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HUMAN RIGHTS - WITH OR WITHOUT THE INTERNAL MARKET?

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I. INTRODUCTION

More than fifty years ago the relationship between the two European Titans - the Court of Justice[1] in Luxembourg and the European Court of Human Rights[2] in Strasbourg was quite simple. The latter was ensuring the protection of human rights[3], while the former was dealing with the beginnings of European integration.[4] With the evolution of the European Union to a more and more integrated community of European states, the relationship between the two courts developed from complete detachment to mutual acknowledgment and cross-referencing.

Today, the relationship between the ECJ and the ECtHR has the opportunity to intensify even more. The word is that the EU will soon become a party to the European Convention on Human Rights[5]. With the introduction of the Lisbon Treaty, now there is finally a legal basis for EU's accession to the ECHR in the form of Article 6(2) TEU. The issue of this accession has been quite in the spotlight, inducing numerous political and academic discussions. It is often described as "the best means of achieving a coherent system of fundamental rights' protection across Europe"[6], which would "ensure [...] the harmonious development of the case-law of the European Court of Justice and the European Court of Human Rights"[7]. This standpoint is to no surprise since the ECJ has been referring to the case-law of the ECtHR and applying its standards of protection of human rights for decades[8], recognizing the European Convention as an equally important source of interpretation of human rights as the national constitutional traditions. It can accordingly be assumed that this recognition of the ECtHR's case-law by the ECJ is one of the reasons why the preparatory documents for EU's accession to the Convention put focus only on its *procedural* aspect[9]. In a nutshell, the accession will

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[1] Further referred to as the European Court of Justice or ECJ.
[2] Further referred to as the ECtHR.
[3] This paper treats the term 'human rights' and the term 'fundamental rights' as synonyms.
[4] Sionaidh Douglas-Scott, ' A Tale of Two Courts: Luxembourg, Strasbourg and theGrowing European Human Rights Acquis' (2006) 43 CMLR 629, 629
[5] Further referred to as the European Convention, the Convention or the ECHR.
[6] Accession by the European Union to the European Convention on Human Rights, Answers to FAQ, 30 June 2011 <http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/EU_accession-QA_2011_en.pdf> accessed 10 April 2012, 2
[7] Ibid, 3
[8] For example in C- 260/89 *Elliniki Radiophonia Tiléorassi* [1991] I-02925, C-368/95 *Familiapress* [1997] ECR I-03689, C-71/02 *Herbert Karner* [1994] ECR I-03025
[9] Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/Study_accession_UE_2002_en.pdf > accessed 30 April 2012

render the EU formally bound by the Convention, which means, among other things, that the ECJ's decisions will be subject to external review from the ECtHR. In other words, the ECtHR will be allowed to find a violation where the ECJ has falsely interpreted or applied the Convention.

Due attention should be given to another novelty of the Lisbon Treaty which also sheds a new light on the ECJ - ECtHR relationship. The Charter of Fundamental Rights of the European Union[10] has been promoted from soft law to a legally binding document, thus advancing the protection of fundamental rights to primary law. It should further be noted that the Charter contains the so-called *corresponding rights*[11]. These rights are also protected by the ECHR, and for that reason the Charter explicitly grants them the same meaning and scope as provided by the ECHR and the ECtHR case-law without excluding the possibility of granting a greater level of protection[12].

These two elements - the EU's accession to the Convention and the new binding force of the Charter - together form a perfect setting for assessing whether the two systems of protection of fundamental rights are at all compatible, and consequently, if they should be formally linked with one another. Still, after the accession, the ECJ "will remain the final authority on the interpretation of EU law"[13], while "the Strasbourg Court will be the final authority on the interpretation of the ECHR"[14]. However, this oversimplified delimitation of jurisdiction is far from the complexity of the issues which lie in the position of the two courts in relation to each other and in their roles in the two different legal systems. As already mentioned above, human rights, the same ones which are protected by the Convention, also form part of the Charter, which is a source of primary Union law. This overlap of Union law and the Convention shows that the assertion on 'who is the final authority on what' does not stand on solid ground after all.

The aim of this paper is to challenge the justifiability of formally binding Luxembourg by Strasbourg, especially given the fact that the ECJ must, alongside

[10] Further referred to as the Charter; [2010] OJ C 83/389
[11] Ibid, Article 52(3)
[12] Ibid.
[13] Accession FAQ (n6) page 6
[14] Ibid. page 7

fundamental rights protection, ensure the preservation of one of the main goals of the EU and that is the functioning of the internal market.

In that regard, this paper analyzes the role of the ECJ as an EU court in fundamental rights protection (part II), outlines the ECJ's approach to fundamental rights in its case law (part III) and examines the role of the Charter in fundamental rights protection as well as the suitability of the EU judiciary system in that protection (part IV). The final remarks (part V) will give a general perspective on the previous detailed analysis.

II. THE EUROPEAN COURT OF JUSTICE IN CONTEXT

In order to properly set the background for analysing the methodology[15] which the ECJ uses in the field of protecting human rights, we must firstly determine what the position of the ECJ in relation to human rights is and how this affects the way it interprets European law.

1. Setting the scene - how the European Court of Justice encounters human rights

The ECJ is the highest court in the EU and in its case law it must handle issues related to various EU policies and legislation, including the protection of human or fundamental rights. In any event, fundamental rights can most often be found in cases related to market freedoms[16]. In that regard there are two types of cases where fundamental rights interact with fundamental freedoms.

The first type entails cases where fundamental rights go hand in hand with fundamental freedoms. Typical examples of this sort of cases are *ERT*[17], *Grogan*[18] and *Carpenter*[19]. In all of these cases the exercise of a market freedom in fact supports the exercise of fundamental rights, and vice versa. Since these cases do not require the ECJ to find a balance between fundamental rights and other EU policies such as the attainment of a single market, this kind of cases is not suitable for determining the specificities of fundamental rights protection in the EU. Accordingly, they shall not be dealt with in this paper.

The second type includes cases where human rights contravene to the free movement rules. Such a situation occurred e.g. in *Schmidberger*[20], *Omega*[21] and *Familiapress*[22]. This type of cases requires the ECJ to strike a fair balance[23] between the two contravening principles; ensuring the functioning of the internal market

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[15] Discussed in part III of this paper.
[16] Further referred to as market freedoms, fundamental freedoms or free movement rules.
[17] *Elliniki Radiophonia Tiléorassi* (n 8)
[18] C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-04685
[19] C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-06279
[20] C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659
[21] C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609
[22] *Familiapress* (n 8)
[23] *Schmidberger* (n 20) para 81

while demonstrating in practice that the EU cherishes fundamental rights as well. This is precisely why this type of cases distinguishes the ECJ from any other court dealing with fundamental rights. Accordingly, this paper will focus on this group of cases when examining the ECJ's approach to fundamental rights protection. But before going into detail, it should first be determined what interpretational tools are generally used by the ECJ.

