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An Arsenal of Weapons But No Ammunition: Does the CJEU Effectively Protect the Rights of Corporate Actors?

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Summary

Corporate actors are amongst the most active and important players in the EU legal system, and have, since the EU's birth, been instrumental in developing EU law by challenging EU and Member State measures which affect or devalue their economic interests. Indeed, by utilising the Treaty provisions pertaining to the "four freedoms", corporate actors have strategically assisted the CJEU in breaking down internal barriers and impediments to the internal market. In addition to their interests captured by the "four freedoms", corporate actors have frequently sought to avail themselves of a variety of other fundamental rights and freedoms, including: the right to property; the freedom of contract; the right to due process; and the freedom to conduct a business or engage in economic activity. Most of these rights are now enshrined in the EUCFR, which attained the status of primary law with the enactment of the Lisbon Treaty in 2009. Due to the economic orientation of the EU and its policy and legislative goals, corporate actors are often the most likely to be affected by Union measures, and so it is important to consider the extent to which the CJEU, as the EU's bastion of justice, protects the rights and freedoms of corporate actors.

Despite having an array of "weapons" at its disposal to assist with this task, it is submitted that outside of the Treaty-based "four freedoms", where corporate and EU interests generally align, the CJEU's protection of corporate actors is inadequate. Indeed, by analysing two of the CJEU's most promising and controversial "weapons", the newly codified freedom to conduct a business or engage in economic activity (Article 16 EUCFR) and the Courts' recently claimed "full jurisdiction" to review administrative decisions under Articles 261 and 263 TFEU, it appears that the CJEU's approach is inconsistent, contradictory, and still offers no way to effectively challenge Union measures. In regards to the former, the CJEU either overlooks the freedom completely or easily finds that limitations to it are justified by countervailing rights or interests. Perhaps more detrimentally, it often fails to genuinely consider the right or engage in a comprehensive proportionality review. In regards to Articles 261 and 263, whilst the CJEU has used its jurisdiction to alter fines and quash decisions, deference to the Commission is still too strong to allow for full judicial review, and due process guarantees are questionable. Ultimately, the CJEU lacks ammunition, and its protection of corporate actors is undeniably hindered by its own self-imposed and overplayed deference to Union measures, which results in a trichotomous approach to the protection of the fundamental rights and freedoms of corporate actors, and impedes effective judicial protection of their interests.

Abbreviations

CJEU	=	Court of Justice of the European Union
ECHR	=	The European Convention of Human Rights
ECJ	=	European Court of Justice
ECSC	=	European Coal and Steel Community
ECtHR	=	The European Court of Human Rights
EU	=	European Union
EUCFR	=	European Union Charter of Fundamental Rights
GC	=	General Court (formerly the 'CFI' = Court of First Instance)
TEU	=	Treaty on the European Union
TFEU	=	Treaty on the Functioning of the European Union

1. Introduction

That companies or corporate actors derive enforceable rights from European Union law is not a particularly controversial or contested fact,¹ nor is it unexpected when considering the origins of the European Union and its various legal and political objectives. Indeed, as countless academics and commentators have noted, the European Union's origin was distinctly economic in nature, with Douglas-Scott describing economic rights as “the nucleus of any rights granted by the European Union” and the “kernel of rights protection” within the European Union legal order.² As the main beneficiaries or standard-bearers of such an economically-focused legal order, it is unsurprising that corporate actors (whatever their legal form may be, though particularly large commercially-driven ones), “dominate”³ the CJEU's docket and have been instrumental in aiding European integration and the completion of the internal market, providing the politically-neutral Courts with the metaphorical sledgehammer needed to break down barriers that the politically-tied Commission could not.⁴

Whilst the enjoyment of such rights is, as Emberland stresses,⁵ generally not disputed within the legal academic community, the exact nature, degree, and scope of the rights afforded to companies by the European legal order is a subject of much theoretical and practical debate. This debate has arguably proved most controversial in regards to the European Convention on Human Rights, which unlike the EU, is not founded on any economic motivation, but rather the “universal observance and enforcement” of “Human Rights” necessary for the attainment of “justice and peace in the world”.⁶ Nonetheless, the arguments advanced in this debate can also be applied to the EU, especially post-TEU, where the EU began to incorporate wider non-commercial “fundamental rights” into its legal-web. With the Charter of Fundamental Rights joining the ranks of primary law of the European Union post-Lisbon Treaty, such debates are likely to intensify, with the central question being the extent to which companies can rely on rights aimed primarily at natural individuals, particularly to the effect that they are able to undermine the protection of such

¹ Marius Emberland, *The Human Rights of Companies* (OUP 2006) 1.

² Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson Education 2002) 454-455.

³ Carol Harlow, ‘Access to Justice as a Human Right: The European Convention and European Union’ in Philip Alston, Mara Bustelo and James Heenan (eds) *The EU and Human Rights* (OUP 1999) 195.

⁴ Note particularly in this regard how the Court secured its own supremacy in *Costa* (Case C-6/64 *Costa v Enel* [1964] ECLI:EU:C:1964:66), and how it constructed the controversial principle of “mutual recognition” in *Cassis* (Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECLI:EU:C:1979:42) where the Commission was stifled by political considerations and discord. See also Hofmann (n 65) 7.

⁵ Emberland (n 1) 1.

⁶ Preamble, the European Convention on Human Rights.

individuals or “avoid” key aspects of European law.⁷ A full consideration of the extent to which companies can or should be able to rely on non-economic “human rights” is beyond the scope of this thesis, as is an exploration of the semantic differences between “fundamental” and “human” rights. It is sufficient here to note that unlike the ECHR, the European Union is not as affected by this existential issue of what human rights actually are, or the “conceptual oxymoron”⁸ that companies are able to possess “human rights” which should be protected.

Indeed, many argue that within the EU legal order, due to the strength of the economic rights found in the Treaties (particularly the “four freedoms”⁹), and the general perception that the internal market “towers over all other objectives”,¹⁰ the fundamental economic freedoms have acquired a status akin to those of fundamental human rights typically protected by States. As such, some commentators have even resolved that within the EU, “human rights and market freedoms are, in effect, one and the same thing”.¹¹ Certainly, Alston laments that human rights have for most of the EU’s existence been an “afterthought”,¹² and that even when they were finally introduced they were merely “grafted onto a set of Treaties”.¹³ That the Charter of Fundamental Rights languished on the sidelines for so many years does little to contest this stance, but whether this economic or market bias still “towers” over all other objectives is questionable, especially in recent years with more attention being paid to social and political rights, and the implementation of the EUCFR, which largely reflects the ECHR and maintains as such in Article 52(3). It is however, hard to dispute that market integration is still a key priority for the Union institutions,¹⁴ which inevitably means that the EU approach still largely “privileges” economic freedoms over human rights¹⁵ and that litigation is still predominantly concerned with trade and commerce.¹⁶

⁷ See generally Emberland and his review of critics who argue companies should not be able to avail themselves of “human rights” due to the fear that they may manipulate them or use them to “advance policies to the detriment of the democratic process”. Emberland (n 1) 27-31.

⁸ Emberland (n 1) 25-27.

⁹ Free movement of goods, services, persons and capital respectively, found in Titles II and IV TFEU.

¹⁰ Armin von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) 37 *Common Market Law Review* 1307, 1308.

¹¹ See Alston’s consideration of Petersmann’s position: Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’ (2002) 13 *EJIL* 815, 817-821. See also Douglas-Scott (n 2) 456.

¹² Alston (n 11) 821.

¹³ Alston (n 11) 821.

¹⁴ In this respect, see generally Article 3 TEU, which emphasises the central place of the internal market.

¹⁵ Alston (n 11) 823.

¹⁶ Harlow (n 3) 195.

A problem remains however where traditionally “human” rights converge with “economic” ones. As socially-constructed “legal persons”, many legal systems (including the EU) allow, in addition to more specific company or commercial law rights, companies to benefit from rights that are traditionally aimed at protecting individual persons.¹⁷ Naturally, companies or corporate actors will not be able to avail themselves of rights such as freedom against torture or inhuman treatment, or other more classically “human” rights found in instruments such as the ECHR, but as Emberland rightly caveats, it “cannot be denied that civil and political rights can be capable of protecting different forms of economic activity”.¹⁸ Nor can it be denied that in a legal system which can appreciably affect the economic sphere within which they operate, corporate actors should be able to rely on such civil and political rights to protect their commercial interests, whether it be before national courts or through direct challenges to the Union institutions. Indeed, despite their commercial nature, corporate actors share many similar interests to natural persons, with property protection, non-discrimination, legal certainty, and due process perhaps being the most salient.¹⁹ It does not therefore seem unreasonable to extend these guarantees to legal as well as natural persons, as due to the potential size of the former, the stakes can often be much greater.

In addition to the aforementioned rights, and perhaps more peculiar to corporate actors, the “freedom to conduct a business” or “economic activity”, now contained in Article 16 EUCFR, represents a more controversial and direct expression of a company’s interest. The controversiality of the “freedom” arguably lies in its inherent ambiguity, as despite having existed under various guises throughout the lifespan of the EU, it has yet to receive an explicit definition, and Article 16 marks the first time a legally binding Union document has recognised it as a “freedom”.²⁰ As Usai notes, the EUCFR aims not to create new rights, but to give greater visibility to existing “fundamental rights”.²¹ That the freedom stands alone and distinct from related rights such as the right to property (Article 17) and the right to engage in work and choose an occupation (Article 15) may also prove significant, as historically the right to “economic initiative” has often been entangled with other rights, such as the right to property.²² The scope and potential of Article 16 is thus a matter of much debate, and will be explored further below. What is clear is that the right does

¹⁷ Emblerand (n 1) 1.

¹⁸ Emberland (n 1) 2.

¹⁹ Emberland (n 1) 1.

²⁰ Andrea Usai, ‘The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social and Political Integration’ (2013) 14 German Law Journal 1867, 1868. Note also that Article 16 actually sits within the “Freedoms” Chapter (II) of the EUCFR.

²¹ Usai (n 20) 1868.

²² Usai (n 20) 1868.

not, and should not, afford companies with “unmitigated free reign”²³ or an unbridled freedom to pursue their own commercial interests. Indeed, Article 16 itself ensures this, limiting the freedom to what is “in accordance” with national and community law. How the Courts interpret this last part will determine the utility of the freedom, but it will be submitted that the Courts should be more ready to recognise the freedom as a standalone right which should be considered when looking at claims brought against corporate actors.

1.1 The Three Faces of the CJEU: A Trichotomous Approach to the Protection of Rights

It is clear from the preceding discussion that companies are able to invoke both the stronger economic fundamental rights found in the Treaties (such as the four freedoms), and many of the civil and political rights residing in the Charter and case law of the CJEU. Indeed, companies have for a long time been the “main litigants”²⁴ before the CJEU, and corporate claims make up a significant portion of all fundamental rights litigation before the Courts,²⁵ with many of the EU’s seminal cases such as *Van Gend & Loos*,²⁶ *Costa*, and *Cassis di Dijon*, being initiated by, or involving, companies. What is less clear however, is whether the CJEU sufficiently protects these rights and ensures their recognition, not just nationally but also at the EU level where the EU institutions are involved. von Bogdandy, writing in 2000, warned of a “double standard”²⁷ in the CJEU’s jurisprudence, with its level of review or scrutiny largely dependent on the defendants and parties involved. Building on this, it is submitted that, at present, one can actually identify a trichotomous approach from the Courts when it comes to the protection of company rights.

First, where Treaty-based “fundamental rights” are concerned, especially as against Member States or involving the internal market, it would appear the Courts are quite willing to uphold a company’s rights and enforce EU laws against the infringing State(s) in question. This is most obvious in regards to the “four freedoms”, where the ECJ²⁸ has, on multiple occasions, rendered national law incompatible with EU law for not adequately respecting EU law. Perhaps the most cognizant example of this more boisterous approach can be seen in the Court’s much-debated “Dassonville

²³ See Emberland in regards to the ECHR, Emberland (n 1) 25.

²⁴ Douglas-Scott (n 2) 455.

²⁵ Emberland (n 1) 1.

²⁶ Case C-26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

²⁷ von Bogdandy (n 10) 1321.

²⁸ Due to the more limited role of the GC in Article 267 references, which form the bulk of cases here, most of the cases regarding the four freedoms have been before the ECJ. As such reference to the CJEU collectively refers primarily to the ECJ in cases other than the competition law ones discussed in Section 3.

formula” where it controversially held that “*all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions*” (emphasis added).²⁹ Whilst the court limited the extent of this far-reaching statement in later cases such as *Keck*,³⁰ its intent is clear, that Member States must not adopt or maintain measures that limit the ability of “citizens” (here largely corporate actors) to operate freely within the internal market. A similar approach, Barnard observes,³¹ can be found in regards to the other three fundamental freedoms, with the ECJ increasingly focused on measures which impede or restrict “access” to the internal market rather than just those which are discriminatory. Indeed, this market access approach³² reflects the “integrationist bias”³³ of the EU, and undoubtedly contributes to why companies have been so successful in this particular area of EU law, as their interests and objectives are in line with those of the CJEU and the EU generally.³⁴

As many critics have already noted, there is “no doubt” that the the four freedoms have been “highly developed”³⁵ by the Court, and that the Court has been “very successful”³⁶ in eliminating internal barriers to market integration. This success may underpin assertions that the ECJ sees no real hierarchy between fundamental economic freedoms and human rights, and whilst some question whether the Court is doing enough in regards to the freedom of establishment,³⁷ it would appear that this “right to economic activity” and “market citizenship” as attained through the four freedoms, remains the “most highly developed part of EU law”.³⁸ Furthermore, attempts by Member States to deviate from these freedoms have not proved very successful, with the Courts adopting a strict proportionality review, particularly where the Member State in question raises an

²⁹ Case C-8/74 *Procureur de Roi v Dassonville* [1974] ECLI:EU:C:1974:82 para 5.

³⁰ Joined Cases C-267/91 and C-298/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECLI:EU:C:1993:905. See also generally Catherine Barnard, *The Substantive Law of the EU* (4th ed, OUP 2013) Chapter 5.

³¹ Barnard (n 30) 102-108. See also *Säger* (Case C-76/90 *Manfred Säger v Dennemeyer & Co.* [1991] ECLI:EU:C:1991:331), where the court at para 12 said Art 56 TFEU required the elimination of: “*not only... all discrimination on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction... when it is liable to prohibit or otherwise impede the activities of a provider of services...*”.

³² Also seen in more recent cases such as *Trailers* (Case C-110/05 *Commission v Italy* [2009] ECLI:EU:C:2009:66) and *Mickelsson* (Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECLI:EU:C:2009:336).

³³ Marie-Pierre Granger, ‘From the Margins: The Government Agents’ in Antoine Vauchez (ed) *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013) 59.

³⁴ Harlow (n 3) 195.

