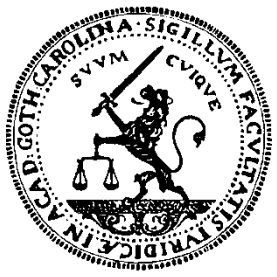

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Freedom to conduct a business as a concept of EU law

How the objectives and rationales of the EU inform the consideration of freedom to conduct a business and individuals in the market

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Abstract

This essay seeks to address how power asymmetries or structural biases may affect how European Union (EU) law considers market actors and the freedom to conduct a business, combining EU legal methodology with feminist and queer legal and political theory. The research finds that the EU is a purposive order, whose primary objectives inform the EU legal order and the development of EU law. EU functionalism and procedural rules have led to judicial action and liberalisation being leading in EU law where the economic internal market project is the central objective guiding EU development. Freedom to conduct a business is symptomatic of this system and was defined in Alemo-Herron as a liberalising tool to engineer the internal market as a free market with limited regulatory intervention. How EU consumer law and labour law construct the average individual in the market is also influenced by the EU functionalistic drive towards liberalisation and realization of the internal market. My argument is that the functionality of EU law can be understood as an overarching norm and structural lens that informs the Court of Justice of the EU (CJEU) to define the market with limited interference and the capable market actor as the norm in the internal market. This norm does not take adequate account of inequalities on the market which disadvantages vulnerable individuals who are not self-standing but in need of regulatory protection. The functional lens furthermore allows for the Court to consider parties as formally equal and to disregard societal structural imbalances, such as the patriarchy that evidently affect the CJEU as a Straight Court in a Straight society. Freedom to conduct a business can however instead be constructed in conformity with doctrine on regulated autonomy, freedom as non-domination and access justice so as to allow consideration for varied parties operating on the market and enable the pursuit of an accessible social market economy at European level.

Contents

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1 Introduction

1.1 Background

Throughout my academic studies of EU law one peculiar provision has kept making an appearance: freedom to conduct a business, within the right to conduct a business in Article 16 in the Charter of Fundamental Rights (CFR). This freedom is normally unsuccessful[1] and easy to restrict[2] in the Court of Justice of the EU (CJEU), but were permitted to prevail in the cases *Alemo-Herron*[3] and *Achbita*[4] - two criticised decisions of the CJEU. While freedom to conduct a business may legitimately protect a minimum degree of market freedom it was used in *Alemo-Herron* in a deregulatory fashion to deregulate protective legislation. In *Achbita* it was used to justify a seemingly discriminatory rule against a muslim woman. This led me to ponder what rationales guided the CJEU in these decisions and how the freedom to conduct a business fits within the overall project of developing the internal market and considering market actors.

1.2 Thesis aim and research questions

In examining EU freedom to conduct a business this thesis seeks to assess the wider context of the recent development on the freedom to conduct a business seen in the context of the EU as a whole, examining the impact of EU functionalism specifically in relation to how EU law addresses power relations and natural individuals in the internal market. For this purpose the formulation of the freedom to conduct a business will be explored, critiqued and contextualized as part of the overall EU legal order that develops the internal market. The thesis seeks to critically consider the impact of EU functionalism using feminist and queer theory to understand how overarching rationales create normative hierarchies, power inequalities and systems of legitimacy that influence substantive outcomes. Altogether the thesis takes its base in examining the freedom to conduct a business, the rationales underpinning it and the implications of its formulation.

<u>Overarching question</u>
How does the EU freedom to conduct a business relate to the overarching EU rationale and can its implications impact the recognition of vulnerable or marginalized individuals operating in the internal market?
<u>Specific questions</u>

- What rationales is the EU legal order guided by and how does the freedom to conduct a business relate to these rationales and the internal market?
- Can the freedom to conduct a business and the market rationale it represents affect how the EU legal order takes account of vulnerable market actors such as consumers and workers?
- Can the EU account of market actors particularly affect actors adhering to marginalized categories?

[1] P Oliver, 'What purpose does Article 16 of the Charter serve?' in Bernitz U, Groussot X and Schulyok F (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) p. 288
[2] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] EU:C:2013:28 para 47
[3] C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* [2013] EU:C:2013:521 para 35
[4] C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] EU:C:2017:203 paras 38-44

1.3 Methodology

This research utilizes EU legal methodology, focusing on methodology for constructing and understanding Europeanised legal concepts. EU construction of legal concepts usually appropriate national or international concepts but re-contextualise them and tie them to EU objectives, understanding concepts as expressions of the scheme and the objectives to which they relate. Legal concepts furthermore rarely operate alone - they form part of sequences and refer to meta-legal concepts or to legal ideologies.[5] Therefore particular attention will be given to the schemes and objectives that inform how the EU legal order conceptualizes its market actors and the freedom to conduct a business. To provide a critical perspective of EU law the essay applies feminist political and legal methodology and theory. Materialist and radical feminism is chosen for its focus on how discourses and rationales relate to power imbalances. These theories will be used to understand how the EU objectives, asymmetries and normative concepts affect its consideration of the freedom to conduct a business and protection of individuals in the internal market.

1.4 Materials

For studying the impact of the freedom to conduct a business it is necessary to consider CJEU case law but more importantly critical accounts of legal doctrine considering the right before and in the central case of *Alemo-Herron*. To understand the EU with an outside perspective the essay also utilizes political theory to explain how the EU legal system is organized and what implications that may have for the development of the EU market and the freedom to conduct a business. The essay consults doctrine across different legal disciplines, although with particular emphasis on labour law and consumer law as areas where protective social concerns traditionally conflict with internal market objectives and market freedom. Consideration of the feminist perspective focuses on Monique Wittig and her work on materialist feminism or lesbianism, for its representation of not only a gender perspective but also a queer perspective laying the framework for assessing structural normative biases in general. The views of Wittig are substantialized with more general accounts of materialist and radical feminism. The legal appropriateness of these theories is considered through doctrinal accounts of the effects structural biases can have on European courts.

1.5 Delimitations

Delimitations must be made in the consideration of the nature and objectives of the EU, focusing on the primary objectives of the EU as a purposive order and on the role of the CJEU. Feminist theory will be limited to relevant ideas focused on normative power relations and how they influence discourse, norms and actors. Consideration of Article 16 CFR delimits issues related to the nature of freedom to conduct a business as a principle or a right, since the CJEU has proved willing to accept reliance on it regardless.

[5] Azoulai L, 'The Europeanisation of Legal Concepts' in Neergaard U and Nielsens R (eds) *European Legal Method - in a Multi-Level EU Legal Order* (DJØF Publishing 2012)

2 Critical Perspective

2.1 Relations of Power

Society at large and particularly the market in any given society features a range of relations, where two parties in a relationship attempt to utilize their available power to secure their own interests. These interests may be harmonious or conflicting, but the power relation remains. In some of these relations the parties will be unequal, either because of their relative power or because of structural power asymmetries. Pettit examines power relations and argues for defining liberty as freedom from power relations of domination.[6] Freedom is compromised where one party can dominate or arbitrarily control another. Power relations include arbitrary control where one party has the capacity to interfere on an arbitrary basis with certain choices the other party can make. Arbitrary power can be exercised collectively, and may be targeted at a collective identity.[7] The interference can alter the availability of options, their expected pay-out or their actual pay-out, to worsen the adversary's choice situation based on the whim of the interfering party. Capacity to interfere is arbitrary where the stronger party can decide their interference after their judgement or whim, their arbitrium, without having to take account of the vulnerable parties' interests or opinions. An act of interference will be non-arbitrary to the extent the stronger party is required to track and take account of the relevant interests and opinions of those subject to the interference. Arbitrariness and power of interference may vary in intensity, extent and reach.[8] As examples of relations of power, Pettit presents the relation between husbands and wives, employers and workers, creditors and debtors and between the mainstream and the marginalized.[9]

The form of freedom presented by Pettit can be contrasted with the model of freedom he argues against - freedom constructed as non-interference. Freedom as non-interference conceptualizes freedom as the individual having a set of accessible choices and the individual being free from other parties interfering with the availability of any option. Freedom in this sense is only limited when someone removes an available option from another, regardless of any control affecting the capacity to choose any particular option. Democratically decided interference with the choices of individuals will diminish freedom conceived as non-interference. Freedom as non-domination on the other hand accepts some interferences for not amounting to arbitrary control over others. Regulation adopted democratically in a process that tracks and takes account of the relevant interests and opinions of those subject to the regulation will not amount to arbitrary control. The individual's range of choices can be limited but they are not deprived of their freedom, construed as non-domination. Freedom is then measured by how free an actor is to make choices, rather than by how many free choices a person has.[10]

[6] P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1999) p. 51
[7] E Gill-Pedro, 'Freedom to conduct a business - Freedom from interference or freedom from domination' (2017) 9:2 European Journal of Legal Studies 103 p. 107-108; Pettit (n 6) p. 52
[8] Pettit (n 6) p. 53-59, 74-75
[9] Pettit (n 6) p. 61
[10] Gill-Pedro (n 7) p. 105-110

2.2 Feminist and queer theory on power relations

The relationship between men and women is, in feminist theory, based on power and therefore political in nature. Foundational power asymmetries, like the one between women and men, influence all aspects of life and can be so comprehensive that they appear natural and invisible.[11] Radical feminism proposes that the basis of structural asymmetries lie in control of culture, language, religion and knowledge. Central to radical feminism is that society, culture, language, discourse, different communications of human life, are not neutral, objective or natural but affected by the context and the normative power relations that persist in that context. These limit thinking and make society as a whole internalize assumptions based on the normative party in creation of knowledge and theory, as universal and objective truths. Communication in patriarchal society is thus created by and based on the male norm which disadvantages women. Successful feminist change need to address and redefine these biased modes of communication.[12] 'Other' or 'otherized' is a queer theoretical concept that labels those presented as different or opposite from those that constitute the norm or dominant group. Wittig proposes that structural imbalances such as the patriarchy need the concept of the 'other' to function. Declaring a group as 'other' is a normative act of power. The concepts man and women can in other words be seen as political concepts masking powers and conflicts of interests as natural through presenting men as the norm and women as 'other'.[13]

State structures, institutions and indeed law are also affected by structural biases that favour normative parties and disadvantage women and different 'otherized' individuals. Accounts of recognition must be critically assessed to ascertain whether they amount to true recognition or merely disguised ways of making the subject conform to the overall biased system.[14] Feminism has naturally been concerned with how the patriarchal order affects how women may participate in the market. Wage gaps and unfavourable conditions can at least in large part be explained with reference to the patriarchy and the heterosexual construction of gender roles and division of labour. This division structures the economy and paid labour around the idea of the male worker, while placing women as primary caregivers.[15] Freedman asserts that the global economy and multinational businesses contribute to structural biases by posing the western, the male, the rich, the urban and the industrialised as normative in a global context. This ideology is framed as necessary for the unequal modern industrial society which exploits the developing world, causes environmental harm and disadvantages 'otherized' and marginalised groups.[16]

2.3 The Straight Mind

Monique Wittig argues that the way in which dominant groups and the patriarchy has controlled language and development of knowledge is an essential part of disadvantaging

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[11] V Bryson, *Feminist Political Theory - An Introduction* (Macmillan International Higher Education 2016) p. 165-166)

[12] Bryson (n 11) p. 198-201

[13] M Wittig, *The Straight Mind and Other Essays* (Beacon Press 1992) (n 13) p. 21-32; See also Cornwall R, 'Queer Economics: Sexual Orientation and Economic Outcomes' in R Free (ed) *21st Century Economics: A Reference Handbook* v2 (SAGE Publications Inc 2010)

[14] Bryson (n 11) p. 196

[15] J Freedman, *Feminism : en introduktion* (Karin Lindeqvist (tr), Liber 2003) p. 69-77

