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Introduction

I. SETTING THE SCENE: A FUNDAMENTAL RIGHTS POLICY IN THE INTERNAL MARKET?

THIS BOOK EXAMINES the relationship between one of the ‘foundations’ of the European Union (EU),¹ fundamental rights protection and its driving force, also considered the ‘cornerstone of Europe’s integration’, the internal market.²

It focuses on the critical but neglected point where the two meet in the EU’s *positive* integration process. This process is characterised by the active adoption of measures by the political institutions in order to pursue the objective of integration. It contrasts with the process of *negative* integration, through which the Court of Justice of the European Union (the Court) plays a central role in interpreting, applying and enforcing legal prohibitions set out by the Treaties.³

Fundamental rights and the internal market not only share their central position in the EU integration project, but also a further characteristic: their respective evolutions are typically described as stories of overall success. The narratives of success differ, however, in their respective fields.

For the internal market project, success was crucially dependent on complementing the operation of the free movement provisions with the pursuit of a rigid and defined policy involving the adoption of positive measures and institutional re-arrangements to facilitate implementation. In other words, the appropriate combination of negative and positive integration had to be achieved. The following is the conventional narrative.

The internal market project underwent a remarkable development from the initial steps in the European Economic Community (EEC) to abolish quotas and tariffs in the trading of goods, to the landmark jurisprudence of the Court of Justice boosting market-making by providing a very wide definition of quantitative restrictions.⁴ Subsequently, the now-renamed EU overcame the stagnant period of the 1980s with the famous White Paper 1992⁵ programme, which could be successfully pursued after adoption of the Single European Act. At the time, a pivotal provision was introduced—Article 100a of the EEC Treaty—today’s Article 114 of the Treaty on the Functioning of the European Union (TFEU).

¹ Articles 6 and 7 TEU.

² M Monti, ‘A New Strategy for the Single Market’, Report to the President of the European Commission (9 May 2010) (hereinafter ‘Monti Report’).

³ JHH Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403; and F Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford, Oxford University Press, 1999).

⁴ In particular, Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

⁵ White Paper from the Commission to the European Council, ‘Completing the Internal Market’ (14 June 1985), COM(85) 310.

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Decision-making at the EU level was facilitated by providing a legal basis for the adoption of harmonising measures by qualified majority voting (as opposed to the previously required unanimity). The adoption of a vast amount of legislation followed between 1986 and 1992,⁶ so that today, the Commission is in a position to say that by 1993 the ‘single market bec[ame] a reality’.⁷ At the same time, on the occasion of the anniversary of the 1992 date which the White Paper set for completing the Internal Market, the Commission made efforts in order to address the ongoing shortcomings.⁸ It adopted the Single Market Act I in order to ‘boost growth and strengthen confidence’.⁹ This item was kept high on the agenda, as is evidenced by the adoption of the Single Market Act II, which complements the list of key legislative actions contained in the former.¹⁰ The political route therefore continues to be key for European trade integration.

The narrative of EU fundamental rights, in contrast, focuses on limits to EU activity—the classic negative function of fundamental rights as a ‘shield’, which contrasts to positive policy-making. This is not surprising, especially when bearing in mind that the watershed moment in the narrative was the introduction of fundamental rights protection in EU law by the Court.

Fundamental rights played a pivotal role in crucial moments of the evolution of the European legal order.¹¹ They constitute a measure for the legality of the EU’s acts, as well as for that of its Member States when they are implementing those acts and when acting more broadly within the scope of EU law. Under Article 7 TEU, Member States may also lose some of their rights under the Treaties if a serious breach on their part of fundamental rights is established. In its external relations, the EU is sending the unequivocal message that it aims at ‘exporting’ the principle for respect of fundamental human rights,¹² thereby pursuing an *external* human rights policy. With the entry into force of the Lisbon Treaty, the EU now even has its own legally binding catalogue of fundamental rights¹³ and finally established a legal basis mandating EU accession to the European Convention on Human Rights (ECHR).¹⁴

⁶ According to the Commission, this included over 280 items. See http://ec.europa.eu/internal_market/top_layer/historical_overview/index_en.htm

⁷ *ibid.*

⁸ Interestingly, Monti identifies one of the three key challenges today as being the false sense that ‘the single market had been really completed and could thus be put to rest as a political priority’. See Monti Report, above n 2, 6.

⁹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, ‘Single Market Act—Twelve Levers to Boost Growth and Strengthen Confidence “Working Together to Create New Growth”’ COM(2011) 0206 final (hereinafter ‘Single Market Act I’).

¹⁰ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, ‘Single Market Act II Together for New Growth’ COM(2012) 573 final.

