reasonably be made, and within which conclusions can reasonably be drawn.

Using that framework, we have already in Section II established the extent to which it is legitimate to constitutionalise/fundamentalise the free movement provisions. The same framework should be used to interpret the other fundamental rights as contained in the EU Charter, their substantive interpretation and their interaction, as well as the EU legal

[129] Nic Shuibhne, op cit.
[130] Conway, op cit.
[131] Garben, Govaere and Nemitz, op cit.
[132] C Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2004) 88.

order more generally. A central idea underlying the framework is that for a legal order to be legitimate in its exercise of public authority, it needs to serve the principles of democracy and constitutionalism to an equal extent.[133] This implies that the judiciary is allowed to overturn democratically decided norms only to the extent that it is necessary to uphold the key elements of constitutionalism, namely procedurally the decision-maker's respect of the prescribed decision-making rules, and substantively the respect for fundamental rights. The substance of these fundamental rights should in turn be informed by (i) human dignity as the source of all human rights, and (ii) the principle of democracy (which is both an important element of the individual and collective agency required by human dignity and a self-standing concern alongside constitutionalism).[134] The fundamental rights that the judiciary should enforce against the legislator are therefore those that guarantee the necessary conditions for a respect of and commitment to human dignity, and those that are necessary for an inclusive, robust and long-term democracy. The latter entails, apart from the central democratic rights such as freedom of expression and assembly, ensuring a minimum degree of socio-economic equality (through social mobility, inclusion and emancipation, as well as non-discrimination and the correction of power asymmetries). Every fundamental right should be interpreted in light of this, and where several rights appear to conflict, the 'balancing' needs to be performed on the basis of these yardsticks, of course in combination with a textual reading of the provisions in question (in particular, for instance, where the EU Charter indicates that the right is only recognized "in accordance with Union law and national laws and practices").[135]

It is beyond the scope of this paper to exhaustively apply the framework to all the fundamental rights in the Charter and their interrelationship. One particular issue deserves to be treated in a little more detail, however, namely the thorny relationship between the free movement provisions and fundamental social rights. The foregoing analysis has set out the reduced scope of fundamentalisation that the current approach allows in relation to free movement, as well as the freedom to conduct a business in Article 16 EU Charter. It is important to emphasize that also fundamental social rights need to be interpreted in light of the above normative yardsticks and can be constitutionally enforced only to the extent that they are necessary for human dignity or a well-functioning, inclusive, long-term democracy. This approach of democratic constitutionalism to the purpose of fundamental social rights could help overcome the "currently inadequate philosophical underpinning of labour rights (that) deprives their advocates of depth of argument"[136] and provide a more robust way to deal with conflicts between the internal market and Social Europe than approaches that argue – even if understandably so – for a more social approach as such and for that reason.

The right to strike and bargain collectively that has a particularly important role in creating and maintaining the conditions for a robust democracy. They are 'procedural' rights rather than establishing certain socio-economic outcomes. As the UN Special Rapporteur put it: "protecting the right to strike is (..) about creating democratic and equitable societies that are sustainable in the long run. The concentration of power in

[133] Tully, op cit, by reference to the work of Habermas and Rawls.
[134] See P Gilabert, *Human Dignity and Human Rights* (Oxford, Oxford University Press, 2018) Ch 10.
[135] It may be that one this basis, a general hierarchy of fundamental rights emerges, in which those that are more directly essential for democracy and dignity are placed in a first-tier, while others that contribute thereto more indirectly, to be ranked second-tier. See for instance N de Boer, who has proposed to use Rawls' theory of justice to determine the interpretation and hierarchy of fundamental rights including the free movement provisions to the extent that they foster equality of opportunity. de Boer, op cit.
[136] R Croucher et al, 'A Rawlsian philosophical basis for core labour rights' (2011-2012) 33 *Comparative Labour Law & Policy Journal* 297.