³⁵ Douglas-Scott (n 2) 456.

³⁶ von Bogdandy (n 10) 1324.

³⁷ See for example the *Cartesio* case (Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECLI:EU:C:2008:723), and the Court’s reluctance to impose on matters of registration it believes reside with Member States.

³⁸ Douglas-Scott (n 2) 455.

economic defence. As such, companies looking to enforce Treaty provisions such as the free movement of goods against a Member State are in a good position to do so, and are more likely encounter a sympathetic Court.

The situation is not so positive however, when one starts to move away from the typical economically-based fundamental freedoms found in the Treaties. Indeed, a second, more ambivalent approach from the Courts can be found when invoking less-established rights from the Charter, or where more sensitive or controversial countervailing rights are raised and the Courts are forced to engage in a balancing act. Certainly, cases like *Groener*,³⁹ *Grogan*,⁴⁰ and *Omega*⁴¹ highlight this more cursory level of review where Member States raise defences which are more politically sensitive, with *Grogan* involving the promotion of abortion services which are illegal in Ireland, and *Omega* the offering of services which entailed “playing at killing” and were thus deemed contrary to constitutional German laws on dignity. In these cases, the Court seemed reluctant to engage in a detailed proportionality analysis akin to that found in *Schmidberger*,⁴² where the Court held fundamental rights could constitute a legitimate interest, and could, where proportionate, restrict economic freedoms.⁴³ Instead, it preferred to either avoid the issue (*Grogan*) or more readily accept the arguments put forward (*Groener* and *Omega*). Whilst no judgement is submitted as to whether or not the Court came to the correct conclusion in these cases, its level of proportionality review is significant and marks a clear departure from its more aggressive integrationist approach found above, with Smith highlighting its particularly “weak” proportionality review in *Groener*,⁴⁴ and Shuibhne citing *Omega* as the clearest example of “deference” to a Member State.⁴⁵ It is notable though, that these cases, unlike *Schmidberger*, involved more culturally-specific matters, and were thus perhaps understandably treated more cautiously by the

³⁹ Case C-379/87 *Groener v Minister for Education and the City of Dublin Vocational Education Committee* [1989] ECLI:EU:C:1989:599.

⁴⁰ Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan* [1991] ECLI:EU:C:1991:378.

⁴¹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECLI:EU:C:2004:614.

⁴² Case C-112/00 *Schmidberger and others v Republik Österreich* [2003] ECLI:EU:C:2003:333.

⁴³ *Schmidberger* (n 42) paras 74-81. See also generally, Truelove, and his criticism of the Court’s level of review in the *Omega* case: Nicholas Truelove, 'Deference From Fundamental Rights: A Case Commentary On The European Court Of Justice’s Decision Of Omega' (2012) 4 *The Student Journal of Law* <<http://www.sjol.co.uk/issue-4/deference-from-fundamental-rights-a-case-commentary-on-the-european-court-of-justice-s-decision-of-omega-spielhallen--und-automatenaufstellungs-gmbh-v-oberburdermeisterin-der-bundesstadt-bonn>> accessed 3 May 2015. It may also be worth noting the heightened potential granted by the ECUFR for this more direct application of rights, rather than the historical reliance on “public policy” or other ambiguously phrased exceptions found in the Treaties.

⁴⁴ Rachel Craufurd Smith, ‘The Evolution of Cultural Policy in the European Union’ in Paul Craig and Grainne de Burca (eds) *The Evolution of European Law* (2nd ed, OUP 2011) 880.

⁴⁵ Nic Shuibhne, ‘Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law’ (2009) 34 *EL Review* 230, 243.

Court which tends to give greater discretion in such cases, lest it be accused of cultural imperialism.⁴⁶

Where the rights in question are less culturally-sensitive, the approach of the CJEU becomes even more contradictory and inconsistent, a feature that is likely to be exacerbated by the enhanced legal status of the EUCFR and the increased potential for conflict. Indeed, in some cases, such as *Schmidberger*, where the freedoms of expression and assembly⁴⁷ were held to prevail over the free movement of goods,⁴⁸ the Court can be seen engaging in a rather comprehensive balancing of rights, a task de Vries suggests it should be more ready to partake in.⁴⁹ Likewise, in *Viking*⁵⁰ and *Laval*,⁵¹ horizontal cases involving private parties and concerning the clash of fundamental freedoms and the right to collective action, the Court was more assertive in its reasoning, mirroring its integrationist approach outlined above. In *Viking*, it held that whilst collective action is a fundamental right of Union law, as now recognised by Article 28 EUCFR, the collective action envisaged would render “less attractive, or even pointless”⁵² Viking’s exercise of its rights to freedom of establishment, and thus was not justified or proportionate. In *Laval*, the Court was similarly determined, rejecting Member State submissions that collective action fell outside of EU law, and holding again that it was unjustified due to its effect on Laval’s right to provide services.

Unsurprisingly, both *Viking* and *Laval*⁵³ were subject to much criticism, with some decriing the possibility that fundamental rights could be construed as restrictions on economic rights, or that employers now have a new “weapon with which to oppose industrial action.”⁵⁴ In this regard, it is worth re-iterating that unlike the ECHR, the EU legal system is not primarily concerned with civil and political rights,⁵⁵ and fundamental economic freedoms are, in practice, awarded a status similar

⁴⁶ See also now Article 4(2) which provides that the Union shall “*respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional...*” and has been the subject of much academic discussion.

⁴⁷ Now contained in Articles 11 and 12 EUCFR.

⁴⁸ Wolf Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) TILEC Discussion Paper No. 2013-003, 22.

⁴⁹ Sybe A. de Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’ (2013) 9 Utrecht Law Review 169, 170.

⁵⁰ Case C-438/05 *International Transport Workers’ Federation and Finish Seamen’s Union v Viking Line ABP* [2007] ECLI:EU:C:2007:772.

⁵¹ Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet and others* [2007] ECLI:EU:C:2007:809.

⁵² *Viking* (n 50) para 72.

⁵³ See Rebecca Zahn, ‘The Viking and Laval Cases in the Context of European Enlargement’ [2008] 3 Web JCLI <<http://webjcli.ncl.ac.uk/2008/issue3/zahn3.html>> accessed 28th April 2015, for further discussion on the two cases.

⁵⁴ Daniel Ornstein, ‘Laval, Viking Line and the Limited Right to Strike’ ELA Briefing <<http://www.elaweb.org.uk/resources/ela-briefing/laval-viking-line-and-limited-right-strike>> accessed 29th April 2015.

⁵⁵ Contrast this with Emberland’s discussion of the ECHR, Emberland (n 1) 32-33.

to those of other fundamental rights.⁵⁶ Thus, the possibility that these economic freedoms could outrank other fundamental rights should not be particularly surprising, especially if one accepts proportionality as a key tenet of EU law. What is important is that it remain a “possibility”, which means the CJEU must be more consistent and transparent in its balancing of rights, highlighting more clearly on a case-by-case basis why certain rights prevail over others, as it did to some extent in *Schmidberger* and *Viking*.⁵⁷

Unfortunately, such consistency has yet to be achieved, especially when moving away from the four freedoms where the EU’s integrationist objective is no longer in accordance with the interests of the companies involved. Indeed, where companies invoke more individual rights such as the right to property (Article 17 EUCFR and Article 1 Protocol 1 ECHR), due process (Article 47 EUCFR and Art 6 ECHR), or freedom to conduct a business (Article 16 EUCFR), the CJEU’s support wanes, particularly when they conflict with politically “hot” countervailing rights such as the right to privacy (Article 7 EUCFR and Article 8 ECHR) or personal data (Articles 8 EUCFR and ECHR). Corporate applicants therefore face an unpredictable court, with its level of review being largely a matter of chance and circumstance. Whilst *Scarlet Extended*⁵⁸ provides some hope for those looking to enforce such rights, with the Court demonstrating a more commercially aware approach, *Sky Österreich*⁵⁹ shows the other end of the spectrum. The recent *Google Spain*⁶⁰ case adds even more uncertainty, as the Court patently overlooked the commercial rights of Google, focusing instead almost exclusively on the right to privacy. These cases will be considered more fully in Section 2, when analysing whether there actually is a freedom to conduct business, and whether the CJEU adequately protects or ensures it. As companies are among the most active litigants before the Courts, it seems inevitable that these Charter rights will only become more popular, with companies using them, perhaps collectively, to either defend their own actions or attack incompatible measures and actions. The Courts must therefore adopt a more coherent body of case law in order to provide some legal certainty for all involved.

Before considering the final approach, it should be pointed out that this ambivalence is not confined to corporate applicants, and natural or non-commercially motivated individuals/associations face

⁵⁶ Jason Coppel and Aidon O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 Common Market Law Review 669, 690.

⁵⁷ Unfortunately it was not as explicit in *Laval*, and the culpability of the trade unions was entangled with Sweden’s failure to provide transparency over the legal situation.

⁵⁸ Case C-70/10 *Scarlet Extended SA v SABAM* [2011] ECLI:EU:C:2011:771.

⁵⁹ Case C-283/11 *Sky Österreich v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28.

⁶⁰ Case C-131/12 *Google Spain and Google Inc. v AEPD and Mario Costeja González* [2014] ECLI:EU:C:2014:317.

similar issues, as is clear from the fact they often represent the opposing side of the cases analysed throughout this thesis. Many commentators thus criticise the CJEU's general approach to the protection of non-Treaty enshrined fundamental rights (whether economic or not), with it appearing "superficial"⁶¹ at best and dismissive at worst. Indeed, Leczykiewicz notes the peculiarity that within the EU, fundamental rights have always been in a "much weaker position" than similar constitutional rights found in Member States, especially when being used to challenge legislative acts.⁶² Whilst some hoped the incorporation of the EUCFR would lead to a "tightening" of the protection of "individual freedoms",⁶³ it is not evident that this has occurred. The focus of this thesis is nonetheless on the perspective of companies, as there is already much literature on the role of non-corporate individuals/associations in the EU legal order.

The final approach of the European courts is the most unsympathetic to corporate applicants, and is most evident in cases where a Union institution's action is being challenged. This is especially true where the Commission is involved, and in such cases, Vane posits that the "house always wins",⁶⁴ a sentiment shared by Hofmann, who notes the "startling empirical insight" that "the European Commission always wins".⁶⁵ Due to the stringent admissibility requirements found in Article 263 TFEU, many of the cases to which these academics refer are competition cases, as "addressees" (corporate or natural) of a Union "act" (here mostly Commission decisions) will have privileged standing before the Courts. Its approach here is almost the antithesis of the approach taken against Member States, and many academics have criticised this "fundamental bias in the ECJ's administration of justice", which entails a lenient attitude as against Union institutions and a draconian one as against Member States.⁶⁶ Indeed, this approach has even led some to conclude that proportionality in the EU is a term "devoid of meaning",⁶⁷ as due to what AG Kokott⁶⁸ has described as the "presumption of lawfulness of Community law", the Courts apply different tests depending on whether a Union institution or Member State is being challenged. For the former, a

⁶¹ von Bogdandy (n 10) 1321.

⁶² Dorota Leczykiewicz, 'Constitutional Justice and Judicial Review of EU Legislative Acts' (2015) in Dimitry Kochenov, Grainne de Burca and Andrew Williams (eds) *Europe's Justice Deficit?* (1st ed, Hart 2015) 102.

⁶³ von Bogdandy (n 10) 1321-1323.

⁶⁴ See generally Henry Vane, 'The house always wins' (2014), *Global Competition Review* <<http://globalcompetitionreview.com/features/article/36947/the-house-always-wins/>>.

⁶⁵ Andreas Hofmann, *Strategies of the Repeat Player The European Commission Between Courtroom and Legislature* (Universitäts- und Stadtbibliothek Köln 2012), 8.

⁶⁶ von Bogdandy (n 10) 1325-1326.

⁶⁷ Sauter (n 48) 2.

⁶⁸ See AG Kokott's summary of the manifest test in her Opinion to *S.P.C.M.* Case C-558/07 Opinion of Advocate General Kokott [2009] ECLI:EU:C:2009:142 para 70.

manifestly disproportionate test is applied, and for the latter a least restrictive means test.⁶⁹ This division, along with the generally unwritten nature of the rights and freedoms pre-Lisbon Treaty, has ultimately allowed the CJEU to “independently” define the level of protection rights are given, and to “differentiate the standard” required from Member States and Union institutions.⁷⁰

Whether or not such a division is justified, the ramifications for those looking to challenge Union acts are clear. In competition law cases, these ramifications are heightened due to the Commission’s central role as judge, jury, and executioner, with it conducting the investigation and issuing penalties under Article 23 Regulation 1/2003, which it can then enforce before the CJEU and increase in the event of non-compliance. This role has been criticised on due process grounds and will be further considered in Section 3, when looking at whether the CJEU⁷¹ is adequately protecting companies under Articles 263 and 261 when reviewing acts of the Commission. Despite claiming “full jurisprudence”, many have questioned the degree to which the Courts can actually review Commission decisions, and considering the extent to which the Commission can fine companies,⁷² this is a worrying question. With recent comments and actions from the EU’s new Competition Commissioner Vestager suggesting the start of a potentially “more activist period”⁷³ in EU competition enforcement, the CJEU’s role may yet become more prominent, in a departure from the Almunia era where around 90% of non-cartel cases were resolved through commitment decisions.⁷⁴ The rights of companies in such cases is thus a critical topic, and the CJEU must ensure it meets its own obligations under the EUCFR (see Article 51) as an EU institution itself.

1.2 Weapons at the CJEU’s Disposal

As explored above, corporate actors have many interests which they may seek to protect through the EU Courts, and the extent to which these interests can be protected by EU law is dependent on how the CJEU interprets the various provisions aiming to safeguard these interests. Certainly, there are many tools or “weapons” at the CJEU’s disposal in this regard, and as has been outlined above, it is more than capable of using them where it so desires or where it is inspired by EU policy

⁶⁹ For more on the two tests, see generally Sauter (n 48) and de Vries (n 49).

⁷⁰ Leczykiewicz (n 62) 102.

⁷¹ As noted above, in these cases the GC plays an enhanced role.

⁷² Up to 10% of the annual turnover of the company/organisation.

⁷³ Christian Oliver and Richard Waters, ‘EU set to follow Google case with broader competition crackdown’ (2015) Financial Times <<http://www.ft.com/cms/s/0/17f055fc-e386-11e4-b407-00144feab7de.html#axzz3Y20iJq7R>> accessed 5th May 2015.

