The Role of Fundamental Rights in the EU Federal Community of Law

A Systematizing Essay

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The role of fundamental rights in the European Union's federal community of law alludes first to fundamental rights and second to the idea of a federal community of law.[1] Fundamental rights are collective promises of protection to any individual concerned. What is understood to be fundamental can vary. In a federal community of law, different promisors can compete. The question of the role of fundamental rights in a federal community of law cannot be appropriately addressed without first considering whether the federal category, elaborated by *Albrecht Weber* in his comprehensive book on European comparative constitutional law,[2] is adequate for the European community of law. Hence, the following observations are divided into three parts: (1) whether the comparative category of a federal community of law is fitting for the European Union; (2) which profiling characteristics of the protection of fundamental rights in the Union have to be discussed from such a comparative view; and (3) what is the prospective role of fundamental rights for the European community of law in relation to the classic transnational market freedoms of the internal market.

1 The Suitability of the Comparative Category of a Federal Community of Law

Using the comparative category of a federal community of law evokes the question of whether it is proper or misleading to use the word "federal" for the European Union in this specific context. One must tread with caution: It is difficult to even bring up the question of using the term "federal" in regards to the Union, even if only in an adjectival way, without being immediately torn apart by the gate keep-

[1] This contribution is based on the German text of a lecture held at the Austrian Constitutional Court in 2013; a German version is separately published.
[2] Weber 2010, p. 369 et seq.

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ers of the Holy Grail of sovereign statehood. This hostility is attributed to one's interpretation of the term "federalism".

1.1 If federalism is understood in the sense of a federal *state*, its marriage with the Union is immediately hit by the carnassial teeth of *Georg Jellinek's* three-element-dogmatics of statehood.[3] It is beyond serious doubt that in six decades of supranational European integration nothing has fundamentally changed in the central aspect that each Member State holds monopoly over legitimate physical power in its autonomously controlled territory and autonomously defines the criteria of its citizenship. Hence, it did not come as a surprise that the Bundesverfassungsgericht in its "*Lisbon*" judgment also drew this conclusion.[4] Conversely, nothing has changed in this respect in view of the Union. The Union does not dispose of the means of physical enforcement against reluctant natural or legal persons, nor is it entitled to autonomously define its territorial configuration, the criteria for Union citizenship, or its own competences.[5]

1.2 However, if the term "federalism" is separated from its origin as the fundamental source of legitimization of collective sovereignty, and related in a *functional* way only to the coexistence of public power of different public agents in the same territory as one model of the territorial partition of power ("Territoriale Herrschaftsteilung" in the comparative classification of *A. Weber*[6]), then parallel questions (although not similar answers) emerge regarding the order and relationship of these powers in a federal state and in the European Union. These questions can be called functional federal matters:[7] for example the questions of the partition and character of competences (such as exclusive or shared competences); the relation between conflicting provisions of the regional dimension and the overarching polity dimension; the issue of mutual loyalty. Since the Union is doubtlessly a community of law as described by the first President of the Commission of the EEC, *Walter Hallstein*,[8] a former professor for private law and economic law, it is reasonable to summarize the totality of answers of Union law to such parallel questions as a federal community of law.

[3] Jellinek 1900.
[4] German FCC, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (Judgment of 30 June 2009) para 299 – *Lissabon-Vertrag* (in BVerfGE 123, 267): sovereign power, para 344 et seq.: territory, para 346 et seq.: people.
[5] Müller-Graff 2012, A I, para 490 et seq.
[6] Weber 2010, p. 343 et seq., p. 369 et seq. (with a comprehensive comparison of the models of Germany, Austria, Switzerland and Belgium).
[7] Müller-Graff 2005, p. 105 et seq.
[8] Hallstein 1979, p. 51 et seq.

2 The Profiling Characteristics of the Fundamental Rights in the European Union in a Comparative Federal View

Moving on to the second question, namely to the profiling characteristics and the significance of fundamental rights in the European Union (after the ratification of the Charter of Fundamental Rights of the European Union together with the Reform Treaty of Lisbon) in a federal comparison – particularly in comparison with federal polities in European countries such as Germany, Austria and Switzerland – at least eight criteria deserve attention: (Sect. 2.1) the living federal promise of fundamental rights, (Sect. 2.2) the federal architecture of the sources of fundamental rights and in relation to the Union specifically, (Sect. 2.3) their federal scope of applicability, (Sect. 2.4) their direct applicability and character as subjective rights, (Sect. 2.5) their relation to national fundamental rights, (Sect. 2.6) their judicial enforceability, (Sect. 2.7) their scope of control relevance and (Sect. 2.8) their potential for judicial references and political guidelines.