[16] Freedman (n 15) p. 81-84

not just women but any group that has been 'otherized' by the dominant group. Treating the gender binary and heterosexuality as apolitical facts is essential for the maintenance of the patriarchal system, and control over communication limits how individuals either conforming with the norm or derogating from it can define themselves. Controlled discourse further dictates what can be considered proper, real or legitimate within the system. This discourse, in relation to gender and sexuality, is coined the 'Straight Mind' by Wittig. The Straight Mind interprets the world through its lens based on the obligatory heterosexual social relationship between men and women and generalizes its view as universal truths. These universal truths are created by the prevalent dominant order and simultaneously become used to prove the existence and legitimacy of that order. The norm creates the envisioned system and the system proves the norm, as created by those forming part of and benefitting from the norm. Overly simplified this means that since males have been those who define discourse they have defined it as heterosexual for it benefits them, and then used the heterosexual discourse created to legitimize that normative system and the male norm. Discursive truths are thereby revealed as political and philosophical dogma.[17]

Ingraham introduces a similar concept to the Straight Mind: 'thinking straight'. 'Thinking straight' historically means to think clearly, logically, correctly, but the phrase also serves to visualize the institutionalisation of heterosexuality and the heterosexual way of thinking as the natural correct way of thinking. The institutionalisation of heterosexuality is hidden and 'thinking straight' contributes to this status, making heterosexuality seem natural and given rather than a constructed notion. Heterosexuality as an institution influences many key aspects of social life, as constructed notions of identity and behaviour. Within the system levels of acceptability, status and legitimacy are attached to the category a person adheres to, where the norm attains the highest level.[18]

2.4 The Straight Court?

Power relations identified by feminist scholars run through the entirety of society. As materialists construct them they affect every aspect of how society is organised, seeping into the very language used to describe that context. Courts tend to be viewed as neutral enforcers of law but it is necessary to realize that they need not be freer of biases in values and discourse than the rest of society. This has been explored by Baars who studied how European courts participated in the binary gendering and heterosexualising that uphold the patriarchal order. The research exposes the lens through which the courts see the world, and the dissenting cases before it where individuals within the system do not fit the mould that the system is based upon. In this case that would be the genderqueer or non-heterosexual trying to find legal recognition within a heterosexual political regime based on the belief of the "natural" "two" sexes and their obligatory mutual attraction.[19]

Baars conceptualizes a Straight Court, based on Wittigs Straight Mind-theory. "It is clear that the Straight Court's main concern is upholding the cis-heteronormative order - even if that

[17] Wittig (n 13) p. 21-32
[18] C Ingraham, 'Introduction' in C Ingraham (eds) *Thinking Straight: the Power, the Promise, and the Paradox of Heterosexuality* (Routledge 2005) p. 1-4
[19] G Baars, 'Queer cases unmake gendered law, or, fucking law's gendering function" (2019) 45 Australian Feminist Law Journal 15 p. 15-59

means applying a homo- or transnormative patch."[20] Thus the questions asked in Court are those that the Straight Court can understand and then respond to. Cases that see success are those that "the heteronormative market of capitalist (re)production"[21] can allow around itself. The world-view of the Straight Court shapes both the legal process and the outcome. Baars warns against complacency setting in when these biased systems appear to offer challengers recognition within the system. As regards to gender and sexuality this relates to the system accepting homosexuality if presented as synthetic heterosexuality and constructing third gender options as umbrella terms without representing the actual gender or non-gender of the individual. These adaptations are mere pseudo-recognitions, leading Baars to argue for deconstructing the fixed categories of the power asymmetry.[22] Courts and the legal system overall are not immune to structural asymmetries or power imbalances that affect the rest of society. Structural asymmetries influence value systems and discourses, in the end affecting the outcomes of legislative and judicial reasoning. Identifying the lens through which a court sees the world and constructs the ideal situation can therefore be helpful in understanding how it reached its conclusions, particularly where its decision may appear loosely justified.

3 The EU legal order

3.1 EU as constitutional legal order

Over time the EU has developed from intergovernmental agreement into an integrated legal order that confers rights and obligations not just on states but on private parties as well. Three pillars are considered to uphold the supranational legal order. The first is the doctrine of supremacy requiring the disapplication of measures incompatible with supreme EU rules. Supremacy combined with the difficulty in changing EU norms give EU law, especially primary norms but also secondary law, an entrenched status and lets it constrain national action similarly to how constitutional norms would. The second pillar is the system of supranational judicial review that has integrated EU law into national systems via domestic courts, as a result of the doctrine of supremacy empowering courts to review and disapply national measures in light of EU law. Direct effect provides the third pillar, establishing how EU law grants individual rights that private parties may rely on before national courts. Granting these rights enable private enforcement of EU law against member states, and are instrumental for achieving full effectiveness of EU law and EU objectives.[23]

The EU legal order operates as a constitutional system, given the flexibility of the Treaties, the maximalist interpretations by the CJEU, the expansion of EU law and its effect on national constitutional systems. However the Union only enjoys delegated powers within a functionally delimited scope. Isiksel argues that the EU features a constitutional machinery but fills its system with administrative logic of legitimation favouring ideological impartiality, neutrality and technical expertise. This hybrid is a particular form of constitutionalism according to Isiksel, 'functional constitutionalism'. The EU is characterized by and draws its

[20] Baars (n 19) p. 60, 2nd sentence
[21] Baars (n 19) p. 60, 3rd sentence
[22] Baars (n 19) p. 59-62
[23] T Isiksel, *Europe's Functional Constitution - A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016) p. 57-61

legitimacy from a purposive or functionalist claim - that certain policy matters are better governed at an European level. Three distinct characteristics make the EU constitutional system a 'functional' system, that is, a system based around a particular purpose or function. First the Union's authority is functionally delimited. Secondly the system has a specific and detailed teleology shielded from democratic contestation, which guides legislation. For the Union this teleology is in practice centered on the pursuit of economic union. Thirdly the legitimacy of the system as such depends on the fulfilment of its function, its substantive goals. Within the boundaries of its integrationist objectives the EU order enjoys sovereignty and primacy over national systems. The functionally delimited authority is insulated against national interference via the constitutional mechanisms developed in the system, entrenchment, supremacy and direct effect. EU law has its own guiding principles, rationales and logics of coordination.[24] Treatment of EU integration as an administrative or technical process tied to the functional aims dictated by member states has led to a depoliticization of EU integration, in a way hiding the EU model of justice and its value system.[25]

Constitutional discussion has in part tended to frame European integration as a process towards state constitutionalism at EU level. Dano concludes that the relationship between EU integration and constitutionalism is more complex in nature. EU law may internalise some aspects of state constitutionalism but is in the process of creating its own form of constitutionalism based on those aspects and its own original functional concerns and normative assumptions. Dano asserts that EU functionalism is not just a means to reach European federalism as the final goal. The EU system is more diverse and complex, functionalism is instead a prominent characteristic of the EU legal order. Divergences from the state conception of constitutionalism may be mature solutions answering to EU-specific concerns and schemes, different from and arguable equally legitimate as those at national levels. EU constitutionalism is adapting and transforming the traditional notion of constitutionalism to the functional concerns that guide the EU legal order, evolving an EU notion of constitutionalism.[26]

3.2 Objectives and functionality of the EU

The EU as a project began as an endeavour of primarily economic integration, market integration, putting aside much social concerns for a functional approach to ensure the development of the EU as a cohesive project.[27] Isiksel submits that the policy goals that empower and limit EU authority all center on and radiate from the project of economic union. The economic union project creates a strong teleology and includes development of market integration, market regulation and the economic and monetary union. Regardless of the kind of project the EU might be capable of becoming, the current and existing constitutional system of the EU remains centered around an economic final goal, a *finalité economique*. The strong and entrenched teleology of the Union affects the institutions, binding them to

[24] Isiksel (n 23) p. 65-66, 76-79, 82-83
[25] H-W Micklitz, 'Social Justice and Access Justice in private law'. (2011) EUI LAW Working Papers 2011/02 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824225 (Last accessed 2020-05-20) p. 14
[26] M Dano, 'Constitutionalism and Dissonances: Has Europe Paid Off Its Debt to Functionalism?' (2019) 15:3 European Law Journal 324 p. 341-342, 348-349, 350
[27] A 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) 14:9 German Law Journal Volume 1867 p. 1879

pursue the objectives. As instruments of the Treaties they cannot question, change or hinder their constitutionally settled objectives, only further and expand them. This strong teleological orientation, compared to that of states, leads the Union on a one-way path towards ever more integration.[28]

3.3 Asymmetries

EU tasks and objectives are at times pursued as if their execution was value-neutral and apolitical and the Union merely an impartial administrator. This hides how the supranational governance has necessarily dealt with value laden and contested political choices with implications for state ability to pursue their politically salient policies, and constitutional values such as democratic autonomy and social justice. The EU economic project implicates nearly all areas of public policy, unavoidably making the limits of the functionally delimited authority fluid, unclear and contested.[29] EU economic integration has led to reducing nation-state autonomy. This has affected national capacity to regulate and control the capitalist economy, and to burden the market with supporting a developed welfare state. Integration, regardless of who drafts it, will tend to lead towards liberalization, and has indeed brought a liberal transformation of Europe. The European structure, its procedural rules and its judicial decisions create asymmetries that favour specific policy goals while hindering others and which shape how national systems can protect their interests. Scharpf identifies two major institutional asymmetries in the EU. Firstly, the EU system favours non-political actors making policy while making political action difficult. Secondly, negative integration and deregulation has come to be the default option over positive integration.[30]

3.3.1 Judicial and political action

In the time of political stagnation after the EU started to grow, the Union saw its Court rise to continue the integration by means of Treaty-interpretation and judicial legislation.[31] The CJEU operates with broad discretion, granted the competence conferred on it and the power that the CJEU has effectively conferred on itself.[32] Judicial power in the EU is founded on the doctrines of direct effect and of supremacy, developed by the CJEU itself in *Van Gend en Loos* and in *Costa v. ENEL*. Supremacy established capacity to display national measures for contravening EU law, while the doctrine of direct effect mobilised national courts and individuals to enforce EU law and drive integration forward.[33] The Court's jurisdiction became vast with the adoption of the *Dassonville*-formula bringing a wide range of national measures under its review as potential violations of EU law, albeit possible to justify via the *Cassis*-doctrine.[34] By not limiting the *Dassonville*-formula the CJEU created a procedural asymmetry. *Cassis de Dijon* offers potential justification but as exceptions to the general

[28] Isiksel (n 23) p. 79, 83, 86
[29] Isiksel (n 23) p. 77, 79, 83
[30] FW Scharpf, 'The asymmetry of European integration, or why the EU cannot be a social market economy' (2010) 8:2 Socio-Economic Review 211 p. 212-214
[31] Scharpf (n 30) p. 215
[32] W Sandholtz and A Stone Sweet, 'Neo-Functionalism and Supranational Governance' in E Jones, A Menon and S Weatherill (eds) *The Oxford Handbook of the European Union* (Oxford University Press 2012) p. 23
[33] Scharpf (n 30) p. 216
[34] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] EU:C:1974:82; Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42; Scharpf (n 30) p. 217-218

presumption of free movement violation, the measures and policy objectives that member states may pursue will be assessed by the CJEU, be judged narrowly and subjected to a proportionality test.[35] In the words of Scharpf this structure "maximises the Court's quasi-discretionary control over the substance of member-state policies".[36]

By basing its case law on primary law and through its extensive incorporation into national judicial systems the CJEU shielded its judicial legislation from political rectification. Correcting interpretations by changing the Treaties or even mere secondary law has proven difficult given the procedural requirements and the growing diversity in Member State interests and preferences. Case law of the CJEU thus enjoys a sense of immunity, and has established itself as higher law vis-à-vis the member states and within the EU legal order.[37] Intergovernmentalism may pose that any development pushing the Union forward is nonetheless funneled through the control of member state governments controlling the EU through intergovernmental negotiation. Sandholtz and Sweet Stone however assert that empirical evidence proves the essential role of the CJEU independently producing rules and policies on routine. The Court is empowered to govern member states within the limits of its functions and are insulated from member states correcting their actions. Neofunctionalism considers that the CJEU will work pro-integration, not as an agent of member state will, but independently as trustees with fiduciary responsibilities under the treaties.[38] As the constitutional court of the EU the CJEU is an institution of a legal order that promotes ever closer and ever more extensive EU integration, it promotes European solutions to European problems.[39] *Dassonville-Cassis* and the doctrine of supremacy subject national policy measures to CJEU discretion, which in the words of Scharpf "is generally guided by a unipolar logic that maximizes Europeanization at the expense of national autonomy"[40]. The relationship constructed by the CJEU is furthermore resistant to political correction.[41]