¹¹ As is very well known, the protection of such rights at the EU level constituted the precondition for the Member States’ acceptance of the (constitutional) doctrines of supremacy and direct effect.

¹² Through means such as the ‘conditionality clauses’ in international agreements or the requirement imposed on a candidate country to fulfil a high standard of protection for human rights in order to be eligible for accession to the EU (the so-called ‘Helsinki criteria’).

¹³ Charter of Fundamental Rights [2010] OJ C83/389.

¹⁴ Article 6(2) TFEU. At the time of writing, the CJEU has declared that the draft agreement on the accession of the EU to the ECHR is not compatible with Art 6(2) TEU or with Protocol (No 8) relating to Art 6(2) TEU. See CJEU, Opinion 2/13 of the Court (18 December 2014). The direct consequence is that re-negotiations based on the Court’s findings have to take place in order to go ahead with the accession process under the current Treaties. Considering how difficult it was to reach agreement on the draft under the Court’s scrutiny, this is likely to prove a very difficult and drawn-out process.

A shift in attention to an EU *internal* fundamental rights *policy* also occurred, and it did so long before the Lisbon Treaty. The landmark moment was the ‘turn of the millennium’, when the search for ‘a Human Rights Agenda for the year 2000’ was announced.¹⁵ The report that followed was compiled by Professors Alston and Weiler.^{16,17} The authors forcefully identified an inherent paradox in EU fundamental rights protection, which had to be remedied: ‘On the one hand, the Union is a staunch defender of human rights in both its internal and external affairs. On the other hand, it lacks a comprehensive or coherent policy at either level.’¹⁸ This was of course not to deny that single instances of positive action did exist; gender equality is one important example,¹⁹ and data protection and intellectual property are others.

In order to build a comprehensive and coherent fundamental rights policy, the authors put forward important proposals for institutional reform. Some of these have materialised today, such as the creation of Directorate General (DG) Justice and a separate Commissioner responsible for fundamental rights,²⁰ as well as the creation of the Fundamental Rights Agency (FRA).²¹

Interestingly, one of the arguments justifying the need for a comprehensive or coherent policy was the analogy drawn with the internal market: just as the EU internal market could only be completed by complementing negative integration with positive integration, so—it was said—comprehensive fundamental rights protection also required a complementary ‘legal prohibition on violation with positive measures and a pro-active human rights policy’.²²

It should be emphasised, however, that the analogy drawn between the two areas in this integration-inspired paradigm is asymmetrical in the following sense: in internal market law, at the core of the distinction between negative and positive integration stands the question of Member State impact; in other words, whether EU law will only strike down single instances of obstacles to trade on a case-by-case basis or whether it will take away the regulatory autonomy of Member States entirely and replace the national with a EU-wide harmonised standard. The choice between negative and positive integration therefore primarily concerns the vertical relationship between Member States and the EU.

In contrast, the distinction between the negative and positive role of fundamental rights is one that first and foremost concerns the actions and interaction of EU institutions and is

¹⁵ *Leading by Example: A Human Rights Agenda for the Year 2000*, Vienna (9–10 October 1998), adopted by a *Comité des Sages*.

¹⁶ P Alston and JHH Weiler, ‘The European Union and Human Rights: Final Project Report on an Agenda for the Year 2000’, in *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000: Agenda of the Comité des Sages and Final Project Report* (1998) Academy of European Law, EUI, Florence; and P Alston and JHH Weiler, ‘An Ever Closer Union in Need of a Human Rights Policy’ (1998) 9 *European Journal of International Law* 658.

¹⁷ The authors clearly acknowledge that similar proposals to some of those contained in the Report had been already made earlier in time: see Alston and Weiler, ‘An Ever Closer Union’, above n 16, 659.

¹⁸ Alston and Weiler, ‘An Ever Closer Union’, above n 16, 661.

¹⁹ Also acknowledged by the authors Alston and Weiler (*ibid* 666).

²⁰ The first Commissioner to hold this post was V Reding, Commissioner for Justice, Fundamental Rights and Citizenship (2010–14). Under the Juncker Commission, fundamental rights fall under a new portfolio on ‘Better Regulation, Inter-institutional Relations, the Rule of Law and the Charter of Fundamental Rights’, which is held by F Timmermans.

²¹ Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

²² Alston and Weiler, above n 16, 666.

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therefore horizontal in perspective. Thus, the question of the nature of positive integration in the fundamental rights context is about two different types of EU institutional duties: the abstention of institutions from acting in violation of fundamental rights and a positive duty to *act* incumbent on the political institutions in order to protect and promote fundamental rights.