2.1 The Living Federal Promise of Fundamental Rights

A federal community of law is not feasible without being founded upon the basis of a living mutual promise. This promise can vary. For example, Swiss citizens transmit from generation to generation the Rütli oath sworn by their forefathers on the meadows of the Alps (Schweizer Eidgenossenschaft). German citizens, after having overcome a most dire dictatorship, trust, in principle, in the federal Basic Law as conceived by the Herrenchiemsee Convention. The specific profile of the promise of the European Union and its community of law is established in the Treaties between the Member States which express the Union's aim to promote peace, its values and the wellbeing of its peoples (Art. 3.1 TEU)[9] and which guarantee in particular the individual transnational market freedoms as the prime vehicle of creating transnational contacts.

Under the specific aspect of fundamental rights, the mutual promise is laid down in the Lisbon Treaty's article on values, which binds the Union and its Member States to the values of respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights (Art. 2 TEU). This is a rather highly abstract oath, with the article leaving open how it is implemented. For the Union – and in a limited way, for the Member States – the promise of respecting fundamental rights is entrusted by Art. 6 TEU to two sources: the Charter of Fundamental Rights of the European Union (EUCFR) and the fundamental rights as general principles of the Union's law as derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the constitutional traditions common to the Member States.

[9] Müller-Graff 2012, A I, para 490 et seq.

2.2 The Federal Multipolarity of Sources of Fundamental Rights

The multipolarity of the federal architecture of the sources of fundamental rights in the Union is well known. Often called a "multi-level-system", this widely used wording should not evoke the idea of a simple hierarchy, which in reality does not match the normative complexity of the system. Normative declarations exist at many points in the federal legal cosmos of the Union: in subnational constitutions of federal states (e. g. Bavaria[10] or Vorarlberg[11]); in national constitutions;[12] in the codified primary law of the Union (this will be elaborated later on); and in the invisible energy of general principles of Union law.[13] By way of the latter ideas that have been developed in other normative universes, can serve as sources of inspiration, persuasive authorities and fortifiers of convincing authority for the development of Union law. These other normative universes are, in particular, international conventions or texts (such as the ECHR, the European Charter of Social Rights or the UN Declaration of Human Rights), but also national legal orders from both within and outside the Union. Against the background of the global spread of normative ideas and of the emergence of *transnational common legal thinking*, this multipolar situation offers fertile ground for inspiring thought about the abstract formulation of codified texts for the protection of fundamental rights and for the solution of concrete conflicts.

The multipolarity of sources of fundamental rights in a federal community of law is not particular to the Union. In addition to the examples of Germany and Austria already discussed, the same is true for Switzerland (e. g. the constitutions of the Canton of Zürich[14] and the Confederatio Helvetica[15]) and the United States (e. g. the constitution of Massachusetts[16] and the Federal Bill of Rights[17]). The specific characteristics of the role of the fundamental rights of the Union become apparent when comparing them to other criteria, such as, first of all, the federal scope of applicability.

2.3 The Restricted Federal Scope of Applicability

When using the German Grundgesetz standard for assessing the federal scope of applicability, the specific feature of fundamental rights in Union law becomes apparent. Art. 1.3 GG is worded (in translation): "The following basic rights shall

[10] Art. 98 et seq. of the Bavarian Constitution (1946).
[11] Art. 7 of the Constitution of Vorarlberg (1999/2014).
[12] See Die Verfassungen der EU-Mitgliedstaaten (6th edn., 2005).
[13] See Art. 6.3 TEU.
[14] Art. 9 to 18 of the Constitution of the Canton Zürich (2005).
[15] Art. 7 to 36 of the Swiss Constitution (1999/2013).
[16] Part the First (Art. I–CVI to XXX) of the Constitution of the Commonwealth of Massachusetts (1780).
[17] Bill of Rights (1789/1791).

bind the legislature, the executive, and the judiciary as directly applicable law." This applies to all public authorities within the federation: the federation itself, the states ("Länder"), the local communities and all other public agents.

