Chapter 11
Excursus: EU Fundamental Rights in EU Gambling Law

According to the judgments of the Court of Justice and the EFTA Court as well as the opinions of the Advocates General, the violation of EU or EEA fundamental rights has so far not been pleaded in the gambling cases.[1] This is somehow surprising: the application of fundamental rights is not excluded from the outset and counsels have argued points that clearly had less chances of success in the gambling cases.[2] Chapter 11 discusses the potential role of EU fundamental rights in the gambling jurisprudence. The *development* of EU fundamental rights, mainly done by case law (Sect. 11.1), and the drafting of the *Charter of Fundamental Rights of the EU* are presented (Sect. 11.2). This lays the basis to analyse, *which* EU fundamental rights may apply to gambling services and to inquire the *level of protection and interpretation* under the Charter as well as their *relationship* to EU fundamental freedoms of the Single Market (Sect. 11.3). Finally, it is examined whether the legal situation changed with the *Lisbon Treaty* (Sect. 11.4).

11.1 Development of Fundamental Rights in Case Law

Fundamental rights are a category of law that the drafters of the Rome Treaties did not have in mind. The focus of the EEC Treaty was on the creation of a common market and the policies and supranational institutions that would be necessary to achieve it. The relation between the Court of Justice on the one side and national

[1] For the first time, EU fundamental rights were pleaded in the case C-390/12 Robert Pfleger et al. in the context of gambling law. At the time of writing, the judgment and the opinion of Advocate General Sharpston were not yet handed down. Therefore, by the time of publication of this book, some of the questions addressed in the present excursus may have arguably been dealt with in this judgment or this opinion.

[2] In relation to the latter point: some Member States pleaded in *Schindler* that games of chance did not constitute an economic activity: C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_11,

constitutional courts as well as the ECtHR on the other can be compared to the two-sword doctrine with the religious and the secular leader each holding their swords.[3] While the Court of Justice had the reign over European economic law, national constitutional courts – supervised by the ECtHR – held the reign over fundamental and human rights law.

The Court of Justice challenged the initial balance and separation of powers. Five years after the EEC Treaty entered into effect, the Court started to develop its constitutional reading of EEC law with *Van Gend en Loos* in 1963[4] and *Costa v ENEL* in 1964.[5] The direct effect and supremacy of EU law were a challenge to the constitutional doctrines of many Member States. According to the Court of Justice, direct effect and supremacy of EU law did not depend on approval by national constitutional doctrines. These principles were *inherent* to the EEC Treaty.

The constitutional reading, based on a predominantly *teleological* interpretation of Union law and the *central role granted to fundamental freedoms* raised concerns that Union law might marginalise national law. The case law on supremacy triggered two questions. First, would EU law be held supreme to *any* national law, including fundamental rights as protected by the constitutional laws of the Member States? Secondly, would EU law even prevail in a situation of conflict where the national legislation was passed *subsequent* to the relevant EU provision? Both questions were answered in the affirmative; the former in *Internationale Handelsgesellschaft*[6] and the latter in *Simmenthal*.[7]

This development of the doctrine of supremacy challenged the constitutional courts. Not only did the Court of Justice claim that its sword was superior to that of national courts (*Costa v ENEL*); it also seemed to question the very relevance of the sword of the constitutional courts. The Court held in *Internationale Handelsgesellschaft* that the validity of Union law could not be "overridden by rules of national law, however framed,"[8] meaning in the case at hand fundamental rights protected by national constitutional law.

In the aftermath of the atrocities committed during the Second World War, human rights had been attributed a central role in Western European legal orders. The Council of Europe was founded whose main role has been the promotion of human rights. The ECtHR was adopted to ensure an effective and independent protection of

[3] The two-sword doctrine (or theory) described the relationship between the power of the pope and that of the emperor. The two swords were the symbols of power of two, in principle, separate reigns.

[4] C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR English special edition 1.

[5] C-6/64 Flaminio Costa v E.N.E.L. ECR English special edition.

[6] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

[7] C-106/77 Amministrazione delle Finanze dello Stato Simmenthal SpA [1978] ECR 629.

[8] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 3.

those rights. National constitutions listed the recognised fundamental rights and empowered courts to protect those rights. The Court of Justice's development of the doctrine of supremacy questioned this central role of fundamental rights. Was the Internal Market a means or a goal in itself? The Court of Justice left the constitutional courts with the impression of ignoring that European economic integration was only a means to avoid a replication of the atrocities of two world wars.

This approach was unacceptable to a number of constitutional courts and later also to the ECtHR.[9] It was intolerable to them that the respect of fundamental rights was subject to the grace of the Court of Justice. In the aftermath of *Internationale Handelsgesellschaft*, several constitutional courts made clear that they were not ready to allow such encroachment on their reign, most prominently the German Bundesverfassungsgericht in its '*Solange I*' ruling.[10] While constitutional courts were ready to accept the idea of supremacy of EU law, they were not ready to sacrifice fundamental rights on the altar of supremacy.

This seemed to leave the Court of Justice with two options. First, EU law would continue to be of mere economic nature and, as such, would be subject to national fundamental rights as interpreted by constitutional courts. Second, the Court would recognise fundamental rights as forming part of EU law – and as interpreted by the Court of Justice. Wisely, the Court opted for the latter option, which the Bundesverfassungsgericht had indicated in the *Solange I* ruling. The Court of Justice realised that it could only sustain the doctrine of supremacy of EU law if it effectively protected fundamental rights.

While the Court of Justice had rebutted to discuss fundamental rights in earlier years,[11] it started in the 1970s to recognise a number of fundamental rights. Eventually, it also became clear that the protection of fundamental rights gave a level of legitimacy to the constitutional reading of Union law that mere market integration could not.[12]

When the Court of Justice first stated that it would protect fundamental rights under Union law, it did so in a quite unspectacular manner. In *Stauder*, the Court chose an interpretation of a provision that allowed it to accommodate the claims of the plaintiff that the provision at hand would otherwise violate his human right

[9] Matthew v the UK, Application no 24833/94 [1999]; Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland Application no 45036/98 [2005].