The arguments in favour of such an approach are not novel: judicial fundamental rights protection presupposes that a violation has already occurred, that the applicant had the means to access a court and that a judicial remedy is appropriate in the given situation, and ultimately accepts that justice is done only in an individual case. The subject matter of the present book is, crucially, at the intersection of these two (vertical and horizontal) paradigms.

Attention to the question of the position that fundamental rights assume in the internal market was triggered by the negative integration process that also occurred in the 2000s (although after the report of Alston and Weiler). A new line of case law emerged,²³ with the *Schmidberger*,²⁴ *Omega*,²⁵ *Viking*²⁶ and *Laval*²⁷ cases featuring particularly prominently. In this case law, the possibility of a direct collision between fundamental rights and internal market freedoms became starkly evident for the first time. This collision is complicated by the fact that both interests carry the epithet ‘fundamental’. Unsurprisingly, there was an avalanche of academic commentary on fundamental rights in the process of negative market integration more generally.²⁸

It is this conflict that triggered the examination conducted in this book as there appears to be an opportunity to address the tension emerging out of the process of negative integration through the mechanism of positive integration.

²³ J Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’ (2006) 12 *European Law Journal* 15, 16–17; Case C-112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659, Opinion of Advocate General Jacobs at [89]; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, Opinion of Advocate General Stix-Hackl at [44].

²⁴ Schmidberger, above n 23.

²⁵ Omega, above n 23.

²⁶ Case C-438/05 *The International Transport Workers’ Federation and the Finnish Seamen’s Union v Viking Lince ABP and OU Viking Line Eesti* [2007] ECR I-10779.

²⁷ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767.

²⁸ See, eg, A Biondi, ‘Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights’ (2004) 1 *European Human Rights Law Review* 52; F Ronkes Agerbeek, ‘Freedom of Expression and Free Movement in the Brenner Corridor: The Schmidberger Case’ (2004) 29 *European Law Review* 255; A Alemanno, ‘Fundamental Common Market Freedoms v Fundamental Individual Rights in the EU; What Role for the ECJ after Omega?’ (2005) *EU Focus* 2; Morijn, above n 23; V Skouris, ‘Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance’ (2006) 17 *European Business Law Review* 225; B Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13 *European Law Journal* 279; T Blanke, ‘Die Entscheidungen des EuGH in den Fällen Viking, Laval und Rueffert—Domestizierung des Streikrechts und europaweite Nivellierung der industriellen Beziehungen’, Oldeburger Studien zur Europäisierung und zur transnationalen Regulierung Nr 18/2008; ACL Davies, ‘One Step Forwards, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2008) 37 *Industrial Law Journal* 126; N Reich, ‘Free Movement v Social Rights in an Enlarged Union—The Laval and Viking Cases before the ECJ’ (2008) 2 *German Law Journal* 125; C Joerges and F Roedel, ‘Informal Politics, Formalised Law and “the Social Deficit” of European Integration: Reflections after the Judgments of the ECJ Viking and Laval’ (2009) 15 *European Law Journal* 1; SA de Vries et al, ‘The Protection of Fundamental Rights within Europe’s Internal Market after Lisbon—An Endeavour for Harmony’ in De Vries et al (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Oxford, Hart Publishing, 2013) 59.

The essential thesis is simple. Since the rules of the market clearly interfere with fundamental human rights protection, as guaranteed at the national level, the balancing of fundamental human rights on the one hand and market freedoms on the other hand is to a certain extent transferred to the European level. Thus, Member States lose a certain degree of their autonomy.²⁹ This ‘loss of autonomy’ not only occurs where the CJEU decides against the lawfulness of a national rule that causes fragmentation of the internal market, but also by the very fact that national rules are caught by free movement rules in the first place. This is particularly evident when taking account of the fact that the EU legislature enjoys the competence ‘to harmonise laws in pursuit of market-building ends’³⁰ (and, it should be added, market-correcting ends) where ‘rules vary between states yet cause *lawful* obstacles to trade integration’ (emphasis added).³¹ It should also not be forgotten that national autonomy can be indirectly constrained by regulatory competition between Member States.³²

The reason for the utility of positive integration as a tool for calibrating the relationship between market freedoms and fundamental rights is that the balancing of the two interests can be addressed *in a conscious manner by the legislator*, instead of remaining ‘a functional result of the degree of negative market integration and its system of competition among rules.’³³ Two features of EU legislative involvement serve to compensate in a way (even if not fully) for the loss of national autonomy in the name of the market. One reason is that there is Member State involvement in defining the appropriate balance (through the Council of Ministers), as well as participation of the only democratically elected institution of the EU, the European Parliament. The other reason is that the operation of the free movement rules is in its essence concerned with market-making, whereas positive integration is a powerful tool for market correction and has been to a large extent used as such.³⁴

There is also another point mandating the examination conducted in this book. Ever since the Charter of Fundamental Rights (the Charter) became legally binding, there is also a clear obligation imposed on the EU institutions to promote fundamental rights within the powers and tasks of the EU.³⁵ Thus, these institutions are required to mainstream fundamental rights considerations in each and every legislative and non-legislative initiative. This clearly includes the positive market integration process, it being immaterial whether the national laws that are sought to be harmonised are concerned with fundamental rights regulation or another subject matter.