3.3.2 The asymmetries of EU functionalism

The CJEU is essential in developing the EU, both in integrating national law and in constructing substantive EU law. A crucial structural limitation of judicial integration is how courts have been limited, whenever uniform interpretation is not possible, to the single remedy of disapplying the offending measure. CJEU judicial action becomes primarily deregulatory, as negative integration removing mobility-threatening legislation. Where the Court has deregulated it also limits national state ability to re-regulate and imposes the obligation of mutual recognition, resulting in de facto liberalisation of national markets. Even where states attempt to maintain the legislation in relation to their own nationals the influx of competition caused by mutual recognition risks pressuring states to liberalize. Integration through law thereby directly and indirectly undermines state capabilities to regulate the conditions of its market both in relation to foreign and domestic actors. By affecting the status quo deregulation also affects the bargaining powers of member states impacted differently by the CJEU and as a result also the substantive direction of political legislation at

[35] Scharpf (n 30) p. 219
[36] Scharpf (n 30) p. 219 2nd paragraph, 1st sentence
[37] Sandholtz and Stone Sweet (n 32) p. 23; Scharpf (n 30) p. 216-217
[38] Sandholtz and Stone Sweet (n 32) p. 22
[39] Scharpf (n 30) p. 228
[40] Scharpf (n 30) p. 231 1st paragraph, 2nd sentence
[41] Scharpf (n 30) p. 230-232

EU level. Status quo in policy areas where the CJEU strikes down national legislation is deregulation and mutual recognition. Liberalisation is thus a default mode, disadvantaging EU regulation of the market and prompting adopted legislation to be liberalising. While political legislation is negotiated the CJEU may continue to integrate and deregulate. Therefore the legislative process at EU level appears to systemize the liberalizing effects of judicial decisions by the CJEU, while legislative attempts at limiting the liberalization are at a disadvantage. Where the Cassis-doctrine has led to national measures and capacity to pursue policy being left intact status quo is instead maintained regulation. Maintained regulations let regulatory states protect their existing regimes and provide bargaining power to promote EU harmonisation regulating the market. Notable such areas are protection of workers, consumers and the environment where EU law at times establishes fairly high standards as opposed to racing towards the bottom.[42]

Sandholtz and Stone Sweet emphasize the importance of the transnational society, especially non-state actors, in explaining the direction of EU development. Diverging national regimes and state borders hinder their transnational operations, lack of EU rules therefore leave costs and obstacles in the way of utilizing mobility to the fullest. Actors who can operate on a transnational basis within the EU are those who will have interest in regulation and litigation at EU level and argue for increased supranational governance. Growing numbers of transnational actors therefore act pro-integrational towards national governments and EU institutions. Transnational activities are enabled by EU integration, the increase in transnational activities creates a need for EU integration and harmonisation, whose adoption further enables more extensive and elevated transnational activity again. Actors within the Union adapt to the rules and contribute to the continued development of those rules, as they move their attention and solution-seeking from national level to European level and as EU institutions answer to their needs. Intense and valuable transnational economic activity increases the need for EU rules, and developing EU rules on the internal market in turn establish conditions for more intense and valuable economic transactions to move into a cross-border context. Removal of visible hindrances lead to discovery of new hindrances for the transactors to seek to remove through litigation and influence on regulatory institutions. Increased transnational activity thus not only leads to more positive legislative integration but simultaneously pushes for more negative integration to remove national differences and other barriers to trade.[43] Development towards liberalisation is driven by private litigants with significant interest in mobility and with capabilities to litigate in pursuit of liberalisation. Cases will thereby present the CJEU with a misrepresentative sample of interests. Successfully removed legislation embolden further pursuit of liberalisation towards a smoother functioning market. Therefore the development cannot be expected to converge to a stable equilibrium where relevant interests are fairly accommodated but towards continuous deregulation and liberalisation. Market- and economy-based focus has led case law to respond mostly to economic interests held by businesses and capital owners, but liberalization can serve social as well as market- or neoliberal interests. Any form of unilateral liberalisation by the CJEU will however be at the expense of national democratic self-determination. Deregulation becomes unavoidable in integration through law while re-regulation through political legislation is more difficult by virtue of consensus requirements and member state diversity.

[42] Scharpf (n 30) p. 221-228
[43] Sandholtz and Stone Sweet (n 32) p. 19-22

The EU legal order therefore presents a strong asymmetry between judicial negative integration and legislative positive integration.[44]

3.4 Fundamental rights and freedoms

Protection of fundamental rights in the EU follows the functionalist pattern of EU law, at least to a notable extent. Fundamental rights were introduced by the CJEU largely in response to human rights-based critique of the doctrine of supremacy. Recognition of human rights were thus largely instrumental and not intended to change the approach of the EU. The EU legal order also grants its citizens particular 'EU' rights, mobility rights in the extended sense, as rights necessary for or fitting within the internal market project. EU particular rights as the fundamental freedoms should be distinguished from what is conventionally understood as human rights, which in the EU is usually called fundamental rights. Fundamental freedoms are enforced in more demanding and far-reaching ways than fundamental rights, most notably being able to bring violations automatically under the scope of EU law. Isiksel argues that the fundamental freedoms based on commercial mobility are at the center of the EU's constitutional system, a position comparable to fundamental human rights protection in national constitutions. The reason for this is functional because the commercial mobility rights are essential for the creation of the internal market making them a core part of the EU's functional constitutionalism. Protection of fundamental rights in the EU are on the other hand circumscribed by the Unions functionally delimited scope, that is, fundamental rights may only be applied within the scope of EU law, in relation to the EU function.[45] Unlike the fundamental freedoms it is considered that violations of fundamental rights are generally not capable of bringing a national measure under the scope of EU law by itself. Application of fundamental rights therefore require that the case come under that scope by virtue of separate legislation.[46] Fundamental rights thus mainly serve an intramural purpose in binding the institutions of the EU.[47] Against this background Isiksel argues that the EU was and remains founded on respect for market-related rights, rather than respect for human rights in general.[48]

4 The freedom to conduct a business

4.1 Origin and content

Article 16 CFR states that "freedom to conduct a business in accordance with Union law and national laws and practises is recognised". The article protects an amalgam of three rights; the freedom to exercise an economic or commercial activity, the freedom of contract, and the

[44] Scharpf (n 30) p. 221-223
[45] Isiksel (n 23) p. 95-97, 108-109
[46] M Bartl and C Leone, 'Minimum harmonisation after Alemo-Herron: The Janus Face of Fundamental Rights Review' (2015) 11:1 European Constitutional Law Review 140 p. 146-147; M Bartl and C Leone, 'Minimum harmonisation and article 16 CFREU: Difficult times ahead for social legislation?' in H Collins (ed) *European Contract Law and the Charter of Fundamental Rights/European Contract Law and Theory vol. 2* (Intersentia 2017) p. 4-5; Gill-Pedro (n 7) p. 127-128
[47] Isiksel (n 23) p. 98
[48] Isiksel (n 23) p. 109

right to free competition.[49] While the text does not elaborate, case law articulates that the freedom to conduct a business denotes that economic actors shall enjoy some degree of freedom vis-à-vis other actors and states making them able to exercise their commercial activities.[50] Freedom to conduct a business is not found in major international human rights documents.[51] Instead the possibility to rely on a right to conduct a business including a freedom to conduct a business originates in CJEU case law, starting with the *Nold*-case[52], with inspiration from member state constitutions.[53] Article 16 CFR is considered to replace the general principle of freedom to conduct a business and its pre-Lisbon case law seamlessly. Both natural and legal persons can rely on the freedom to conduct a business, provided that they are considered to carry out a business activity. Definition of 'business' and 'economic activity' should follow their general meanings in internal market law.[54]

Despite its inclusion in the CFR, among the hardcore rights of Title II, it is considered that the freedom to conduct a business is a 'weak' right, at least prior to *Alemo-Herron*.[55] Freedom to conduct a business is merely 'recognized', and only as freedom 'in accordance with EU law and national laws and practices'. Textually this suggests a relative weakness compared to the formulation of other rights, but that reflects the case law codified.[56] Most attempts to rely on the freedom to conduct a business have been rejected and it is argued that the right should remain subject to extensive limitations.[57] In line with the perceived weakness it follows that the freedom to conduct is subject to a wide room for restrictions. CJEU case law has repeated that the freedom to conduct a business is not absolute and must be considered in light of its social function.[58] In *Sky Österreich* the CJEU emphasised that the freedom to conduct a business can be subjected to a broad range of interventions by public authorities, which are allowed to limit the exercise of economic activity when pursuing public interests. The wide discretion to limit the freedom to conduct a business afforded to public institutions by case law is reflected by the phrase 'in accordance with EU law and national laws and policies'.[59] Article 16 is limited by the existent case law, by Article 52 CFR and its upper limits are determined by its social function. A variety of interests have

[49] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) Explanation on Article 16; Gill-Pedro (n 7) p. 104; X Groussot, GT Pétursson and J Pierce, 'Weak right, strong Court - The freedom to conduct business and the EU charter of fundamental rights' in S Douglas-Scott and N Hatzis (eds) *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017) p. 327-328

[50] Compare Case C-184/02 and C-223/02 *Kingdom of Spain (C-184/02) and Republic of Finland (C-223/02) v European Parliament and Council of the European Union* [2004] EU:C:2004:497; Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] EU:C:2011:77; *Sky Ösyterreich* (n 2)

[51] Bartl and Leone (2015) (n 46) p. 149; Gill-Pedro (n 7) p. 115-116; Oliver (n 1) p. 281

[52] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] EU:C:1974:51

[53] Gill-Pedro (n 7) p. 115-116; Oliver (n 1) p. 282; Usai (n 27) p. 1868-1869

[54] Oliver (n 1) p. 283-285, 296-297

[55] Bartl and Leone (2015) (n 46) 2 p. 150; Bartl and Leone (2017) (n 46) p. 121; Groussot et al. (49) p. 331; S Weatherill, 'Use and abuse of the EU's Charter of fundamental rights: on the improper veneration of freedom of contract' (2013) 10:1 European Review of Contract Law 167 p. 180

[56] Oliver (n 1) p. 285

[57] Gill-Pedro (n 7) p. 116-117; Groussot et al (n 49) p. 329-330; Oliver (n 1) p. 288

[58] *Nold* (n 52) paras 14-15; Gill-Pedro (n 7) p. 115

[59] *Sky Österreich* (n 2) paras 46-47; Gill-Pedro (n 7) p. 118-119; Groussot et al (n 49) p. 330, 339; Oliver (n 1) p. 292-293

been allowed to limit the exercise of economic activity, notably promotion of safety and protection for consumers and workers, competition, environmental protection and protection of intellectual property.[60] The freedom to conduct a business has nonetheless been relied on successfully, as a guide for interpretation of secondary legislation. Most notably in *Scarlet Extended* an injunction was disapproved for seriously and disproportionately impacting the freedom to conduct a business.[61]

Groussot, Pétursson, Pierce and Gill-Pedro allude to the possibility that a 'strong court' may interpret the textually weak protection of freedom to conduct a business more extensively and turn the right into a strong and effective provision for litigation. Inclusion of Article 16 in the binding CFR gives the freedom to conduct a business a constitutional flavour which may embolden the CJEU to accept challenges of regulation based on the freedom to conduct a business.[62]

4.2 The core or essence of the freedom to conduct a business

Any restriction of a fundamental right must respect the core or essence of that right by virtue of Article 52(1) CFR. The *Wachauf*[63] case establishes that limitations may not amount to disproportionate or intolerable interferences impairing the very substance of a right.[64] Bartl and Leone argue that invoking a violation of that core lets the CJEU bypass the regular procedure for considering violations. Interpretative tools such as proportionality, balancing of rights or social function become irrelevant when the very core is at issue.[65]