[10] Solange I BVerfGE 37, 271 *et seq.*

[11] C-40/64 Marcello Sgarlata et alii v Commission [1965] ECR English Special Edition 215. As this judgment showed, the CJEU maintained this position even after *Costa v ENEL* and was not willing to take fundamental rights considerations into account. Cf. judgment *i.f.* (no paragraphs indicated): "The applicants object that, if recourse to Article 173 were to be refused by reason of a restrictive interpretation of its wording, individuals would thus be deprived of all protection by the courts both under Community law and under national law, which would be contrary to the fundamental principles governing all the Member States. However these considerations, which will not be discussed here, cannot be allowed to override the clearly restrictive wording of Article 173, which it is the Court's task to apply".

[12] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 233.

to privacy. The Court simply stated without further elaboration at the end of the decision:

> Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.[13]

Certainly, the Court of Justice in *Internationale Handelsgesellschaft* repeated that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice."[14] But the decision was overshadowed by the blunt statement that the validity of Union law could not be "overridden by rules of national law, however framed."[15] Furthermore, the Court found after a rather superficial analysis that the Union system at hand did "not violate any right of fundamental nature."[16] Fundamental freedoms took precedence over fundamental rights or were at least protected at a higher level than fundamental rights.[17]

In the following years, the Court continued to insist on the autonomous development of EU fundamental rights. Nevertheless, it *indicated certain authoritative sources for EU fundamental rights*. These rights were "inspired by the constitutional traditions common to the Member States"[18] and "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines for these rights."[19] It became evident that particular attention would be given to the *ECHR*. The Court of Justice started to refer to it in *Rutili*,[20] and finally found that the ECHR had "special significance."[21] The Court of Justice has accepted a broad variety of fundamental rights that can be grouped into civil rights, economic rights, rights of defence and (other) general principles of law.[22] The two main sources of inspiration for the Court

[13] C-29/69 Erich Stauder v City of Ulm – Sozialamt [1969] ECR 419, para. 7. Earlier, in *Van Eick*, the Court had only referred to the need to "observe the fundamental principles of the law of procedure": C-35/67 August Josef Van Eick v Commission [1968] ECR 329, Heading A, p. 342 (no paragraphs indicated).

[14] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 4.

[15] Ibid., para. 3.

[16] Ibid., para. 20.

[17] Kombos, C. (2006). "Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity", *European Public Law, 12*(3), 433–460, at 435.

[18] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 13.

[19] C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491, para. 13.

[20] C-36/75 Roland Rutili v Ministre de l'Intérieur [1975] ECR 1219, para. 32.

[21] C-299/95 Friedrich Kremzow v Republik Österreich [1997] ECR I-2629, para. 14.

[22] For a list of these rights, cf. Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 235–236.

of Justice in defining these rights have been the *constitutional traditions common to the Member States and the ECHR*, including the case law of the ECtHR.[23]

While this *excursus* focuses on EU fundamental rights, it should be noted that the *EFTA Court* too has accepted *fundamental rights as general principles of EEA law*.[24] The first such recognition occurred in the case *TV 1000*,[25] which regarded a Norwegian ban on the transmission of pornographic films from Sweden to Norway. The EFTA Court found that this prohibition was a restriction of the freedom of expression, however, justified by public morality concerns. The EFTA Court referred to the case law of the ECtHR, namely the latter's well known *Handyside* judgment.[26] It held, in very similar terms as the ECtHR, that there was no uniform conception of morals in the domestic laws of the Contracting States.[27] The EFTA Court recognised further EEA fundamental rights in subsequent decisions. In *Bellona*, it held that access to justice constituted an essential element of the EEA legal framework and that the idea of human rights reinforced calls for widening the avenues of access to justice in the EEA.[28] In relation to the right to a fair and public hearing within a reasonable time, it noted that the ECHR and the case law of the ECtHR were important sources for determining the scope of EEA fundamental rights.[29] Recently, it held that effective judicial protection, including the right to a fair trial, constituted a general principle of EEA law. It was in this light that the EFTA Court assessed the burden of proof and the legality of a fine imposed during a competition law procedure.[30] Finally, it should be noted that the EFTA Court has repeatedly referred to the Charter of Fundamental Rights of the EU.[31]

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[23] For a comparison of the protection of human rights in the two legal frameworks, cf. Gebauer, K., Parallele Grund- und Menschenrechtsschutzsysteme in Europa? Ein Vergleich der Europäischen Menschenrechtskonvention und des Strassburger Gerichtshofs mit dem Grundrechtsschutz in der Europäischen Gemeinschaft und dem Luxemburger Gerichtshof, Hamburger Studien zum Europäischen und Internationalen Recht, vol. 45, Berlin: Duncker & Humblot, 2007.

[24] Baudenbacher, C., *EFTA Court – Legal Framework and Case Law*, 3rd ed., Luxembourg: EFTA Court, 2008, at 25–26; Baudenbacher, C., "Fundamental Rights in EEA Law or: How far from Bosphorus is the European Economic Area Agreement?" in *Human Rights*, *Democracy and the Rule of Law*: *Liber amicorum Luzius Wildhaber*, Breitenmoser, S., Ehrenzeller, B., Sassòli, M., et al. (Eds.), Baden-Baden: Nomos Verlagsgesellschaft, 2007c, pp. 59–89.

[25] E-8/97 TV1000 Sverige AB v Norway [1998] EFTA Court Report 68.

[26] Handyside v the UK, Application no 5493/72 [1976].

[27] E-8/97 TV1000 Sverige AB v Norway [1998] EFTA Court Report 68, para. 48.

[28] E-2/02 Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA [2003] EFTA Court Report, 52, paras 36–37. In relation to access to justice, cf. further E-3/11 Pálmi Sigmarsson and the Central Bank of Iceland [2011] EFTA Court Report 430, para. 29; E-5/10 Dr Joachim Kottke and Präsidial Anstalt and Sweetyle Stiftung [2009–2010] EFTA Court Report 320, para. 26.