²⁹ MP Maduro articulates this idea when discussing the effects of negative market integration on efficiency enhancing versus redistributive (social) policies in ‘Europe’s Social Self: “The Sickness unto Death”’ in J Shaw (ed), *Social Law and Policy in an Evolving Union* (Oxford, Hart Publishing, 2000) 331.

³⁰ S Weatherill, ‘The Internal Market’ in S Peers and A Ward (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004) 191.

³¹ *ibid.*

³² O de Schutter, ‘A New Direction for the Fundamental Rights Policy of the EU’, Working Paper Series: REFGOV-FR-33 (2010) 11.

³³ Maduro, above n 29. One might add that the balance struck in negative integration is also a result of the particular case that happens to come before the Court.

³⁴ Scharpf, above n 3; and W Wagner, ‘Positive and Negative Integration in EU Criminal Law Cooperation’, Paper prepared for presentation at ECPR’s 5th Pan-European Conference on EU Politics (Porto, 24–26 June 2010) 2 with reference to Scharpf.

³⁵ Article 51(1) CFR.

Against this normative background, an evaluation of the fundamental rights policy in the internal market becomes necessary, and the following questions arise in that respect:

First, does the legislator consciously and expressly pursue an internal market fundamental rights policy? Does internal market legislation refer to, incorporate or address fundamental rights issues?

Second, when viewed from a fundamental rights perspective, what is the state of existing internal market harmonisation practice on fundamental rights? Is it considerable or negligible? Did it start only with the Charter or did it pre-exist that document?

Finally, what is the substantive level of fundamental rights protection achieved through the ongoing interplay between the Court and the legislator?

So far, this theme has not been extensively studied in a systematic way. Academic debates examining the relationship between fundamental rights and economic freedoms in the internal market have mainly focused on the tension between the two interests as it arises in the negative market integration process. Their relationship in the positive integration process has largely been neglected,³⁶ and the present book aims to fill this lacuna.

II. METHODOLOGY

The main part of this study consists of an examination of the existing harmonisation practice and its eventual legislative output. However, two inquiries had to precede this analysis.

First, this exercise presupposes an affirmative answer to a question, which is of vital importance in the daily policy-making process in the EU: as in all things, the EU lawmaker must first overcome the hurdle of establishing its competence to act—the EU is a creature of circumscribed competences. Therefore, at the outset, we must identify and explore whether and to what extent internal market competences can be used to deal with fundamental rights.

Second, ever since the 2000s, when the Charter was proclaimed, new mechanisms for fundamental rights protection outside the courts have emerged in the EU. These mechanisms were introduced to build a fundamental rights culture inside the EU institutions. The existence of such a fundamental rights culture was considered likely to decisively influence the EU's legislative output (in and beyond the area of the internal market). Therefore, an empirical examination of these mechanisms precedes any research into the presence or absence of an institutional culture. The starting point for assessing whether the *ex ante* fundamental rights scrutiny tools in place are operating to a satisfactory degree was therefore to screen legislation, pre-legislative and legislative history for fundamental rights language. Preliminary conclusions were subsequently tested in semi-structured interviews with EU officials. The results were fed into the analytical discussion below, primarily taking an EU institutional and constitutional law perspective, but also drawing on and comparing national practices, to the extent that it was deemed useful for informing the EU debate.

The main part of the book has been organised according to four fundamental rights protected by the Charter: data protection, freedom of expression, fundamental labour rights (the right to take collective action and the right to fair and just working conditions) as

³⁶ See A Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur* (Brussels, Bruylant-Publications des FUSL, 2009), who examines this relationship in both integration processes. See also de Schutter, above n 32, 11 et seq.

well as the right to health. In defining these rights, however, other instruments on which the relevant Charter provisions were based have also been taken into account, as can be discerned from the Explanations to the Charter.³⁷ First, this includes the ECHR as interpreted in the case law of the European Court of Human Rights (ECtHR) in Strasbourg. Its special significance was acknowledged in early CJEU jurisprudence³⁸ and has been given the following recognition in the Charter itself: according to Article 52(3) CFR, those rights contained in the Charter which correspond to rights guaranteed by the ECHR shall have at least the same meaning and scope as the latter (although EU law can always provide for a higher level of protection). Next are the other major conventions of the Council of Europe—including the European Social Charter. It should be noted that other international law instruments have also been taken into account alongside the EU's own (but not legally binding) social rights instrument: the Community Charter of Fundamental Social Rights of Workers.