2. Tricks of the trade - teleological interpretation at the core of the approach of the European Court of Justice

The ECJ uses grammatical, systematic and teleological interpretation as the main methods of interpretation.[24] Special emphasis should be put on teleological interpretation, as this is one of the main tools of the ECJ to ensure uniform application of European law and consequently to preserve the authority of its judgments.[25]

So what does exactly teleological interpretation include? And how does this reflect and/or define the role of the ECJ in protecting fundamental rights?

It is well-known that teleological interpretation has its base in finding the purpose, the aim of the legal norm that is being interpreted. But this is not where the story ends. Maduro argues that teleological interpretation in EU law is not exclusively focused on the purpose of the legal rule.[26] Teleological interpretation also takes into account 'a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules'.[27] This basically means that the ECJ interprets EU law in light of the broader context of the EU legal order, the special aim this order pursues - the so-called 'constitutional telos'.[28] Consequently, the final interpretation and the outcome of the case are dependent on both the purpose of the rule and the purpose of the whole system in which this rule exists.

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[24] Hannes Rösler, 'Interpretation of EU Law' <http://fds.oup.com/www.oup.com/pdf/13/9780199578955.pdf> accessed 8 July 2012, 1
[25] Ibid.
[26] Miguel Poiares Maduro, 'Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism' <http://dx.doi.org/10.2139/ssrn.1134503> accessed 5 July 2012, 3
[27] Ibid.
[28] Ibid.

If this premise is applied to the ECJ as a protector of human rights in comparison to the ECtHR and the corresponding ECHR system, we can conclude the following.

It is the 'telos' of the *legal context* in which human rights are protected that distinguishes the approach of the ECJ from that of the ECtHR. The difference in legal context can primarily be seen from the difference in the institutional background of the two courts - those being the European Union and the Council of Europe. These two organisations were formed with different aims and starting points and they developed themselves each in its own separate way. While the Council of Europe is mostly concerned with the promotion of protecting human rights, the EU has evolved into a supranational community of states which share a number of policies that have started as only economic in nature and now, among other goals, also entail the protection of fundamental rights.[29]

Furthermore, the 'telos' of the legal context in which the ECJ operates, and perhaps the 'telos' of the ECJ itself, is reflected in the legal and political implications of its judgments. These implications also demonstrate the disparity of the legal contexts in which the ECJ and the EctHR operate.

Firstly, the rulings of the ECJ have a different, much stronger impact on the Member States, as opposed to the rulings of the ECtHR. Unlike the Council of Europe which does not dispose of a coercive mechanism for enforcing the rulings of the ECtHR, the Union is far better equipped in that regard. Not only that Member States may be sanctioned, but the ECJ itself introduced a mechanism of State liability in *Francovich*[30] and *Brasserie*[31]. However, this authority of the ECJ may come out as a double-edged sword, since its judgments have an impact on the national procedural autonomy and national constitutional identities[32] of the Member States, thus compelling the ECJ to draw a fine line between the Union's and the Member States' competence.

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[29] Article 3 TEU; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] C 83/01

[30] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357

[31] Joined cases C-46/93 and C-48/*93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029

[32] Article 4(2) TEU (n 29)

Secondly, as the ECJ operates in an economic and political integration with a conundrum of aims, interests and policies, it is occasionally left with the responsibility to fill in the legal lacunas which the political process failed to fulfil.[33] An example of such a situation is the well-known "empty chair crisis" when the impossibility of introducing positive integration due to a lack of political accord resulted in the case of *Dassonville*[34] which became the corner stone in removing the obstacles to intra-Community trade from national laws, thus enhancing negative integration.[35]

Thirdly, as a result of the former two implications, the decisions of the ECJ have an impact on the level of EU integration *in general*. If it decides to leave a certain issue in the margin of the Member States, in that way it supports the Member States' autonomy while slowing down the integration process, and vice versa.

Therefore, it can be argued that these implications presume that there is not enough 'systemic identity'[36] between the ECJ and the ECtHR system. As Maduro argues, in a situation where fundamental values of one legal order may be better protected by another institution, it leads to the deference of that legal order to the jurisdiction of that institution.[37]

Let us now put this notion in the context of this paper. If it can be proven that indeed there is systemic identity between the EU system and the ECHR system of protecting human rights, the Union and subsequently the rulings of the ECJ should be subject to review on behalf of the ECtHR. In other words, the EU should accede to the ECHR *only* if the ECtHR protects fundamental rights in the EU context better than the ECJ.

In that regard, the remainder of this paper will show that the case law of the ECJ proves that its current approach is optimal for human rights protection in the Union context (part III) and that the Charter better fulfils the role of an integral fundamental rights document in the Union context than the ECHR does (part IV).

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[33] Maduro (n 26) 6
[34] Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 00837
[35] Karen J. Alter, Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community - European Integration and the Pathbreaking *Cassis de Dijon* Decision' (1994) 26 Comparative Political Studies No. 4, 535
[36] Phrase used by Maduro (n 26) 13
[37] Maduro (n 26) 13

III. THE APPROACH OF THE EUROPEAN COURT OF JUSTICE TO HUMAN RIGHTS PROTECTION - ANALYZING THE RELEVANT CASE LAW

This part of the paper will analyze in detail how exactly the ECJ tackles the sensitive balance between human rights and market freedoms.

1. Preliminary observations

Dating back from *Nold*[38], it is now settled case law of the ECJ that it draws inspiration from ECtHR's case law in order to determine the meaning and scope of human rights, which it had recognised as general principles of Community law[39]. At first, the ECJ only referred to the text of the ECHR; it was only later that it started taking into account the case law of the ECtHR.[40]

Even in the early days of human rights protection, the ECJ had been aware that the ECHR and the corresponding case law come from a different system and therefore, they cannot be directly transposed to the case law of the ECJ.