In *Nold* the right was not considered to protect the specific commercial outcomes or opportunities of a particular enterprise against regulatory interference, as their uncertainty are part of conducting a business.[66] Before *Alemo-Herron,* in *Sky Österreich*, the Court considered that the core of the freedom to conduct a business will not be affected where a measure does not prevent a business activity from being carried out as such. Requiring provision of a certain service without remuneration only stipulated a condition for how it may be carried out, thereby not affecting the core of the freedom.[67] *Spain and Finland v Parliament and Council* show a comparable formulation, where a measure did not violate the essence of the freedom to conduct a business since the measure did not lead to exclusion of self-employed transport workers from the market, but only dictated how the economic activity could be performed.[68] The core content has thus been considered to be violated only when a measure precludes business from being carried out as such.[69]

[60] Usai (n 27) p. 1870, 1873-1874
[61] *Scarlet Extended* (n 50) paras 43-48; Oliver (n 1) p. 291
[62] Gill-Pedro (n 7) p. 119; Groussot et al. (n 49) p. 336
[63] Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] EU:C:1989:321
[64] *Wachauf* (n 63) para 18; Bartl and Leone (2017) (n 46) p. 121; Groussot et al. (n 49) p. 340; Oliver (n 1) p. 289
[65] Bartl and Leone (2015) (n 46) p. 152-153
[66] *Nold* (n 52) paras 14-15
[67] *Sky Österreich* (n 2) paras 44-49; Bartl and Leone (2017) (n 46) p. 121-122; Oliver (n 1) p. 293
[68] Usai (n 27) p. 1873-1874
[69] Bartl and Leone (2015) (n 46) p. 151

4.3 Alemo-Herron

4.3.1 The case

Alemo-Herron concerned a transfer that privatised a branch of economic activity including employees. Their employment agreements incorporated provisions of a public sector collective agreement, a dynamic clause continuously incorporating new versions of the collective agreement. Parkwood LtD as the private transferee could not take part in the negotiation of the public collective agreements. When a new version of the collective agreement outlined pay increases Parkwood declared that it would not recognise those increases and the employees subsequently sued. The question referred to the CJEU were whether the Acquired Rights Directive[70] allowed transfer of dynamic clauses incorporating future collective agreements, like the one in the case, or only allowed static clauses that merely incorporate collective agreements in force at the time of transfer. National law had no issue with the dynamic clauses, which had been transferred as is with the employment contracts.[71] Making transferees bound by dynamic clauses like those binding Parkwood would according to the CJEU be contrary to the Directive interpreted in the light of fundamental rights, or more precisely, such clauses infringed the very core of the freedom to conduct a business.[72]

4.3.2 Applicability of freedom to conduct a business

Unlike the fundamental freedoms it has been considered that violations of fundamental rights are not capable of bringing a national measure under the scope of EU law by itself. Fundamental rights apply only within the scope of EU law, application therefore require that the case come under that scope by virtue of separate legislation.[73] Usually the CJEU will apply fundamental rights to determine a fair balance between relevant interests, for example between freedom to conduct a business and protection of IP, freedom of expression or the right to a high level of consumer protection. Groussot, Pétusson and Pierce consider the possibility that particularly economic rights may come to enjoy horizontal direct effect by virtue of their close connection to the fundamental freedoms.[74]

Alemo-Herron concerned national legislation going beyond an EU minimum, which the CJEU has appeared indecisive over whether to include under the scope of EU law.[75] Nonetheless *Alemo-Herron* applied Article 16 CFR and the freedom to conduct a business to disapply a national measure going beyond EU minimum in a conflict between private parties. Bartl and Leone propose that the *Alemo*-court either assumes that national rules going beyond minimum harmonisation falls within the scope of EU law, or assumes that violation of the

[70] Now the Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, at the time the older version Dir. 77/187

[71] Bartl and Leone (2015) (n 46) p. 142-143; Bartl and Leone (2017) (n 46) p. 113-114

[72] *Alemo-Herron* (n 3) paras 35-39; Bartl and Leone (2015) (n 46) p. 144-145

[73] Case 617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] EU:C:2013:280 para 21; Bartl and Leone (2015) (n 46) p. 146-147; Bartl and Leone (2017) (n 46) p. 117-118; Gill-Pedro (n 7) p. 127-128

[74] Groussot et al. (n 49) p. 331-333

[75] Bartl and Leone (2015) (n 46) p. 147

freedom to conduct a business can bring a national situation under that scope. Either one is problematic.[76]

Joined cases C-609/17 *TSN* and C-610/17 *AKT* (*TSN* collectively) shed light over the issue of whether measures going beyond minimum harmonisation standards fall under the scope of EU law.[77] The relevant directive made clear allowance for measures going beyond minimum rules to provide more favourable protection to workers, in the case concerning additional days of paid leave. Rights to more favourable protection going beyond the minimum established by the directive are according to the CJEU "governed not by that directive, but by national law, outside the regime established by that directive". Member states retain competence to both decide whether to grant more favourable rights and to decide the conditions tied to the rights, without being bound by the rules of the Directive. So long as the minimum level is guaranteed in accordance with conditions stipulated by the relevant Directive, member states can provide for other conditions for the amount of leave days going beyond the minimum level. The CJEU then, at much more considerable length than in *Alemo-Herron*, considered whether fundamental rights could be applied to the national measure.[78] As the provision of more stringent protection falls under retained national powers and is not governed by EU law, it falls outside the scope of the EU law excluding fundamental rights review of the national measure.[79]

This suggests that *Alemo-Herron* did not in fact provide for more protective measures to fall under EU law, if the Court is consistent, but for Article 16 CFR on the freedom to conduct a business to have the capacity of bringing measures in under the scope of EU law in a manner similar to that of the related fundamental freedoms. If such capacity and proximity to fundamental freedoms is established it presents a significant extension of the capacity for Article 16 CFR to affect national regimes and the regulation of market powers, with corresponding powers of review for the CJEU. Mayhap this answers to the predictions presented earlier, that the protection of the freedom to conduct a business might appear a 'weak' right but could become strong with an active court.[80]

4.3.3 Constructing the core of the freedom to conduct a business

The *Alemo*-court detailed a more protective core of the freedom to conduct a business than previous cases. A transferee must be able to effectively assert their interests and negotiate contracts so that they can make the changes necessary with a view to their future economic activity. Where this is not guaranteed, the *Alemo*-court considered the very core of the freedom to conduct a business to be adversely affected, so as to render the interference unjustifiable. The Court did not consider if this freedom might be secured outside of the drafting of the collective agreements.[81]

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[76] Bartl and Leone (2017) (n 46) p. 119-120

[77] Joined Cases C-609/17 *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* and C-610/17 *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry* [2019] EU:C:2019:981 paras 24, 31

[78] *TSN* (n 77) paras 33-49

[79] *TSN* (n 77) paras 52-55

[80] Bartl and Leone (2015) (n 46) p. 150; Bartl and Leone (2017) (n 46) p. 121; Gill-Pedro (n 7) p. 116-117; Groussot et al (n 49) p. 329-331; Oliver (n 1) p. 285, 288

[81] *Alemo-Herron* (n 3) paras 25, 27, 34; Bartl and Leone (2017) (n 46) p. 121-122; Bartl and Leone (2015) (n 46) p. 151; Gill-Pedro (n 7) p. 125; Oliver (n 1) p. 294-295; Weatherill (n 55) p. 171-172

Reinterpretation of the objectives of the Acquired Rights Directive led the CJEU to arrive at the need to consider the freedom to conduct a business. Dynamic clauses were judged against a second objective of the Directive, even though the Directive only mentioned employee protection, as the *Alemo*-court found that it pursued a fair balance of employer and employee interests in addition to employee protection. Accepting the clauses would undermine that fair balance, according to the court.[82] *Werhof*[83], which the CJEU reference, did state that employer interests should not be disregarded, but did not by any means indicate that protection of employer concerns would preclude the more extensive employee protection at issue in *Alemo-Herron*. While the contested clauses will limit the manoeuvre room for the employer, it has to be agreed with Weatherill that the CJEU did not sufficiently explain why that would make the balance of interests unfair.[84]

4.4 Freedom to conduct a business as part of the EU purposive order

EU law is not ideologically neutral but inspired by liberal values.[85] EU law is particularly guided by the ideology behind its objectives. Groussot, Pétursson and Pierce assert that this awareness is essential for understanding case law on the CFR, especially on Article 16 in cases like *Alemo-Herron*. They emphasise that the CJEU's definition of the ends of EU law remains strongly economically oriented. When conflicting with economic economic constitutional rights in horizontal situations they consider that there are no guarantees for adequate recognition of human rights.[86] The aims of the EU inform the CJEU and similarly they influence both what fundamental rights the EU protects and how the CJEU interpret and enforce those rights. Therefore it must be considered how the freedom to conduct a business fit within the EU functional system and the internal market project.

Attention must be given to how the formulation of market freedom for businesses relates to the shaping of the internal market ideal. Bartl and Leone submit that freedom to conduct a business is a problematic type of right and should arguably not have been constitutionalised in the CFR. Any meaningful definition of a freedom to conduct a business will, inadvertently or not, be dependent on how the relation between the market and societal intervention is understood. Such understandings will vary with time and ideological alignments but are above all contingent on the social, political and economic framework of the particular society in question. Establishing a certain understanding, or particularly an essence, to such a right is contentious in Bartl and Leones view. Even more so to fixate its meaning at a European level for all the varied societies within its borders. The only essence they see possible to agree on would be requiring a market economy.[87] The CJEU however assumed there to be a more extensive identifiable essence to the freedom to conduct business. When EU law constitutionalizes the right of market actors to be generally free from regulatory interference, only limitable in accordance with CJEU ideology, it simultaneously establishes a certain

[82] *Alemo-Herron* (n 3) para 29; Bartl and Leone (2015) (n 46) p. 144-145; Bartl and Leone (2017) (n 46) p. 115-116
[83] Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006] EU:C:2006:168n
[84] Weatherill (n 55) p. 170
[85] Groussot et al. (n 49) p. 343
[86] Groussot et al. (n 49) p. 343-344
[87] Bartl and Leone (2015) (n 46) p. 149; Bartl and Leone (2017) (n 46) p. 123

understanding of the ideal market and what role states should assume in regulating the market.

Freedom to conduct a business in other words feature a 'lack of intrinsic essence' or a 'conceptual emptiness' which has let those attempting to rely on it argue for their preferred kind of market, namely the market without or with very limited regulatory interference. Reliance on the freedom to conduct a business thus mobilise the Court in a seemingly political pursuit, which it answered to in *Alemo-Herron*. When the Court expanded the essence of freedom to conduct a business it did so on the basis of its own economic and political theory, which is asserted by Bartl and Leone to let the Court redefine the (internal) market and redistribute the benefits stemming from it. How the Court defines the freedom to conduct a business and relies on it against national legislation in *Alemo-Herron* in other words enforces a particular understanding of how the market should function vis a vis regulatory intervention at national and European level.[88]

Furthermore *Alemo-Herron* suggests that the freedom to conduct a business, unlike most other rights the EU order affords its citizens, can bring otherwise purely national situations under the scope of EU law where those measures threaten that right.[89] This capacity would put the freedom to conduct a business on a level more akin to the fundamental freedoms than that of regular rights.[90] Given how Article 16 CFR has been perceived as weak,[91] it might appear strange that the freedom to conduct a business of all rights should enjoy such an elevated status. I would instead argue that it is very understandable that the CJEU and the EU legal order should come to treat such an economic right specially.