⁷⁴ Alan Riley, ‘The failed search for a Google deal’ (2015) Financial Times <<http://www.ft.com/cms/s/0/7b6010e2-e36c-11e4-9a82-00144feab7de.html#axzz3XUEhUZ1Y>> accessed 5th May 2015.

objectives such as the integration factor. Whilst not weapons the Courts themselves can wield, the Treaty provisions pertaining to judicial review (primarily Articles 263 and 267 TFEU) are effective tools for opening the arena for the Courts to invoke their expansive jurisdiction, and as has been mentioned, it has not been shy in using the Treaty provisions relating to the four freedoms to strike down incompatible measures and build up an admirable body of case law. The EUCFR and its vast array of freedoms and rights, the ECHR, and the general principles of EU law are further weapons that the CJEU can use to assist it in the protection of fundamental rights (economic or otherwise). It would appear however that these tools have been grossly underused by the Court, and it is not clear that the EUCFR's coming of age has done much to alter this, despite it having "the same legal value as the Treaties".⁷⁵ There is however much potential, should the Courts choose to embrace the EUCFR as primary legislation, and it would still seem to be the case that there is "little reason not to develop pertinent primary law"⁷⁶ on fundamental rights, especially now that they can refer to the rights more explicitly rather than relying on strained or ambiguous general principles.

Naturally, it is not possible to consider every weapon or tool at the CJEU's disposal and whether its trichotomous approach is consistent with them, nor is it feasible to investigate every option open to companies which wish to challenge aspects of EU law that impede or otherwise negatively affect their ability to conduct a business or pursue commercial interests. Thus, the focus of this analysis will be on what are arguably the most controversial and underutilised weapons in the CJEU's toolbox: the Article 16 EUCFR freedom to conduct a business (and where appropriate the various associated rights), and the CJEU's ability under Articles 261 and 263 TFEU to "review the legality... of acts... of the Commission" brought by "any natural or legal person" sufficiently concerned, on the grounds of "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". EU competition law will form the conduit through which Articles 261 and 263 are analysed, and this thesis will not consider the agricultural sector or EU laws pertaining to that which have also been the subject of many proceedings brought by companies against the Commission.

The potential interplay between these weapons will also be discussed, with it being submitted that the CJEU should be prepared to use the EUCFR to engage in a more thorough analysis of Union

⁷⁵ Art 6(1) TEU.

⁷⁶ von Bogdandy (n 10) 1324.

legislation and Commission decisions, particularly where the Decision in question suggests or requires remedies which encroach upon a company's freedom to conduct a business.

1.3 Ammunition

Through analysing the above “weapons” at the CJEU’s disposal it will be argued that, at present, and outside of the sphere of the four freedoms, the CJEU is not sufficiently protecting the fundamental rights of corporate actors within the EU, and thus is not sufficiently meeting its own obligations to recognise the rights and freedoms enshrined in the EUCFR. Whilst it has a variety of weapons to help it achieve this, the CJEU lacks ammunition and has been reluctant to use the tools, as evidenced by its inconsistent three-fold approach to the protection of rights and the unfortunate “proliferation of different proportionality tests”.⁷⁷ Such a situation undermines key principles of EU law such as proportionality, equality, and legal certainty, and when coupled with the due process criticisms levied against its lenient treatment of EU institutions, may eventually erode its legitimacy, and encourage rich and influential corporate actors to try and achieve their interests through less transparent means such as lobbying,⁷⁸ which could further threaten the rule of law.

There is however, scope for the CJEU to increase its protection of such fundamental rights, and whilst, as von Bogdandy notes,⁷⁹ there is no general right “against any form of intrusion”, it is essential for the CJEU to strike the right balance between competing interests, and be more consistent and explicit about why its outcomes are “right” or justified in each specific case where it engages in such a balancing act.

2. Is There Freedom to Conduct a Business?

2.1 Article 16: The Freedom

Article 16 EUCFR states that:

“The freedom to conduct a business in accordance with Community law and national laws and practices is recognised”.

⁷⁷ Sauter (n 48) 2.

⁷⁸ See generally Tridimas’ discussion of the ramifications of having a perennial “low success rate”. Takis Tridimas and Gabriel Gari, ‘Winners and losers in Luxembourg: A statistical analysis of judicial review before the European Court of Justice and the Court of First Instance’ (2010) 35 EL Review 131, 135.

⁷⁹ von Bogdandy (n 10) 1324.

The wording of Article 16 is not likely to convince many that the EU has fully embraced a general right to conduct business, or what Petersmann has previously referred to as a “fundamental human right to trade”;⁸⁰ but its very inclusion in the EUCFR is a progressive step on the part of the EU. Indeed, its inclusion in the EUCFR’s “freedoms” chapter on its own merits,⁸¹ unattached or subsumed by more nebulous rights and principles such as the right to property or legitimate expectations, marks the first time such a freedom has been recognised in a transnational agreement focused on the protection of “fundamental rights”. A similar freedom can however be found in the constitutions of some Member States, including Italy, Spain, Luxembourg, and Finland.⁸² At this point, it is important to recall that the EUCFR aims only to give greater “visibility” to existing rights, and does not purport to create any new rights or alter the existing competences of the EU, as is clear from Article 51(2) EUCFR and Article 6(1) TEU. As such, it would be incorrect to state that Article 16 gives “new” rights to companies to push their commercial interests. The novelty however, is its disentangling from other rights, which, much like the EUCFR intended to do, gives it greater visibility and thus potential to be used in its own right, rather than as a parasitic right apathetically tagged onto more established rights in an attempt to strengthen one’s case.

The problem however, is identifying what exactly the freedom aims to protect, as the CJEU, despite the freedom’s “long history in EU law”;⁸³ has been rather unobliging in this respect, and the case law thus far (where acknowledging it at all) tends to simply cite Article 16 without appraising what it actually entails.⁸⁴ The somewhat ambiguous limitation found in Article 16 also leaves much room for clarification, as it is not particularly evident what conduct will be deemed “in accordance” with Union and national law. Indeed, if taken too literally, any provision or practice found in Union or national law, or any act made by a Member State or Union institution affecting the freedom to conduct business, would arguably supersede Article 16 which would then again be subject to the new law, however intrusive. Such circularity would render Article 16 wholly redundant, as it would, in effect, be almost impossible to invoke or consider, except in the unlikely case that the law or practice itself was unlawful to begin with.⁸⁵ It seems highly unlikely such a result was intended, as it would alter the nature of the “pre-existing” freedom, contrary to the EUCFR’s mandate, and be inconsistent with the EU’s economically-conscious agenda and the “almost universally

⁸⁰ See Alston’s criticism and response to Petersmann’s work, Alston (n 11) 817.

⁸¹ “Freedom” and “right” will be used interchangeably except where specifically distinguished.

⁸² Usai (n 20) 1869.

⁸³ AG Cruz-Villalón’s Opinion to *Mark Alemo-Herron* (Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Lesiure* [2013] ECLI:EU:C:2013:521); Advocate General Opinion ECLI:EU:C:2013:82 paras 48-50.

⁸⁴ Indeed, see AG Cruz-Villalón’s general consideration of the right in *Mark Alemo-Herron* (ibid), paras 48-52.

⁸⁵ Such a situation would be further complicated by the fact that the law or practice would have to be deemed unlawful in regards to EU or national provisions other than the freedom to conduct business itself.

acknowledged requirement” that individuals be able to conduct business or partake in economic activity without “unnecessary state intervention”.⁸⁶

At the same time, it seems clear the freedom is not intended to protect the “subjective positions of individuals”⁸⁷ or allow for the unrestrained pursuit of commerce. If one considers the history of the freedom, as Oliver has,⁸⁸ and the EUCFR’s legal explanation, the freedom appears to be an “amalgam”⁸⁹ of three rights, those being: the freedom to exercise economic initiative and economic activity; the freedom of contract; and the right to free competition. It is submitted that the first of these is most representative of the telos and current formulation of Article 16, as alluded to by AG Cruz-Villalón in *Mark Alemo-Herron*.⁹⁰ The second and third however, provide useful context with which to interpret the freedom, and imply a slightly broader reading than Article 16 would suggest. As such, Usai’s submission that Article 16 “protects all economic and social benefits deriving from the free market”,⁹¹ whilst perhaps a little optimistic, may not be so at odds with the nature of the freedom, despite the lacklustre wording of Article 16 itself. Indeed, AG Cruz-Villalón recognises that the freedom, which is also a general principle of EU law, “acts to protect economic initiative and economic activity” and, within limits, ensure “certain minimum conditions for economic activity in the internal market”.⁹² Such an interpretation is probably the most explicit quasi-judicial consideration of Article 16, and mirrors the general idea outlined above, that individuals should be free to engage in economic activity without unnecessary state, or indeed, EU, intervention. The case law however, would suggest it may also have a significant role to play in private horizontal disputes such as *Viking* or *Laval* outlined above, or in *Mark Alemo-Herron* itself, where certain “dynamic clauses” relating to collective agreements were pitted against secondary legislation and fundamental rights, and held to be contrary to EU law (discussed below).

The need to protect and promote economic initiative and activity is generally consistent with the integrationist ideology underpinning the four freedoms, which aim primarily to help with the attainment of the free market by abolishing unnecessary internal restrictions to trade. Indeed, it would be futile to remove barriers and ensure access to the market, if, once there, one were unable

⁸⁶ Xavier Groussot, Gunnar Thor Petursson and Justin Pierce, ‘Weak Right, Strong Court - The Freedom to Conduct a Business and the EU Charter of Fundamental Rights’ (2014) Lund University Legal Research Paper Series No 01/2014 <<http://ssrn.com/abstract=2428181>> accessed April 14th 2015.

⁸⁷ Usai (n 20) 1869.

⁸⁸ Peter Oliver, “What Purpose Does Article 16 of the Charter Serve?” in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer, 2013).

⁸⁹ Groussot et al. (n 86) 3.

⁹⁰ Paras 48-50. See also Oliver’s stance that Article 16 has now subsumed or “replaced” the more ambiguous general principle preceding it, and first noted in *Nold* (discussed below): Oliver (n 88) 285.

⁹¹ Usai (n 20) 1870.

⁹² AG Cruz-Villalón (n 83) paras 49-50.

to exercise any autonomy or recoup any benefits derived from such initiative or activity.⁹³ Whilst, as Groussot et al. highlight,⁹⁴ AG Cruz-Villalón stresses the freedom to conduct a business protects *participation* in the market, rather than financial profit, there exists a wide gulf between “access” and “participation”, with access being no indication of an ability to participate. Ensuring access to the market is not therefore enough to protect the fundamental rights and freedoms of corporate actors, and though the CJEU has successfully used the four freedoms to protect various forms of economic initiative, the provisions are not wide enough to catch every situation where economic activity might be unduly repressed by others, whether they be Member States, Union institutions, or other individuals.

Cases such as *Mark Alemo-Herron*, *Scarlet Extended*, and *Sky Österreich*, demonstrate this lacuna, and the other associated rights such as the right to property, freedom to choose an occupation, freedom to contract, and right to free competition, are equally ill-equipped to adequately protect corporate actors against undue interference. Indeed, the right to property has been interpreted in line with Article 1 Protocol 1 ECHR, which allows for “broad justifications for interference”⁹⁵, and protects only the right to “retain” or “transfer” property, not to acquire it.⁹⁶ Likewise, the freedom to contract is unsurprisingly limited to more contractual issues like the one found in *Mark Alemo-Herron*, and the right to free competition consists primarily of Articles 101 and 102 TFEU, both of which are heavily restricted, requiring either illegal and non-insignificant agreements affecting trade, or a finding of dominance and subsequent abuse, requirements not easily met and ultimately for use by the Commission, not individuals.⁹⁷

Article 16 therefore has an important place within the EU legal order, and can, if used to its full potential, ensure more effective protection of corporate actors. Usai even submits that it could be used as a “new engine of European social, economic, and political integration”,⁹⁸ and thus benefit consumers and the internal market by counteracting protectionism, reverse discrimination and even the lack of horizontal direct effect of directives, issues which have plagued the EU since its genesis. It seems unlikely, due to the CJEU’s hesitance, that Article 16 will have such a revolutionary impact, but as he rightly notes, in times of economic uncertainty, protectionism can be a “silver

⁹³ Usai (n 20) 1869.

⁹⁴ Groussot et al. (n 86) 4.

⁹⁵ Groussot et al. (n 86) 5.

⁹⁶ Oliver (n 88) 282.

⁹⁷ This right to free competition can also find expression more generally in the Treaties and Protocol 27 on the Internal Market and Competition, but its enforceability is questionable and in any case, the Competition provisions found in the TFEU are undoubtedly the main source of EU competition law. See Oliver (n 88) 286-287 for a discussion of this “right”.

⁹⁸ Usai (n 20) 1868.

bullet” for overcoming issues such as unemployment, inflation, and recession.⁹⁹ What is often overlooked in such discussions, is the potential effect of protectionism stemming not just from Member States, but also competitors and, more controversially, EU institutions. Indeed, recent criticism of EU competition law has centred on this last point, with some arguing the EU is engaging in protectionist or “anti-American” measures, with Google becoming a “lightning rod” for European fears over Silicon Valley.¹⁰⁰ The potential for Article 16 to combat possible EU protectionism will be considered further in Section 4.

It is not proposed that the Courts prioritise the freedom to conduct a business or hold it sacrosanct; certainly, the CJEU’s long-standing position that “fundamental rights recognised by the Court are not absolute” and “must be considered in relation to their social function”,¹⁰¹ as confirmed by Article 52 EUCFR, applies to Article 16 as well as every other fundamental right and freedom found in the EUCFR and EU Treaties. What is essential however, is that the CJEU treat this freedom in a manner consistent with how it treats other fundamental rights. Thus, it must genuinely recognise that this ability to engage in economic activity without undue interference is a legitimate principle of EU law,¹⁰² which is capable of being used as a “counterweight”¹⁰³ to other conflicting fundamental rights and freedoms. Where commercial or economic initiatives, activities, or interests are being jeopardised, the CJEU must therefore consider the proportionality of the interference in light of Article 16, and not be afraid to give priority to the freedom where it is proportionate to do so. As previously stressed, in this regard the CJEU is not in an analogous position to that of the ECtHR, which, perhaps rightly, appears more reluctant to allow corporate actors to benefit from the ECHR.¹⁰⁴

The preceding is a normative discussion about the nature of Article 16, and how it should be utilised or interpreted by the EU Courts. Having outlined what the freedom entails, and its suggested embodiment of the “almost universally accepted requirement” that individuals be able to engage in economic activity without undue interference, the case law of the CJEU will be considered to see the extent to which it is reflecting this approach, and ultimately, whether it is protecting this freedom to conduct a business or engage in economic activity.

⁹⁹ Usai (n 20) p1870.

¹⁰⁰ Henry Mance, Alex Barker and Murad Ahmed, ‘Google break-up plan emerges from Brussels’ (2014) Financial Times <<http://www.ft.com/cms/s/0/617568ea-71a1-11e4-9048-00144feabdc0.html#axzz3Y20iJq7R>> accessed 8th May.

¹⁰¹ Summarised by Oliver (n 88) 289, but expressed in many cases.