In relation to that, the ECJ held in *Nold*[41] that the rights which the applicant invoked 'should, if necessary, be subject to certain limitations justified by the overall objectives pursued by the Community'[42]. It goes on in *Wachauf* by stating that 'the rights recognized by the Court are not absolute, however, but must be considered in relation to their social function'.[43]

Furthermore, the Advocates General of the ECJ have shown awareness of this issue as well. For example, AG Darmon reminds the Court in *Orkem*[44] that 'according to its case law, the existence in Community law of human rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument'.[45] He further continues by saying that

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[38] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 00491
[39] C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-08089, para 61; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 25
[40] Adam D J Balfour , 'Application of the European Convention on Human Rights by the European Court of Justice' (2005) Harvard Law School Student Scholarship Series <http://lsr.nellco.org/harvard_students/4> accessed 15 June 2012, 12
[41] *Nold* (n 38)
[42] Ibid, 508
[43] Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609
[44] Ibid.
[45] C-374/87, *Orkem v Commission*, [1989] ECR 3283, Advocate General Darmon at para 139.

the ECJ uses the ECHR only as a point of reference; and although it tries to go as further as it can in that direction, it still directly or indirectly develops its own interpretaion of the ECHR.[46] More recently, AG Geelhoed adopted a similar approach in *SGL Carbon*.[47]

Regardless of how persistent the ECJ is in noting that indeed the ECHR cannot be applied in the same manner in the EU context, it should be examined whether the ECJ actually applies this postulate in its case law.

In that regard, this paper shall undertake a thorough analysis of the ECJ's case law. For the purposes of clarity and compactness, research is narrowed to cases dealing with clashes of market freedom with the *freedom of expression*.[48]

2. Freedom of expression as a research model

The jurisprudence of the ECJ offers a medium-sized menu of around 20 cases which involve the interaction of the freedom of expression with market freedoms. Besides the compact number of cases, the freedom of expression is ideal for this analysis because it emphasises the 'telos' of the legal context (see part II) as the main difference between the ECJ and the EctHR, and not so much the 'telos' of the rule. This is supported by a set of reasons.

Firstly, the ECJ has adopted in its case law the ECtHR's approach vis-à-vis the meaning and the scope of the freedom of expression. In that regard it states that 'freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the ECHR], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the

[46] Ibid. (n 45)
[47] C-308/04 P, *SGL Carbon AG v Commission of the European Communities* [2006] ECR I-05977, Advocate General Geelhoed at para 90.
[48] Article 10 of the ECHR and Article 11 of the Charter.

demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".'[49]

Secondly, the ECJ also accepts the EC(t)HR's standpoint on the limitations to freedom of expression. In that regard it, the limitations to freedom of expression are allowed if they *pursue one of the legitimate aims* enlisted in Article 10(2) of the ECHR and if that limitation is *necessary in a democratic society*, which means that it constitutes *a pressing social need*.[50]

However, the protection of the freedom of expression, as of any fundamental right, must be balanced with the exercise of the fundamental freedoms which ensures the proper functioning of the internal market.[51]

It is precisely due to this specificity of human rights protection before the ECJ that the analysis of the case law, namely *United Pan Europe*[52], *Familiapress*[53] and *Schmidberger*[54] will prove the following. Regardless of the fact that the ECJ accepts the ECtHR's standpoints on the criteria for limiting freedom of expression, it is the balancing of fundamental rights with fundamental freedoms that forces the ECJ to interpret those criteria *anew* in order to adapt them to the specific 'telos' of the legal context in which they operate, that being the internal market.

2.1. United Pan Europe[55]

The applicants in the main proceedings are cable operators. Through their networks they distribute television channels in the bilingual region of Brussels-Capital. In that region, the field of television services is regulated by the Broadcasting Law, which contains the so-called 'must-carry' obligation. Such an obligation entails the duty of cable operators to transmit programs, simultaneously and in their entirety, which fall under the powers of the French Community and those falling

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[49] *Connolly* (n 39), para 39; *Handyside v United Kingdom* (1976) Series A no. 24, para 49; *Müller and Others* (1988) Series A no. 133, para 33; and *Vogt v Germany* (1995) Series A no. 323, para 52.

[50] C-421/07 *Criminal proceedings against Frede Damgaard* [2009] ECR I-02629, para 26; *Laserdisken* (n 39) para 64; *Karner* (n8), para 50

[51] C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767, paras 93-4

[52] C-250/06 *United Pan-Europe Communications Belgium SA and Others v Belgian State* [2007] ECR I-11135

[53] *Familiapress* (n 8)

[54] *Schmidberger* (n 20)

[55] n 52

under the powers of the Flemish Community. The Belgian authorities claim that this provision forms part of their cultural policy, aimed at securing linguistic diversity in the region. On the other hand, the applicants are convinced that this impedes them in exercising their freedom to provide services.

So how did the ECJ handle this case? First of all, it identified the underlying conflict between freedom of expression and freedom to provide services.[56] To be more specific, it recognised that the maintenance of the pluralism which the cultural policy (invested in the Broadcasting Law) seeks to safeguard is connected with the freedom of expression.[57] In other words, the freedom to provide services in this case is in direct conflict with the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region. [58]

The next step was to find a balance between the free provision of services and freedom of expression. This is where the ECJ departed from the approach of the ECtHR.

Under the ECHR system, in order for a measure to be 'necessary in a democratic society' and thus an allowed limitation to freedom of expression, the State must show *relevant and sufficient reasons* for the application of the measure, as well as that some *less restrictive measures would not achieve the legitimate aims* that the State is following.[59] If the State fulfils these conditions, its actions are considered to be in the limits of its margin of discretion and there is no violation of freedom of expression.

Admittedly, these criteria are not unambiguous, they are still susceptible to interpretation and their application greatly depends on the factual background of each case. For example, in *Vogt v. Germany*[60] it was not necessary in a democratic society to dismiss a teacher from civil service on the account of her being a communist, but it was necessary to ban a political party in *Refah Partisi (The Welfare Party) and Others v. Turkey*[61] due to its promotion of non-secularity.

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[56] *United Pan Europe* (n 52), para 40
[57] Ibid, para 41
[58] Ibid, para 42
[59] *Vogt v Germany* (n 49)
[60] Ibid.
[61] *Refah Partisi (The Welfare Party) and Others v. Turkey* App nos.: 41340/98, 41342/98, 41343/98 and 41344/98(ECtHR 13 February 2003)

So how does the ECJ apply these criteria in its case law, when balancing the protection of freedom of expression with the application of the free movement rules?