Freedom to conduct business fit well with the economic and integrationist goals of the EU. As discussed by Isiksel the EU is a functionally based legal system focused on pursuit of economic unison, most prominently taking the form of the internal market.[92] The EU undoubtedly pursues more than economic goals, ever more clearly since the adoption of the Lisbon Treaty and its claim of pursuing a 'social market economy'.[93] Even so the core of the Union and EU law remain an economic project.[94] As an EU institution the CJEU is bound to this goal when it interprets and legislates,[95] and its worldview or value system will inevitably be influenced by the economic and integrationist objectives the Court is tasked with safeguarding. The special treatment of freedom to conduct a business in *Alemo-Herron* can be understood against this ideology. As discussed EU law appears to treat fundamental rights as instrumental to ensure the integrity of the overall EU legal order. Freedom to conduct a business, as a right, is connected closer to the objectives of EU law. The freedom

[88] Bartl and Leone (2015) (n 46) p. 150, 153
[89] *Alemo-Herron* (n 3) paras 30-31; *TSN* (n 77) paras 36-39, 52-55; Bartl and Leone (2015) (n 46) p. 144-145; Bartl and Leone (2017) (n 46) p. 120
[90] Bartl and Leone (2015) (n 46) p. 146-147; Bartl and Leone (2017) (n 46) p. 117, 120; Gill-Pedro (n 7) p. 127-128; Isiksel (n 23) p. 97
[91] Bartl and Leone (2015) (n 46) p. 150; Bartl and Leone (2017) (n 46) p. 121; Groussot et al (n 49) p. 331; Oliver (n 1) p. 285; Weatherill (n 55) p. 180
[92] Isiksel (n 23) p. 65-66, 76-78
[93] Art 3(3) The Treaty on European Union (TEU); P Craig and G de Búrca, *EU Law - Text, Cases and Materials* 6 ed (Oxford University Press 2015) p. 632
[94] Isiksel (n 23) p. 79, 83
[95] Isiksel (n 23) p. 86

is not only an instrument for protecting the legitimacy or integrity of the EU as a legal order but simultaneously an instrument closely tied to defining and promoting the internal market project. I therefore argue that there is a divide between 'regular' fundamental rights and freedom to conduct a business, noticeable in how freedom to conduct a business seemingly brought the case of *Alemo-Herron* under the scope of EU law. This special treatment stems from EU functionalism, which constructs and values norms after its theology based on achieving EU primary objectives. Freedom to conduct a business is thus instrumental, as other fundamental rights, but for a different purpose - the realization of the internal market instead of defending EU supremacy, which grants the right a particular position within the EU legal order. Sharing the purpose of fundamental freedoms motivates treatment similar to those provisions. In this special treatment I argue that the EU functionalism is clearly visible - as proposed by Isiksel[96] EU law is not based on respect for fundamental rights, but on respect for market rights or rather on a functionalistic respect for the internal market objectives and the means to realize those objectives. Instruments with closer connection to those objectives, such as fundamental freedoms and freedom to conduct a business, will receive greater protection and recognition in the EU legal order that weighs legitimacy based on contribution to those very same objectives. This veneration for internal market rules is also a contributing reason for the deregulatory and liberalising asymmetries of EU law that disadvantage social regulation because of its impact on market uniformity.

Alemo-Herron suggesting that the freedom to conduct a business is similar to fundamental freedoms and capable of bringing national measures under the scope of EU law equips the CJEU with a capacity to review national measures not just against the mobility-objective of the internal market but also against how the Court perceives the ideal form of the market and degree of freedom on that market. In deciding what right to freedom businesses have in the internal market the CJEU simultaneously dictates what interferences with market 'freedom' are acceptable, not only when they implicate mobility but for being interferences as such. While member states have contributed to defining the fundamental freedoms through continuous Treaty-amendments, albeit extensively developed by the court, they have not in similar ways guided the definition of 'market freedom' in Article 16 CFR, which has been developed through case law[97]. Doctrine is in agreement that article 16 recognises a textually weak right.[98] It is by the Courts activism that the right comes to encompass any wide or strongly enforceable notion of market freedom.[99]

Against this background the protection of freedom to conduct a business starts to make sense as an EU-specific right. With it the EU can use a concept with widespread national support, protection of fundamental rights, to further the development of a market in line with CJEU economic and political theory.[100] As discussed it is a right whose definition depends on how the proper market is visualised, what freedom that market must afford its actors and to what extent public forces are allowed to interfere to regulate that market. These questions are controversial and subject of debate in national democracies, where political elects must

[96] Isiksel (n 23) p. 109
[97] Gill-Pedro (n 7) p. 115-116; Oliver (n 1) p.282; Usai (n 27) p. 1868-1869
[98] Bartl and Leone (2015) (n 46) p. 150; Bartl and Leone (2017) (n 46) p. 121; Groussot et al (n 49) p. 331; Oliver (n 1) p. 285; Weatherill (n 55) p. 180
[99] As considered by Gill-Pedro (n 7) p. 119; Groussot et al. (n 49) p. 336
[100] See Bartl and Leone (2015) (n 46) p. 153

carefully source and justify any interference they make as non-arbitrary. The unilateral power of the CJEU appears particularly problematic when it can dictate such distinctions without much threat of political correction or review against national interests. Determining freedom to conduct a business without acknowledging the sensitive political nature of the issue risks the Court becoming a source of domination imposing its arbitrary rule and alien control on the member states.[101] The CJEU is not an institution equipped to take fair and equal account of the legitimate diversity of national interests across all member states and weigh them as normatively equal to the interests of the purposive order the CJEU form part of.[102] This incapacity is not borne from CJEU negligence but is simply the product of EU purposiveness combined with the vast diversity among EU subjects.[103]

5 Freedom to conduct a business, the market and its actors

5.1 The EU conception of freedom to conduct a business and the market

5.1.1 The internal market without interference

Gill-Pedro asserts that the *Alemo*-court formulated the freedom to conduct business as a freedom from interference.[104] Freedom as non-interference considers that any interference with the choices available to an agent compromise the freedom of that agent. Unlike freedom as non-domination, non-interference does not recognise a general possibility to legitimately interfere in a non-arbitrary fashion.[105] In *Alemo-Herron* the CJEU uses Article 16 CFR to give the employer an EU freedom to do something it would not have been allowed to within its freedom under national law. Businesses are envisioned to be free to use all available resources as they see fit, limited only by their own liability[106] Protection of the freedom grants businesses a right to challenge national law that limits their freedom to act - as a right to be generally free from regulatory interference.[107] Freedom to conduct a business as freedom from interference grants strong protection of a business private autonomy.[108] Conceptualizing Article 16 as a general right to freedom of trade, without regulatory interference, would pose the article as a means for protecting private autonomy or non-interference as desirable values and aims in themselves.[109] Freedom from regulatory interference as an independent value and an EU right would require any interference limiting the freedom of businesses to be carefully justified before the CJEU in accordance with the Court's own economic and political theory.[110]

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[101] Gill Pedro (n 7) p. 132-134
[102] Scharpf (n 30) p. 228-233
[103] Scharpf (n 30) p. 240-241
[104] Gill-Pedro (n 7) p. 123, 128-129
[105] Gill-Pedro (n 7) p. 105-109
[106] Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] EU:C:2014:192 para 49; Gill-Pedro (n 7) p. 130
[107] Gill-Pedro (n 7) p. 128-129
[108] Groussot et al. (n 49) p. 335-336
[109] Gill-Pedro (n 7) p. 122-123; Groussot et al. (n 49) p. 335-336; D Leczykiewicz, 'Horizontal effect of fundamental rights: In search of social justice or private autonomy in EU law?' in U Bernitz, X Groussot and F Schulyok (eds) *General Principles of EU Law and European Private Law* (Kluwer 2013) p. 172
[110] Bartl and Leone (2015) (n 46) p. 153

Any conceptualization of the freedom to conduct a business will as discussed be dependent on the socio-economic framework and how the relation between market freedom and market intervention is visualised.[111] In *Alemo-Herron* the CJEU defines the freedom to conduct a business, and with it redefines the internal market and the extent to which it may be regulated.[112] CJEU economic and political theory in *Alemo-Herron* conceptualizes the internal market as a free market, without or with only limited regulatory interference in favour of wide market freedom.[113] The discussed conception of the freedom to conduct a business and its possible ability to bring violations under the scope of EU law equip the CJEU with power to assess the legitimacy of any market-interfering legislation against its conception of market freedom.[114] Recognition of the freedom to conduct a business can become a valuable tool to challenge national interferences that would conflict with the CJEU's idea of the free market. The freedom to conduct a business shows similarities to the fundamental freedoms, which the CJEU in the past have come close to treating as general freedoms to free.[115] With the ability to define the freedom to conduct business as it sees fit the Court may well utilize the Article 16 CFR to enforce a wide right to free trade as freedom not to be regulated, except as the Court deems appropriate.

5.1.2 The actors of the internal market

How the CJEU articulates the internal market influences how the EU system considers and envisions the actors operating on that market. To examine how the EU considers parties operating as private individuals in the market this thesis examines the notion of the European consumer and the European employee as the crucial accounts of how EU law considers natural individuals operating in the internal market. These two notions of natural individuals partaking in economic activities on the internal market shall for this purpose be considered to contribute towards the overall EU notion of the economically active individual. Micklitz argues that the EU has developed a model of justice called 'access justice'[116], which focuses on ensuring access to and fair participation in the relevant markets of the Union. EU access justice does not protect vulnerable or marginalised parties per se, but as Micklitz puts it "the dynamic, open-minded, flexible, well-informed, self-standing and self-conscious mobile worker or consumer"[117] who attempts to enjoy the benefits of the internal market. The market needs this strong capable individual to function and allegedly be the most beneficial.[118]

The consumer that will best realize the internal market forms the basis for how EU law primarily considers the EU consumer. An 'average' EU consumer is considered well informed, observant and circumspect, active, rational and capable of defending their rights and interests by themselves. This is the predominant notion of the consumer within EU law,

[111] Bartl and Leone (2015) (n 46) p. 149; Bartl and Leone (2017) (n 46) p. 123
[112] Bartl and Leone (2015) (n 46) p. 150, 153; Gill Pedro (n 7) p. 132-134
[113] Bartl and Leone (2015) (n 46) p. 150, 153
[114] Bartl and Leone (2015) (n 46) p. 141; Gill Pedro (n 7) p. 132-134
[115] Oliver (n 1) p. 298-299
[116] Not to be confused with access to justice, a separate procedural concern
[117] Micklitz (n 25) p. 21 3rd paragraph, 2nd sentence
[118] Micklitz (n 25) p. 13, 15-21

but it does not reflect reality and should thus only apply within limits.[119] However, EU law includes several notions of the EU consumer, considering the consumer as capable individuals that can protect themselves in most contexts but acknowledging them as vulnerable parties in need of protection in certain situations. Vulnerability in a market situation may stem from various sources, such as market conditions, discrimination, physical or intellectual disabilities, contractual power relations, discrimination or from financial situations. Therefore it may not be possible, as EU law attempts, to consider consumers as a singular undifferentiated group that is generally capable.[120] Here it can simultaneously be questioned whether the ideal consumer image is based on the 'weird' individual that behavioural science tends to focus on - the western, educated, industrial, rich and democratic.[121]

Consumer policy recognising consumer vulnerability has mainly taken the form of minimum directives that allow for more stringent protection at national level.[122] EU law treating consumers as capable of protecting themselves and their interests is in contrast with the protective stance of secondary legislation treating consumers as vulnerable parties in need of protection. Howells, Twigg-Flesner and Wilhelmsson however asserts that EU law does not protect consumers as a recognized vulnerable class, but as individually justified exceptions based on situational particular vulnerability. A particular issue with the EU focus on the average or the capable consumer is how it labels certain consumers as particularly vulnerable, despite the fact that all consumers will need protection in certain situations. Need for protection becomes a statement of weakness, which not all consumers may be willing to accept - no one wants to consider themselves as lesser than the norm. Targeting the 'average' capable consumer leaves below-average consumers without protection except for when they can be considered particularly vulnerable.[123] Recognition of vulnerable consumers appear similar to the pseudo-recognition discussed by feminists,[124] in how it protects consumers not for their own sake but to maintain the capability norm and the overall market-focused system. For various reasons it can be argued that recognition of the vulnerable consumer should be leading EU consumer law.[125]

An image of consumers can serve either as a point of reference in policy adoption or as an ideal regulation seeks to realize.[126] The capable EU consumer may well be a worthwhile ideal for ensuring a functioning market and consumers that can enjoy the benefits of the market. Realization of the market and empowerment of consumers to become capable EU consumers however requires the recognition of power relations, vulnerability and how they are perpetuated in a free market without regulatory interference.