[29] E-2/03 Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson [2003] EFTA Court Report, 185, para. 23.

[30] E-15/10 Posten Norge AS v EFTA Surveillance Authority [2012] nyr.

[31] E-4/11 Arnulf Clauder [2011] EFTA Court Report 216, para. 49; E-15/10 Posten Norge AS v EFTA Surveillance Authority [2012] nyr, para. 86.

11.2 Drafting of the Charter of Fundamental Rights of the EU

After three decades during which the Court of Justice recognised a number of fundamental rights as general principles of EU law, many EU stakeholders felt that fundamental rights should receive a more prominent and visible place. In 1999, the European Council of Cologne decided that a charter of fundamental rights should be composed. That document should combine the rights of the ECHR, those of the common constitutional traditions, EU citizenship rights as well as the social rights enshrined in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.[32]

Accommodating earlier criticism of a lack of democratic legitimacy and procedural transparency, a completely new method – the Convention – was chosen to draft the charter. The Convention's meetings were public, attended by various observers, and many groups from civil society were invited to submit contributions.[33] One year after the constituent meeting of the Convention, the Charter of Fundamental Rights was signed and proclaimed by the presidents of the Council, the European Parliament and the Commission during the European Council of Nice in 2000.[34] The result was ambiguous. While the Charter contained a broad variety of rights, it *was not given legally binding status* mainly because it also listed social rights, which not all Member States were ready to accept as binding.

The development of EU fundamental rights profited from a mutual influence between the Court of Justice and the EU legislator, even though the former's role was dominant up to the new millennium. When the Court in the early 1970s started to develop a jurisprudence of fundamental rights, there was no express legal basis in Union law to base it on. In 1977, the Council, European Parliament and Commission passed a joint declaration in which they stressed

> the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[35]

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[32] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 237.

[33] The Convention was composed of representatives of the Heads of State and Government, of the national parliaments, of the European Parliament and the Commission. It was chaired by Roman Herzog, former President of Germany and of the German Constitutional Court. In addition, it was attended by observers from the Court of Justice, the Committee of the Regions, the Economic and Social Committee, the Ombudsman, and – from outside the EU institutions – the Council of Europe. "The Charter of Fundamental Rights of the European Union – Annex: The Convention Responsible for Drafting the Charter of Fundamental Rights", available at http://www.europarl.europa.eu/charter/composition_en.htm.

[34] Conclusions of the Presidency at the Nice European Council.

[35] Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ C 103, 27.04.1977, 1.

The EU legislator expressly referred to the Court's fundamental rights case law and to the same sources that the Court too indicated as sources of inspiration. Two years later, the Court of Justice in return referred to this declaration in *Hauer*.[36]

The other aforementioned documents that influenced the Charter of Fundamental Rights of the EU were the Community Charter of the Fundamental Social Rights of Workers,[37] the Maastricht Treaty[38] with its citizenship provisions and the European Social Charter.[39] The Community Charter was adopted by the European Council in 1989 in the form of a declaration. It established the major principles on which European labour law should be modelled; the Commission was supposed to take action in this matter.[40] The Maastricht Treaty introduced the Union citizenship, which offered a couple of political rights to EU citizens, including diplomatic protection. By contrast, the European Social Charter[41] was not adopted by the Union but passed by the Council of Europe in 1961 as the natural complement of the ECHR; it contains social and economic human rights and was revised in 1996.[42]

The Lisbon Treaty and the Charter of Fundamental Rights of the EU also *redefined the relationship of the EU to the ECHR*. The EU gained legal personality: it can enter legally binding acts and enjoys in each of the Member States "the most extensive legal capacity accorded to legal persons under their laws."[43] According to the revised Treaties, the EU itself shall accede to the ECHR.[44] Once this occurs, the EU and its institutions will be subjected to the jurisdiction of the ECtHR – a major readjustment of the judicial architecture of the European High Courts. However, the fundamental rights as guaranteed by the Convention and resulting from the constitutional traditions common to the Member States form in any event already general principles of EU law.[45]

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[36] C-44/79 Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3727, para. 15.

[37] "Community Charter of the Fundamental Social Rights of Workers", available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community_Charter_of_the_Fundamental_Social_Rights_of_Workers.pdf.

[38] Treaty on European Union, OJ C 191, 29.07.1992.

[39] "European Social Charter (revised)", available at http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm.

[40] The Community Charter was not signed by the UK at the time of its adoption but only later in 1998 after Tony Blair was elected as Prime Minister: "Community Charter of Fundamental Social Rights of Workers", available at http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/c10107_en.htm.

[41] Available at "European Social Charter (revised)".

[42] "The European Social Charter", available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp.

[43] Arts 47 TEU and 335 TFEU. Prior to the TFEU, the situation was more complex. Only the three communities had legal personality but not the EU. Agreements relevant for the Internal Market were concluded either by the EC, the Member States or both of them. For a publication on mixed agreements, cf. Hillion, C., *Mixed Agreements Revisited – The EU and Its Member States in the World*, Oxford: Oxford University Press, 2010.

[44] Art. 6(2) TEU.

[45] Art. 6(3) TEU.

At the time of writing, the EU's accession to the ECHR was not yet finalised, but the entry into force of Protocol No 14 in 2010 provided the necessary legal basis for this step.[46] A draft accession agreement of the EU to the ECHR was reached in April 2013.[47] In spite of the yet to finalise accession process, the EU is already *indirectly* subjected to the ECHR. All EU Member States ratified the ECHR. The ECtHR made it clear that the Signatory States have to comply with the ECHR, irrespective of whether or not they are members of the EU. The question whether the ECHR is directly applicable in a case is a matter for the national law to decide. Some countries follow a dualist, others a monist approach. In any case, *the veil of EU law does not prevent* the Signatory States from being under a legal obligation to respect the ECHR. The ECtHR has been very outspoken on this point, for instance in the well-known *Bosphorus* case,[48] a kind of *Solange* judgment of the Strasbourg Court similar to that of the German Constitutional Court.[49] EU law must thus comply with the ECHR.