In *United Pan Europe* the ECJ gives guidelines to the national court[62] in form of the criteria that the national law must satisfy if it is to be considered as an allowed manifestation of protecting freedom of expression in the internal market context. Basically, the ECJ reverses the position of the ECtHR. It does not analyse the justifiability of the *limitations* to the freedom of expression, but whether the *exercise* of protecting freedom of expression is to be considered in the margin of the Member State. In particular, the ECJ instructs the national court to ensure that the award of 'must-carry' status to cable operators is not exercised in an arbitrary manner[63], that it is based on objective criteria which are suitable for protecting freedom of expression[64] and applied in a non-discriminatory manner.[65]

The ECJ is in fact using the 'usual' criteria for determining whether a certain derogation from a market freedom is justified.[66] However, from the perspective of human rights, this means that their protection - when they are in conflict with the internal market - is subject to a more detailed test than that of the ECtHR.[67] From the structure of the test and from the wording of the criteria in that test, it can be concluded that they have a special purpose. That purpose is to ensure that in the event that a market freedom is to a certain extent limited by the protection of fundamental rights, this limitation affects all the market operators in the same manner. In that way, the functioning of the internal market might be impeded in the name of protecting fundamental rights, but at least the relations among market operators are left more or less intact. Consequently, the ECJ is protecting fundamental rights while ensuring that the functioning of the internal market is not gravely disrupted.

It can therefore be concluded that it is inherent to the approach of the ECJ to assess the impact of human rights protection on the internal market and to ensure that the relation in the market are not disrupted.

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[62] On the pros and cons of the preliminary rulings procedure, see part IV of this paper.
[63] *United Pan* Europe (n 52), para 46
[64] Ibid. para 47
[65] Ibid. para 48
[66] See, in particular, Joined Cases C-286/82 and 26/83 *Luisi e Carbone* [1984] ECR 00377, para 34 ;, Joined Cases 358/93 and 416/93 *Bordessa* [1995] ECR I-0361, paras 24-6; Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* [1995] ECR I-04821 paras 24-5
[67] See above.

2.2. Familiapress[68]

Familiapress is an Austrian newspaper publisher which seeks to restrain HBV, a German publisher, from marketing in Austria a magazine called *Laura*. Familiapress supported their claim with the fact that Laura contained crossword puzzles for which the winning readers would receive certain prizes. According to the Austrian legislation, publishers are prohibited to include such prize competitions in their papers. The Austrian authorities claim that the purpose of this piece of legislation is to preserve press diversity, because small publishers are not able to compete with larger ones in respect of the value of the prize and are thus being squeezed out from the market.

The factual background of this case is a bit peculiar from the aspect of the fundamental rights - market freedoms relationship. On the one hand, free movement of goods (magazines) is opposed to press diversity, which is one of the purposes of safeguarding the freedom of expression.[69] Therefore, we have here a classic conflict of a fundamental freedom with a fundamental right. On the other hand, the German publishers, who are impeded in their exercise of free movement of goods because they cannot market *Laura* in Austria, are also restricted in their freedom of expression because they may not publish whatever they want with *Laura* being limited content-wise. Therefore, it can be concluded that in this case freedom of expression is at the same time supportive of *and* in conflict with the free movement of goods.

This intricate interplay of human rights with market freedoms resulted in a very specific approach of the ECJ. It instructed the national court to determine firstly, whether newspapers which offer the chance of winning a prize are in competition with those small press publishers whom the contested legislation is intended to protect;[70] secondly, whether a prospect of winning constitutes an incentive to consumers to actually purchase the paper, capable of causing a shift in demand,[71] and

[68] n 8
[69] Article 11 of the Charter.
[70] *Familiapress* (n8) para 28
[71] Ibid.

thirdly, whether the papers in question are in competition so that the shift in demand reduces the sale of papers which do not offer a prize.[72]

Basically, the ECJ invited the national court to conduct an extensive market research in order to determine whether the measures in question are indeed necessary for the protection of press diversity, and consequently freedom of expression. This strict scrutiny of Member State actions is quite the opposite from the margin of appreciation doctrine of the ECtHR. At first sight it might seem that such scrutiny is not lenient enough towards Member States' human rights policies and that consequently, this impedes the protection of fundamental rights in general. However, a closer look on the case of *Familiapress* reveals quite the opposite. By greater scrutiny, the ECJ is in fact forcing Austria to be more elaborate and detailed in its fundamental rights protection because it must support its efforts with a tangible end result.

The conclusion is that the ECJ took into consideration the implication of fundamental rights protection for the internal market, while also using market relations to support *effective* protection of fundamental rights.

2.3. Schmidberger[73]

Schmidberger is not a classic freedom of expression case. The fundamental right in question is actually freedom of assembly, but this does not affect the coherence of this research. Firstly, that is because the freedom of assembly is a specific manifestation of the freedom of expression[74]; and secondly, because in this case the ECJ invokes freedom of expression cases of the ECtHR.[75]

It all started with a group of environmental activists who protested against pollution by blocking the Brenner motorway in Austria. This protest was allowed by the Austrian authorities because they had no legal basis for banning it under national law. The case came before the ECJ because Schmidberger, a transportation company,

[72] Ibid. para 31
[73] n 20
[74] *Vogt v Germany* (n 49)
[75] J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 European Law Journal 26

brought an action to seek damages before its national court claiming that five of his trucks were unable to use motorway for four days. Consequently, Austria should be held accountable for impeding the free movement of goods by allowing the protest on the motorway.

This case raised a lot of discussion. It was expected from the ECJ to give a clear-cut and universal solution for determining whether fundamental rights or market freedoms should take precedence. According to many, *Schmidberger* did not resolve that issue.[76] In fact, it can be argued that the approach of the ECJ shows that it did not even try to set such a rule.[77]

This can be seen from the ECJ's approach to conflicting interests in the case. Although it affirms the wide discretion of the national authorities[78], it in fact conducts a detailed analysis of whether the freedom of assembly and expression could have been exercised in a manner which is less detrimental for the enjoyment of free movement of goods by other individuals.[79] The ECJ continues and states that not allowing the protest would mean unacceptable interference in the fundamental rights of the protesters.[80] Moreover, the protesters might in that event disapprove of not being allowed to exercise their fundamental rights and the fact that the Austrian authorities might not be able to control them also implies an even greater risk *for intra-Community trade.*[81]

Albeit the ECJ does not follow nor offer a test similar to that from *United Pan Europe* or *Familiapress*, the judgment in *Schmidberger* is indicative to the delicacy of balancing fundamental rights and fundamental freedoms. *Schmidberger* shows that the balance is to be found on a case-by-case basis, by weighing all the facts of the case and the pros and cons of various solutions.