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[119] G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) p. 33-34; D Leczykiewicz and S Weatherill, 'The Images of the Consumer in EU Law.' in D Leczykiewicz and S Weatherill (eds) *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) p. 17; Micklitz (n 25) p. 21-22

[120] Leczykiewicz and Weatherill (n 119) p. 8, 15

[121] Freedman (n 15) p. 81-84; Howells et al. (n 119) p. 33-34

[122] T Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27 Journal of Consumer Policy 317 p. 322

[123] Howells et al. (n 119) p. 32-33

[124] Baars (n 93) p. 61-62; Bryson (n 11) p. 196

[125] See Howells et al. (n 119) p. 34; Leczykiewicz and Weatherill (n 119) p. 17

[126] Leczykiewicz and Weatherill (n 119) p. 15

The EU consumer is seen as essential for the realization of the internal market project and the functionality of the EU.[127] Functionality of the transnational market rests on the willingness of consumers to buy foreign products and to shop abroad.[128] Ensuring competitiveness and stability on the internal market has come to rely on the choices and actions of responsible and capable consumers. Shaping the market behaviour of consumers thus becomes essential for realizing the internal market and consumer policy becomes the means for shaping the consumer that will best realize the internal market project.[129] EU consumer protection law has turned into consumer behaviour law.[130] Wilhelmsson notes how EU consumer policy has been adopted under internal market competences and been guided by internal market ideals, alongside protective concerns, with reference to national divergences creating trade barriers and distortions of competition between businesses. Justification for adopting consumer law has thus focused on the needs and activities of businesses and the market, addressing the effects of differentiated consumer protection on fair competition in the internal market. Protective objectives have achieved greater recognition over time but adoption of consumer policy remains largely tied to the internal market competence and the relevance of harmonising consumer policy to achieve the internal market objective. The trend towards establishing uniform EU maximum rules is not for the sake of consumers, as consumers will put more value on being protected substantively well over enjoying uniform protection and since the trend will lower standards in some member states. Wilhelmsson asserts that the turn towards total harmonisation is based on the needs of businesses more than consumers - businesses benefit from uniform rules, not consumers.[131] Focus on consumers as components of the market aligns with continued driven EU integration and unification in pursuit of internal market function.[132] The worker is also considered essential for the realization of the internal market, and similarly the notion of a worker within EU law also focuses on the requirements of the market. Rather than attempting to offer employees a certain level of protection the CJEU has been concerned with establishing a uniform level of protection to ensure optimal function of the internal market. EU law seeks to ensure mobility and market function, not to address the power asymmetry in the employment relation that motivates national labour law to regulate. The aim is not to protect the individual on the market in terms of redistributive or social justice but to facilitate transnational mobility.[133] EU law is thus concerned with uniform protection of employees, perhaps at a high level, rather than ensuring protection as such. *Alemo-Herron* utilizing the freedom to conduct a business to interpret a minimum directive as a maximum level is therefore in line with EU functionalist economic rationales.

EU law recognises in part that individuals will be vulnerable on the market, but predominantly entertains the notion of the strong, self-standing, capable agent that can realize the internal market. Consumer policy and labour policy are thus instrumental for the realization of the internal market - EU law does not protect individuals per se, but the actors

[127] Leczykiewicz and Weatherill (n 119) p. 3
[128] Leczykiewicz and Weatherill (n 119) p. 16
[129] Leczykiewicz and Weatherill (n 119) p. 19; Wilhelmsson (n 122) p. 317-321
[130] Micklitz (n 25) p. 19-20
[131] Wilhelmsson (n 122) p. 319-323, 328, 333
[132] Leczykiewicz and Weatherill (n 119) p. 18
[133] S Giubboni, 'Being a worker in EU law' (2018) 9(3) European Labour Law Journal 223 p. 223-225, 234

needed to realize the EU functional goal whom have the confidence and resources to act transnationally. This goes well with the notion of the internal market as a market characterized by freedom from interference - such a market necessitates strong actors that can operate independently. In defining freedom to conduct a business as a freedom from interference the CJEU articulates this market ideal, which limits protection of individuals in favour of establishing greater freedom of contract on the market.

5.2 Protection of vulnerable parties in the market

5.2.1 Effects in the market and on vulnerable parties

The question must however be posed whether full freedom of contract and private autonomy is actually desirable or functional for the internal market, and if it justifies deregulation at the expense of vulnerable market actors.

Employees were identified by the very directive as the vulnerable party that EU law were to protect.[134] Weatherill fears that the *Alemo-Herron* development embracing strong protection of the freedom to conduct a business will lead to the CJEU emphasising concerns for the autonomy of economically strong parties, at the expense of vulnerable parties in need of regulatory protection. It is almost as if the Court saw the employer in *Alemo-Herron* as the vulnerable party in the transfer situation. No concern was given to the employees. Using the CFR to protect the flexibility of the traditionally stronger parties instead of protecting vulnerable individuals is misguided according to Weatherill.[135]

Businesses can generally be expected to have high capacity to guard their interests and influence public and private regulative processes, compared to consumer organisations.[136] Parties capable of bringing cases to plead their interests before the CJEU are more likely to be affluent parties with resources to litigate, presenting the CJEU with a selection of interests angled towards representing businesses and otherwise economically strong parties with significant interests in mobility and a free internal market.[137] Businesses drive deregulation and liberalisation to remove hindrances to free trade, interstate or otherwise, which begs the question of whether the internal market is becoming a market where businesses operate relatively free from regulation but where legitimate interests of other social groups are insufficiently safeguarded.[138] Weatherill predicts that the precedent of *Alemo-Herron*, as a deregulatory tool against protective regulation, may join *the Laval Quartet* as notorious examples of when EU market integration inadequately respects when market freedom and liberalising harmonisation need to be restricted by public interests and protection of vulnerable parties.[139]

[134] Bartl and Leone (2015) (n 46) p. 144-145; Bartl and Leone (2017) (n 46) p. 115-116; Weatherill (n 55) p. 174-175
[135] Weatherill (n 55) p. 167, 172, 176
[136] A McGee and S Weatherill, 'The Evolution of the Single Market - Harmonisation or Liberalisation' (1990) 53:5 Modern Law Review 578 p. 585-586
[137] Scharpf (n 30) p. 221-222
[138] McGee and Weatherill (n 136) p. 586; See also Craig and de Búrca (n 93) p. 627-629
[139] Weatherill (n 55) p. 181-182

The risks of interpreting Article 16 as a freedom of non-interference, seen from the perspective of freedom as non-dominance, will be vulnerable parties enjoying limited freedom due to arbitrary interference by businesses, and political communities being limited in their freedom to non-arbitrarily determine their common rules according to their relevant circumstances and preferences. Veneration for unregulated freedom of contract risks enabling exercise of arbitrary control.[140]

Weatherill emphasizes the power imbalances of the market and scepticism towards the reality of freedom of contract. Preserving freedom of contract and blocking protective intervention consolidates and strengthens the imbalances present in the 'free' market. Protective legislation intervenes to bring the situation closer to what 'real freedom of contract' could have brought vulnerable parties if they could negotiate on equal footing with employers and businesses on the free market.[141] The market can not be trusted to take fair account of consumer interests wherefor creation of free and fair competition in the single market requires both trade freedom and protective regulation. McGee and Weatherill argue that the internal market moves towards a market where businesses benefit from operating with relatively limited regulatory interference, but where legitimate interests of social groups risk being ignored by legislature and market powers. In other words a market where business freedom comes at the expense of vulnerable market actors.[142]

5.2.2 The EU as protective of vulnerable market parties

Protecting private autonomy in a substantive sense requires a level of regulation to address economic imbalances, informational asymmetries and negative externalities to enable parties to participate in the market and make informed decisions. This includes consumer protection reconciled with formal freedom of contract (enabling consumers to enjoy practical freedom of contract).[143] Protective or socially minded minimum harmonisation provides these vulnerable parties with uniform minimum protection in the internal market. Afforded minimum protection strives to make parties capable of asserting their interests in a manner they would not be able to on the free unregulated market.[144] Protective measures aim to replace the formal unequal balance established by the contract between rights and obligations on the parties, with an effective balance that re-establishes equality between them. The law thus intervenes to tackle the imbalance between traders and consumers stemming from permitting contractual freedom to entirely dictate the relationship between them.[145]

In certain fields of policy the EU legal order has recognised the need for protective legislation. The asymmetries that generally liberalise and deregulate policy areas that conflict with internal market law have not affected consumer, worker and environmental protection to the same extent as other fields of policy.[146] Minimum harmonisation is used in these fields of policy as a sensitive tool for ensuring a guaranteed level of protection for vulnerable parties acting across borders in the internal market while enabling member states

[140] Gill-Pedro (n 7) p. 131, 134
[141] Weatherill (n 55) p. 172
[142] McGee and Weatherill (n 136) p. 585-587, 595-596
[143] Leczykiewicz (n 109) p. 177
[144] Bartl and Leone (2015) (n 46) p. 141, 154
[145] Weatherill (n 55) p. 174-175
[146] Scharpf (n 30) p. 227-228

to maintain their own levels of protection where they go beyond the harmonised minimum.[147] Article 3(3) TEU and certain CJEU case law visualize the internal market as a social market economy, with a mandatory high level of social protection.[148] Rebalancing of economic powers has been considered by the CJEU to form part of the objectives of the internal market project. Harmonisation combines social protective and economic rationales, ensuring protection of vulnerable parties and simultaneously unifying the costs such protection entails for market actors. Protective regulation rests on the unacceptable consequences of unregulated freedom of contract and recognizes both workers and consumers as vulnerable parties in contracting.[149] The Acquired Right Directive in *Alemo-Herron* was in itself an EU measure specifically responding to the need for regulatory interference to structurally rebalance the employer-employee power relation in transfers by protecting employees as the vulnerable party.[150] Micklitz argues that this is an essential part of access justice, to ensure that the internal market is accessible. EU access justice intervenes attempting to ensure that the relevant markets are open to all Europeans, for example pursuing a labour market that is not just accessible to cishet white males working full time.[151]

Weatherill submits that the case law cited in support of the *Alemo*-ruling were not judgements supporting private autonomy with freedom from regulation but establishing regulated autonomy as characteristic of EU law. Regulated autonomy lets private autonomy be limited where necessary. In line with regulated autonomy and the protective sub-objectives of the internal market project, the CJEU has historically been unwilling to articulate a right to free trade without interference that would limit the legislative options for regulating the market. Instead the freedom to conduct a business has been extensively limited as long as a public interest can be demonstrated, and the basic requirements for limiting a fundamental right can be considered met. Protection of economically vulnerable parties like consumers has been included among these interests.[152]

Bartl and Leone conclude that the ideological stance of defining freedom to conduct a business as a freedom of non-interference makes social and protective legislation vulnerable to challenges by politically liberal actors, whose ideals of limited state interference in the market align with the concept of freedom from interference. The ideology enforced via Article 16 CFR is based on the CJEU's own political and economic theory on the internal market. Review against the freedom to conduct a business gives the CJEU power to lower differentiated standards of protective regulation burdening businesses to EU minimums, at the expense of vulnerable parties whose enjoyment of the market benefited from the regulation.[153]

The *Werhof*-case urges that employer interests should not be disregarded, but does not support how *Alemo-Herron* put the need for employer protection as equal to the need for employee protection. Bartl and Leone agree that the CJEU has not properly motivated why