11.3 EU Fundamental Rights in Gambling Law

11.3.1 Applicable Rights

The status of the Charter[50] has been a controversial issue. It became *legally binding only with the entry into effect of the Lisbon Treaty* and has now the same legal status as the Treaties,[51] thus holding the potential to substantially add to the constitutional reading of the Court. The adoption of the Lisbon Treaty gave the Charter a more prominent place in the legal architecture of the Union.[52]

It is important to note that, irrespective of its legal status, the Charter *reaffirms rights* that were already recognised earlier. There are ample indications for this position. The preamble itself reaffirms

[46] "Council of Europe, Directorate of Communication, Press release 437(210) of 31 May 2010", available at https://wcd.coe.int/ViewDoc.jsp?id=1628875&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE.

[47] "Council of Europe, Secretary General, Newsroom of 4 April 2013", available at http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1394983&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=10.

[48] Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland Application no 45036/98 [2005].

[49] Solange I BVerfGE 37, 271 *et seq*.

[50] Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007.

[51] Art. 6(1) TEU.

[52] On the other hand, there are a few elements that may reduce the Charter's importance. For instance, the Charter outlines "rights, freedoms and principles" (Charter, Preamble, *i.f.*) with principles being judicially cognisable only in the interpretation of implementing Union legislative and executive acts and implementing Member States acts (Charter, Art. 52(5)).

> the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.[53]

The fact that the Charter reaffirms formerly recognised rights was also noted by members of the Court of Justice. Prior to the entry into effect of the Lisbon Treaty and shortly after the Charter's initial proclamation in Nice, Advocates General and the General Court began referring to the Charter. According to Advocate General Tizzano

> the Charter […] is not in itself binding. However, […] the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments. […] in particular, we cannot ignore [the Charter's] clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved […] in the Community context.[54]

The General Court[55] and the Court of Justice[56] confirmed the reaffirming character of the Charter.

Consequently, even where this chapter refers to provisions of the Charter, the relevant rights were already relied upon prior to the Lisbon Treaty, simply sometimes under a slightly different term. *Three fundamental rights* are of main interest for the purpose of this analysis: Article 16 (freedom to conduct a business), Article 15 (freedom to choose an occupation and right to engage in work) and Article 11 (freedom of expression and information).

Article 16 protects the *freedom to conduct a business*.[57] Unsurprisingly, any business must be conducted "in accordance with Union law and national laws and practices."[58] This 'limitation' does not further restrict the fundamental right since fundamental rights can generally be limited if provided by law.[59] The interpretation of the fundamental rights is guided by the Explanations Relating to the Charter of Fundamental Rights.[60] According to these Explanations, Article 16 is based on the case law of the Court of Justice, which recognised the freedom to exercise an

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[53] Charter, Preamble.

[54] Opinion of Advocate General Tizzano in C-173/99 The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) ECR I-4881, paras 27–28.

[55] T-177/01 Jégo-Quéré & Cie SA v Commission [2002] ECR II-2365, para. 42: "In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union."

[56] C-540/03 Parliament v Council ('family reunification') [2006] ECR I-5769, para. 38.

[57] "The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."

[58] Charter, Art. 16.

[59] Charter, Art. 52(1); confirmed in Explanations to Art. 16.

[60] Explanations Relating to the Charter of Fundamental Rights, OJ C 303/02, 14.12.2007; according to this document, the Explanations do not have the status of law, but they are "a valuable tool of interpretation intended to clarify the provisions of the Charter" (Explanations, *i.i.*).

economic or commercial activity[61] as well as the freedom to contract.[62] In addition – and neglected by the Explanations – the Court also recognised the right to trade.[63] The Explanations further refer to Article 119(1) TFEU protecting free competition.[64]

The example of the fundamental right to conduct a business illustrates that the *Charter does not simply protect human rights already protected under the ECHR*. The two instruments differ in their *genesis and purpose*. Contrary to the Council of Europe, which was founded to protect a minimum level of classic human rights, the economic dimension has always been central to the EU integration process. While the *right to conduct a gambling business* is protected under the Charter, it falls *outside the scope of the Convention*, *except where national law determines* '*civil rights*' of gambling operators.

> In view of the status of the Convention within the legal order of Sweden, the Court observes firstly that the Convention does not grant to individuals or companies the right to provide betting and gaming services. Such a right can be derived neither from Article 6 § 1 nor from any other provision of the Convention or its Protocols. It follows that the question whether such a right can be said to exist in any particular case must be answered solely with reference to domestic law. In deciding whether a right, civil or otherwise, could arguably be said to be recognised by Swedish law, the Court must have regard to the wording of the relevant legal provisions and to the way in which these provisions are interpreted by the domestic authorities.[65]

Therefore, where national law does not provide for a right to acquire a licence but rather involves a mere *allocation of a limited number of concessions*, the Convention is regularly not applicable in the absence of any determination of 'civil rights'. With regard to *gambling consumers* finally, *Article 1 of Protocol No 1* does not confer a right to possess gambling goods such as gaming machines. The provision

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[61] The CJEU referred in *Nold* to the "right freely to choose and practice their trade or profession"; cf. C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491, para. 14, and in *Spa Eridania* to the right to "the carrying on of economic activity"; cf. C-230/78 SpA Eridania-Zuccherifici Nazionali and SpA Società Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali ECR-2749, para. 20.

[62] "Freedom to contract": C-151/78 Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture [1979] ECR 1, para. 20; "contractual freedom": C-240/97 Spain v Commission [1999] ECR I-6571, para. 99.

[63] C-240/83 Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU) [1985] ECR 531, para. 9.

[64] "1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

[65] Ladbrokes Worldwide Betting v Sweden, Application no 27968/05 [2008] (no numbering of paragraphs).

only protects property *but not a right to acquire property*.[66] The different scope of the Convention and the Charter must not be neglected.

The scope of application of Article 16 of the Charter is *more general and broader* than that of Articles 15 and 11. Generally, it applies to situations where the freedom to conduct a business is somehow restricted. This is significantly the case where monopolistic structures or strict licensing/authorisation systems are in place. Gambling businesses are regularly conducted by legal persons but may exceptionally be conducted by natural persons as well. Article 16 protects both of them.