3. Concluding remarks to part III - the ECtHR perspective

The above analysis showed that the ECJ adapts its approach to fundamental rights protection so that the functioning of the internal market also becomes a

[76] Tamara Perišin, 'Interaction of Fundamental (Human) Rights and Fundamental (Market) Freedoms in the EU' (2006) 2 CYELP 91
[77] Ibid.
[78] *Schmidberger* (n 20) para 93
[79] Ibid. paras 91-3
[80] Ibid. para 89
[81] Ibid. para 92

relevant factor in the equation. This is only logical, since the ECJ operates in a specific legal context, with a 'telos' different to that of the ECHR system.

Nevertheless, what would happen if the ECtHR analyzed the same cases? This is not merely of theoretical interest; it is soon to become a reality when the EU accedes to the ECHR and the ECJ's judgment become subject to review on behalf of the ECtHR. Therefore, it should be examined how the approach of the ECJ fits into the analysis that would be subsequently conducted by the ECtHR. To put it simply, would the ECtHR consider the attainment of a single market as a *relevant and sufficient reason* for restricting the freedom of expression (or any fundamental right for that matter)? Would it even recognize it as a legitimate aim under Article 10(2) of the ECHR?

If it would accept that the internal market is a factor to be taken into account, the ECtHR would most probably rule that the restriction is in the margin of appreciation of the responding Member State[82]. If so, the judgment of the ECJ would be upheld, with the ECtHR simply expressing its accord. If the ECtHR would rule otherwise and disregard the functioning of the internal market in its decision making process, that would be proof that the ECtHR does not protect fundamental rights better than the ECJ; in fact, that the ECtHR is not at all suitable for fundamental rights protection *in the Union context*. After all, it is highly unlikely if not impossible that the ECJ would completely disregard the fundamental rights aspect of a case or that it would go against its own case law and impair the *very substance* of a fundamental right in question.[83]

Therefore, it can be concluded that as regards the methodology in the decision making process, the ECtHR would not contribute in any way to the human rights protection in the EU. Consequently, at least in this aspect, the EU's accession to the ECHR seems more superfluous than beneficial.

It should further be examined whether the Charter of Fundamental Rights, the main instrument of the ECJ in human rights protection, is to change this conclusion.

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[82] Or the European Union, if it would be the EU acting as respondent, which is all possible after its accession to the ECHR.
[83] C-62/90 *Commission v Germany* [1992] ECR I-02575, para 23; C-404/92 *X v Commission* [1994] ECR I-04737, para 18

IV. THE ROLE OF THE EU CHARTER IN HUMAN RIGHTS PROTECTION IN THE EUROPEAN UNION

Part IV will assess the added value of the Charter in fundamental rights protection in the EU. The specific content (1) and application (2) of the Charter will be put in relation to the role of the ECJ in balancing fundamental rights with market freedoms as described in parts II and III.

1. The substance of the Charter in context

It is well-known that the Charter was first adopted in 2000, albeit only as a non-binding source of law. At that time, fundamental rights were protected as 'general principles of Union law'[84]. This concept suggested that 'their primary source lay elsewhere, in constitutional traditions common to Member States and international human rights law'[85]. In other words, fundamental rights protection was based primarily on the case law of the ECJ, which articulated those common traditions into autonomous Union principles.

Although the Charter basically 'collects' the general principles of Union law from the case law and puts them in one place, its binding nature still brings change. The most obvious one is related to those whose rights it protects - the citizens. The mere fact that there is a transparent list of rights at the peak of the hierarchy of sources of EU law raises the awareness of the existence of such rights[86], which might result in a greater amount of fundamental rights cases referred to the ECJ.

Furthermore, it is imaginable the binding force of the Charter will in time change the ECJ's approach to fundamental rights protection.

Firstly, the Charter forces the ECJ to address fundamental rights more openly and in greater detail.[87] The Charter sets boundaries for interpretation of each fundamental right contained therein. Perhaps the same could be argued for the

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[84] Dorota Leczykiewicz, 'The Charter of Fundamental Rights and Member States' Derogations from Internal Market Obligations' in PM Huber, K Ziegler (eds), 'The EU and National Constitutional Law', , Forthcoming;(2011) Oxford Legal Studies Research Paper No. 51/2011, 2
[85] Ibid.
[86] Research shows that around 64% of EU citizens are familiar with the Charter. <http://ec.europa.eu/public_opinion/flash/fl_340_en.pdf> accessed 14 July 2012
[87] Morijn (n 75) 15

ECHR in relation to general principles of law, but one must admit that the ECJ may not explicitly derogate from the Charter as it is a source of primary law.

Secondly, the binding nature of the Charter allows the ECJ to liberalize its approach and define fundamental rights in a more extensive and independent manner from national courts.[88] Simply put, the Charter emphasises the fundamental rights' supranational and Union-law nature, because their source is finally and clearly in Union's primary law. This consequently means that the place of the Charter in Union's legal order supports the idea, at least in part, that fundamental rights are equally important as market freedoms. It follows that fundamental rights are no longer to be perceived merely as derogations from market freedoms but one of the core values and goals of the Union, alongside the functioning of the internal market.

Thirdly, the scope of rights which the Charter protects may influence on the way those rights are interpreted. To be more specific, the Charter contains "like the ECHR, civil and political rights, but also, unlike the ECHR, economic and social rights as well as the right to good administration, and certain 'third generation' rights such as those to environmental and consumer protection."[89] This is a result of the Charter being inspired not only by the ECHR, but also by Council of Europe's Social and the Community Charter of Fundamental Rights of Social Workers.[90]

The Council of Europe already expressed its fear that "the presence of social rights in the Charter may affect the interpretation of the rights contained therein."[91] This concern is not completely unsound. As already mentioned, the Charter contains the so-called 'corresponding rights' which mirror rights from the ECHR and thus the level of protecting these rights should not go below the ECHR's standard.[92] It is imaginable that a case arises before the ECJ where the 'corresponding rights' are in conflict with second or third generation rights from the Charter.

[88] Miguel Poiares Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights in the European Union' in T Harvey and J Kenner (eds),' Economic and Social Rights under the EU Charter of Fundamental Rights' (Hart Oxford 2003) 269, 297.
[89] Council of Europe, CDL-AD (2003) 92 Or. Eng. Strasbourg 18 December 2003, Opinion 256/2003, para 26
[90] Balfour (n 40) 32
[91] Council of Europe (n 6), para 48
[92] Article 52(3) of the Charter.