The selection of, and examination according to, a limited number of rights chosen in this study keeps a sharp focus for the fundamental rights lens. It allows an analysis of a variety of legislation across different policy fields. It also reveals how different forms and levels of harmonisation can impact on the same right, but on different dimensions of that right.

The choice of the specific rights examined is motivated by three reasons. First, and most obviously, *the existence of legislation* that has been adopted on an internal market legal basis, which appears to have either a strong objective aimed at protecting those fundamental human rights—be that an exclusive, parallel or secondary objective of the legislation—or to have adverse implications on a fundamental right. This reflects the predominant approach taken in this study in analysing the harmonisation practice and legislative output, which is bottom-up or one of inductive reasoning. This means that the research commenced with specific observations and then progressed to detect patterns in order to be able to reach some general conclusions.

Second, a conscious choice has been made to cover rights that are, according to the traditional typology, understood to belong to different categories: civil and political rights on the one hand (data protection and freedom of expression, which are placed in the Charter's Chapter on 'Freedoms') and social and economic rights on the other (the right to collective bargaining, including the right to strike, the right to fair and just working conditions, and the right to health(care) which are contained in the Charter's Chapter on 'Solidarity'). This approach allowed an investigation into whether legislators adopt a different approach based on the generation of the right and, if so, how. This is a particularly interesting enquiry in view of the lauded indivisibility of the two types of rights in the Charter, which is not organised along those traditional lines, but is rather ordered in a 'transverse systematic' way.³⁹

Finally, the rights chosen are among the most important in terms of their direct impact on human life, as opposed to economic activity,⁴⁰ which can also be expressed in fundamental

³⁷ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/02.

³⁸ Case C 4/73 *Nold v Commission* [1974] ECR 491.

³⁹ S Sciarra, 'Diritti sociali fondamentali' in Baylos Grau et al, *Dizionario di Diritto Del Lavoro Comunitario* (Bologna, Monduzzi, 1996), cited in S Giubboni, *Social Rights and Market Freedom in the European Constitution—A Labour Law Perspective* (Cambridge, Cambridge University Press, 2006) 109.

⁴⁰ With the exception of commercial expression discussed in ch 5, 'Freedom of Expression'.

rights terms based on the Charter: the freedom to choose an occupation and the right to engage in work (Art 15 CFR), the freedom to conduct a business (Art 16 CFR) and the right to property (Art 17 CFR). Certainly, given the proximity of these rights to the economic freedoms, there is a considerable amount of legislation that could have been examined in this book—for an important example, consider the legislation on intellectual property.

III. ANALYSIS

A. The Internal Market Competence and Fundamental Rights

Chapter two establishes that there is an internal market competence to harmonise fundamental rights protection if certain conditions (as set out in the Court's legal basis case law) are met.⁴¹ The precondition is that there are divergent national laws, which are liable to put the establishment and functioning of the internal market at risk or to distort competition. Importantly, once that is the case, the legislation is correctly founded on the basis of the internal market—whether it is of a market-making or a market-correcting nature and whatever the actual motives of the legislator. Such a measure can even *abolish* a specific market and cover purely internal situations, according to the Court's case law.

It should be noted that the above is true for regulation concerning all non-market values rather than only fundamental rights. In fact, there is a further commonality between fundamental rights and other non-market values. Both non-market policy objectives and fundamental rights have to be mainstreamed in the EU's action. The latter proposition means that irrespective of whether the subject matter of the laws harmonised is fundamental rights regulation, fundamental rights will be taken into account and further realised when harmonising.

As regards non-market objectives, a mainstreaming clause specifically for the internal market is to be found in Article 114(3) TFEU, but there are also the horizontal mainstreaming clauses in Articles 8–13 TFEU, including objectives such as consumer and environmental protection. As regards fundamental rights, the general mainstreaming obligation is contained in the Charter (in Art 51(1)), and a specific manifestation of this is the prohibition of discrimination (Art 10 TFEU). Fundamental rights as pursued in legislation can, however, still be distinguished from other non-market values, in that they constitute a foundational element of the EU, not merely an aspiration.