Article 15 protects the *freedom to choose an occupation and the right to engage in work*.[67] As opposed to Article 16, this provision *only protects natural persons*. The Explanations on Article 15 deal with its three paragraphs separately. Article 15(1) refers first to the case law of the Court of Justice protecting the freedom to choose an occupation.[68] Moreover, the paragraph draws upon Article 1(2) of the European Social Charter and Point 4 of the Community Charter of the Fundamental Social Rights of Workers. The former protects the right to work and calls the parties "to protect effectively the right of the worker to earn his living in an occupation freely entered upon." The latter holds that "[e]very individual shall be free to choose and engage in an occupation according to the regulations governing each occupation." Hence, the first paragraph applies to situations where somebody cannot pursue gambling activities as an occupation (Article 15(1)), either by offering gambling services or by receiving these services in the sense of a professional occupation.[69]

Article 15(2) deals with the fundamental freedoms of workers, services and establishment. The fact that these 'fundamental freedoms' are listed in the Charter also makes them take the shape of 'fundamental rights'.

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[66] Linde v Sweden, file no 11628/85 [1986] (Commission Decision) (no numbering of paragraphs).

[67] "1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. 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.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

[68] C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491, para. 14; C-44/79 Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3727, para. 31; C-234/85 Staatsanwaltschaft Freiburg v Franz Keller [1986] ECR 2897, para. 8.

[69] According to the odds of games of chance, gambling cannot be a sustainable basis to make a living for the player. Hence, the most relevant situation would regard games that hold a strong skill component such as Texas hold'em poker in tournament form. While poker is considered in some European jurisdictions a game of skill, it is considered a game of chance in other jurisdictions: cf. poker sections in Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997-2010*. For the qualification of poker as a game of chance, skill or sport, cf. Diaconu, M., and Veuthey, A. (2012). "Poker – Game of Chance, Mind Game or Sport?", *Causa Sport, 1*, 32–36.

According to the Explanations, paragraph 3 is based on Article 153(1)(g) TFEU[70] and Article 19(4) of the European Social Charter.[71] They both intend to improve the conditions of employment of migrant workers. Whereas the TFEU provision is rather programmatic, the provision from the European Social Charter would appear to provide a right to 'treatment not less favourable' than towards nationals. A potential application of Article 15(3) could be the following. If national measures restricted the employment of casino staff to nationals of that country, Union citizens and nationals of third countries entitled to work in the Union (Article 15(3)) would be protected in their seeking for employment and working in this field (Article 15(1–2)).

Finally, Article 11 protects the *freedom of expression and information*.[72] Freedom of expression is relevant in that it also covers *free commercial speech*, at least as interpreted by the ECtHR. According to the Explanations, Article 11 corresponds to *Article 10 of the ECHR*;[73] therefore, the meaning and scope of this right is identical to that of the ECHR. In fact, this is considered to be a minimum threshold and the equivalence requirement does not prevent Union law from providing more extensive protection.[74] According to the Explanations, restrictions to the freedom of expression

[70] "1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

[…]

(g) conditions of employment for third-country nationals legally residing in Union territory."

[71] "With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

[…]

4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

a. remuneration and other employment and working conditions;
b. membership of trade unions and enjoyment of the benefits of collective bargaining;
c. accommodation."

[72] "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected."

[73] Article 10 ECHR:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[74] Charter, Art. 52(3).

and information may not exceed those limitations provided for by the Convention (Article 10(2)).

Freedom of expression and information is most relevant in the field of *advertising*.[75] Restrictions to gambling services are very common; usually, only licensed operators are allowed to feature advertising. In some jurisdictions, advertising is supposed to be informative rather than aggressive.[76]

11.3.2 Level of Protection and Interpretation

Due to the rather complex interplay of EU fundamental rights, ECHR and constitutional laws, the issue of the level of protection is very important. The Lisbon Treaty introduced a couple of aspects that are relevant in this regard. Prior to Lisbon, EU fundamental rights were *de iure* not necessarily protected at the same level as their corresponding rights at national and ECHR level. The Court of Justice insisted in keeping the autonomy of deciding on the level of protection.[77] Yet, the Court of Justice, subsequent to *Solange I* and similar rulings, was aware that it could not simply affront constitutional courts with a low standard of protection. In *Omega*, it even went as far as to accommodate national sensibilities to the potential detriment of a homogeneous application of EU Internal Market law.[78]

The Charter eliminates some legal uncertainty. It contains *four guiding principles* that inform the level of protection and the interpretation of EU fundamental rights.[79] First, Article 53 provides that the protection offered by national constitutions and international treaties is not to be undermined.[80] According to the Explanations, this provision intends to at least *maintain the current level of protection*.[81] In the unlikely event of the ECtHR lowering the protection level, the Court of Justice would remain bound by the higher protection level as formerly practised ('standstill'). On the

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[75] For a detailed discussion of the protection of commercial communication in EU law, cf. Oesch, M., "Der Schutz kommerzieller Kommunikation im EU-Recht" in *Kommunikation*: *Festschrift für Rolf H. Weber zum 60. Geburtstag*, Heinemann, A., Hilty, R.M., Nobel, P., et al. (Eds.), Bern: Stämplfi Verlag, 2011, 605–620.

[76] Cf. advertising sections in Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*.

[77] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

[78] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

[79] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 242.