¹⁰² As expressed by Article 16, which Oliver suggests should supersede reference to the similar general principle so as to prevent a dual regime of fundamental rights protection. Oliver (n 88) 283.

¹⁰³ Groussot et al. (n 86) 4.

¹⁰⁴ Emberland (n 1) 7, and generally Chapters 1-2.

2.2 The Court's Approach to the Freedom to Conduct a Business

Whilst Article 16 marks the first time the freedom has been codified in EU law, it has been raised in its general principle form in a variety of cases over the years, beginning in 1974 with *Nold*,¹⁰⁵ which concerned the ECSC Treaty and an alleged violation by the Commission of the applicant's right to private property and economic initiative by its approval of new rules which required large wholesale orders and adversely affected medium-sized wholesalers. The Court did not explicitly address the claim in light of what is now Article 16, but did, as Oliver notes,¹⁰⁶ recognise the non-absolute existence of the "right" or principle. Despite the various incarnations of this freedom,¹⁰⁷ the Courts have reaffirmed its existence in many subsequent cases, adding that limitations to the right or freedom to conduct a business or engage in economic activity are only justified if in accordance with the public interest and not constituting a disproportionate or intolerable interference.¹⁰⁸

Unfortunately, the Courts chose not to elaborate on what a disproportionate or intolerable interference would be, and this negligent approach¹⁰⁹ to the freedom is representative of the general case law of the CJEU, with the Courts often citing or acknowledging its validity without actually considering the relevance of the freedom or its effect on the matter at hand, preferring instead to conclude on other grounds, such as the right to property.¹¹⁰ It is also significant that in nearly all of the cases where the Courts acknowledged the freedom, attempts to actually invoke it failed, possibly due to the ongoing problem that the Courts tend to combine or associate it with other rights, most notably the right to property, a right which Groussot et al. note is not normally upheld by the Courts.¹¹¹

There are however, cases where the Courts seem to take a more conscientious approach to the economic interests of companies, even if not referring explicitly to the freedom outlined above. Indeed, Oliver cites *Neu*¹¹² as an early case where the freedom to engage in economic activity or to

¹⁰⁵ Case C-4/73 *Nold KG v Commission of the European Communities* [1974] ECLI:EU:C:1974:51.

¹⁰⁶ Oliver (n 88) 286-289.

¹⁰⁷ Usai (n 20) summarises at 1873 that the freedom has also been referred to as: "the right of private initiative"; "freedom of enterprise"; "freedom of trade"; "freedom to pursue an occupation"; and "professional activity".

¹⁰⁸ Oliver (n 88) 289.

¹⁰⁹ Consistent with the Court's second "ambivalent approach" outlined above.

¹¹⁰ Indeed, in the early *Hauer* case (Case C-44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290), rather than considering the freedom to pursue the occupation of wine-growing, a freedom Oliver implies is analogous in this case to the freedom found in Article 16, the Court just extended justifications restricting the right to property to the freedom to conduct a business, treating it as "adjunct" to the former right. See Oliver (n 88) 288 for more.

¹¹¹ Groussot et al. (n 86) 5.

¹¹² Case C-90/90 *Neu and others v Secrétaire d'Etat à l'Agriculture* [1991] ECLI:EU:C:1991:303. Also see Oliver (n 85) 289.

“choose whom to do business with” was considered by the Court, and, whilst not invalidating the legislation being challenged, significantly influenced the Court’s interpretation of it, resulting in a more business friendly outcome which ensured producers wishing to switch to different dairy products were not prevented from doing so because of the milk quota regime in place. Such cases do not however, provide a particularly accurate indication of the CJEU’s approach to the actual freedom, and so more recent cases must be considered.

With the ECJ only really acknowledging the Charter in 2006, a few years before it became binding with the Lisbon Treaty, it is not particularly surprising that reference to the freedom has been sparse, even if it was encapsulated in Article 16 in 2000. The 2005 Grand Chamber *ABNA*¹¹³ decision though, largely reflects the interpretation of Article 16 given above, with the ECJ holding that a provision requiring manufacturers to give detailed ingredients lists to customers was not proportionate due to the potential for others to use the information to produce their own versions of the product. As the provision could not be justified on public health or any other grounds, the Court held that it was invalid. It is unfortunate that the Court chose not to explicitly use Article 16 to aid this outcome, relying instead on the principle of proportionality. Nonetheless, as Oliver¹¹⁴ convincingly asserts, the decision was “tantamount” to a finding that the provision breached the freedom to conduct a business. Indeed, the economic activity in question, here the sale of “feedingstuffs”, was unreasonably jeopardised or restrained by the requirements of the provision in question, and therefore held to be invalid. Even though the Court did not hold that Article 16 was infringed (a judgment made largely redundant by the finding that it was disproportionate and the fact that no fundamental rights were raised which Article 16 could counter), its approach is consistent with the need to ensure that individuals can engage in economic initiative or activity without intolerable interference, and thus suggests some protection of this freedom. Had there been a more tenable justification for the provisions, the Court may have considered competing freedoms such as the one under discussion.

In more recent years, it would appear that the CJEU (and certainly the Advocate Generals)¹¹⁵ has been more willing to refer to the EUCFR, and though most of its references to Article 16 have been as superficial as its pre-Lisbon approach, there have been a handful of recent cases where the CJEU has finally addressed Article 16 more directly, albeit in combination with Union legislation and other rights. The two most important cases, *Scarlet Extended* and *Sky Österreich*, however, paint a

¹¹³ Joined Cases C-435/03, C-11/04, C-12/04 and C-194/04 *ABNA and others v Secretary of State for Health and others* [2005] ECLI:EU:C:2005:741.

¹¹⁴ Oliver (n 88) 290.

¹¹⁵ Indeed, in regards to Article 16 see AG Cruz-Villalón above (n 83) and AG Mazak in *Deutsches Weintor* (n 157) amongst others.

rather confused picture of the freedom, and when considered with the *Google* case below, do little to assuage legal certainty concerns.

The first of these cases, *Scarlet Extended*, is perhaps the most dramatic, with the Court essentially ruling that the proposed injunction infringed Scarlet Extended's right to conduct business under Article 16. The case concerned a dispute between Scarlet Extended, an ISP operating in Belgium, and SABAM, an association representing the rights of authors, composers, and musical editors. The latter claimed that Scarlet Extended had infringed its members' IP rights by allowing its users to illegally download and/or share their works. SABAM therefore sought an injunction in accordance with national law forcing Scarlet Extended, as an intermediary, to bring an end to the infringements by implementing, amongst other things, a complicated filtering system by which it could monitor its users and block the illegal sharing of files. After consulting experts to see if the proposed measures were even possible,¹¹⁶ the Brussels Court ordered that Scarlet Extended adopt them in order to bring an end to the infringements. Scarlet Extended then appealed arguing the requirements of the injunction were unfeasible, costly, impractical, and "doomed to fail".¹¹⁷ They also argued that it was not compatible with the EUCFR, Directive 2000/31 which prohibits obligations to monitor communications, and other EU Directives similarly limiting the ability of providers to disseminate, store, or manipulate the information they transmit or receive. The appellate Court then sent a reference to the ECJ, which held that the injunction was not proportionate and not consistent with EU law, as it required indiscriminate monitoring of all users for an unlimited period of time and at the ISP's sole expense.

More importantly for this discussion, it recognised the clash of the fundamental right to property (here the intellectual property of SABAM's members), and Scarlet Extended's freedom to conduct a business. Indeed, it stated that whilst the right to property in Article 17 EUCFR must be observed, there is "nothing whatsoever suggesting the provision is inviolable or absolute".¹¹⁸ As such, it is necessary to strike a fair balance between the two fundamental rights, and in this case, the proposed injunction would be a "serious infringement"¹¹⁹ of Scarlet Extended's right to conduct business. Perhaps to mitigate the impact of the decision, which marked a departure from the cases above and *Promusicae*,¹²⁰ it added that the ISP's customers would also be affected as the measures, if imposed, would violate their rights to personal data (Article 8 EUCFR) and to receive or impart information

¹¹⁶ For more see paras 21-23.

¹¹⁷ Para 24.

¹¹⁸ Para 43.

¹¹⁹ Para 48.

¹²⁰ Case C-275/06 *Promusicae v Telefonica de Espana SAU* [2008] ECLI:EU:C:2008:54.

(Article 11 EUCFR).¹²¹ Nonetheless, as Oliver rightly notes,¹²² these latter rights very much played a supporting role, with Article 16 taking centre stage along with the secondary legislation.

Such a case indicates that the Court is prepared to use Article 16 as a “weapon” with which to protect the rights of corporate actors and ensure that they can engage in economic activity without undue interference. It is also encouraging that the Court undertook a more detailed proportionality analysis, genuinely balancing the competing rights by considering their implications. The case is however, somewhat of an anomaly, and when considering the approach taken in *Sky Österreich* below, may be a product of its facts. Indeed, rather than combining Articles 16 and 17, as has been typical of the CJEU’s approach, it had to consider Article 16 in its own right due to the fact it actually clashed with the right to property. Whilst this is positive, it also reinforces the perception that the right to property is not highly regarded by the Courts, and thus where the two rights converge, it is likely that this unsympathetic approach to the latter will overshadow any genuine consideration of Article 16, thus limiting its ability to protect the freedom to engage in economic initiative or activity. The case also concerns a controversial global issue: the role of intermediaries in the infringement of IP rights by its users. Thus far, different approaches have been taken, and there is no general consensus on how culpable intermediaries should be or how invasive they should be in order to prevent such infringements.¹²³

Whilst *Scarlet Extended* demonstrated that the CJEU is able to use Article 16 in order to protect the rights of corporate actors, *Sky Österreich* reinforces the CJEU’s more cautious and diffident attitude to the freedom. The Grand Chamber case concerned the validity of Article 15(6) of Directive 2010/13 relating to media services and requiring broadcasters who held exclusive broadcasting rights to allow competitors to use excerpts or snippets of “events of high interest to the public”. Where the implementing Member State allowed for compensation, it had to be restricted to the actual costs of providing access. Here *Sky Österreich* objected to another broadcaster using its football match snippets, contrary to the aforementioned Directive. The Austrian Court then submitted a reference to the ECJ asking whether the provision was compatible with the right to property and freedom to exercise economic activity. Once again the Court stressed that the freedom enshrined in Article 16 is “not absolute, but must be viewed in relation to its social function”.¹²⁴ After noting that the provision had a legitimate aim, that being the protection of media pluralism and the freedom to receive information (Article 11),¹²⁵ the Court held that the provision was

¹²¹ Para 50.

¹²² Oliver (n 88) 291.

¹²³ A full discussion of this issue is beyond the scope of this paper, but such a backdrop may indicate why the Court was more ready to push the rights of the ISP to conduct a business.

¹²⁴ Para 45.

¹²⁵ Paras 51-52.

suitable for achieving said aim, and that whilst it did interfere with Sky Österreich's freedoms to contract and to conduct a business, it was justified and proportionate in this situation, largely due to the fact the provisions were limited to news programmes, had a maximum time limit, and required broadcasters to credit the original source. As such, the restriction to Article 16 was in accordance with Article 52(1) EUCFR.

The outcome itself is predictable, but the Court's treatment of Article 16 is highly significant. Indeed in paragraph 47, the Court explicitly highlighted that the wording of Article 16 "differs from the wording of the other fundamental freedoms" found in Chapter II (Freedoms) and is similar to the generally weaker social rights contained in Chapter IV (Solidarity). As such, "the freedom to conduct business may be subject to a *broad range of interventions* on the part of public authorities which may limit the exercise of economic activity in the public interest" (emphasis added). The affiliation with Chapter IV is consistent with Article 16's development, as it was intended to act as a counterpoise to the rights contained in Chapter IV, but the reading of "in accordance with Union law and national laws and practices" as allowing for "a broad range of interventions" is disappointing, and appears to relegate Article 16 to a lower status of regard, reinforcing Lord Goldsmith's¹²⁶ view that the EUCFR is hierarchical with some rights and freedoms being stronger than others, a reality further confirmed in the *AMS* case.¹²⁷

What is encouraging though, is that once again the Court undertook a more detailed proportionality review, perhaps suggesting what Pirker¹²⁸ refers to as "methodological refinement" on the part of the Court when considering fundamental rights, a refinement necessary to ensure this freedom to exercise economic activity is protected. Indeed, as stressed previously, it is not submitted that Article 16 be inviolable, merely that it is explicitly considered and balanced with competing rights. The Court's finding then that the provision was necessary and proportionate as it did not "affect the core content of the freedom" or prevent the economic activity, is to be welcomed for its transparency. Unfortunately, subsequent cases such as *McDonagh*¹²⁹ and *Google Spain* indicate this refinement is still an ongoing process, with the Court "scarcely attempting a serious balancing exercise"¹³⁰ in the former, and generally ignoring the freedom to conduct a business in the latter.

¹²⁶ Lord Goldsmith, 'The Charter of Rights: A Brake Not an Accelerator' (2004) 5 European Human Rights Law Review 473.

¹²⁷ Case C-176/12 *AMS v Union ocale des syndicats CGT and others* [2014] ECLI:EU:C:2014:2. See particularly Advocate General AG Cruz-Villalón's view on the relationship between rights and principles in the EUCFR, with the latter's enforcement being dependent on further "expression" through EU or national legislation, as indicated in Article 52(2) EUCFR). Advocate General Opinion ECLI:EU:C:2013:491.

¹²⁸ Benedikt Pirker, 'Case C-283/11 Sky Österreich: Taking Proportionality Seriously' (2013) European Law Blog <<http://europeanlawblog.eu/?p=1496>> accessed 10th May 2015.

¹²⁹ Case C-12/11 *McDonagh v Ryanair* [2013] ECLI:EU:C:2013:43.

¹³⁰ Oliver (n88) 294.

Interestingly, AG Cruz Villalón’s previously endorsed view of Article 16 in the *Mark Alemo-Herron* case came one month after the judgment above, and perhaps reaffirms that *Sky Österreich* need not be a death knell to Article 16’s application. Indeed, the case itself, similarly to *Scarlet Extended*, demonstrates the Court’s ability to use Article 16 to aid with the protection of the freedom to conduct a business, with it stating that it is “settled case-law” that the provisions in question “must be interpreted in a manner consistent with the fundamental rights as set out by the EUCFR” and “must in any event comply with Article 16” which covers, “inter alia, the freedom of contract”.¹³¹ It then used Article 16 to interpret the legislation in question,¹³² which protects employees by requiring transferees of undertakings to observe the terms and conditions of any collective agreement entered into by the transferor until they expire, are terminated, or novated. The dynamic clauses being challenged meant that terms in the collective agreement could be changed or altered post-transfer by a third party, here the National Joint Council which oversaw the collective agreement. As the transferee was not a member of the NJC, and could not be represented on it, it was unable to influence or negotiate any such alterations. Accordingly, the ECJ held that a Member State could not insist on the transfer of such clauses,¹³³ as the legislation aimed to balance the rights of both employees and employers. As the employer/transferee had no ability to participate or assert its interests, its contractual freedom was “seriously reduced to the point” where the limitation was “liable to adversely affect the very essence of its freedom to conduct a business”.¹³⁴ This finding was contrary to the AG’s, who suggested the clauses could be in accordance with Article 16, so long as they are not unconditional and irreversible, as adjudged by the national court. Nonetheless, the Court’s explicit reference to, and consideration of, Article 16 is encouraging, and again shows that the Court is able to use the freedom to ensure companies can sufficiently engage in economic activity.