Indeed, there is a competition case of which the factual background can be conveniently used for the sake of this argument. In *Bayer AG v Commission*[93], Bayer was a pharmaceutical company which manufactured a medicine called Adalate and sold it via its national subsidiaries in various Member States.[94] Let us imagine that this company was state owned.[95] The price of Adalate varied from one Member State to the other, because it was in most cases directly or indirectly fixed by national health authorities.[96] These authorities fixed the prices in order to ensure the availability of the medicine to their citizens as part of medical insurance. At a certain point in time, the price of Adalate in Spain was approximately 40% cheaper than in the United Kingdom. After realising this, Spanish wholesalers started selling Adalate to those in United Kingdom.[97] Bayer obviously disapproved of such practice since that lowered its income from the United Kingdom. As a consequence, Bayer ceased to fulfil large scale orders to Spanish wholesalers.[98]

Regardless of the real final outcome of this case competition-wise, the analysis of its set of facts in the light of fundamental rights reveals the following. Bayer could invoke its right to property[99] (corresponding right) for justifying its refusal to fulfil orders to Spanish wholesalers. The wholesalers could invoke the free movement of goods[100] (market freedom), because Bayer is in fact using its right to property in a way that it conditions their use of this market freedom. In addition, the exercise of the market freedom supports other fundamental rights, these being the right to health care[101] (second generation right) and consumer protection[102] (third generation), because the lower price of Adalate imported from Spain to the UK makes it more available to the UK citizen.

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[93] T-41/96 *Bayer AG v Commission of the European Communities* [2000] ECR II-03383
[94] Ibid, para 1
[95] Although this differs from the actual facts of the case, it is necessary for the sake of the argument that Bayer is under the control of the state so that Articles 34 and 35 TFEU may subsequently be invoked.
[96] Ibid (n 94) para 2
[97] Ibid, para 3
[98] Ibid, para 4
[99] Article 17 of the Charter (n 10).
[100] Articles 34 and 35 TFEU (n 29)
[101] Article 35 of the Charter (n 10)
[102] Article 38 of the Charter (n 10)

Although the fact that the limitation to Bayer's right to property would probably be allowed under the ECHR system[103], this example is here to depict the complexity of the relationship between various generations of fundamental rights and market freedoms. It must therefore be underlined that in this case the corresponding rights rule[104] from the Charter has the effect of 'freezing' the protection of the right to property to the ECHR level. And since the other rights from the example are in a relationship of dependence to the right of property, it means that the level of protection of those rights is pre-determined as well. Therefore, it can be concluded that in such a situation, the ECHR 'may actually act as a ceiling to the development and protection of human rights, not the floor as it is so commonly considered'.[105]

However, this does not necessarily mean that the Charter is poorly construed due to its corresponding rights rule, but perhaps that the ECHR in time became obsolete. Many have argued that it is 'out of date...both in language and content'[106] and that it is 'unsuitable for dealing with contemporary developments'[107]. It seems that the ECtHR is aware of this issue, since it emphasised in *Tyrer v UK*[108] that the Convention is a living instrument and that it should be interpreted according to present-day conditions. [109] Although the ECtHR has lived up to this expectations e.g. in cases *Dudgeon v UK*[110] and *Goodwin v UK*[111] by taking into account issues related to homosexuality and transsexuals, the ECJ is still perceived as a more liberal and progressive court.[112]

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[103] The right to property is subject to limitations justified by the general interest. In this case that would entail the functioning of the internal market and the benefits for UK citizens. See M. Carss-Frisk, 'Human Rights Handbook No. 4 - Right to Property' (2001) Council of Europe, available at <http://echr.coe.int/NR/rdonlyres/AFE5CA8A-9F42-4F6F-997B-12E290BA2121/0/DG2ENHRHAND042003.pdf> accessed 7 July 2012

[104] Article 52(3) Charter (n 10)

[105] Balfour (n 7), 44

[106] Balfour (n 7), 43

[107] Ibid.

[108] *Tyrer v United Kingdom* (1978) Series A No. 26, (1980) 2 E.H.R.R 1

[109]Ibid, para 31

[110] *Dudgeon v United Kingdom* (1981) Series A No. 45; (1981) 3 E.H.R.R. 40

[111] *Goodwin v United Kingdom* (2002) 35 E.H.R.R 18

[112] Douglas-Scott (n 4) 646 ; Sophie Robin-Olivier, 'Protection of Fundamental Rights under Internal Market Rules and in the Area of Freedom, Security and Justice: Unity or Dualism ?' (2009) University of Paris Ouest-Nanterre la Défense Working Paper, <http://www.google.hr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CE4QFjAA&url=http%3A%2F%2Fwww.cejec.eu%2Fwp-content%2Fuploads%2F2009%2F12%2Fseminarv61.doc&ei=fM4BUJv4D8PctAbl9rTPBg&usg=AFQjCNGrmrYYgaAq-mduG4cbn9ZddHxtTw> accessed 14 July 2012, 10 ; Lammy Betten, Nicholas Grief, 'EU Law and Human Rights' (Longman London and New York 1998), 85

It can be concluded that the substance of the Charter in fact offers a lot of advantages for fundamental rights protection in the Union context. It places fundamental rights at the core of the values which the Union seeks to protect. Moreover, its extensive list of rights forms a *complete* system of protection, which takes into account the specificities of the context in which fundamental rights operate, that being the internal market. This conclusion is supported by the fact that the Charter also contains rights which have been derived exclusively from the case law of the ECJ or other sources of European law. These rights include freedom to choose an occupation and right to engage in work[113], freedom to conduct a business[114], right to asylum[115], equality before the law[116], cultural, religious and linguistic diversity[117], equality between men and women[118], environmental protection[119], consumer protection[120], right to good administration[121], right to petition[122], freedom of movement and of residence[123] and the right to diplomatic and consular protection[124]. It is understandable that the ECHR does not protect that many rights due to the disparities among the members of the Council of Europe. However, this only proves that the Charter is better suited for the Union context. It also supports the notion that formally linking the Charter with the ECHR, as explained above, impedes the full use of the Charter's potential. After all, the Charter was initially intended to be an alternative to the Union's accession to the ECHR[125].

All of this leads to the conclusion that the content of the Charter is more suitable for human rights protection in Union context than that of the ECHR. Still, it should further be examined whether the EU judicial system offers appropriate institutional support for bringing the Charter to full effect in fundamental rights protection.