[80] "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[81] Explanations on Art. 53.

other hand, if the ECtHR were to raise the protection level, the Court of Justice would arguably have to follow.[82]

Secondly, the Charter is composed of very different categories of rights, from classic defence rights to social rights. Insofar as rights correspond to rights guaranteed by the ECHR the meaning and scope shall be identical. However, Union law can offer more extensive protection.[83] This represents the practice of the Court of Justice in its case law. The Court's practice was criticised as a 'cut-out and paste' reliance on the ECtHR's jurisprudence[84] and that it did not take sufficient account of the substantial differences to the ECHR and the Council of Europe whose level of integration for instance was far less deep.[85]

The third and fourth guiding principles can be seen as a kind of safeguard measure by the governments to prevent the Court from becoming 'too creative' in its interpretation of EU fundamental rights. Certainly, the Charter does not introduce rights that were unknown earlier to the EU legal order. But considering that the Charter is granted the same legal value as the Treaties and the Court's affinity for a dynamic and teleological interpretation of EU law, concerns about a further intensified constitutional reading of EU law may not have been completely unfounded. Article 52(7) states that Union and national courts must give "due regard" to the Explanations.[86] It thus underlines the historic will of the legislator as method of interpretation. However, its significance may be limited since the Explanations mainly point at the source of the respective rights but not the scope and content.[87] Finally, Article 52(4) prescribes that rights resulting from the constitutional traditions common to the Member States should also be interpreted in harmony with those traditions.[88] This principle found prominent expression in *Omega* where human dignity served as justification ground to restrict the freedom to provide services.[89]

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[82] Charter, Arts 53 and 52(3) *i.f. e contrario*. Lenaerts, K. (2012). "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", *Europarecht, 47*(1), 3–17, at 12.

[83] "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[84] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 243.

[85] Greer, and Williams, "Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?", at 462.

[86] "The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

[87] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 243.

[88] "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[89] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

11.3.3 Relationship Between EU Fundamental Rights and EU Fundamental Freedoms

In more recent years, EU fundamental rights raised most attention when they were used to justify national measures restricting EU fundamental freedoms. Prominent cases included *Schmidberger*, *Omega*, *Viking* and *Laval*. In these cases, the Court of Justices acknowledged that there were additional limits to fundamental freedoms and balanced the interest in the application of fundamental freedoms with the interest in respecting fundamental rights. Especially in *Schmidberger*, the Court used a methodology and language that is reminiscent of the approach of the ECtHR when it attempts to 'strike a fair balance'. The diverging interests need to be reconciled. In *Viking*, the Court summarised its approach.

> In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods […].
>
> However, in Schmidberger and Omega, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality […].
>
> It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article [49 TFEU] inapplicable to the collective action at issue in the main proceedings.[90]

The constellation, which is of interest for this analysis is a different one: Can a party rely on fundamental rights *in addition* to it relying on fundamental freedoms? As opposed to the earlier mentioned constellation, precedent is scarce in this case. The 'cause célèbre' in this context is *ERT*.[91]

Elliniki Radiophonia Tileorassi Anonimi Etairia ('*ERT*') was a Greek radio and television undertaking that was granted exclusive broadcasting rights. Notwithstanding these exclusive rights, Dimotiki Etairia Pliroforissis ('DEP'), a municipal information company, and Mr Kouvelas, Mayor of Thessaloniki, set up a television station. ERT was seeking an injunction prohibiting the broadcasting as well as an order to seize and sequestrate the technical equipment before the Thessaloniki Regional Court, which referred the case to the Court of Justice. DEP and Kouvelas relied mainly on the provisions relating to competition and the

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[90] C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-10779, paras 45–47. For a very similar wording, cf. the judgment in *Laval*, handed down one week after *Viking*: C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECR I-11767, paras 93–96.

[91] C-260/89 Elliniki Radiophonia Tiléorassi AE ('ERT') and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas et alii [1991] ECR I-2925.

freedom to provide services as well as on the freedom of expression as guaranteed in Article 10 ECHR. The government justified the restrictions by public policy interests (Article 62 referring to Article 52 TFEU). The objective was to avoid disturbances due to a restricted number of channels.

The Court recalled that fundamental rights, such as Article 10 ECHR, formed an integral part of the general principles of EU law. Measures incompatible with those rights could not be accepted. Where rules of the Convention fell "within the scope of Community law," the Court of Justice had jurisdiction.

> In particular, where a Member State relies on the combined provisions of [Articles 52 and 62] in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, *such justification*, *provided for by Community law*, *must be interpreted in the light of the general principles of law and in particular of fundamental rights*. Thus the national rules in question *can fall under the exceptions* provided for by the combined provisions of [Articles 52 and 62] *only if they are compatible with the fundamental rights* the observance of which is ensured by the Court.
>
> It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions *having regard to all the rules of Community law*, *including freedom of expression*, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.[92]

ERT is of utmost relevance for several reasons. First of all, as opposed to earlier cases, *ERT* states that the Court of Justice can assess the compatibility with fundamental rights as soon as the situation "fall[s] with the scope of Community law."[93] In earlier cases, the Court had argued that it did not have jurisdiction over situations where national rules did not *implement* provisions from Community law.[94] In *ERT*, the situation was that the freedom to provide services could have been obstructed, and the government relied on Treaty exceptions to justify the restrictions. Hence, *ERT* expanded the scope of EU fundamental rights law quite significantly.[95] This has been met with criticism[96] but also with more accommodating views.[97]

Second, if national measures fall within the scope of Union law, they become subject to a *twofold test*. They will not only be assessed by the requirements of the provisions on the fundamental freedoms but also in the light of EU fundamental rights.

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[92] Ibid., paras 43–44. Italic emphasis added.

[93] Ibid., para. 42.

[94] C-12/86 Meryem Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719, para. 28 *i.f.*; C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, para. 19. Less clear wording but often cited in this context: C-60/84 and C-61/84 (Joined Cases) Cinéthèque SA et alii v Fédération nationale des cinémas français [1985] ECR 2605, paras 25–26.

[95] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 254.

[96] Huber holds the view that, especially with the abolition of the pillar structure (post-Lisbon), there is virtually no area of life left that would not lie within the scope of Community law: Huber, P.M. (2008). "The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to Be Reviewed", *European Public Law, 14*(3), 323–333, at 327.

[97] Eeckhout, P. (2002). "The EU Charter of Fundamental Rights and the Federal Question", *Common Market Law Review, 39*(5), 945–994.