The cases also indicate however, that the previously defined trichotomous approach of the CJEU is still very much alive, and it is significant that in *Scarlet Extended* and *Mark Alemo-Herron*, the measures being challenged were national in origin, which perhaps explains why the CJEU was more ready to directly grapple with Article 16 and uphold the interests of the companies. Indeed, as previously noted, the CJEU is traditionally more combative when considering national barriers to market access or trade, a hangover from the EU’s initial (and seemingly ongoing) economic disposition. *ABNA* can be similarly explained, and these cases support Usai’s¹³⁵ assertion that the four freedoms and Article 16 actually aim to protect the same interests by removing barriers to

¹³¹ Paras 29-30.

¹³² Primarily Article 3(3) Directive 2001/23.

¹³³ Paras 30-37.

¹³⁴ Para 35.

¹³⁵ Usai (n 20) 1878-1879.

economic activity in the internal market. On the other hand, *Sky Österreich* represents a challenge to Union legislation, where the CJEU's third stricter approach to the protection of rights is activated. This stricter approach is also evident in *McDonagh*, where the Court considered whether Regulation 261/2004, which requires air carriers to pay for their passengers' accommodation and transport expenses in the event that they are unable to fly them home, was contrary to Ryan Air's rights under Articles 16 and 17. Without conducting any real proportionality assessment, the Court held that the Regulation was proportionate and supported by Article 38 EUCFR, which seeks to protect customers.

This contradictory approach means that the rights of corporate actors and the CJEU's willingness to use Article 16 as a weapon will largely depend on which measures are being challenged, a state of affairs that will limit Article 16's utility to the challenging of national or private measures,¹³⁶ a task already largely catered for by the associated rights and the four freedoms, which Oliver contends,¹³⁷ despite requiring an interstate element, have been quite flexible in their scope and have at times emulated a "general freedom to trade". Whilst this would still offer some indirect protection of the freedom, as mentioned, these associated rights and freedoms will not be able to cover all situations where the right to economic activity is interfered with, and will certainly be of little assistance when challenging Union legislation (considered further below). Thus, even if the CJEU were to engage in a full proportionality review in every case where fundamental rights conflicted, as it has been submitted it must, the weight given to each freedom will be influenced by the CJEU's own self-imposed "internal constraints",¹³⁸ with it seeming likely that where Union legislation is under consideration, rights opposing the freedom to conduct a business will be treated with higher esteem, as in *Sky Österreich* and *McDonagh*. Such self-imposed constraints ultimately, as Leczykiewicz notes, "devalues" the protection of fundamental rights by the CJEU, and "enables timid reasoning" by the Courts which subsequently robs the EU of full justifications about why EU law is correct or "just".¹³⁹

2.3 Google: Does the Right to be Forgotten Limit the Freedom to Conduct a Business?

Despite the continued low success rate of Article 16, the above cases show a greater tendency to refer to Article 16 and a possible "refinement" on behalf of the CJEU to the consideration of fundamental rights. The recent *Google Spain* "right to be forgotten" case however, represents a

¹³⁶ Whilst it is beyond the scope of this thesis to fully analyse the role of Article 16 in private disputes, it will certainly be the case that references to it will increase, and it seems likely the success rate of it will also depend on the underlying legislation or measure in issue.

¹³⁷ Oliver (n 88) p298-299.

¹³⁸ Leczykiewicz (n 62) 100.

¹³⁹ Leczykiewicz (n 62) 103.

more primitive and textual approach to fundamental rights, with the ECJ focusing primarily on the legislation in question, the anachronistic EU Data Protection Directive.¹⁴⁰ In brief, the case concerned a Spanish citizen who wanted Google to remove access to an old news article documenting his troubled financial history. After controversially determining that Google was a “controller” of data, contrary to the AG’s opinion and despite the fact the data had already been published elsewhere, the Court held that the Directive necessarily had broad territorial scope and consequently caught Google’s Spanish subsidiary, even though its server operations were carried out in the USA. More controversially, it then held that Google, and seemingly search engine operators in general, was responsible for removing information, even where the information had been published legally elsewhere. Therefore, individuals have the right, under the Data Protection Directive, to request the removal of information that is “inaccurate, inadequate, irrelevant or excessive” for the purposes of data processing.¹⁴¹ Without expressly stating so, the ECJ ultimately endorsed the “right to be forgotten”,¹⁴² and thus Google must, at its own expense and with no guidance or supervision, consider individual requests to remove search results, and itself determine on a case-by-case basis whether the data is such that it should be removed.¹⁴³

Many expected the Court to follow the AG’s more subdued Opinion, and whilst the establishment of such a right is in line with current proposals for the controversial and drawn-out General Data Protection Regulation (indeed the initial Article 17 referred to the “right to be forgotten and to erasure”), the actual case creates much uncertainty for search engine operators, and potentially other social networks such as Facebook and Wikipedia. More importantly for this discussion, and in a departure from the other recent cases above, the ECJ entirely ignored the right to conduct a business, and undeniably failed to balance the competing interests of data subjects, Google, and other internet users (the general public). Indeed, instead of conducting a thorough proportionality analysis, the Court “easily”¹⁴⁴ found that Google’s economic interests were “overridden”,¹⁴⁵ and that the potential seriousness of the interference with the right to privacy, as protected by the Directive, could not “be justified by merely the economic interest” of the search engine operator.¹⁴⁶ It therefore appears that Peers is correct to assert that the CJEU concerned itself so much with the

¹⁴⁰ Directive 95/46/EC. Indeed, the Directive actually predates Google itself.

¹⁴¹ Paras 92-93.

¹⁴² Steve Peers, ‘Further Comments on Google Spain’ (2014) Human Rights Centre Blog <<http://blogs.essex.ac.uk/hrc/2014/05/13/further-comments-on-google-spain/>> accessed 10th May 2015.

¹⁴³ See in this regard the European Commission’s Factsheet on the “Right to be Forgotten” ruling <http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf> accessed 10th May 2015.

¹⁴⁴ Steve Peers, ‘The Right to be Forgotten: The future EU legislation takes shape’ (2014) EU Law Analysis <<http://eulawanalysis.blogspot.se/2014/09/the-right-to-be-forgotten-future-eu.html>> accessed 10th May 2015.

¹⁴⁵ Para 97.

¹⁴⁶ Para 81.

right to privacy that it neglected to consider other applicable rights, such as Article 16.¹⁴⁷ It did however, refer to the freedom of expression, albeit not expressly or intelligibly, suggesting there may be cases (such as those involving public figures) where the freedom of expression could outweigh the right to privacy. As regards the economic interests of corporate actors or their freedom to engage in economic activity, the Court seems to adopt an “automatic test”¹⁴⁸ subjugating the freedom to the right to privacy, contrary to its previous condemnation of such automaticity by Member States in *ASNEF*.¹⁴⁹ It also largely ignored the interests of other internet users.

The implications of such a statement are severe, and seem to suggest the right to privacy will always prevail over the economic interests of a corporate actor. Whilst the right to privacy has, perhaps rightly, always been a heavily protected fundamental right, such automaticity seems at odds with the nature of the EUCFR, and potentially subjects search engine operators (and other social networks) to much unnecessary litigation, especially if, as is the case here, they are left to determine for themselves without guidance which data should be removed. Indeed, it is not clear what a “public figure” is, what information is unnecessary, inaccurate, inadequate or irrelevant, or which requests should be denied in “the interests of the general public”.¹⁵⁰ Such uncertainty means there is much scope for error on the part of the search engine operator or “controller” (likely to be interpreted broadly), a problem which is exacerbated by proposals to allow data protection authorities to impose fines of up to 2% of annual turnover on companies not respecting citizen rights under the General Data Protection Regulation.¹⁵¹ Protecting this right to be forgotten is also likely to be costly, as it would require active monitoring of removal requests, which could deter nascent economic actors from participating in the affected markets.

Unfortunately, and despite the case being a prime candidate for further consideration of the freedom, the Court chose not to examine Article 16, and so it is unclear to what extent these easily overridden economic interests align with the freedom to conduct a business or engage in economic activity. That the Court’s reasoning pursues a similar agenda to the Commission is also significant, and again reflects this strict and inadequate approach to the protection of rights when challenging Union legislation. It remains to be seen how this decision will be construed in a wider context, but it seems likely, considering the European Parliament’s watering down of the right to just a “right to

¹⁴⁷ Peers, ‘Further Comments...’ (n 142).

¹⁴⁸ Peers, ‘Further Comments...’ (n 142).

¹⁴⁹ Joined Cases C-468/10 and C-469/10 *ASNEF and FECEMD v Administracion del Estado* [2011] ECLI:EU:C:2011:777. Indeed, here the Court held that the Spanish Court had failed to adequately balance the rights of data subjects and marketing companies, by ignoring the latter’s right to engage in business.

¹⁵⁰ European Commission Factsheet on the Right to be Forgotten (n 143), p5.

¹⁵¹ European Commission Factsheet on the Right to be Forgotten (n 143), p4.

erasure”¹⁵² that the right will be slightly more limited than *Google Spain* would suggest. In any event, it seems inevitable that the Court’s decision will be challenged in the near future, especially as the internet becomes more advanced and creates further platforms for the infringement of fundamental rights such as the right to privacy. For now though, the case represents a clear failure by the Court to consider the rights of corporate actors.

2.4 Article 16 as a Sword?

It has already been noted that, in addition to being invoked as a defence, Article 16 can, in theory, be used to challenge national and Union (secondary) legislation, whether directly (through Article 263 TFEU) or indirectly (through Article 267 TFEU), as demonstrated by cases such as *Mark Alemo-Herron* and *Sky Österreich*. Whilst many have recognised the huge potential for Article 16 in this regard,¹⁵³ it is also clear that the CJEU’s prejudice will play a role in the success of such claims, with attacks against national measures (if within the scope of the EUCFR¹⁵⁴) seeming more likely to succeed (as was the case in *Scarlet Extended* and *Mark Alemo-Herron*) than those against Union acts. This means that Article 16 is unlikely, at present, to change the status quo, as the CJEU is already quite willing to uphold claims against national measures where they impact the internal market, with a vast array of national measures being declared incompatible with the economic Treaty provisions, which, as documented, have been interpreted broadly. As Groussot et al. suggest, it appears unlikely that applicants will be able to rely on Article 16 where a stronger Treaty provision, such as one of the four freedoms, can be invoked, lest the latter provisions become “obsolete”.¹⁵⁵ This has been similarly observed by Oliver, who recognised the irony in the four freedoms being a potential “surrogate”¹⁵⁶ for Article 16.

One advantage Article 16 has over the four freedoms and other similar economic Treaty provisions however, is that, as ensured by Article 6(1) TEU and Article 51 TFEU, it applies directly to the “institutions and bodies of the Union”, as opposed to just Member States and/or private individuals. Indeed, under Article 52(1), any limitation by a Union institution on the rights and freedoms contained within the EUCFR “must be provided for by law and respect the essence of those rights and freedoms” in accordance with the principle of proportionality. Article 16 is thus, in theory at

¹⁵² European Commission Factsheet on the Right to be Forgotten (n 143), p3.

¹⁵³ See generally Groussot et al. (n 86).

¹⁵⁴ Indeed, it is important to stress that, by virtue of Article 51(1), the EUCFR applies only where EU law is engaged or where Member States “implement” EU law. Whilst a full consideration of this point is beyond the scope of this thesis, it is necessary to note that the CJEU has taken a broad approach to “implementation”, with *Åkerberg* generally confirming that the EUCFR will apply whenever Member States are acting within the scope of EU law. Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

¹⁵⁵ Groussot et al. (n 86) 9.

¹⁵⁶ Oliver (n 88) 298.

least, better placed to challenge Union legislation which itself fails to respect the freedom to conduct a business or engage in economic activity, rather than just a Member State's interpretation or implementation of it.

The CJEU's interpretation of Article 52(1) will ultimately confirm whether this advantage can actually be realised in practice, and a recent attempt to use Articles 15 and 16 to more directly challenge EU law illustrates that this will not be an easy task. In the *Deutsches Weintor*¹⁵⁷ case, Deutsches Weintor sought permission from the German Federal Administrative Court to use the description 'easily digestible', arguing that it did not breach Regulation 1924/2006 prohibiting health claims as its description referred only to general well-being, not health. The Court then referred to the ECJ, also asking whether the prohibition was consistent with the fundamental freedoms recognised by Articles 15 and 16. Unsurprisingly, the Court easily found that the description was a health claim, and that the prohibition contained in the Regulation, even though it was without exception, was compatible with the EUCFR as it fairly balances the protection of health (Article 35) with the company's rights under Articles 15 and 16.

It is certainly not contended that the CJEU interpret Article 52(1) so as to allow for the invalidation of a host of EU measures which may conflict with fundamental rights, as such an outcome would be absurd. However, in the unlikely, though not impossible, event that EU secondary legislation does seriously fail to adequately balance the rights of those affected, it should remain a *possibility* for the Courts to use Article 16 and other related rights and freedoms to aid a finding of illegality. This possibility will perhaps be tested in the upcoming *Totally Wicked*¹⁵⁸ case, concerning the legality of the EU Tobacco Products Directive.¹⁵⁹ *Totally Wicked* initiated judicial review proceedings in the UK, arguing in its Statement of Facts¹⁶⁰ that it would be unlawful to implement the Directive as certain provisions within it relating to e-cigarettes (Article 20) were contrary to EU law and the internal market provisions, as e-cigarettes are not (as supported by scientific research) equivalent to tobacco or medicinal products as the Directive incorrectly assumes. *Totally Wicked* therefore asserts that the Directive fails to respect the principles of proportionality, equality (non-discrimination), and subsidiarity, as well as the fundamental right to property and freedom to conduct a business. The High Court has subsequently referred to the ECJ under Article 267 TFEU. This case presents a stronger argument than the one found in *Deutsches Weintor*, with Bates

¹⁵⁷ Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] ECLI:EU:C:2012:526. Also see 'Wine may not be promoted as 'easily digestible'' (2012) CJEU Press Release No 112/12 <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-09/cp120112en.pdf>> accessed 11th May 2015.

¹⁵⁸ *The Queen on the Application of Philip Morris (Trading as "Totally Wicked") and Others v Secretary of State for Health* [2014] EWHC 3669 (Admin).