2.3.1 Such a federal claim of universal applicability to all acts of all public authorities within the relevant territory is not inherent in the Charter of Fundamental Rights. Its scope of applicability is restricted by Art. 51.1 EUCFR, which says that "the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union … and to the Member States only when they are implementing Union law."

A well-known dispute exists over whether the term "implementing" adopts the narrow implementation formula of the "*Wachauf*" judgment of the ECJ[18] or whether Art. 52.7 EUCFR activates the larger formula of the "*ERT*" judgment ("falling within the scope of Community law"[19]). According to that provision, "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." In addition, the formula, which the ECJ created in the "*Åkerberg Fransson*" decision,[20] has created concern[21] over whether the ECJ is beginning to transgress the limits intended by the Member States when they agreed on the term "implementing" (in the German version: "durchführen"). The Åkerberg formula stipulates that the Charter is applicable "in all situations governed by European law" and hence for "national legislation (which) falls within the scope of European Union law."[22] This formula is very abstract and could indeed open the way for encroaching upon the competences of the Member States. While further discussion of this point is not within the purview of this paper, it should be remembered that the ratified words of the Member States enjoy prime legitimate authority. Hence, the ECJ would be well advised to take a cautious view in defining the scope of applicability of the Charter in national measures.

Independently from the concrete definition of the demarcation line in Art. 51, it must be stated for a thorough comparison of federal communities of law that the Charter does not address national measures that are not implementing Union law. Additionally, implementing measures are not addressed in Britain and Poland to the degree stated in Protocol 30.[23] In particular, such laws, regulations or administrative provisions, practices or actions must not be found by the ECJ or any national court or tribunal as inconsistent with the rights, freedoms and principles of the Charter. Nevertheless, this does not preclude the national courts of these states from using the Charter as persuasive authority.

[18] Case 5/88, *Wachauf* (ECJ 13 July 1989) para 19.
[19] Case C-260/89, *ERT* (ECJ 18 June 1991) para 42.
[20] Case C-617/10, *Åkerberg Fransson* (ECJ 26 February 2013).
[21] See, e. g., Frenzel 2014, p. 1.
[22] Case C-617/10, *Åkerberg Fransson* (ECJ 26 February 2013).
[23] See Lindner 2008, 786.

2.3.2 Apart from that, all Member States are bound by fundamental rights as general principles of the Union's law, as stated in Art. 6.3 TEU, within the limits of the so-called extension jurisprudence of the ECJ to national measures ("Erstreckungsrechtsprechung") in accordance with "*Wachauf*"[24] and "*ERT*".[25] This would be different if the Charter were considered to be the exhaustive regulation of the protection of fundamental rights in the Union's law. But such an approach would clearly contradict Art. 6.3 TEU, and likely contradict the explicit safeguarding clause of the acquis in Art. 53 EUCFR. Conversely, an extension of the extension jurisprudence beyond the traditional limits would risk a circumvention of the idea of federal partition of protection.

2.4 Direct Applicability and Subjective Rights

In respect to direct applicability and subjective rights, the German Grundgesetz standard is clear; it rejects all theories, held, for example, under the Weimar constitution, which consider fundamental rights only as programmes for political action. The Charter lacks an equivalent statement. On the contrary a clear response to this question is made difficult to ascertain by the Charter's distinction between rights and principles in Art. 52.2 and 52.5 EUCFR. This indicates that not all provisions of the Charter contain rights, although the Charter does not precisely classify its provisions according to this demarcation line. Moreover, there might even be an overlap of both categories in certain provisions. Here, legal erudition is tasked with clarification. For example, one can hardly overcome the impression of a programme provision when Art. 38 EUCFR states, "Union policies shall ensure a high level of consumer protection." Different from the transnational freedoms, not every position mentioned in the Charter contains a subjective right (e. g. Art. 37 EUCFR which deals with environmental protection).

2.5 The Legal Question of Federal Primacy

In view of the legal question of federal primacy again the German Grundgesetz can serve as a federal standard against which to measure. It contains the short provision: "Bundesrecht bricht Landesrecht" ("Federal law shall take precedence over State law"; Art. 31 GG). This applies also to the relation between different rules on fundamental rights in the Federation and individual States. In Union law, conflicts concerning the scope and content of fundamental rights in relation to Member States should be solved, in principle, according to the "*Costa/E.N.E.L.*" jurisprudence,[26]

[24] Case 5/88, *Wachauf* (ECJ 13 July 1989) para 19.
[25] Case C-260/89, *ERT* (ECJ 18 June 1991) para 42.
[26] Case 6/64, *Costa/E.N.E.L.* (ECJ 15 July 1964).

which – as interpreted today – gives primacy to the Charter and the general principles over national laws. However, on this basis, a differentiated approach seems to be preferable.