The Court of Justice described this twofold test in more detail in the subsequent judgment *Familiapress*.[98] The facts were about a prohibition on selling publications, which offered the chance to take part in competitions of prize games. The government here relied on 'press diversity' as an overriding requirement[99] that could justify restrictions on the free movement of goods. After recalling *ERT*, the Court described the due assessment:

> it must therefore be determined whether a national prohibition […] is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.[100]

Certainly, one may argue that the Court of Justice in *Familiapress* did not separately assess whether the measures where proportionate in relation to intra-Union trade on the one hand and freedom of expression on the other. Sceptics could thus conclude that the Court of Justice would simply apply the same standard of review in relation to both aspects. However, it should not be neglected that the Court left the proportionality assessment to the national court and offered several criteria that this court would have to take into account. It is not unreasonable to argue a stricter standard of review where a national measure restricts both EU fundamental freedoms and EU fundamental rights.[101] At least, this is what a grammatical and teleological interpretation of the Preamble of the Charter suggests: The 'telos' of ensuring EU fundamental freedoms requires a strengthening of EU fundamental rights.[102]

Future cases will show whether the Court is willing to give guidance that provides separate criteria relating to the proportionality of fundamental freedoms and fundamental rights. The Charter mentions an aspect of fundamental rights that may well justify an assessment that gives special attention to EU fundamental rights. Article 52 on the scope and interpretation of rights and principles states:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and

[98] C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997]

[99] The Court of Justice thus applied this twofold test both in situations relating to Treaty exceptions (*ERT*) and overriding requirements (*Familiapress*). This is relevant in that the gambling cases have generally been dealt with by overriding requirements.

[100] C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689, para. 27.

[101] Concurring: Frenz, W. (2011). "Annäherung von europäischen Grundrechten und Grundfreiheiten", *Neue Zeitschrift für Verwaltungsrecht, 30*(16), 961–964.

[102] See in this context the Preamble of the Charter, third and fourth indent: "[the Union] ensures free movement of persons, goods, services and capital, and the freedom of establishment. To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."

> genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[103]

The provision refers to an important aspect of the doctrine on human and fundamental rights. The essence of the right must in principle be respected, the core of a right is not supposed to be violated. The German-speaking literature refers to 'Kerngehalt' or 'Wesensgehaltsgarantie'.[104] While it is difficult to predict where the Court of Justice will draw the line regarding the essence of fundamental rights, the criterion obviously is only relevant in situations of very far-reaching restrictions to economic freedom.

The total ban of an activity, such as gambling services or of a certain type of game, would need to be assessed under a *national* fundamental rights perspective and not under Union law if there was no intra-Union trade element to it. The other extreme restriction is the complete nationalisation of a sector with only one monopolist remaining. In this situation, other operators (national or foreign) do not have any possibility of exercising this activity.

Article 52(1) did not introduce a novel element to the EU legal order. It can be seen as a confirmation of a doctrine found in the "constitutional traditions and international obligations common to the Member States."[105] The Court of Justice too had used similar language in its case law prior to Lisbon. It referred to the essence of the right for instance in *Wachauf*, a case decided two years prior to *ERT*:

> restrictions may be imposed on the exercise of those [fundamental] rights […] provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, *impairing the very substance of those rights*.[106]

In the following paragraph, the Court seemed to suggest that the core of the fundamental right concerned would indeed be violated if a certain regulatory solution were chosen. It called the Member State to apply the Union law "in a manner consistent with the requirement of the protection of fundamental rights."[107]

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[103] Charter, Art. 52(1).

[104] Art. 36(4) of the Federal Constitution of the Swiss Confederation of 18 April 1999 states: "Der Kerngehalt der Grundrechte ist unantastbar." (French language version: "L'essence des droits fondamentaux est inviolable.") The German 'Grundgesetz' states in Art. 19(2): "In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden." *Ex multis*, cf. Drews, C., *Die Wesensgehaltsgarantie des Art. 19 II GG*, Baden-Baden: Nomos, 2005.

[105] Charter, preamble, indent 5. Cf. also Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at 9.

[106] C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, para. 18. Italic emphasis added. For further examples in the case law, cf. Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at fn 34.

[107] C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, para. 22.

11.4 Scope of Application After the Treaty of Lisbon?

Prior to the abolition of the three-pillar structure, the Court of Justice applied two different tests. It limited its *ERT* formula ('fall within the *scope* of Community law') to situations under the first pillar. For situations under the third pillar, it applied, even after *ERT*, the formula 'when *implementing* the law of the Union'.[108]

With the entry into force of the Lisbon Treaty, the Union acquired legal personality and the pillar structure was abandoned. It is thus clear that the Court may not necessarily continue to make the aforementioned differentiation between the different pillars. The Charter seems to offer guidance in this context.

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are *implementing* Union law.[109]

It would appear that this provision indicates that the drafters of the Charter called for a narrower scope of application of EU fundamental rights than the Court of Justice used to give under the *ERT* formula. However, the Explanations are far from being clear on this point, and it will be – again – for the Court of Justice to find an appropriate interpretation.[110] In fact, the Explanations on Article 51(1) make reference to the Court's case law, noting that

> it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the *scope* of Union law.[111]

Besides other judgments, the Explanations also expressly refer to the *ERT* ruling. According to the wording of the Explanations and the express reference to *ERT*, the drafters seem to nevertheless favour the wider scope of application from *ERT*. The Explanations, however, take yet a different direction, claiming that the Court of Justice had "confirmed this case law" and referring to the *Karlsson* case. In that case, the Court had used the formula "binding on Member States when they *implement* Community rules."[112] This case related to a situation where the Swedish authorities had applied EU secondary law and national law implementing EU law. Thus, there was no need for the Court to resort to the *ERT* formula, which applied to a situation relating only to the fundamental freedoms from primary law. Considering the facts in *Karlsson*, the Court could have also resorted to the

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[108] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 254. For an illustrative case, cf. C-355/04 P Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council [2007] ECR I-1657, para. 51.

[109] Charter, Art. 51(1) first phrase. Italic emphasis added.

[110] Concurring: Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at 4. Scholars disagree on the meaning of "when they are implementing Union law". For the literature, cf. the next couple of paragraphs.

[111] Italic emphasis added.