¹⁵⁹ Directive 2014/40/EU.

¹⁶⁰ For more information see Clive Bates, 'Totally Wicked legal challenge to the Tobacco Products Directive e-cigarette measures' (2014) <<http://www.clivebates.com/?p=2446>> accessed 12th May 2015.

remarking that the case “should succeed”¹⁶¹ on the grounds outlined above. He adds that whilst not submitted by Totally Wicked, there are also potential procedural violations to consider, such as the Commission’s failure to consult under Article 11(3) TEU. It is also worth noting that the same Directive is being challenged by other parties, including the Government of Poland. It remains to be seen how the Court will consider Article 16 in this case, and it is possible that it will either adopt a broad approach to the specifics of the Directive, or strike out the potentially malign Article 20 without referring at all to Article 16 or the EUCFR, relying instead on the stronger principles of proportionality and/or equality. The case could however, confirm or deny the status of Article 16 (albeit in conjunction with other rights) as a viable weapon with which to challenge Union legislation.

2.5 How Much Freedom?

The freedom to conduct a business is subject to the limitations found within Article 16 itself, the general Article 52(1) and pre-charter “social function” limitations which apply to all fundamental rights and freedoms, and the CJEU’s own propensity. As submitted and discussed, the freedom to conduct a business ought to protect an individual’s ability to engage in economic initiative or activity without undue interference, with undue interference being determined in accordance with the limitations outlined above. While the nature and scope of the limitations are, as explored, far from clear, it is undisputed that Article 16 does not represent an absolute right or unbridled freedom to pursue commercial interests. Nor should it be used to politicise the CJEU or overcome distinctly political issues affecting economic interests such as Rosneft’s recent attempts¹⁶² to indirectly challenge sanctions imposed by the EU on Russia, which it asserts are indirectly and illegally affecting it. Although it is unclear whether Article 16, or indeed the EUCFR, would even apply in such a situation, it would be highly unlikely such a case would succeed, and Article 54 prohibits the use of any Charter rights “to engage in activity... aimed at the destruction of any of the rights and freedoms recognised in this Charter”. In any case, this is patently not the type of economic interest Article 16 is intended to protect.

2.6 What Next?

The above analysis of Article 16 demonstrates that the CJEU is not sufficiently protecting or utilising the fundamental freedom to conduct a business or engage in economic initiative/activity. Indeed, the CJEU has been inconsistent in its reference to the freedom, acknowledging it in *Scarlet*

¹⁶¹ *ibid.*

¹⁶² See Jane Croft, ‘Rosneft’s Russian sanctions case referred to the EU’ (2015) Financial Times <<http://www.ft.com/cms/s/0/474dc534-a261-11e4-9630-00144feab7de.html#axzz3WhvAflW>> accessed May 12th 2015.

Extended, *Sky Österreich* and *Mark Alemo-Herron*, but ignoring it in the more recent *Google Spain* case. Furthermore, it is still the case that most attempts by companies to rely on Article 16 fail, possibly due to its association with the right to property. As stressed, it is not the failure itself of Article 16 claims that signifies the CJEU is failing to adequately protect the freedom to conduct a business, but rather the negligent or erratic way it balances the freedom with competing interests, often unjustifiably bundling it with other rights and hastily dismissing it as in *Hauer* and *McDonagh*. Bizarrely, it has also upheld it at the expense of a proper consideration of other fundamental rights too, such as employee rights in *Mark Alemo-Herron*, which Groussot et al. cite as a “serious”¹⁶³ failure on the part of the CJEU to consider the respective social functions of the competing fundamental rights.

Cases like *Scarlet Extended* and *Sky Österreich*, whilst opposing each other in outcome, verify that the CJEU can undertake a more detailed proportionality assessment, and moving forward, it is essential that the CJEU adopt this approach as a default stance, especially as it seems inevitable that more conflicts will arise between the rights and freedoms contained within the EUCFR. The *Google Spain* case unfortunately suggests that this is unlikely to happen anytime soon, with the Court adding, rather than clarifying, issues which it will undoubtedly have to resolve in the near future. More worrying is that the CJEU’s protection of the freedom seems reliant on the other interests or measures being considered, creating a dual reading of the freedom. Though it is important for the CJEU to cooperate with the other Union institutions in achieving EU aims, this cooperation should manifest itself at the balancing stage, with any weighting in favour of Union interests or legislation being explained in a more transparent and justified way. At present, the CJEU seems too ready to dismiss or overlook claims which challenge Union legislation or conflict with Union interests, an issue which goes beyond just Article 16 and has understandably given rise to some criticism.

Indeed, as Leczykiewicz stresses, this “absence of discursive engagement” with constitutional provisions such as the fundamental rights under discussion (and indeed, fundamental rights in general) undermines “constitutional justice” within the EU, and fails to impose the required “justificatory requirements” on the law-making institutions, meaning that measures are too easily accepted as being justified, an outcome which threatens individual rights, questions the legitimacy of EU acts, and “undoubtedly impoverishes” EU law.¹⁶⁴ Such engagement with fundamental rights and their compatibility with each other and EU legislation is even more important when

¹⁶³ Groussot et al. (n 86) 15.

¹⁶⁴ Leczykiewicz (n 62) 99.

considering, as Micklitz does,¹⁶⁵ the very different expectations Member States and individuals have in respect of how these rights should be upheld and what degree of interference by law-making institutions is justified and proportionate. The CJEU must therefore be more prepared to fully examine the nature of the rights and freedoms under discussion and why they outrank each other or are outranked by EU legislation on a case-by-case basis. At present, it is not clear that the CJEU is prepared to accept this task, but it is submitted that it must in order to achieve “constitutional justice” and adequately protect the rights of individuals. The upcoming *Totally Wicked* case may nonetheless, provide an opportunity for the CJEU to improve on this stance, and clarify the role of Article 16 in challenging Union legislation which fails to adequately consider the freedom of “individuals” to engage in economic initiative or activity.

3. Repeat Offenders: The Commission and Corporate Actors

As noted in the Introduction, corporate actors are amongst the most active litigants before the European Courts, often challenging national measures which conflict with EU law. They are also quite adept at challenging Commission “acts” addressed to them (mostly decisions), and indeed, along with Member States, are the most common applicants in Judicial Review proceedings (particularly before the GC).¹⁶⁶ Due to the more direct consequences of its actions (as opposed to the Council or other Union bodies), and the almost “insurmountable barriers” that Article 263 presents,¹⁶⁷ the Commission is understandably the “most popular defendant” in such proceedings.¹⁶⁸ It is therefore perhaps no surprise that corporate actors and the Commission have been labelled the “repeat players” of the EU legal system, which Granger defines as players with the “financial, policy, and institutional capacity of engaging in long-term litigation”.¹⁶⁹ Within the field of competition law, such repeat playing is all but guaranteed, as it primarily aims to regulate the actions of large corporate actors (or “undertakings”) who have the ability to affect competition within the EU.

The problem here however, is that much like its approach vis-a-vis Union legislation, the CJEU often takes a more deferential approach to the Commission, with Granger noting the Commission’s

¹⁶⁵ See Micklitz’s analysis of the different interpretations and development of the “freedom to contract” in the UK, Germany, and France, and how the EU must be aware of such differences. Hans-W. Micklitz ‘On the Intellectual History of Freedom of Contract and Regulation’ (2015) EUI LAW 2015/09 ERPL-12 <http://cadmus.eui.eu/bitstream/handle/1814/35178/LAW_2015_09.pdf?sequence=1> accessed 20th May 2015.

¹⁶⁶ Tridimas (n 78) 159 and generally.

¹⁶⁷ Ami Barav, ‘Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court’ (1974) 11 CMLR 191. See also Philippa Collins, ‘Article 263(4) TFEU: Still an ‘insurmountable barrier’ or a welcome change?’ (2013) 5 SJOL <http://www.sjol.co.uk/issue-5/article-263-4-tfeu-still-an-insurmountable-barrier-or-a-welcome-change#_ftn6> accessed 15th May 2015.

¹⁶⁸ Tridimas (n 78) 159

¹⁶⁹ Granger (n 33) 58, footnote 19.

legal service has a “particularly strong influence” on the CJEU, and that “according to all quantitative surveys, the court follows the Commission in the majority of cases”.¹⁷⁰ This reality has also been confirmed by Hofmann, who states that, despite the “sparse” judicial data, “every study”¹⁷¹ he has reviewed indicates that in addition to being the most popular defendant, the Commission is also the “most successful litigant”,¹⁷² winning the majority of its cases. Such comments refer to both its standing as against Member States and as against other parties, including for the purposes of this discussion, corporate actors.

Whilst statistics show that corporate actors have had some success in challenging Commission decisions in the competition field through Article 263,¹⁷³ most of this success has been due to procedural faults, and if one takes the view that an “effective regime of judicial review acts as a counterbalance to the Commission’s broad powers”,¹⁷⁴ such deference to the Commission can be problematic, especially in the field of competition law where the Commission essentially acts as investigator, prosecutor, and decision-maker. It should be noted that this “deference” consists of the discretion or “margin of appreciation” awarded to the Commission in competition cases, which the Courts are, due to the separation of administrative and judicial powers, more hesitant to review (considered below).

The success rate of the Commission, and potential “prosecutorial bias”¹⁷⁵ stemming from its central role as judge, jury, and executioner, has given rise to genuine concerns about whether the rights of individuals (here mostly corporate actors) are being respected, recalling von Bogdandy’s assertion that when it comes to interference with fundamental rights by Union institutions, the protection awarded is “low” and discretion “broad”.¹⁷⁶ More recently, Schweitzer has added that the CJEU has essentially “failed to systematically integrate the fundamental rights dimension”¹⁷⁷ into its judicial review of competition law cases. This is regrettable as it is clear that competition law enforcement can interfere with the fundamental rights of corporate actors, including the ones already considered in this paper such as the right to property and the freedom to conduct a business or engage in

¹⁷⁰ Granger (n 33) 59.

¹⁷¹ Hofmann (n 65) preface.

¹⁷² Hofmann (n 65) 8.

¹⁷³ Tridimas (n 78) 159.

¹⁷⁴ Jose Carlos Laguna de Paz, ‘Judicial Review in European Competition Law’ (2013) <<http://intranet.law.ox.ac.uk/ckfinder/userfiles/files/JUDICIAL%20REVIEW%20IN%20EUROPEAN%20COMPETITION%20LAW.pdf>> accessed 14th May 2015. Page 4.

¹⁷⁵ Heike Schweitzer, ‘The European Competition Law Enforcement and the Evolution of Judicial Review’ (2009) EUI-RSCAS <<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Schweitzer.pdf>> accessed 15th May 2015. Page 25.

¹⁷⁶ von Bogdandy (n 10) 1323.

¹⁷⁷ Schweitzer (n 175) 25.

economic activity. In addition to these rights, their right to due process is also threatened by the Commission's role, as due to the fact that competition law sanctions are generally viewed as being criminal in nature,¹⁷⁸ they fall within the scope of Article 6(1) ECHR, which requires that everyone be "entitled to a fair and public hearing... by an independent and impartial tribunal", a right now also ensured by Article 47 EUCFR. The question then, is whether the CJEU actually has sufficient jurisdiction to protect these rights, and if so, whether it using it. This question is all the more significant as only the CJEU can rule on whether or not the decision or act in question is contrary to EU law. Indeed, Member State courts do not have the competence to declare such acts invalid, and unlike under Article 267 TFEU, do not get the opportunity to execute the CJEU's "ruling" which they could, in theory,¹⁷⁹ refuse to implement for violating fundamental freedoms.

3.1 'Full Jurisdiction': Articles 261 and 263 TFEU

The main "weapons" available for challenging or reviewing Commission decisions or penalties are Articles 261 and 263 TFEU, with the former granting "unlimited jurisdiction" to "cancel, reduce or increase"¹⁸⁰ penalties issued by the Commission, and the latter allowing for a more general review or "control of legality". This distinction between "unlimited jurisdiction" and "control of legality" is, as Laguna de Paz comments, somewhat "confusing" and should not be read to suggest that Article 263 provides for "limited jurisdiction".¹⁸¹ Nonetheless, between the two Articles the CJEU has, at least textually, the scope to review decisions and fines issued by the Commission to corporate actors. In reality, its ability to review decisions is not unlimited, and the CJEU tends to confine itself, particularly in regards to Article 263, to a review of whether the decision in question is voided¹⁸² by a "manifest error" in judgment by the Commission, which could take the form of, amongst other things: a failure to follow procedure; a failure to consider all relevant facts or a misinterpretation of them; a failure to demonstrate the harm being punished or to provide comprehensive reasoning and evidence; or the misuse of its powers.¹⁸³ Similarly, the "unlimited jurisdiction" provided for under Article 261 has "rarely" been exercised,¹⁸⁴ and, as explored in

¹⁷⁸ A classification endorsed by the ECHR in *Menarini (Menarini Diagnostics v Italy App no 43509/08 (ECHR, 2011))* due to the intent to punish and deter perpetrators.

¹⁷⁹ See for example, the German Court's ruling in *Solange II* which reserved the right to review the CJEU's supremacy in the event that it failed to respect fundamental rights and freedoms. Judgment of October 22nd 1986, 73 BVerfGE 339.

¹⁸⁰ Read in conjunction with Regulation 1/2003 Article 31 which extends Article 261 to Commission decisions.

¹⁸¹ Laguna de Paz (n 174) 2.

¹⁸² Control of legality under Article 263, unlike Article 261, only allows for the quashing of the decision, in part or in whole. The CJEU cannot substitute or edit the Commission's decision.

¹⁸³ See generally Laguna de Paz (n 174) 10-14.

¹⁸⁴ Bernadine Adkins, 'A question of deference: Is it time to get tougher about European Commission fining decisions' (2014) <<http://www.wragge-law.com/insights/a-question-of-deference-it-is-time-to-get-tougher-about-european-commission-fining-decisions/>> accessed 15th May 2015.

Siemens Österreich,¹⁸⁵ is limited to an assessment of arguments the parties themselves raise, and the actual powers of the Commission (i.e. the CJEU cannot provide for fines or a re-allocation of them in a way that the Commission itself could not).

The limitations to its “control of legality” under Article 263 largely stem from the discretion or “margin of appreciation” awarded to the Commission in regards to complex economic, technical or policy assessments. Such discretion is necessary to ensure that the judicial and administrative powers of the EU are properly separated and that the CJEU’s role is limited to the *review* of decisions and not the replacement or substitution of them. Indeed, the CJEU is not the “decision-maker” and “cannot perform new investigations”.¹⁸⁶ A similar separation of powers and judicial deference to the executive can be found in some form in nearly every Member State, and whilst the “exact meaning, scope and rationale... have remained vague”,¹⁸⁷ such deference is required for the successful functioning of a multifaceted politico-legal system.