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[113] Article 15 of the Charter (n 10)
[114] Ibid. Article 16
[115] Ibid. Article 18
[116]Ibid. Article 20
[117] Ibid. Article 22
[118] Ibid. Article 23
[119] Ibid. Article 37
[120] Ibid. Article 38
[121] Ibid. Article 41
[122] Ibid. Article 44
[123] Ibid. Article 45
[124] Ibid. Article 46
[125] Jeffrey Kenner, 'Economic and social rights in the EU legal order: the mirage of indivisibility', in T. Hervey, J. Kenner (eds), Economic and Social Rights under the EU Charter of Fundamental Rights (Hart, 2003), 1–25, 6

2. The application of the Charter - effectiveness of the EU judiciary system

The protection of fundamental rights before the ECJ comes in already familiar packages - the preliminary rulings procedure[126] and direct action[127]. Unlike the procedure before the Court in Strasbourg, none of these two is specialised for fundamental rights protection but still, they provide a more or less effective way for an individual to succeed in the protection of his or her rights.

Before dealing with the two procedures in greater detail, it should first be determined *who* and *when* can be held accountable for violating rights from the Charter. The Charter directly deals with this issue by stating that it is addressed to firstly, European institutions and secondly, to Member States when they are implementing EU law. [128] The notion of 'implementing EU law' is further defined in the Explanations of the Charter[129] where it is used as a synonym for 'acting in the context of Community law' as defined in the case law of the ECJ[130]. To put it simply, the situation has to be in the scope of EU law. Although defining the scope of EU law has been ambiguous in the case law of the ECJ, going into that discussion would excessively overstep the framework of this research.

The preliminary rulings procedure is quite beneficial for fundamental rights protection. First of all, unlike the procedure in Strasbourg, it does not require the applicant to exhaust all national legal remedies. The national court may at any time decide to stay the proceedings before it and refer to the ECJ seeking interpretation of a piece of EU legislation or review of its validity. Perhaps more importantly, the preliminary ruling resolves the dispute almost in the very start, before any national authority has reached a decision. P. Eeckhout incisively summarized the gist of it, by saying that 'an effective and speedy preliminary rulings procedure is a marvellous tool for the administration of justice, in that it permits resolution of often complex legal issues... hopefully at an early stage of the settlement of a dispute'.[131]

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[126] Article 267 TFEU (n 29)
[127] Article 263 TFEU (n 29)
[128] Article 52(3) of the Charter (n 10)
[129] n 10
[130] Explanations to the Charter (n 10), Article 52(3)
[131] Piet Eeckhout 'The European Courts After Nice' in M Andenas, J Usher (eds) 'The Treaty of Nice and Beyond', 325

In contrast, direct action has been severely criticised. Individuals may seek the annulment of EU legislation before the ECJ if they satisfy the *Plaumann* test[132] of being *directly and individually concerned* with the piece of legislation in question. According to many, these criteria are so strict that they render the application to the ECJ virtually impossible. For example, P. Craig commented on this issue specifically in relation to the Charter by saying that '"It will be scant comfort to those who seek to enforce Charter rights against Union acts to be told that even though they possess such substantive rights, they do not have an interest sufficient to allow them to challenge the norm directly'.[133]

Not suprisingly, the accession of the EU to the ECHR should resolve this issue. A special procedure is currently being negotiated which should enable ECtHR to refer to the ECJ about a case before it, if by force of circumstances the national court did not send a preliminary reference nor the applicant succeeded in satisfying the criteria for the admissibility of a direct action.[134]

Nonetheless, one must ask the question - are the drawbacks of direct action a sufficient reason for concluding that the EU's accession to the ECHR is in fact a good idea? The answer is far from clear.

On the one hand, the accession renders the ECJ's judgments subject to control of the ECtHR. As it has been argued in parts II and III of this paper, the ECJ operates in a special context as the highest court in the EU, of which the role is to reconcile various contravening EU policies and values, including fundamental rights with fundamental freedoms. If the ECJ would be subject to control of the ECtHR, all the benefits gained from the ECJ's approach to finding a fair balance between human rights and market freedoms and from the Charter's suitability for the Union context would be rendered practically meaningless, because in the end the ECtHR would have the last say.

On the other hand, there is indeed a possibility that some cases never reach the ECJ, either because national court did not refer to it or because the applicants were

[132] Case 25-62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR 00095
[133] Paul Craig 'What does Europe need? The House that Giscard Built: Constitutional Rooms with a view' <http://www.fedtrust.co.uk/uploads/constitution/26_03.pdf> accessed on 7 July 2012
[134] Draft Agreement on EU Accession to ECHR < http://echrblog.blogspot.com/2011/09/draft-agreement-on-eu-accession-to-echr.html> accessed 28 June 2012

not considered directly and individually concerned with the act in question. However, not all is lost. Individuals may use the procedure prescribed by the ECHR by lodging an application before the ECtHR after they have exhausted all national remedies. Of course, what here catches the eye is the fact that this takes human rights protection out of the hands of the ECJ and brings it back to the exclusive jurisdiction of the ECtHR.

Still, this might not be such a bad thing after all. I shall elaborate.

The accession of the EU to the ECtHR is intended to close all the gaps in fundamental rights protection. That in itself is not a poor goal, but the problem is that it is based on a conception that it would be resolved simply by giving the ECtHR the last word. As it has been argued in previous parts of this paper, the EU and the Council of Europe and in that regard their two Courts are not compatible enough to be subordinated to a sole, unitary concept of only one of them. Naturally, if the idea of EU's accession is abandoned, this does not imply complete abolition of any contact between the two Courts. It rather includes the continuance of fostering a 'fruitful dialogue'[135] between them. The purpose of this dialogue is to ensure that the interplay between the two legal orders in fact constitutes the whole nine yards of fundamental rights protection in the EU. In other words, instead of trying to bind one with the other, perhaps the emphasis should be put on their mutual replenishment.