2.5.1 As far as the compatibility of Union measures (in particular secondary law) with the Charter is concerned, its primacy should be beyond any doubt. National standards should play no autonomous role in this respect. This deviates from the conceptual approach of the Bundesverfassungsgericht in its "*Solange II*" decision[27] (as affirmed in its "*Lisbon*" decision[28]), but this approach is presently without practical consequences and also not persuasive in the system of German constitutional law (because of the openness of the national constitution towards European integration in Art. 23 GG and the competence attributed to the ECJ by the respective German consent Acts).

2.5.2 In relation to national implementing measures, which are *not completely* determined by Union law, the federal character of the Union commands a dual compatibility; meaning a national measure that is compatible with the Charter must also comply with the standards of national fundamental rights (as far as it is not completely determined by the directive), and vice versa. For example, a concrete national provision that implements a directive on data protection and satisfies the requirements of Art. 8 EUCFR must also fulfil the standards of a national fundamental right to privacy (as far as it is not completely determined by a directive). This approach also corresponds to the objective of Art. 53 EUCFR.

2.6 The Judicial Enforceability of the Rights of the Charter

A specific federal aspect is also inherent in the issue of judicial enforceability. In comparison to the German system, the peculiarity of the Union system is marked by a different partition of direct judicial protection and, at least until now, by a different context of consideration to the fundamental right argument. Different from German law, the Union's law does not offer individuals the direct procedural means to lodge a constitutional complaint based on the assertion of a violation of a fundamental right by a public authority ("Verfassungsbeschwerde") at the ECJ.

2.6.1 Consequently, an individual may only institute proceedings against certain *acts of the Union* before the ECJ on grounds of infringement of the Treaties (here the Charter included) or of any rule of law relating to their application under the restrictive conditions of Art. 263 TFEU. Otherwise, the complaint of an infringement

[27] German FCC, 2 BvR 197/83 (Order of 22 October 1986)–*Solange II* (in BVerfGE 73, 339 [387]).
[28] German FCC, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (Judgment of 30 June 2009) para 181 – *Lissabon-Vertrag* (in BVerfGE 123, 267 et seqq.); for the development of this jurisprudence see Müller-Graff 2011, p. 153 et. seq.

of a right of the Charter can only be treated by the ECJ in "indirect" procedures, such as a preliminary reference procedure (Article 267 TFEU) or an incident control (Art. 277 TFEU).

2.6.2 In view of *national implementing measures*, the competence for assessing claims that national measures contradict the Charter primarily rests with the national courts and requires the direct applicability of the invoked position. In such a case, the individual's complaint can only reach the ECJ by way of a preliminary reference procedure concerning the interpretation of the Charter, which can be initiated only by the decision of a national court. Regardless of this, the Commission can start an infringement procedure against a Member State (Art. 258 TFEU).

2.7 Factual Scope of Legal Conflicts and Judicial Control Relevance

Concerning the factual scope of legal conflicts and judicial control relevance, the role of the fundamental rights of Union law in the federal community of law depends on the volume of potential conflicts with public measures and their control. In comparison to the array of measures that are available to a state, several factors might lower the importance of fundamental rights concerning Union measures. This pertains in particular to Union legislation, where it takes place either in the form of directives (instead of regulations) and leaves the substantive implementing measures to the discretion of Member States or when texts are formulated in the open spirit of a "caractère diplomatique." Moreover, in the administrative area, the Union lacks physical enforcement power.[29] Union law offers only a restricted direct complaint procedure on the judicial level. Additionally, Union law looks to an array of many legal criteria other than fundamental rights when reviewing a measure or conduct of the Union. Therefore, it seems that serious friction areas with the Charter will most likely be confined to administrative acts and regulations of the Union and may more often arise in regards to national implementing measures.