B. *Ex Ante* Fundamental Rights Tools

Chapter three is concerned with fundamental rights compliance, promotion and mainstreaming through non-judicial actors during the policy and law-making stages of

⁴¹ Important literature on which this Chapter has drawn includes: JHH Weiler and SC Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences', Jean Monnet Working Paper 4/99; B de Witte, 'Non-market Values in Internal Market Legislation' in NN Shuibhne (ed), *Regulating the Internal Market* (Cheltenham, Edward Elgar, 2006); and F Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks et al (eds), *Governance in the European Union* (London, Sage, 1996).

legislation. While this theme is not new in the academic literature of national legal orders (beyond Europe), for the specific EU context, the literature is limited.⁴²

The chapter traces the gradual evolution of *ex ante* fundamental rights protection in the EU, setting out the tools that have been put in place at the different institutional levels and assessing their use.

What emerges is that although today all EU institutions have put procedures in place for conducting *ex ante* scrutiny, the European Commission still remains the primary actor in this process when it comes to the systematic and compulsory scrutiny of all legislation. However, at least up until the entry into force of the Lisbon Treaty, this *ex ante* process did not seem to perform adequately. A fundamental rights culture was apparently lacking. It is suggested that this is due to the absence of incentives and pressures from outside the administration. The Lisbon Treaty may serve to remedy this by providing judicial incentives (the increase in fundamental rights adjudication prompted by the Charter on the one hand and the envisaged EU accession to the ECHR—even if currently stalled⁴³—on the other). One non-judicial incentive from within the EU legal order could be crucially provided by the FRA if it were granted an unconstrained mandate for legislative scrutiny. This is a matter that should be revisited in any re-negotiation of the body's founding regulation.

The EU combines almost all methods of *ex ante* scrutiny that can be found in national legal orders, which as a basic starting point appears promising. There is, however, considerable scope for improvement, both in terms of the current institutional/procedural foundations of the system and (if not more so) its operability. It is hoped that the increased attention to fundamental rights in the *post*-Lisbon era together with the new incentives provided therein will push forward the necessary advancements.

C. Data Protection

The examination of harmonisation practice, the concrete legislative output and the substantive level of fundamental rights protection therein commences with data protection in chapter four. The legislation in place⁴⁴ constitutes the prime example of *explicit* fundamental rights regulation based on the internal market and, as such, stands out from the rest of the legislation under examination. However, that is soon to change, given the introduction of a separate legal basis⁴⁵ for data protection, which has already been used for

⁴² Notable exceptions on which this chapter has built include in particular those of P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU—The Contribution of the Fundamental Rights Agency* (Oxford, Hart Publishing, 2005) and the contributions therein; de Schutter, above n 32. See also more recently I Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' (2012) 4 *European Law Review* 397; and O de Schutter, 'The Implementation of the Charter by the Institutions of the European Union' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights—A Commentary* (Oxford, Hart Publishing, 2014).

⁴³ See the analysis above in n 14.

⁴⁴ In particular, Directive 95/46/EC on the protection of individuals with regards to the processing of personal data and on the free movement of such data (DPD) [1995] OJ L281/31; and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, [2002] OJ L201/37 (hereinafter the 'e-Privacy Directive').

⁴⁵ Article 16 TFEU.

proposing a new legislative package that is to replace the old data protection regime.⁴⁶ This shift from the market towards a specific fundamental rights legal basis is a noteworthy, albeit not novel phenomenon.⁴⁷ This development is indicative of the limits of pursuing fundamental rights protection through the door of a distinct competence such as that of the internal market (in this case, the legislator is prevented from adopting a coherent, comprehensive and overarching regime for the fundamental right pursued), but at the same time it also indicates the ‘spill-over’ potential when fundamental rights *are* pursued through the internal market.

Given that data protection is the most regulated fundamental right of the EU, the focus of this chapter is on the examination of the consequences of that fact: to what degree has the right gained a truly autonomous definition of its scope at EU level? At first sight, the answer seems to be that the degree is considerable. However, not only does empirical evidence suggest the contrary,⁴⁸ pointing to the fact that the instruments themselves allow degrees of variation in implementation, despite the choice of a maximum harmonisation approach, but also the CJEU’s institutional deference when conflicting fundamental rights are at stake. Recent case law may suggest a changing approach. A further challenge has come from national constitutional courts as regards the Data Retention Directive,⁴⁹ through which the EU has delineated a restriction of the right to privacy. Interestingly, the challenge to the EU autonomous definition does not arise so much from national courts disagreeing with each other as to the definition of the right; rather, it seems to be a manifestation of common agreement that the EU standard, as set out in the Directive, is not a satisfactory one. In other words, it is not national constitutional diversity that clashes with EU interference here, but the fact that the EU standard as set out in the Directive seems to be falling short of those of the Member States. Finally, the European Data Protection supervisor and eventually the CJEU challenged the legislator’s definition of restrictions to data protection when declaring the Data Retention Directive invalid.⁵⁰