This deference however, when coupled with the Commission’s broad investigative, prosecutorial, and enforcement powers, has been challenged by corporate actors asserting that their due process rights, as enshrined by Article 6(1) ECHR, have been infringed. With the upgrading of the EUCFR to primary law, many hoped to take advantage of the due process guarantees found in Chapter VI (Justice) to more effectively challenge the Commission’s concentration of power in competition investigations. However, as Swanson et al. summarise, such hope may have been misplaced with many “largely disappointed” with its “limited utility” in challenging the Commission’s extensive investigative powers.¹⁸⁸ It is worth noting first that the Commission is not a “tribunal” for the purposes of Article 6(1) ECHR, with AG Sharpston confirming¹⁸⁹ that it is sufficient for Article 6(1) if Commission decisions can be reviewed by a Court having “full jurisdiction”.¹⁹⁰ The complaints thus centre around this “full jurisdiction” of the CJEU (particularly the GC) in reviewing such decisions.

¹⁸⁵ Case C-231/11 *European Commission v Siemens AG Österreich* [2014] ECLI:EU:C:2014:256.

¹⁸⁶ *Laguna de Paz* (n 174) 20.

¹⁸⁷ *Schweitzer* (n 175) 18.

¹⁸⁸ Daniel G. Swanson, Peter Alexiadis and Pablo Figueroa, ‘The Schindler Ruling of the Court of Justice of the European Union: Potential Implications for Fundamental Rights and EU Competition Law’ (2013) Gibson Dunn Client Briefing <<http://www.gibsondunn.com/publications/pages/Schindler-Ruling-of-Court-of-Justice-Potential-Implications-EU-Competition.aspx>> accessed 15th May 2015.

¹⁸⁹ In her *KME Germany* Opinion (Case C-272/09 P *KME v European Commission* [2011] ECLI:EU:C:2011:810; Opinion of Advocate General Sharpston ECLI:EU:C:2011:63) paras 67-70.

¹⁹⁰ See Christopher Bellamy, ‘ECHR and competition law post: Menarini: An overview of EU and national case law’ (2012) e-Competitions 47946 <<http://awa2013.concurrences.com/business-articles-awards/article/echr-and-competition-law-post>> accessed 15th May 2015.

In *Menarini*, whilst not specifically looking at EU competition law, the ECHR generally confirmed Sharpston’s approach, holding that sanctions imposed by administrative authorities (here the Italian Competition Authority) are compatible with Article 6(1) if subject to control by a court having full jurisdiction, which requires an ability to decide on *all* aspects of law and facts.¹⁹¹ As noted above, the CJEU’s jurisdiction under Articles 261 and 263 is far from unlimited. In *KME Germany* however, the ECJ stressed that the CJEU does have full jurisdiction over such decisions, with Article 261 providing for “unlimited jurisdiction” in regards to fines, which it can substitute, alter or quash, and Article 263, whilst allowing for a margin of appreciation in regards to “complex economic assessments”, not preventing the CJEU “from reviewing the Commission’s interpretation of information of an economic nature”.¹⁹² It further added that the Courts must not “use the Commission’s margin of discretion... as a basis for dispensing with the conduct of an in-depth review of the law and the facts”,¹⁹³ and that its role is not only to establish whether the evidence used is “factually accurate, reliable and consistent” but also that it contains all of the necessary information needed to make and support such a complex assessment.¹⁹⁴

The CJEU found similarly in *Chalkor*,¹⁹⁵ and the more recent *Schindler*¹⁹⁶ case echoes these sentiments. Whether such an impassioned statement will alleviate fears that the CJEU cannot effectively review Commission competition decisions is questionable as many still argue that the Courts only pay “lip-service” to due process matters.¹⁹⁷ The cases do however, suggest a break from previous case law as regards the Commission’s discretion, with the CJEU seeming more confident in its ability to review these complex assessments. It is also important to note that in most of the cases where an infringement of rights has been alleged, the facts indicate a clear or “naked” cartel, and so as Swanson et al.¹⁹⁸ note, it seems likely that the outcome would have been the same even if the Court had scrutinised the entire economic assessment of the Commission. As concerns the CJEU’s “full jurisdiction”, it seems the matter is closed for now, and it appears that the CJEU *can* effectively review such decisions, though that is not to say that it *does* actually review them to the standard suggested in *KME Germany* and *Chalkor*.

¹⁹¹ Para 59. See also Bellamy (n 190).

¹⁹² Para 121.

¹⁹³ Para 129.

¹⁹⁴ Para 121.

¹⁹⁵ Case C-386/10 P *Chalkor v Commission* [2011] ECLI:EU:C:2011:815.

¹⁹⁶ Case C-501/11 P *Schindler Holding and others v European Commission* [2013] ECLI:EU:C:2013:522.

¹⁹⁷ See Swanson et al. (n 188).

¹⁹⁸ *ibid.*

Whilst it is not possible to review every due process infringement levied against the CJEU and Commission by corporate actors and other individuals, another worth briefly noting is the double jeopardy implications¹⁹⁹ of the Commission's central role and the fact that when the Commission undertakes an investigation, Member State courts are bound to accept its decision. This essentially means that, as in *Otis*,²⁰⁰ where the Commission exercises its fundamental right to seek compensation before a Member State court for competition law infringements affecting the EU, Member State courts must determine the compensation with the "harmful event" (a necessary component of such compensation assessments) already being pre-determined by the Commission's own decision and finding of fault. In *Otis* though, the CJEU held that this is not a breach of due process requirements as the decision itself can be challenged under Article 263, and the Commission has a legitimate right (along with anyone else harmed by such actions) to seek compensation on behalf of the EU. This is not the most convincing argument, and the fact that the CJEU has seemingly adopted a different approach to the ECHR in regards to double jeopardy (now found in Article 50 EUCFR)²⁰¹ may create further problems in the future.

Finally, as concerns these due process complaints, one should be aware that under Article 6(2) TEU the EU is bound to formally join the ECHR, which may grant a right of appeal to Article 263 cases and thus provide the ECtHR with a chance to more explicitly consider the EU's current due process standards. The ECJ's recent and surprising determination²⁰² that the draft accession agreement is not compatible with EU law however, makes "accession very difficult, if not impossible",²⁰³ with Peers commenting that the Court's Opinion is a "clear and present danger to human rights protection",²⁰⁴ and Douglas-Scott similarly criticising the Court's seemingly protectionist stance on its own sovereignty.²⁰⁵

¹⁹⁹ For more on double jeopardy arguments see also the CJEU's ruling in *Toshiba* (Case C-17/10 *Toshiba and Others v Úřad pro ochranu hospodářské soutěže* [2012] ECLI:EU:C:2012:72).

²⁰⁰ Case C-199/11 *Europese Gemeenschap v Otis NV and Others* [2012] ECLI:EU:C:2012:684.

²⁰¹ See *Åkerberg* (n 154).

²⁰² Its highly anticipated Opinion 2/13. See Sionaidh Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' (2014), UK Constitutional Law Blog <<http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>> accessed 16th May 2015.

²⁰³ *ibid.*

²⁰⁴ Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (2014) EU Law Analysis <<http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>> accessed 16th May 2015.

²⁰⁵ Douglas-Scott (n 202).

3.2 EU Competition Law and Protection of the Fundamental Freedom to Conduct a Business and Engage in Economic Activity

Assuming the CJEU does actually have the “full jurisdiction” it claims for itself in *KME Germany*, *Chalkor*, and *Schindler*, the question becomes whether it is sufficiently recognising and protecting the rights of corporate actors when reviewing fines or “controlling” the legality of decisions.

Thus far, the CJEU has not explicitly referred to Article 16 or the other associated rights in competition law proceedings, and so it is difficult to consider the case law comprehensively. Furthermore, in proceedings under the competition law Treaty articles, the situation is rather different to the one considered in Section 2 as there is already an element of fault on behalf of the corporate actors. Indeed, where they have breached provisions such as Articles 101 or 102 TFEU, it will often be the case that they themselves have infringed EUCFR freedoms, including Article 16, which, as specified in the EUCFR explanations, includes the “right to free competition”.²⁰⁶ Usai’s assertion that Article 16 and EU competition law often serve the same purpose, thus seems apposite, as does his claim that there “would be no real right to economic initiative without competition law”.²⁰⁷ Certainly, the freedom to conduct a business or engage in economic activity would be rendered fantastical if there were no effective tools in place to regulate competition within the market. The situation must therefore be approached differently, as it entails a balancing of the same rights, and as noted, Article 54 EUCFR prevents rights and freedoms stemming from the EUCFR being used to violate other freedoms contained within it.

It is worth noting that in general the Commission undertakes relatively few investigations, with most ending before a Statement of Objections is issued or a decision made. Due to the average length of such investigations and the research required, where the Commission does proceed to issue a decision, it will often have a strong case against the accused undertakings. As such, and as mentioned, it is likely the undertakings will have breached EUCFR freedoms themselves, and so there will be little scope for them to invoke fundamental rights or freedoms beyond the due process ones considered above. The CJEU’s manifest error test may therefore be the most appropriate way to ensure the rights of corporate actors being “punished” are protected, and that the Commission’s finding is legitimate and supported by evidence that is accurate, consistent, and providing “sound factual basis”.²⁰⁸

²⁰⁶ See generally Section 2.1 above.

²⁰⁷ Usai (n 20) 1876-1877.

²⁰⁸ Laguna de Paz (n 174) 13.

Whilst the Commission has discretion over “complex assessments”, the Courts have proved willing to challenge them where they appear unfounded, unconvincing, or fail to meet all of the required procedural checks, especially in the area of mergers where the Commission’s assessment is more speculative. Indeed, in *Tetra Laval*,²⁰⁹ the Court annulled the Commission’s determination that the proposed merger was anticompetitive as they had failed to adequately demonstrate the anticompetitive effects of the resulting concentration. Likewise in *Hellenic Republic*,²¹⁰ the GC annulled the Commission’s Article 102 (and 106) decision because they had failed to prove that the undertaking had abused or had the potential to abuse its dominant position on the market; it had merely determined that the state measure in question created unequal opportunities, which the GC held, was insufficient to find an infringement.

In regards to fines and its unlimited jurisdiction under Article 261, the CJEU has also been forthcoming in amending them where the Commission fails to account for certain facts, with Cassels finding that only around 50% of cartel fines are upheld entirely.²¹¹ As such, in *Chalkor*, the Court reduced the base amount as the Commission failed to account for the fact that the undertaking had only participated in one branch of the complex cartel, and in *BASF*,²¹² they conducted a recalculation and substantially reduced the imposed fines to better reflect the true roles of the cartelists. Laguna de Paz’s assertion that discretion does not mean a “lower standard of proof” thus seems accurate,²¹³ and as the Commission’s fines have increased over the years, Craig’s conclusion that the CJEU’s “review of both fact and discretion has become more intensive over time” seems encouraging.²¹⁴ Indeed, whilst these complex assessments are subject to a more limited review, it is the CJEU that has ultimately determined the requirements the Commission must meet when making a decision or fining the undertakings involved, and it has not refrained from invalidating or at least modifying them where they fail to meet the requisite standards.

As established, it is clear that Article 16 does not provide a right to unrestrained economic pursuit, and whilst competition penalties can affect a company’s freedom to conduct a business or engage in economic initiative, where a Commission decision is substantiated and supported by the required

²⁰⁹ Case T-5/02 *Tetra Laval v Commission* [2002] ECLI:EU:T:2002:264. Note also that the ECJ upheld the GC’s ruling, dismissing the Commission’s appeal.

²¹⁰ Case T-169/08 *DEI v Commission* [2012] ECLI:EU:T:2012:448.

²¹¹ See John Cassels, ‘Appealing EU cartel decisions: prospects for success’ (2011) <<http://www.fieldfisher.com/publications/2011/11/appealing-eu-cartel-decisions-prospects-for-success#sthash.V1e6xnIL.dpbs>> accessed on 16th May 2015. Note that this does not mean the remaining 50% were annulled or reduced. Indeed, some were actually increased by the CJEU.

²¹² Case T-15/02 *BASF AG v Commission* [2006] ECLI:EU:T:2006:74. See also Cassels (n 203) generally.

²¹³ Laguna de Paz (n 174) 14.

²¹⁴ Paul Craig, ‘Judicial Review of questions of law: a comparative perspective’ in Susan Rose-Ackerman and Peter Lindseth (eds) *Comparative Administrative Law* (Edward Elgar 2010), 461.

evidence, it is arguable that the Commission itself is contributing to the protection of the freedom by fostering a more competitive market within which the freedom to conduct a business and “right to free competition” can be exercised. Usai’s conclusion²¹⁵ that Article 16 is not limited by competition law is thus, in this respect, well founded.

4. Going Beyond Fines: Microsoft and Google - Punished for Being Too Good?

One situation where the freedom to conduct a business or engage in economic activity *is* perhaps threatened by competition law is where the Commission orders remedies that go beyond just fines or the cessation of the infringement, and encroach more directly on the actual operations of the undertaking or its property.

The Commission’s broad discretion as to the policy it adopts and the cases it chooses to investigate has often been criticised for being protectionist with many high profile investigations being directed at large American corporations, and though constitutionally it is not for the Courts to adjudicate on such policy decisions, the CJEU must be aware of the implications for undertakings living a “life under the regulators’ gaze”.²¹⁶ As Economides and Lianos recognise,²¹⁷ it is true that competition remedies must aim to achieve both “micro” and “macro” goals, the former being the cessation of the infringement and compensating of victims, and the latter being the restoration of the market to “but for” conditions and implementation of measures to prevent recurrence. Indeed, such “macro” goals are essential for the maintenance of any semblance of free competition, which as discussed, is part and parcel of Article 16 and the freedom to conduct a business or engage in economic activity. Merely fining infringing undertakings would do little to restore the market as many have the financial capacity to withstand significant fines, especially if the underlying infringement proves more profitable in the long run (Kaldor-Hicks efficient). As such, “conduct remedies” like the required untying of Windows Media Player and the Windows operating system in *Microsoft*,²¹⁸ are effective ways to somewhat restore the market and/or remove the anticompetitive restraint.

However, more intrusive remedies which interfere with the undertaking’s actual business plans, property rights, or commercial strategies, present a slightly different issue, as whilst they might aid

²¹⁵ Usai (n 20) 1876.

²¹⁶ Richard Waters, ‘Google faces life under regulators’ gaze’ (2015) Financial Times <<http://www.ft.com/cms/s/0/809ea246-e38d-11e4-b407-00144feab7de.html#axzz3XUEhUZ1Y>> accessed 17th May 2015.

²¹⁷ Nicholas Economides and Ioannis Lianos, ‘The Quest for Appropriate Remedies in the EC Microsoft Cases: A Comparative Appraisal’, in Luca Rubini (ed) *Microsoft on Trial Legal and Economic Analysis of a Transatlantic Antitrust Case* (Edward Elgar 2010), 395-397.