one sector – whether in the hands of government or business – inevitably leads to the erosion of democracy, and an increase in inequalities and marginalization with all their attendant consequences. The right to strike is a check on this concentration of power'. It is also important for the sense of individual and collective empowerment and agency necessitated by human dignity, of being able to take a minimum degree of control over the conditions of one's life and take a stand alongside others in solidarity. This right should therefore, in principle, be forcefully protected by the judiciary, both against democratic decision-making (at national and European level) as well as in relation to other fundamental rights, especially where they clash. On the other hand, substantive worker's rights or interests such as to be protected against collective dismissal and negative repercussions of restructuring/company transfer, are political decisions in a well-functioning democracy, and the extent of protection should therefore primarily be for the democratic process to flesh out, as it would seem that there is significant scope for counter-balancing with other rights and interests. Strong protection would need to be provided against unjust dismissal generally, as the lack of such protection would undermine the enforcement of any other right in an employment context and would entrench an unacceptable power asymmetry between the employer and the individual worker which cannot be justified in a democratic society. But the scope for collective dismissal for economic reasons is not something that should a priori be determined by the judiciary or the constitution, and instead is a main battleground for the political process.

The current approach under EU law does not follow the above framework, which could be argued to raise profound legitimacy questions. This transpires clearly from the various controversial judgments of the CJEU where it has 'balanced' fundamental social rights and fundamental economic rights. For one, as many have argued, in the seminal and controversial *Viking* and *Laval* rulings, economic fundamental rights were taken too far. The above principles would support that criticism, but from a perspective that transcends the 'economic vs social' battle, pointing out that on the basis of the meta-values of democratic constitutionalism, the right to strike should receive a forceful interpretation while the internal market provisions are more limited in scope. It is questionable whether there should have been a *prima facie* restriction of the fundamental aspects of the free movement rights at all, as they should be about combating unjustified (indirect) discrimination against foreign actors. Arguably, this was not the case in *Viking* and *Laval*, as in the former case the strike opposed a national company seeking to 'reflag' as a foreign actor to escape the national democratic process, and in the latter case the strike was about procuring equal treatment of foreign workers with national workers. As a second example, we can apply the above interpretation principles to *Alemo-Herron* and *AGET*. While the social interest of protecting workers against the negative repercussions of company restructuring that were at stake in these cases should, following be open to significant (economic) counter-balancing, the counter-interest of freedom of establishment or conducting a business was not even legitimately in play. In *AGET*, the national rules applied equally to all companies. In *Alemo-Herron*, no *prima facie* breach of the internal market was established, and Article 16 EU Charter therefore should not have been in discussion at all. And even if it were, this should only be a right for individuals to set up a business or access a profession (in limited circumstances), and not a right for businesses to conduct economic activities (hiring & firing, contracting) without restriction. And even if the freedom to conduct a business would have been considered relevant to the facts of the cases, our above adjudication and interpretation framework suggests that it is the political process that should have decided on the balance. The EU legislator had, in the Directives at stake, not decided on that balance

as regards the cases at hand – they fell outside the scope of the Directives. Thus, it should have been left to the national democratic process: the UK and Greek rules in question should have been upheld until the European legislator would have acted to establish a different balance at EU level on these specific questions. Instead, the EU judiciary gave a(n overly) forceful interpretation to the freedom to conduct a business, thereby constitutionalising a certain view on the right socio-economic balance that was not necessary for a democratic society, and in fact counter-productive to it. These judgments further empower the powerful and entrench societal inequalities and national and European level, disguised as constitutionalism but instead offending the true values of human rights and their meaning for constitutional democracy and democratic constitutionalism.

IV. Conclusion

The free movement provisions currently occupy a status in the EU legal order that in most constitutional democracies would only be conferred on fundamental human rights, and they are – maybe not always, but definitively sometimes - treated with a degree of priority over other fundamental rights. Yet, they are not integrated into EU fundamental rights law, nor embedded in any sound constitutional theory of the EU legal order. Such internal market exceptionalism and myopic integrationism is practically and normatively unsustainable. This paper has made the argument that to a limited extent, a constitutionalisation of the free movement provisions can be defended by transnational democratic and individual justice (dignity) arguments: namely to the degree already covered by Article 15 EU Charter, and in the way that they give economic actors a (rebuttable) right not to be subjected to protectionist measures. To the extent that the direct application of the free movement provisions against national measures and in relation to the EU legislative process goes beyond this legitimate degree of 'fundamentalisation', they have – as some influential scholars have critically agued – indeed been 'over-constitutionalized'. As this poses deep legitimacy concerns, the CJEU needs to fundamentally re-configure the free movement provisions, launching an 'internal market 2.0' that is anchored in a robust theory of democratic constitutionalism.[137]

[137] See further: S Garben and I Govaere (eds), *The Internal Market 2.0*, Hart Publishing, 2020.

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