[147] Bartl and Leone (2015) (n 46) p. 141, 174, 154; Bartl and Leone (2017) (n 46) p. 115, 124; Groussot et al. (n 49) p. 341-342; Scharpf (n 30) p. 227-228
[148] Groussot et al. (n 49) p. 341-342
[149] Weatherill (n 55) p. 173-177
[150] Bartl and Leone (2015) (n 46) p. 145; Bartl and Leone (2017) (n 46) p. 115-116
[151] Micklitz (n 25) p. 13, 15-21
[152] Weatherill (n 55) p. 177-180
[153] Bartl and Leone (2015) (n 46) p. 141, 151, 154

the employer needs protection in *Alemo-Herron*.[154] Employee protection was set by the legislative process as the aim that should guide interpretation of ambiguities. Weatherill adds that reinterpretation of the objectives twists the rationales behind adopting the Acquired Rights Directive and attaches pro-employer flavour without anchor in the directive. Interpretation to the benefit of the vulnerable is a general interpretative principle in EU law according to Weatherill.[155] Reinterpretation further moves the balancing of interests from a legislative structural forum into judicial interpretative balancing, ultimately decided unilaterally by the CJEU.[156] Groussot, Pétursson and Pierce critique the need to protect the employers freedom in *Alemo-Herron*. Nothing appeared to hinder the employer from renegotiating the contested clauses with its employees, nor was it clear that the increased costs brought by the safeguarding clauses would preclude the business from being exercised as such. It was therefore not clear that the core of the freedom to conduct business were harmed by the protective clauses.[157] Neither was it clear that privatisation could automatically warrant lowering of employee benefits to enable the business to operate. To the contrary the CJEU has long held that a transfer is never in itself legitimate motivation for changing employment conditions for the worse.[158] Nor have the CJEU been prone to accept general complaints about costs and reduced profit as reasons justifying protection of business freedom and subsequent disapplication of protective legislation.[159] If the labour law *Alemo*-approach is allowed to be applied in relation to consumer protection or discrimination law it would risk much of the protective aims behind EU law.[160]

Gill-Pedro asserts that the CJEU has consistently interpreted Article 16 CFR as ensuring the regulated autonomy of business and freedom from arbitrary control, not from interference. Freedom to conduct a business was nonetheless characterized as a freedom from interference in *Alemo-Herron*.[161] *Alemo-Herron* appears as a break in the CJEU tradition of emphasising the social dimension of the internal market. The *Alemo*-court uses the rhetoric of balancing, but Groussot, Pétursson and Pierce argue that a fair balancing would have led the Court to recognize this tradition and maintain the national high level of protection for transferred employees. Interpretation of Article 16 according to *Alemo-Herron* risks the Charter coming to serve different agendas than the Treaty commended protection of employees and other vulnerable market actors.[162] Moving from freedom to conduct a business requiring business interests to not be disregarded, as in Werhof, towards requiring positive protection from general regulation, as in *Alemo-Herron*, is however twisting the pro-employee rationales behind the Acquired Rights Directive into pro-employer rationales.[163] Gill-Pedro joins other authors in asserting that *Alemo-Herron* is out of line with previous CJEU jurisprudence.[164] Dorssemont considers that Article 16 CFR itself amounts to

[154] Bartl and Leone (2015) (n 46) p. 145; Bartl and Leone (2017) (n 46) p. 116, 123
[155] Weatherill (n 55) p. 174-175
[156] *Alemo-Herron* (n 3) para 25; Bartl and Leone (2015) (n 46) p. 145; Bartl and Leone (2017) (n 46) p. 116; Weatherill (n 55) p. 172, 174
[157] Groussot et al. (n 49) p. 341-342
[158] Bartl and Leone (2015) (n 46) p.145-146
[159] Groussot et al. (n 49) p. 333; Weatherill (n 55) p. 179
[160] Weatherill (n 55) p. 174
[161] Gill-Pedro (n 7) p. 123, 128-129
[162] Groussot et al. (n 49) p. 341-342
[163] Bartl and Leone (2015) (n 46) p. 145; Weatherill (n 55) p. 174
[164] Gill-Pedro (n 7) p. 129

constitutionalisation of capitalist principles and a stealthy upgrade of economic principles to full-fledged fundamental rights, as part of an economic agenda that will adversely affect the balancing of economic freedom against social rights.[165] Articulation of Article 16 as a right not to regulated autonomy but to non-interference certainly appears to constitutionalize a politico-economic ideology that will be unfavourable to social protection when businesses become burdened.

5.3 The future for Article 16 CFR on the freedom to conduct a business?

In forming a market that is regulated non-arbitrarily it is essential to track and consider the relevant interests of all parties operating in the market.[166] Interests of employers and businesses should not be disregarded, as stated in *Werhof*.[167] Protection of the freedom to conduct a business has value as a means for private autonomy to counterbalance general interests and other rights.[168] Costs of protective legislation will generally fall on businesses which particularly warrants that their interests should be considered when regulating.[169] It must however be considered that businesses will generally be in stronger positions than consumers or employees to safeguard and assert their interests effectively and independently on the market and to influence development of regulation.[170] The crucial point is that the interests of both vulnerable and strong parties in the market must be taken into account, market regulation must balance all relevant interests fairly. Freedom to conduct a business must in other words be formulated so as to respect public interests and protection of vulnerable parties motivating regulation, while at the same time ensuring that businesses can exercise their economic activities autonomously within the limits of the law.

Freedom to conduct a business before *Alemo-Herron* is considered to conform to freedom as non-domination and to regulated autonomy, as freedom that can be legitimately limited via market regulation.[171] Subjecting freedom to conduct a business to the limits set by legislation is supported by the formulation of Article 16 CFR,[172] and the extensive case law allowing restrictions on how business may be operated so long as operation is not impossible.[173] Article 16 will however hinder arbitrary interference that make business exercise impossible. In such cases Article 16 CFR becomes an enforceable right ensuring that the room to conduct business as created by law is not arbitrarily interfered with, whether by private parties, states or the EU. Article 16 should however not create a right to be generally free from regulation. *Scarlet Extended* is an excellent example of this. The contested injunction was not disallowed for interfering as such with the conduction of the business, but because the injunction did not take account of the interests of the business and essentially rendered it impossible to exercise the economic activity allowed under law. Formulated solely after the rightholders interest in protection of intellectual property the

[165] F Dorssemont, 'Values and Objectives' in N Bruun, K Lörcher and I Schömannet (eds) *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) p. 53-55; Groussot et al. (n 49) p. 343
[166] Pettit (n 6) p. 55
[167] Bartl and Leone (2015) (n 46) p. 145
[168] Groussot et al. (n 49) p. 335-336; Leczykiewicz (n 109) p. 179-182; Weatherill (n 55) p. 174-176
[169] Craig and de Búrca (n 93) p. 630;
[170] Weatherill (n 55) p. 172
[171] Gill-Pedro (n 7) p. 123, 128-129; Weatherill (n 55) p. 180
[172] Gill-Pedro (n 7) p. 112-113; Weatherill (n 55) p. 178-179
[173] *Sky Österreich* (n 2) paras 47-49; Bartl and Leone (2015) (n 46) p. 151; Bartl and Leon (2017) (n 46) p. 8; Oliver (n 1) p. 293; Usai (n 27) p. 1873-1874; Weatherill (n 55) p. 177-179

injunction would have constituted an arbitrary interference with the freedom to conduct a business.[174] Business interests must naturally be weighed against other actors, to ensure a market for everyone to benefit from[175] - with all the non-arbitrary interferences that the market requires.

Freedom to conduct a business has been held to not protect subjective positions of companies, nor the opportunities or outcomes they might have had in absence of regulation.[176] While I disagree with Usai's general veneration for the free market there may be some merit in the proposition for a second part to the freedom to conduct a business. This second part is a right to have a single and properly functioning competitive market, based on a socially useful purpose in preserving competition and the benefits of the internal market.[177] Freedom to conduct a business constructed like this would characterize Article 16 as protecting not the individual interests of particular economic operators but their shared interest in a functioning competitive market where they are able to conduct their business. This conforms with case law establishing that Article 16 protects the basic possibility to conduct a business, but not the conditions for how that ability may be exercised.[178]

In light of these considerations it appears reasonable that freedom to conduct a business should not be defined as in *Alemo-Herron* but in accordance with the concepts of freedom as non-domination, of regulated autonomy and of access justice. Freedom to conduct a business ensures that economic actors can access the functional internal market and participate in it on equal terms, as dictated by the model of access justice. The freedom is recognised within the limits of the law as protecting regulated autonomy.[179] Finally, it is a freedom of non-domination, ensuring that market actors are not subject to arbitrary control by states, the EU or other actors on the market. Freedom to conduct business should in other words protect not the individual freedom of business actors, but protect how the market functions making it possible to exercise economic activity within the limits of the law. The market is then a regulated market, where parties should not be subject to or be capable of arbitrary control, that is open for all citizens and allows them to act autonomously and freely within the limits stipulated by law.

5.4 Structural biases and the CJEU

Power imbalances exist not only on the market, in relations between different actors on the market such as employers, employees, consumers and suppliers. Power imbalances also persist at a more structural level, based on characteristics or group adherences of individuals. These are the types of power imbalances most prominently discussed by feminist and queer theory, which may influence their participation in the market but also other aspects of life.[180] Feminist thinkers will in this respect put emphasis on how the market and the productionalist economy remains fundamentally adapted to the male worker without

[174] Gill-Pedro (n 7) p. 113, 119, 121-122
[175] See 3(3) TEU; Craig and de Búrca (n 93) p. 632-635
[176] *Nold* (n 52) paras 14-15; Groussot et al (n 49) p. 333; Usai (n 27) p. 1869; Weatherill (n 55) p. 179
[177] Usai (n 27) p. 1869, 1887
[178] See Chapter 4.2; See Cases *Spain and Finland v Parliament and Council* (n 50); *Scarlet Extended* (n 50); *Sky Ösyterreich* (n 2)
[179] Gill-Pedro (n 7) p. 134
[180] Bryson (n 11) p. 198-201; Wittig (n 13) p. 21-32

responsibilities for home- or childcare.[181] As discussed in Chapter 2.2 the structural biases of a system influence what actors in that system consider proper, accurate and realistic - both how to interpret the world and what the world should look like. Structural inequalities can be so comprehensive that they become considered given facts reflecting an objective reality. These normative hierarchies place certain individuals and concepts as the normative base for the system, attach legitimacy and status to that norm and disadvantage those that are 'other' to the norm.[182] The Straight Mind or 'thinking straight' describes a biased lens that filter discourse and, mayhap unawaringly, enforce the structural heterosexual bias as a natural world order.[183] Lenses such as the Straight lens affect outcomes in courts and how courts are able to perceive and address structural inequalities before it. Even where courts attempt to address these asymmetries they may at times do so in a way that in fact only strengthens the bias and the stereotypes of the asymmetry. This may particularly be the case where individuals do not conform with either of the categories presented as the norm and the 'other'.[184] Given these considerations of the heterosexual patriarchy it appears reasonable to assume that similar conclusions can be drawn for separate types of marginalising or 'othering' power relations, where one group risk suffering arbitrary interference or discrimination from a group presented as the social norm. Researching these power relations and specifically their presence in courts is an interesting topic, but for a different thesis.

While the EU and the CJEU have proven driven to ensure equality between women[185] and men it has acted as a Straight Court in certain discrimination cases. Craig and de Búrca critique how the CJEU considers labour law requirements in relation to pregnancy and maternity in ways that appear to enforce gender roles. In some cases the CJEU has put significance on how women are largely responsible for childcare and how childcare from a mother is something special and different from care by a father. Thereby the Straight CJEU confirmed the stereotype of women as primary caregivers, cited it as a factor to consider and stated that the relevant legal norms were not meant to 'alter the division of responsibilities between parents'.[186] It must be noted that in other cases the CJEU has instead taken express notice of the risk of perpetuating the stereotype of women as primary caregivers.[187]

Craig and de Búrca make an interesting observation on the CJEU jurisprudence on gender equality:

> "The shortcomings of the indirect discrimination/objective justification test in the field of sex equality have often been noted, given the male norm on which the concept of discrimination used is generally based, and given the relative ease with which the commercial objectives of the undertaking or employer can defeat a claim of indirect discrimination."[188]

The "male norm" underpinning the concept of discrimination leads to the Straight lens discussed by feminists.[189] Furthermore the observation businesses and economic interests

[181] Freedman (n 15) p. 69-77
[182] Bryson (n 11) p. 165-166, 196-201; Freedman (n 15) p. 69-77, 81-84; Wittig (n 13) p. 21-32
[183] Ingraham (n 18) p. 1-4; Wittig (n 13) p. 21-32
[184] Baars (n 19) p. 59-62
[185] "Women" understood as the heterosexual category, rather than the identity or gender 'women'
[186] See Craig and de Búrca (n 93) p. 949 and cited case law
[187] Craig and de Búrca (n 93) p. 917-918 and cited case law
[188] Craig and de Búrca (n 93) p. 949, last paragraph
[189] Ingraham (n 18) p. 1-4; Wittig (n 13)

would be allowed to justify indirect discrimination with 'relative ease' is problematic, suggesting that the CJEU don not only a Straight lens, but also an Economic or Market-friendly lens when assessing claims for social protection in relation to structural biases. The CJEU thus appears to be guided in general by assumptions and biases favouring the normative party in structural and market-based relations of power. This would contextualize the liberalising effects of CJEU case law discussed above and the gendered bias in discrimination law.