The need for fruitful dialogue also applies to the relationship between the ECJ and the national courts. This is particularly important in the preliminary rulings procedure, because the lack of reference to the ECJ on behalf of national courts in cases where such a reference is necessary, does not mean that the preliminary rulings procedure is not suitable for fundamental rights protection, but that the national courts are not fulfilling their role of European courts. After all, it is the duty of national courts to ensure that EU law is properly applied in their respective Member State.[136]

The counterpart of this duty of national courts is reflected in the fact that they may not assess the validity of Union acts; this power is left exclusively to the ECJ.[137]

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[135] Maduro (n 26) 12
[136] C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG.* F2003] ECR I-05197, paras 38, 40, 42
[137] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 04199

And this is where the preliminary ruling on validity and direct action come into play. As to the latter, the strict *Plaumann* formula indeed constitutes an obstacle to accessing the ECJ. Some suggest that the criteria in question should be loosened in a manner which renders them similar to that of the ECHR.[138] In other words, that would mean that the criterion of being 'individually concerned' is completely abandoned and that the applicant must prove only to be affected by the act in question (i.e. directly concerned). Although such a proposal is not completely unsound since it makes the criteria more propulsive for cases of possible fundamental rights violations, the proper application of EU law and especially the functioning of the internal market would not go without a scratch. According to Article 278 TFEU, the ECJ may, if it considers that circumstances so require, order that application of the contested act be suspended. It is highly unlikely that the ECJ would recourse to granting interim measures to such an extent that it renders the functioning of the internal market virtually impossible. Still, it can be concluded that an increased number of interim measures may be expected in the event of reducing the *Plaumann* formula solely to 'direct concern'.

In conclusion, there are some drawbacks to the EU judicial system. However, these drawbacks are not inherent to human rights protection, but they form obstacles to the administration of justice in general. It can therefore be concluded that they should be addressed internally, by reviewing the functioning of the EU system of judicial remedies. It further follows that remedying the system *externally*, such as by subjecting the EU to the ECHR system, is only a roundabout which solves the problem only in the field of human rights protection, while also introducing some other setbacks in that very same field, as discussed in previous parts of the paper.

3. Concluding remarks to part IV

The discussion in part IV of this paper reveals several conclusions. Firstly, the Charter is an instrument far better suited, both in content and in structure, for fundamental rights protection in the EU, as opposed to the ECHR. Secondly, albeit some disadvantages, the EU judiciary offers a complete system of remedies and there is no harm in encouraging their interplay with other external procedures like the one before the ECtHR. It can therefore be concluded that, from the aspect of the Charter

[138] Balfour(n 40) 37

and its application, the EU's accession to the ECtHR and the subsequent subjecting of the ECJ's judgments to the review of the ECtHR does not bring added value to fundamental rights protection in the EU.

V. FINAL CONCLUSION

In the end, should human rights in the European Union be protected with - or without - the internal market?

The aim of this paper was to examine whether the ECJ or the ECtHR is better suited for human rights protection in the EU. The reply to this question is relevant because it has implications for the EU's accession to the ECHR. That is so because the accession would bind the Union with the ECHR, which also implies that the judgments of the ECJ would be subject to the control on behalf of the ECtHR. In other words, the ECtHR would formally be made the final authority for human rights protection in the EU. And if it would be the final authority, the question is whether the ECtHR is suitable for such a role of a protector of human rights in the EU and whether it can fulfil it in a better way than the ECJ.

Whether or not the ECtHR should indeed have the last say when it comes to human rights has been examined through the legal contexts in which the ECtHR and, in comparison, the ECJ operates. These legal contexts have a great impact on the way the two courts are interpreting human rights. The courts take into consideration both the purpose of a human rights rule itself, as well as the purpose of the legal order in which this rule exists.

It is quite evident that the ECJ and the ECtHR do not operate in the same legal order and consequently, in the same legal context. This can be seen from the different goals of their backing institutions - the European Union and the Council of Europe, as well as through the implications their rulings have on the Member States and their autonomy. Finally, the EU is more of an ever-evolving entity, in which the ECJ has a meaningful role in regulating the dynamics of integration.

Since the two orders are, to put it in layman's terms, 'just too different', there is no need for the ECJ to be under the review of the ECtHR. However, this perhaps oversimplified postulate is supported by the human rights case law of the ECJ and by the instruments the ECJ has at its disposal in human rights protection.

As to the case law, the analysis of certain cases related to the conflicts of the freedom of expression with market freedoms has shown that the ECJ adopts a more detailed approach than the ECtHR, which takes into account that the aim of ensuring

the functioning of the internal market is also attained. Moreover, the ECJ even uses market relations and the Member States' regulation of these relations as a means of raising the effectiveness of human rights protection.

Of course, these cases do not reflect an overall approach of the ECJ to human rights protection. After all, there are some other cases in which the ECJ very scarcely elaborates the relationship between human rights and market freedoms.[139] Still, the case law in this paper depicts the interplay of human rights with market freedoms in all its complexity, emphasising the need of finding a balance between them on a case-by-case basis.

In relation to this, perhaps it would be best to refer to the opinion of AG Stix-Hackl in *Omega*, where it is stated that "the necessary weighing-up of the interests involved ultimately takes place in the context of the actual circumstances in which the particular fundamental rights are restricted".[140] The analysis has shown that the ECJ operates in a special, internal market context, and that it 'interprets the [...] restrictions on fundamental rights, in substance, in a particular manner tailored to the needs of the Community'.[141] Moreover, further analysis of the ECtHR's approach has shown that its review of the rulings of the ECJ would not bring any added value to human rights protection in the Union context.

A similar conclusion is drawn in relation to the EU's Charter of Fundamental Rights. Its promotion to a legally binding source of primary law enables a more transparent protection of human rights, which also incites the ECJ to develop more autonomous, Union concepts of fundamental rights. Furthermore, the list of human rights which the Charter protects is more extensive than that of the ECHR and more adapted to the special, internal market context of the EU.

Although the judiciary system of the EU poses some obstacles to the full application of the Charter, these obstacles are not to be circumvented by subjecting the ECJ to the review of the ECtHR and thus enabling the ECtHR to 'fill in the gaps'. It is true that this would remedy those drawbacks, but only in the field of human rights and at the expense of subjecting the protection of human rights to a court

[139] See c-479/04 Laserdisken or RTL
[140] c-36/02 omega ag opinion, p 53
[141] Ibid

which does not and cannot take into account the importance of safeguarding the proper functioning of the internal market.

Indeed, time will tell whether these concerns are legitimate. However, if the Union in the end accedes to the ECHR, it is highly unlikely that a major shift in the case law of the ECJ would occur. Most probably, conflicts between the two courts would remain scarce. The only difference is that after the accession it is not the 'good will' of the ECJ that keeps its case law in line with that of the ECtHR, but it is the authority of the ECtHR over the EU in respect of human rights that *forces* the ECJ to 'get back on track'. Instead, it would be more beneficial to leave things as they are and foster a relationship of cooperation and mutual recognition between courts in Luxembourg and Strasbourg.

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LEGISLATION

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