2.8 Potential for Judicial References and Political Guidelines

Without prejudice to the foregoing considerations, the Charter offers an unlimited potential of arguments to be made by all public bodies in the federal community of law of the Union, including both Union institutions and national public agents. In particular, it can be expected that many policies of the Union will reference articles of the Charter as supporting the objectives pursued by a policy. However, caution must be taken; the more fundamental rights are referenced in daily life situations,

[29] See above Sect. 1.1.

the more their authority is endangered of being watered down. In light of the experience with the jurisprudence of the Bundesverfassungsgericht (in particular, the ability to file constitutional complaints against judgments of courts) it is possible to transform any social conflict into an issue of fundamental rights (e. g. even the issue of validity of the surety of a housewife given to a bank for the debt of her husband[30]). Such a development can transport regular legal arguments in a specific area of law into the rather abstract realm of discussions on fundamental rights and generate rather general assessments without additional concrete substance. Moreover, such a development may unduly restrict the discretion of the democratically elected legislator. Conversely, it provides an opportunity for strengthening the dominance of unbiased rationality (like in the "Unisex" decision of the ECJ[31]). This leads to the general issue of the proper mutual control and balance between political authorities and the judiciary.

In sum, the federal comparison demonstrates a specifically differentiated picture of the role of fundamental rights in the federal community of law of the Union. Moreover, an additional factor plays an important role – the guarantee of the transnational market freedoms.

3 The Prospective Role of Fundamental Rights for the European Community of Law in Relation to the Transnational Market Freedoms

In primary Union law the fundamental rights of Union law do not represent the full panoply of subjective rights. It is well known that the supranational integration of Europe was founded on the bedrock principles of transnational market access freedoms. Hence, the question arises as to how fundamental rights are to be understood in relation to these principles. In this respect, an analysis of several short test points is instructive: (Sect. 3.1) the normative-systematic functions, (Sect. 3.2) the dogmatic structure, (Sect. 3.3) the cooperative relationship, (Sect. 3.4) the conflict situation, and (Sect. 3.5) the relevance for the cohesion of European integration.

3.1 The Normative-Systematic Functions

Beyond the common function of granting subjective rights, the normative-systematic function of market freedoms and fundamental rights has to be distinguished. While market freedoms guarantee the free movement of productive factors and products within the internal market across state borders (Art. 3 TEU, Art. 26.2

[30] German FCC, 1 BvR 567/89, 1 BvR 1044/89 (Order of 19 October 1993)–*Bürgschaftsvertrag* (in BVerfGE 89, 214 et seqq.).
[31] Case C-236/09, *Test Achats* (ECJ 1 March 2011).

TFEU), the fundamental rights protect against public conduct in the context of Union law (in the sense of Art. 51 EUCFR).

3.1.1 If viewed under the aspect of subjective rights within the federal community of law, market freedoms horizontally open transnational opportunities and risks for natural and legal persons, while the fundamental rights vertically grant preventive or reactive protection in relation to public measures in the context of the Union. Hence, private dynamics are expected within market freedoms while public defence and promotion is expected within fundamental rights. Moreover, market freedoms are rooted in the institutional concept of a common economic area, originally conceived of by the *Jean Monnet* group, as an eo ipso functioning common market area.[32] In comparison, the objective of fundamental rights (as conceived in the 18th century) includes the protection of different individual positions against the collective public polity – notwithstanding the modern view, which ascribes them an additional objective content and the duty of proactive protection through the public polity.[33] An institutional function of the protection of fundamental rights for European integration can be conceived only on a rather highly abstract level as a community of values.[34]

3.1.2 Against the background of this model distinction, the question arises whether Art. 15.2 EUCFR blurs this distinction. According to that provision, a subset of market freedoms is inserted in the Charter, namely the free movement of workers, the right of establishment and the freedom to provide services. It is true that the scope of Art. 15 EUCFR is broader, because it defines the freedoms without limiting them to transnational projects; but it also comprises them. Insofar it generates the requirement of parallel interpretation in the Charter and the Treaty on the Functioning of the EU (Art. 52.2 EUCFR). In the judical practice the multitude of the first access to such problems can be expected to rest with the market freedoms; because, as outlined by the ECJ's President *Skouris*, usually the market freedoms open the competence of the Court.[35]

3.2 The Dogmatic Structure

In relation to the dogmatic structure of both sets of law, it has long been known that, despite all differences in the details, a parallel pattern of questions and criteria prevails: legal nature, entitled persons, addressees, substantive content, legitimate restrictions, and restrictions of restrictions. Examples of this parallelism include the "*Banana*" judgment of the ECJ (fundamental rights)[36] and the "*Schmidberger*"