²¹⁸ *Microsoft* Commission Decision 2007/53/EC of 24 March 2004 [2007] OJ L32/23.

restoration of the market, they can also erode an undertaking's autonomy or freedom to conduct a business, which can consequently harm consumers. Although it has been noted that corporate actors breaching competition law will often have infringed others' EUCFR freedoms, and so may have little scope to invoke the EUCFR when challenging the decision (if well founded), this should not mean that their own rights and freedoms should be overlooked at the remedy stage, as the situation is quite distinct from the initial determination of liability. Indeed, though they may have a hard time arguing their rights are more worthy of protection on proportionality grounds at the decision stage, there should be no such limitation when considering the remedies, as they alone shoulder the brunt of the penalties.

Thus, the remedies required from the infringing undertakings should, like all other Union measures,²¹⁹ be proportionate. In many cases it seems likely that the remedy will be proportionate (regardless of whether the CJEU explicitly refers to Article 16 or the associated rights), as the infringement itself will often indicate the most suitable remedy, as was arguably the case with the untying of WMP and Windows OS. However, where undertakings are required to disclose knowledge or supply confidential information to competitors so that they can compete better, the CJEU must recognise the potential threat to the corporate actor/undertaking's right to property and freedom to conduct a business. The requirement in the same case that Microsoft supply competitors with information about its operating systems so that they could develop secondary competing products is thus worthy of more scrutiny than the requirement it untie its products.

Indeed, in such cases there is a legitimate argument that companies are being punished for being "too good", and as one author notes in response to the Commission's charges of abuse against Google, whilst the Commission must be observant, "it would be wrong for Google to be hamstrung by regulators merely because its services are superior to those offered by rivals".²²⁰ Such a statement bears a strong resemblance to academic debates about whether competition law aims to protect competitors or competition itself, and this is a balance that the CJEU must ensure the Commission strikes. As many advocate,²²¹ competition law should aim to protect only consumers and the structure of the market itself, not competitors. In new economies, this aim is particularly vexed as companies can acquire and lose vast market shares quickly depending on their ability to innovate and adapt. As such, it is difficult to consider the counterfactual situation, where it will often be the case that without the "infringing" company there would be no product market within which others could even compete. The Commission must therefore consider, as must the CJEU

²¹⁹ See generally for example para 49 Case C-354/95 *R v Minister for Agriculture, Fisheries and Food, and others* [1997] ECLI:EU:C:1997:379.

²²⁰ 'Brussels finally takes on Google in an open fight' (2015) Financial Times <<http://www.ft.com/cms/s/0/97a4dc62-e360-11e4-9a82-00144feab7de.html#axzz3Y20iJq7R>> accessed 18th May 2015.

²²¹ See generally Chapter 1, Alison Jones and Brenda Sufirin, *EU Competition Law* (5th Edition, OUP 2014).

where challenged, the implications of any remedy that requires the disclosure of information which may be key to the undertaking's business strategy, as it could prove to be an "intolerable" interference with their rights and freedoms, most obviously Articles 16 and 17 EUCFR. Indeed, the very advent of intellectual property protection was built on similar considerations, so as to allow society (and for the purposes of this discussion, consumers) to benefit from innovation by providing protection for innovators.

In *Microsoft*, Microsoft was found to have infringed EU (and US) competition law by refusing to provide competitors with necessary interoperability information to enable them to develop software which was compatible with Windows operating systems. Due to the ubiquity of Microsoft's operating systems, this refusal, according to the Commission, effectively "eliminated competition in the relevant market" as the "information was indispensable for competitors".²²² Microsoft was thus held to be causing harm to consumers by reducing the selection of products available to them, and by leveraging its dominance in the OS market to that of the secondary work group server one.²²³ A full consideration of the Microsoft decision is not possible, nor integral for this discussion, but the order that Microsoft "disclose complete and accurate specifications"²²⁴ in order to "ensure Microsoft's competitors can develop products that interoperate with Windows domain architecture... and hence viably compete with Microsoft's"²²⁵ products on that market, is significant.

Furthermore, as Economides and Lianos highlight,²²⁶ the Commission's order applies prospectively, meaning that Microsoft must update the specifications when introducing new versions, and also implies that Microsoft's ability to seek remuneration for this "licencing" is limited so as to ensure "viable competition". Unsurprisingly, such disclosure proved problematic, as due to the technical nature of the information, it was hard to decipher what information constituted "complete and accurate" disclosure, and Microsoft subsequently faced a number of penalties. Whilst such an order seems to heavily interfere with Microsoft's right to conduct a business or engage in economic activity by using its own innovation to profit and grow, it is important to note that this secondary market was already well-established as Microsoft had previously provided competitors with the required information for its earlier generations. The Commission therefore found that Microsoft's sudden decision to provide less information was the "key factor"²²⁷ for its "rapid rise to

²²² Economides and Lianos (n 217) 402.

²²³ Economides and Lianos (n 217) 414.

²²⁴ Decision (n 218) 999.

²²⁵ Decision (n 218) 1003.

²²⁶ Economides and Lianos (n 217) 416.

²²⁷ Decision (n 218) 637.

dominance”²²⁸ in the secondary market, and thus part of a deliberate leveraging strategy contrary to EU law. This clear history of providing similar information is important when considering the proportionality of the remedy, and though Microsoft’s rights to property and to conduct a business may have been limited, it is submitted that the order was proportionate in this instance, as the information disclosed was not essential or a key part of Microsoft’s business strategy or product offering, but was essential for the other actors on the market.

The situation is different however when considering the recent anticompetitive charges brought against Google. Whilst it is too early to consider the full ramifications of the Commission’s investigation and charges, as they have largely been confined to Google’s relatively insignificant shopping services (including the failed ‘Froogle’), suggestions that further charges may follow merit attention.²²⁹ In particular, whilst the Statement of Objections separates the “general search” and “comparison shopping” markets, in considering the latter, much discussion centred around Google’s “systematic favouring” of its own services which has a “negative impact on consumers and innovation”²³⁰ and potentially distorts search results so that the most relevant ones for consumers are rendered less visible than Google’s own. These arguments are not entirely convincing, and it seems unlikely that anyone would limit their search to the first few options provided by Google, especially in the comparison shopping market where Google has a lower reputation and market share. Likewise, the Commission’s claims that innovation is compromised as competitors will be deterred because of this favouring of Google products seems dubious, and as Fumagalli notes, “Google is not a regulated entity which needs to grant access to competitors on equal terms”²³¹ and so merely claiming that google discriminates is not a particularly strong argument to justify interference with the way it uses its own product.²³²

Indeed, in this regard the situation is disparate to the one considered in Microsoft above, as the search engine is Google’s primary product. More concerning then, are calls from some for Google to disclose its confidential algorithms so as to provide greater accountability and determine whether Google is using its search engine to hurt rivals.²³³ Whilst the Commission has not itself adopted this

²²⁸ Economides and Lianos (n 217) 402.

²²⁹ Note also the recent charges relate to only one of “four concerns” the Commission has outlined. See European Commission - Fact Sheet: MEMO/15/4781 <http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm> accessed 19th May 2015.

²³⁰ *ibid.*

²³¹ See Ferdinandi Giugliano, ‘Economists warn Brussels faces tough task in proving case against google (2015) Financial Times <<http://www.ft.com/cms/s/0/34c1b3da-e438-11e4-9e89-00144feab7de.html#axzz3Y20iJq7R>> accessed 19th May 2015.

²³² *ibid.*

²³³ See Alex Barker and Christian Oliver, ‘Europe to accuse Google of illegally abusing its dominance’ (2015) Financial Times <<http://www.ft.com/cms/s/0/643f49ec-e285-11e4-aa1d-00144feab7de.html#axzz3af6o6qv0>> accessed 19th May 2015. Particularly the discussion amongst French regulators to require disclosure/monitoring.

approach *yet*, such a requirement would be a gross and disproportionate breach of Google’s right to property and freedom to conduct a business. For now, the Commission requires only that Google treat its own shopping service the same way as it treats its rivals,²³⁴ which it stresses does “not interfere with either the algorithms Google applies or how it designs its search pages”.²³⁵ This suggested remedy already seems to come with inherent flaws, and whilst the investigation is still ongoing, the case will certainly test whether the Commission is genuinely trying to protect consumers and competition itself, or Google’s competitors. The CJEU must therefore, treat any decision, which will likely be subject to appeal if not settled, with great caution to ensure it adequately protects Google’s EUCFR rights and freedoms. Indeed, the CJEU would be wise to explicitly refer to Articles 16 and 17 in assessing whether the Commission is protecting competition or protecting competitors in a potentially protectionist way. With new economies providing a myriad of new ways to amass market share and create markets, questions about the most prudent way to safeguard competition are only likely to become more complex, and the CJEU must be ready to ensure that the rights and freedoms of corporate actors and innovators are respected.

5. Conclusion

The preceding discussion has considered and analysed the extent to which the CJEU has used the weapons at its disposal (primarily Article 16 EUCFR and its ‘full jurisdiction’ under Articles 261 and 263 TFEU) to protect the rights and freedoms of corporate actors within the EU. Whilst it may seem strange to discuss the fundamental rights of companies, as explored, the European Union was largely premised on economic integration and although there has been some development in regards to the protection of more typical fundamental rights, it still appears to be the case that the EU has not fully embraced “any substantive ideal of justice going beyond... the economic objectives of the market integration project”.²³⁶ As such, the general corporate use of the EUCFR and fundamental rights and freedoms to protect economic interests is, as Leczykiewicz suggests, largely “compatible with the market-orientated focus of the EU’s own activities”.²³⁷

As stated, Article 16 arguably represents the most explicit formulation of a company’s interest, and marks the first time the freedom to conduct a business has been codified in a binding Union document. It was submitted, in line with AG Cruz Villalón’s interpretation in *Mark Alemo-Herron*, that the right ought to be read so as to ensure that individuals can engage in economic activity without undue or “intolerable” interference. Thus far, the CJEU has not provided a definitive

²³⁴ MEMO/15/4781 (n 229).

²³⁵ MEMO/15/4781 (n 229).

²³⁶ Dimitry Kochenov, Grainne de Burca and Andrew Williams (eds) *Europe’s Justice Deficit?* (n 62) Preface.

²³⁷ Leczykiewicz (n 62) 106.

definition of what the freedom actually entails, but has in a variety of cases adopted a similar interpretation of the freedom, holding, in line with what is now Article 52(1) EUCFR, that the freedom must be upheld and that limitations must “respect the essence” of the freedom.

Unfortunately, and despite its codification, the CJEU has greatly underused Article 16, with reference to it being irregular at best, and the weight afforded to it varying significantly depending on which measures, rights, and freedoms it is being used to counter. Although the Courts have proved willing to use it (in combination with other rights and freedoms or legislation) against private individuals and Member States, it appears that its role as a “sword” with which to challenge EU legislation will be limited. Furthermore, despite the textual disentangling of the freedom from the associated right to property, the CJEU has continued to bundle the freedom with it, giving Article 16 little scope to act in its own right and leaving it vulnerable to the CJEU’s irreverence of the latter right.

As stressed throughout this paper, it is not the failure of the Courts to uphold the freedom which demonstrates that the CJEU’s protection is inadequate, but rather the inconsistent or non-existent proportionality assessments it undertakes to determine whether the freedom is being unduly interfered with. Though *Scarlet Extended* and *Sky Österreich* show a more activist approach to assessing the proportionality of interferences with fundamental rights and freedoms, the recent *Google Spain* case reaffirms the historically diffident approach to the freedom to conduct a business, and to fundamental rights in general, re-enforcing longstanding concerns that the price to pay for the achievement of EU policy goals and integration is substandard rights protection.²³⁸

As regards Articles 261 and 263, despite convincingly claiming “full jurisdiction” to review the law and facts of Commission decisions in the field of competition law, it is not clear the CJEU is actually using it to the standard it assures it can in *KME Germany*. Indeed, the CJEU often defers to the Commission, and too easily classifies things as a complex assessment which it must review more hesitantly, to the effect that, as Leczykiewicz asserts, it restricts its own powers of review and undermines its ability to promote constitutional justice.²³⁹ Furthermore, as Douglas-Scott warns,²⁴⁰ the EU is perfectly capable of committing injustice, and the CJEU must therefore be ready to rectify it, lest it contribute to the injustice itself. As submitted, it appears that the CJEU’s review of fines and decisions is generally adequate, and it has on numerous occasions been willing to alter (though not quash) Commission fines, and question Commission decisions which fail to meet the required

²³⁸ Micklitz (n 165) 18.

²³⁹ Leczykiewicz (n 62) 107.

²⁴⁰ Sionaidh Douglas-Scott, ‘Justice, Injustice and the Rule of Law in the EU’ (2015) in Kochenov et al (n 62) *Europe’s Justice Deficit?*.

standards. There are however legitimate due process concerns which have not been persuasively allayed by the CJEU, and are further jeopardised by the ECJ's recent determination that EU accession to the ECHR is not practicable at present. It also remains to be seen whether the CJEU is willing to protect the rights of corporate actors against competition remedies which impinge upon their economic strategies or property rights, a question that will only become more pressing as new economies continue to develop in both scope and complexity.

Overall, it would appear that the CJEU lacks the ammunition or desire to use the weapons available to it, and outside of the four freedoms where its protection is strong, is not adequately protecting the rights of corporate actors. Whilst it has offered some protection through Article 16 EUCFR and Articles 261 and 263 TFEU, this protection has been haphazard and heavily influenced by the CJEU's own Union bias. Indeed, it is this last point which ultimately impedes the CJEU's ability to use the weapons it has to protect corporate actors. As contended, the CJEU adopts a three-fold approach to the protection of fundamental rights, with its review being aggressive as against Member States infringing the four freedoms, ambivalent in the balancing of conflicting and sensitive non-union measures, and uncompromising in attempts to challenge Union acts and measures. There thus remains, despite Article 16's potential, no viable way of either indirectly (through Article 267 TFEU) or directly (through Article 263 TFEU) challenging EU legislative acts which fail to respect the rights of corporate actors, and this is regrettable. More problematic is that the CJEU rarely undertakes a full proportionality assessment explaining why certain fundamental rights outrank each other or why EU measures constitute a justified restriction on an individual's rights and freedoms. This consequently subverts some of the EU's legitimacy, as it diminishes the justificatory value of the rights, freedoms, or legislative acts in question.

The CJEU must therefore be more consistent in its approach and legitimately balance the competing interests of private parties, Member States, and Union institutions on a case-by-case basis, so as to ensure that it does not itself contribute to the proposed "justice deficit"²⁴¹ within the EU and infringe its own institutional responsibility to observe and respect the rights and freedoms of individuals (whether corporate or not).

²⁴¹ See generally Kochenov et al.'s *Europe's Justice Deficit?* (n 62).

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