[112] C-292/97 Kjell Karlsson et alii [2000] ECR I-2737, para. 37. Italic emphasis added.

alternative formula known from *Wachauf* and other cases. In sum, the Explanations make Article 51(1) much more ambiguous than the provision appears at first sight.

According to Huber, certain members of the Convention tried to narrow the Court of Justice's formula. He also noted unclear Explanations of the Convention as well as diverging language versions.[113] Kober observed that a systematic limitation of the Court's jurisdiction could not be identified from the discussions in the Convention nor had any critical discussion of *ERT* or *Familiapress* taken place in the Convention. He further argued that at least the German version of the Charter ("Durchführung des Rechts der Union") also covered the observance of primary law.[114] This is all the more remarkable since the attempts to limit the Court's jurisdiction had come, according to Huber, from two German members (and one French member).[115]

As a result, it is certainly not excluded that the Court of Justice will hold that the Charter applies where national measures fall within the scope of Union law,[116] and that it might abandon the narrower formula formerly used in relation to second and third pillar issues. In any event, a two-tier approach with a narrower scope applying to the Charter's fundamental rights and a wider scope applying to fundamental rights recognised in the case law as general principles of EU law does not seem to be desirable.[117]

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[113] Huber, "The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to Be Reviewed", at 331–332.

[114] Kober, M., Der Grundrechtsschutz in der Europäischen Union: Bestandsaufnahme, Konkretisierung und Ansätze zur Weiterentwicklung der europäischen Grundrechtsdogmatik anhand der Charta der Grundrechte der Europäischen Union, Europäisches und Internationales Recht, vol. 71, Nolte, G., and Streinz, R. (Eds.), Munich: Herbert Utz Verlag, 2009, at 175.

[115] Huber, "The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to Be Reviewed", at 331. For further literature on these and related aspects, cf. Rosas, A.K. (2011). "L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de Justice – un premier bilan'", *Il Diritto dell'Unione European, 16*(1), 1–28; Lenaerts, K., and Gutiérrez-Fons, J.A. (2010). "The Constitutional Allocation of Powers and General Principles of EU Law", *Common Market Law Review, 47*(6), 1629–1669; Egger, A. (2006). "EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited", *Yearbook of European Law, 25*(1), 515–553; Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford: Oxford University Press 2006, at 363.

[116] Concurring, *ex multis*: Brosius-Gersdorf, F., Bindung der Mitgliedstaaten an die Gemeinschaftsgrundrechte: Die Grundrechtsbindung der Mitgliedstaaten nach der Rechtsprechung des EuGH, der Charta der Grundrechte der Europäischen Union und ihre Fortentwicklung, Berlin: Duncker & Humblot 2005. This author's analysis relates to Art. II-111 of the Constitutional Treaty which had the identical wording as Art. 51(1) of the Charter.

[117] Concurring: Advocate General Bot in his opinion in C-108/10 Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca (2011) ECR I-7491, paras 119–120 (the CJEU did not address this issue in its judgment); Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at 16.

11.5 Results

Chapter 11 examined the potential role of EU fundamental rights in the gambling jurisprudence. Section 11.1 outlined the development of fundamental rights in the case law. The Court of Justice's jurisprudence on the supremacy of EU law triggered opposition from constitutional courts, which saw the effective protection of national fundamental rights endangered. In response, the Court of Justice developed a rich case law on autonomously interpreted EU fundamental rights and referred to two main sources of inspiration: the constitutional traditions common to the Member States as well as international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, in particular the ECHR. Similarly, the EFTA Court too recognised fundamental rights as general principles of EEA law.

Section 11.2 showed that the EU legislator and judiciary mutually influenced each other over several decades in the development of the protection of EU fundamental rights. A novel, mixed institution – the Convention – was in charge of drafting the Charter. That document became legally binding with the entry into effect of the Lisbon Treaty. According to the revised EU Treaties, the EU itself shall accede to the ECHR.

Section 11.3 first inquired which EU fundamental rights could apply to gambling activities. The latter can fall within the ambit of three rights. First, the *freedom to conduct a business* (Article 16) protects in particular the freedom to exercise an economic or commercial activity, the freedom to contract and the freedom to trade, both of natural and legal persons. Secondly, the *freedom to choose an occupation and right to engage in work* (Article 15) protects natural persons. Thirdly, the *freedom of expression and information* (Article 11) is relevant for the gambling jurisprudence in that it also covers *free commercial speech*, including the advertising of gambling services. The Charter contains guiding principles for its interpretation and notes *inter alia* that the respect for EU fundamental rights is meant to be maintained (*at least*) *at the level of national constitutions and international treaties*, *namely the ECHR*.

Finally, Sect. 11.3 examined the relationship of EU fundamental rights and EU fundamental freedoms. The Court of Justice developed two important points in *ERT* and *Familiapress*. First, Member States are bound by EU fundamental rights if the facts of the case "fall within the scope of Community law." While the abandonment of the pillar structure does not necessarily mean that the Court of Justice will apply this approach to all areas of EU law, gambling activities relate in any event to the Internal Market (formerly under the first pillar). Secondly, in those situations, a *twofold test applies to the national measures*. Are there measures available that would be less restrictive of *both* intra-Union trade and EU fundamental rights? In relation to EU fundamental rights, an additional criterion is mentioned both in the Charter and the jurisprudence: *Restrictions must respect the essence of fundamental rights* ('*Kerngehalt*'), a criterion which at least holds the *potential* to argue against the nationalisation of a national gambling market leading to a total prevention of other operators to exercise their fundamental rights.

Section 11.4 examined whether the scope of application changed with the Lisbon Treaty. Article 51 of the Charter at first sight seems to answer this question in the affirmative, noting that the Charter applies to "the Member States only when they are implementing Union law." However, the 'travaux préparatoires' sent ambiguous signals by using unclear language and an express reference to the *ERT* judgment, thus suggesting that the broader scope from the case law continues to be applicable, that is, if the facts of the case fall within the scope of Union law. It will be therefore again for the Court of Justice to interpret the ambiguous signals surrounding the scope of application of EU fundamental rights.