[32] Monnet 1976, p. 186.
[33] See, e. g., Szczekalla 2002; see also Case C-368/95, *Familiapress* (ECJ 26 June 1997).
[34] In this direction Alston and Weiler 1998, p. 723.
[35] Skouris 2006, p. 93.
[36] Case C-280/93, *Germany v. Council* (ECJ 5 October 1994).

decision of the ECJ (free movement of goods).[37] In both groups of provisions, a powerful parallel in favour of the federal community of law can be seen in the requirement of proportionality, which tends to civilize politics and administration in detail. In each realm of sovereign power, a public measure is required to abstractly fulfil the same control criteria of the (potential) judicial review, namely suitability, necessity and a positive contribution to the common good ("Gemeinwohlgewinn"). According to a widely asserted impression, the judicial review of regulatory measures of the economy seems to be more rigid if market freedoms are restricted by Member states than if fundamental freedoms are restricted by the Union. However, without parallel constellations, such a comparison is methodologically unsustainable.

3.3 The Cooperative Relationship

The guarantee of transnational market freedoms and the protection of fundamental rights can enter into a cooperative relationship. In this respect, fundamental rights can reinforce market freedoms through an assessment of the proportionality of a restriction under the aspect of a contribution to the common good: for example, in the question of whether a prospective increase of health protection expected from a general national prohibition of alcopops advertising can be considered proportional in relation to the prohibition of marketing newspapers from other Member States, even in the case where the advertisement would be blackened out. Here, the freedom of expression and the pluralism of the media (Art. 11 EUCFR) can work as barriers to a legitimate restriction of the free movement of goods ("Schrankenschranken"). Besides, this line of reasoning presupposes the interpretation of "implementing" in Art. 51 EUCFR in the sense of the "*Åkerberg Fransson*" formula ("national legislation falls within the scope of Union law"[38]).

Conversely, a reinforcement of the fundamental rights by market freedoms can also occur: for example, if a national prohibition of marketing fruit liquors of low alcohol content does not serve health protection and is not necessary to protect the consumer against being misled,[39] then the assessment of an identical Union regulation cannot produce a different result in the light of the right to conduct a business (Art. 16 EUCFR).

[37] Case C-112/00, *Schmidberger* (ECJ 12 June 2003).
[38] Case C-617/10, *Åkerberg Fransson* (ECJ 26 February 2013) para 21.
[39] Case 120/78, *Cassis de Dijon* (ECJ 20 February 1979).

3.4 The Conflict Situation

The guarantee of market freedoms and the protection of fundamental rights not only have a potential for cooperation, but also for collision. In this regard, two areas of conflict have to be distinguished: (3.4.1) the area of the Union's policy to effectuate the market freedoms by adopting secondary law, in particular by approximating national provisions, and (3.4.2) the area of direct applicability of market freedoms.

3.4.1 For the first type of conflict, the potential control function of fundamental rights for relevant directives, regulations or decisions is evident. However, they are not the prime or sole measurement of primary law used in assessing whether secondary law complies with the federal community of law.

The first criterion to be met is the existence of Union competence in accordance with the principle of conferral (Art. 5.2 TEU). This means that, first of all, a secondary act which is supposed to effectuate transnational market freedoms has to be examined as to whether it is covered by the claimed competence of the Union to promote the establishment and the functioning of the internal market (e. g. Art. 114 TFEU). For example, the first tobacco advertising directive did not meet this criterion.[40] Serious doubts also exist as to the adequacy of the proposed Common European Sales Law as an approximation of national laws in the sense of Art. 114 TFEU[41] (without prejudice to the suitability of the competence of Art. 352 TFEU). If the competence for a concrete measure meets this first criterion, the next step in assessing compatibility with primary law is to examine whether a bundle of principles other than the fundamental rights is complied with. This bundle includes, in particular, subsidiarity (Art. 5.3 TEU), proportionality (Art. 5.4 TEU), sufficient reasoning (Art. 296.2 TFEU) and the market freedoms that bind the Union in its actions.[42] In the interest of keeping fundamental rights as a strong authority, they should come into play only if they can perform a genuine function which is not yet covered by other primary law requirements. And in terms of legal reasoning, the differentiated set of legal principles should not be swallowed by the sole idea of fundamental rights.