D. Freedom of Expression

Chapter five tackles freedom of expression. It takes three different dimensions of that right which the EU has attempted to regulate, or which it has actually regulated: media pluralism, the right to receive and impart information, and commercial expression. The instruments are organised according to the degree to which they are *expressly* conceptualised

⁴⁶ Commission Proposal for a Regulation on the protection of individuals with regards to the processing of personal data and on the free movement of such data, COM(2012) 11 final (hereinafter the ‘General Data Protection Regulation’).

⁴⁷ A comparison can be made with social policy, which was also initially (and still is to a certain extent) pursued through the internal market, before the insertion of a separate title in the Treaties.

⁴⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Safeguarding Privacy in a Connected World A European Data Protection Framework for the 21st Century’ COM(2012) 09 final.

⁴⁹ Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

⁵⁰ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd and Kärntner Landesregierung et al v Ireland* ECLI:EU:C:2014:238.

as fundamental rights legislation, starting from the legislation that is most expressly so conceived and progressing in descending order. Hence, the analysis commences with media pluralism. The discussion highlights the potential importance of an express fundamental rights conceptualisation not only in relation to the content of the legislation, but also in the politics of negotiation and lobbying. Consideration is also given to how the use of fundamental rights language may be employed to instrumentalise the competence argument. The demonstration of these points draws to a considerable extent on political science literature.

Next, the right to receive and impart information is regulated by the Audiovisual Media Services Directive,⁵¹ the proposal of which Commissioner Reding had characterised as ‘a harmonised implementation of the fundamental right of freedom of expression.’⁵² Its origins⁵³ reveal a firm institutional belief that the instrument will ensure freedom of expression and promote democracy across Europe, and that rhetoric is still to be found in the Preamble of the current instrument. At the same time, the Directive can also be seen as restricting the freedom to provide and receive information, for example, to the extent that it imposes European quota rules, or restrictions on broadcasts for the protection of minors. These interests can also be conceptualised in fundamental rights terms, which means that the Directive is also an example of the European legislator striking a balance between conflicting rights.⁵⁴

The fundamental rights rhetoric employed here did not provoke a challenge on competence grounds (from other policy actors). This is arguably because the right to receive and impart information coincides with the internal market freedom to provide and receive services (Art 49 TFEU). Furthermore, it is this trade lens that has coloured the greatest part of the substantive provisions adopted. It is clear that conceptualisation does matter for the content of a legislative instrument, which in this case turns out to be one of market liberalisation and increased commercialisation.

The final part of the analysis in chapter five turns to commercial expression, which as a concept is largely absent in the regulation of advertising—be that horizontal or sector-specific legislation. The vast majority of instruments considered here lack fundamental rights language both on the face of the text and in their legislative history. This is true irrespective of whether content-based or content-neutral rules are at stake. This finding seems to match the Court’s approach of not conducting substantive review when legislation is challenged on the ground that the freedom of commercial expression is infringed. Hence, it appears that the presence of a fundamental rights approach would not have made a difference. It is suggested that the legislator’s approach is justified, given the weak theoretical foundations on which recognition of that right rests.

⁵¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1.

⁵² V Reding’s intervention in an European People’s Party hearing on the scope of the Audiovisual Media Services Directive (29 June 2006).

⁵³ Commission Green Paper, ‘Television without Frontiers—Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable’ COM(84) 300 final (14 June 1984).

⁵⁴ Pluralism, cultural identity and children’s rights, the protection of human dignity and protection against hate speech, and the freedom to conduct a business. The latter is not mentioned in the instrument, but see Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28.

E. Fundamental Labour Rights

The next chapters (six and seven) turn to fundamental social rights. Chapter six deals with two sets of fundamental labour rights: the right to fair and just working conditions, and the right to take collective action (including the right to strike), both of which were subjected to legislative intervention in response to Court-led negative integration.

The former is regulated in the Posted Workers Directive,⁵⁵ but it is not expressly acknowledged as such, even if the Directive was understood by the European Parliament as an instrument implementing the Community Charter of the Fundamental Social Rights of Workers, at least at an early stage of its negotiation. However, despite abandonment of that emphasis, the social dimension (and with it the fundamental rights dimension) could still outweigh the economic objective. This was reversed in later case law.⁵⁶ This in turn created a renewed momentum for a legislative response, leading to a proposal for a separate instrument.⁵⁷ The impact assessment of that instrument is permeated with fundamental rights language, as perhaps can be expected in the post-Lisbon era,⁵⁸ although this did not decisively affect the substantive outcome reached in the report (that the substance of the Posted Workers Directive⁵⁹ will not be re-opened) and also in the resulting final instrument.⁶⁰

The right to take collective action has been dealt with by the legislator before and after the *Viking-Laval* line of case law through ‘saving clauses’. These clauses served to exclude that right from the scope of application of the legislation at issue. Different types of ‘saving clauses’ have been produced in the instruments:⁶¹ some in favour of national autonomy, others leaving the matter entirely to the CJEU, some equivocal and others seemingly unequivocal. Their potential (when unequivocal and in favour of national autonomy) to ‘save’ collective action from EU law could be seen as questionable, given that their application will be subject to the free movement rules of the Treaty. Yet they have a role in informing the Court of the weight that such rights should assume in the internal market. This function is crucial in the internal market where there is a need for both the Court and the legislator to work in tandem towards deeper integration.

⁵⁵ Directive 97/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

⁵⁶ *Laval*, above n 27.

⁵⁷ Commission Proposal for a Directive on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services, COM(2012) 131 final.

⁵⁸ COM Communication, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573/4 (19 October 2010).

⁵⁹ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (Posted Workers Directive).

⁶⁰ Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2014] OJ L159/11 (‘the IMI Regulation’).

⁶¹ Directive 2006/123/EC on Services in the Internal Market [2006] OJ L376/36 (Services Directive); Posted Workers Directive, above n 59; Council Regulation (EC) No 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L337/8 (‘Monti I’); Commission Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final (‘draft Monti II Regulation’).

The chapter also examines the single legislative attempt to expressly regulate the right to take collective action at the EU level, the failed draft Monti II Regulation. However, this attempt—to the extent that one can make sense of the contradictory and hence poor legislative drafting—does not set out to expressly alter the Court’s approach. In this sense, the approach seems similar to that taken with regard to the saving clauses enacted post-Lisbon.

Overall, the impression one gets is that the legislator opts for an ‘abdication of political responsibility to the Court’⁶² both in the use of saving clauses and in express regulation.

F. The Right to Health

Chapter seven tackles the right to health. Language naming the fundamental right to health is virtually absent in the internal market legislation and its legislative history, but the overall conclusion drawn is that such conceptualisation would have provided limited added value in this area. This can be explained partly by drawing on empirical arguments and partly by the nature of the right to health operating in a system of limited competences.

The arguments are the following. First, human health is among the values that rank very high in the internal market and it is pursued through a great amount of internal market legislation/regulation despite the absence of fundamental rights language. Second, this regulation is in fact in compliance with the fundamental right to health standards. Third, the strongest form of the right (its combination with the principle of non-discrimination: the ‘negative dimension’ of the right) is in the patient mobility context already guaranteed through the operation of the free movement rules. Fourth, in order to achieve the legislative aims, social mobilisation has not been facilitated by rights language. In fact, the types of civil society organisations involved in lobbying for EU health legislation are public health organisations, not human rights organisations, but tobacco lobbying groups did have recourse to the fundamental rights arguments in this context in order to oppose health legislation. It may be speculated that this has contributed to the introduction of fundamental rights language in the negotiations leading to the second Tobacco Products Directive.⁶³ Against this background, it can be maintained that linking health to fundamental rights can provide for a strong counter-argument when a proliferated use is made of other fundamental rights arguments (these would typically be fundamental rights relating to economic activity) in order to oppose health regulation. Finally, other areas where a fundamental rights approach could provide for added value is fundamental rights-compliant allocation and prioritisation of resources. However, there is no EU activity in this field due to competence constraints.

⁶² T Novitz, ‘Labour Rights as Human Rights: Implications for Employers’ Free Movement in an Enlarged European Union’ (2006–07) 9 *Cambridge Yearbook of European Legal Studies* 358, 371–75.

⁶³ Directive 2014/40/EU on the manufacture, presentation and sale of tobacco products [2014] OJ L127/1.

IV. CONCLUSION

The concluding chapter eight pulls together, reorganises and evaluates the findings of chapters two to seven in an attempt to answer the questions posed above and identified as central to this book. It reveals the prevalent type of conceptualisation of the legislation and identifies the determining factors that account for such a conceptualisation. Finally, it assesses the consequences of the adopted approaches both for the substantive content of legislation and for its judicial review. At the end of this assessment, we are left with a much more differentiated account of the EU's fundamental rights policy in and through the internal market than was perhaps initially expected.