3.4.2 In the area of direct applicability of the market freedoms, the relation to fundamental rights is more complex. Here the question arises of whether a restriction of free transnational movement can be justified by the protection of national or European fundamental rights. Some efforts in scholarly literature to construe a simple hierarchical relation between the two general groups of norms (in the sense of a general primacy of one group over the other) do not match their equivalent rank in primary law, the difference of their functions, the variety of concrete collisions or the federal character of the Union's community of law. Concerning concrete colli-

[40] Case 376/98, *Germany/Parliament and Council* (ECJ 5 October 2000).
[41] Müller-Graff 2014a, p. 617 et seq.
[42] E. g. Case 15/83, *Denkavit Nederland* (ECJ 17 May 1984) para 15; Cases C-154/04 and C-155/04, *Alliance for Natural Health* (ECJ 12 July 2005) para 47.

sions, a distinction must be drawn between public or private actors as the originators of a restriction.

3.4.2.1 If a national public authority defends a restrictive measure (e. g. the prohibition of marketing virtual killing games[43] or the authorization of a demonstration for environmental protection on a motorway[44]) on the grounds that it is necessary for the protection of national fundamental rights, then the federal character of the Union's community of law requires that such an argument is treated in the same way as arguments that invoke other mandatory public interests, such as health protection in the sense of Art. 36 TFEU. As long as no exhaustive Union legal measure is adopted in the concrete matter concerned, a Member State enjoys the discretion to define its preferred level of protection. Hence, this approach in the reasoning of the ECJ decisions "*Omega*"[45] and "*Schmidberger*"[46] is convincing. However, in any case, the national measure has to comply with the general criteria of proportionality (i. e. suitability, necessity, proportionality in the sense of a gain for the common good of the Union) and the Member State concerned must justify invoking the protection of fundamental rights for the concrete measure.

3.4.2.2 If, however, a restriction originates from the conduct of a private actor, a different distinction must be drawn.

As far as restrictions flow from preference decisions of private market participants (e. g. the preference of a marble tradesman for Carrara marble thereby reducing his willingness to trade in other types of marble produced in other Member States), no justification is necessary. Preference decisions precisely fit the very purpose of transnational market freedoms, namely, promoting transnational competition.[47] Preference decisions are at the core of a market economy with free and undistorted competition.[48]

However, if the restriction to use a transnational market freedom is rooted in the conduct of a third party, which is not founded on a preference decision for a personal transaction (e. g., rules of international sport associations or boycotts by trade unions) and concerns a concrete project of transnational interaction of other market actors (e. g., the move of a football player from a Belgian soccer club to a French soccer club[49] or the registration of a Finnish ship in another Member State[50]), then such conduct is compatible with the relevant market freedom (e. g., the free movement of workers or services or the freedom of establishment) only if it can be justified by the guarantee of a national fundamental right. Art. 51 EUCFR

[43] Case C-36/02, *Omega* (ECJ 14 October 2004).
[44] Case C-112/00, *Schmidberger* (ECJ 12 June 2003).
[45] Case C-36/02, *Omega* (ECJ 14 October 2004).
[46] Case C-112/00, *Schmidberger* (ECJ 12 June 2003).
[47] Müller-Graff 2010, p. 329 et seq.
[48] Müller-Graff 2014b, p. 18.
[49] Case C-415/93, *Bosman* (ECJ 15 December 1995).
[50] Case C-438/05, *Viking* (ECJ 11 December 2007).

bars invocation of the Charter by the acting private party because it does not address private actions, statutes of private associations or collective bargaining agreements.

3.5 The Relevance for the Cohesion of European Integration

Eventually the role of fundamental rights in relation to market freedoms will also be determined by their contribution to the cohesion of the Union. Such a prognosis is difficult. On the one hand, there are good reasons for assuming that the permanent subtle orientation of people towards shared values, such as the permanent reliable realization of fundamental rights, can serve as an important factor of cohesion for the transnational federal polity of the Union. This concept is expressed by Art. 2 TEU which provides that the values of the Union (among them the respect for human rights) "are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". On the other hand, there are also good reasons to assume that the central factual cohesion generated by the multiple uses of the border-crossing market freedoms (which are also part of Art. 2 TEU) by multiple private actors can hardly be replaced by an orientation towards more abstract common values. Therefore, it seems safe to predict that the realization of both forms of subjective rights will contribute to the cohesion of the Union.

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