The Straight lens in the CJEU is to some extent hidden by its guise as a given world-order and to some extent follow the functionalist market approach that attempts to consider individuals as formal equals and pursues a market ideal based on societal discourse that includes these normative structures. By considering that parties are on average capable and formally equal with limited need for regulatory protection the CJEU appears to not only ignore structural power imbalances but to exacerbate them. 'Otherized' individuals will be disadvantaged in a system of unregulated freedom where intervention does not address the structural biases that affect society, the market and law. Where these individuals are subject to a Straight lens in society and law courts risk legitimizing and enforcing structural inequalities, as the CJEU enforced stereotypes in some gender discrimination cases. Structural lenses affecting the CJEU become particularly impactful seen in the context of the CJEU's central role in EU law and the entrenched status of its case law.[190]

I shall add the case *Achbita* to this consideration of structural biases to illustrate concerns beyond gender equality and concerns about intersectionality where discrimination law and freedom to conduct a business come into conflict. The *Achbita*-case concerned the female muslim worker Achbita, who sought to wear her religious headscarf at work. After she insisted on wearing her headscarf the company made a previously unwritten rule explicit in the company code, claiming that it required all its workers to abstain from wearing any signs indicating their religious, political or philosophical affiliation in accordance with a neutrality policy towards customers.[191] The CJEU found that the rule did not constitute indirect discrimination in light of the requirements for respecting freedom to conduct a business.[192] Posing miss Achbita with the choice between removing her religious headscarf or ceasing to work with customers[193] was thus within the freedom and prerogative of the company to determine how to conduct its business and direct its employees. In *Bougnaoui*, considering a very similar situation,[194] the order to remove the workers headscarf was disapproved by the CJEU.[195] The offending company had not cited any wish to operate its business in a particular way, for example with a neutrality policy, as motivation for its rule, but cited only its wish to comply with the preferences of clients disapproving of the headscarves. In other

[190] Sandholtz and Stone Sweet (n 32) p. 22-23; Scharpf (n 30) p. 215-219
[191] *Achbita* (n 4) paras 10-21
[192] *Achbita* (n 4) paras 30-43
[193] This part was mandated by the CJEU, which considered it unreasonable to terminate Achbita, but wholly reasonable to confine her to backoffices…. See *Achbita* (n 4) para 43
[194] Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* [2017] EU:C:2017:204 paras 13-15; D Cuypers, 'Religion, discrimination, the head scarf and labour law' [2019] ERA Forum 415 p. 438
[195] *Bougnaoui* (n 194) para 41; Cuypers (n 194) p. 441

words, it sought to maximize profit, which is not protected by the freedom to conduct a business.[196]

Internal market law moving from protecting vulnerable parties to protecting the flexibility and freedom of employers, sellers and suppliers would be particularly problematic in the context of EU anti-discrimination law. Discrimination law restricts the choices of businesses and will therefore be vulnerable to deregulation motivated by freedom to conduct a business understood as non-interference in *Alemo-Herron*.[197] Increased consideration for market freedom and uniform standards over material protection risks lowering the overall anti-discrimination protection afforded in Europe.

The particular nature of the labour law employment relationship warrants some measure of power imbalance motivated by the employer prerogative and some measure of discretion motivated by their freedom to conduct a business. An employer must thus be able to exercise some degree of control over their workers. This control must nonetheless be restricted by law to prevent employers from discriminating or arbitrarily controlling their employees. Cuypers considers that *Bougnaoui* makes clear that fundamental rights should not be dictated by a noisy minority of customers opposing certain rights or characteristics.[198] Allowing businesses to take account of and pander to such wishes may amount to judicial recognition and legitimation of prejudice and societal power imbalances based on characteristics protected by discrimination law.[199] The CJEU thus appears to be at least partially aware of societal inequalities and the need to address them when considering the internal market and market freedom. As part of an overall biased society the CJEU still risks being affected by the ingrained normative lenses that derives from the heterosexual regime and other normative power structures.

I do not submit that neutrality policies or other rules that might appear discriminatory will never have legitimate corporate concerns motivating them. Non-domination requires all relevant interests to be taken account of.[200] It must however be asserted that the discussed cases appear peculiar, as allowing freedom to conduct a business to justify what might otherwise be considered discriminatory. One cannot know for certain whether the outcomes were affected by the fact that the employees belonged to ‘otherized’ groups, as women and as muslims (when muslims and the headscarf in particular experienced growing debate in Europe). However against the considerations of structural power relations it cannot be ruled out. The CJEU forms part of the overall social system and can, will, in certain situations be affected by the lens that the current societal order equips it with.[201] It is therefore important to tread with special awareness and sensitivity when dealing with intersectional cases. Where a subject is in a vulnerable position not only as an employee vis-à-vis an employer but also as a female, coloured or muslim worker in a patriarchal economy, courts and other actors must

[196] *Bougnaoui* (n 194) paras 25-41; Cuypers (n 194) p. 441
[197] Weatherill (n 55) p. 181
[198] Cuypers (n 194) p. 443-445
[199] Cuypers (n 194) p. 445; JR Marín Aís, ‘Freedom of Religion in the Workplace V. Freedom to Conduct a Business, The Islamic Veil before the Court of Justice: Ms. Samira Achbita Case’ (2018) 3:1 European Papers 409 p. 414-415
[200] Gill-Pedro (n 7) p. 109; Pettit (n 6) p. 55
[201] See Baars (n 19); Bryson (n 11) p. 196

be particularly weary to ensure that the power imbalances are not consolidated and enforced through law.

5.5 The EU structural bias

The EU system at large creates asymmetries that favour judicial deregulation and liberalisation,[202] all in all focusing on removal of interferences. This reached its peak in *Alemo-Herron*, where the CJEU characterized the internal market as encompassing freedom to conduct a business as a general freedom from interference.[203] EU law puts emphasis on individuals as rational and circumspect parties capable of defending their own interests and rights on the market.[204] It is mainly the reasonably capable and strong actors, with high interests in access to mobility, that will be able to reach the CJEU and to influence the EU legislative process to their benefit.[205] Emphasis on strong capable market actors fits very well with the *Alemo*-conception of the internal market as a market with freedom from interference. If the internal market is to function without much regulation its actors must be able to defend their interests and rights independently. These two concepts contribute to furthering the development of the internal market, making them become intricate parts of the EU functionalist system.

I argue that the conceptions and asymmetries of EU law discussed in this essay can be critically understood using feminist theory on social constructs and norms.[206] Feminist theory can be used to understand how the development of internal market law is affected by functionalism as the normative rationale in the system. As the EU conceptualizes the internal market as a market without interference[207] populated by strong and capable market agents[208] it establishes those parties as the normative figures of EU law. EU law claims that these capable parties are essential for the realisation of the internal market, while simultaneously conceptualizing the internal market as a market for these capable parties. They are essential because the internal market is conceptualized around and built for them, at least in part because of their influence on the development of the system. This interpretation of reality matches how feminist theory describes how structural normative hierarchies as social constructs affect the societal system and discourse, so that the system proves the norm which the system is based on.[209]

As discussed by feminist scholars the normative concepts of a system influence the entirety of that system, including states and courts, becoming a mind and a lens that guide institutions of the system to interpret the world and organise the system in ways that benefit the rationale and the norm. Normative concepts thus influence the discourse, how different subjects are defined as normative or ‘other’ and what policies are considered legitimate in

[202] See Sandholtz and Stone Sweet (n 32) p. 19-23; Scharpf (n 30) p. 215-232
[203] Gill-Pedro (n 7) p. 123, 128-129
[204] Leczykiewicz and Weatherill (n 119) p. 3, 16, 19; Micklitz (n 25) p. 21-22; Wilhelmsson (n 122) p. 317-321
[205] Craig and de Búrca (n 93) p. 612, 627-629; McGee and Weatherill (n 136) p. 585-586; Scharpf (n 30) p. 221-222
[206] See presentation in Chapter 2
[207] Gill-Pedro (n 7) p. 123, 128-129
[208] Leczykiewicz and Weatherill (n 119) p. 3, 16, 19; Micklitz (n 25) p. 21-22; Wilhelmsson (n 122) p. 317-321
[209] Wittig (n 13) p. 21-32

the system.[210] I therefore argue that the EU legal system, through the functionalism of EU law and the asymmetries centralizing liberalisation builds a market where capable subjects are the norm. As the agents that serve the EU functional goals the best, the concept of the capable agent also becomes the concept derived from the integrationist and economic rationales of the CJEU. The functional aims of the EU, mobility and transnational access to markets, also serve and are the most beneficial for capable parties that can ensure their interests and rights in a transnational context, where necessary through litigation.[211] Capable parties benefit from the EU functional system of transnational mobility and therefore invest in transnational activity and in influence on the development of the system.[212] EU law is influenced by capable parties and in turn benefits from capable parties exercising their mobility to realize the internal market. In this manner the EU system becomes biased towards these capable agents, for they perpetuate one another - benefitting capable parties have them benefit the development of the internal market, and developing the internal market benefits capable individuals. Similarly to the Straight lens[213] EU law appears to feature a functionality lens that guides how the EU considers individuals that fit the norm and those that are 'other' to the norm. The existence of this lens becomes especially important when considering the special status of the CJEU. EU law relies heavily on judicial and interpretative developments from the CJEU. Developments made in case law furthermore have a particularly entrenched character in the EU legal order.[214] Any lens donned by the CJEU, whether a functionalistic economic lens or a Straight lens, can therefore be expected to have great and lasting effects on how the EU legal order defines and takes account of European subjects.

Identification of the norm within a system naturally begets the question of what or whom its 'other' is.[215] Who is 'otherized' in the EU system? Capable parties are those that will best realize the internal market project, but are caricatures of reality as not all individuals on the market will be capable in this sense.[216] The conception of market freedom as non-interference and the focus on enabling capables parties to participate in the market disadvantage parties that benefit from or need protective regulation to enjoy market freedom and autonomy in a substantive sense. These 'otherized' parties include the vulnerable consumers that can not be expected to be capable of looking out for themselves, for various reasons related to knowledge, disabilities, the specifics of relevant power relations, financial circumstances or structural discrimination. Employees are vulnerable, particularly where the market is built on social norms they do not fit[217] or where the employment relationship is more uneven than what might be considered necessary. In any of these cases the vulnerable 'otherized' party will risk experiencing arbitrary interference from the strong capable parties whose freedom EU law favours in the internal market.

[210] Bryson (n 11) p. 196-201; Ingraham (n 18) p. 1-4; Wittig (n 13) p. 31-32
[211] Craig and de Búrca (n 93) p. 612, 627-629; McGee and Weatherill (n 136) p. 585-586; Scharpf (n 30) p. 221-222
[212] Sandholtz and Stone Sweet (n 13) p. 19-21
[213] Ingraham (n 18) p. 1-4; Wittig (n 13) p. 21-32
[214] See Sandholtz and Sweet (n 13) p. 22-23; Scharpf (n 30) p. 215-219
[215] Wittig (n 13) p. 21-32; See also Cornwall (n 13)
[216] Howells et al. (n 119) p. 33-34; Leczykiewicz and Weatherill (n 119) p. 17; Micklitz (n 25) p. 21-22
[217] Freedman (n 15) p. 81-84

Consistent with this the EU legal order must not just be critiqued as a Straight system with a Straight Court and a heterosexual rationale.[218] It must also be critiqued as a functionalist economic system with a functionalist court, that follows the economic and integrationist rationales of the functionalist approach[219] by setting the capable market agent as the norm in EU law. Similarly to how the patriarchal heterosexual system influences societal discourse,[220] the EU functionalism and market project influence EU discourse and how it perceives and visualizes market actors.

The rationales and norms of a system inform the entirety of that system[221] - for the EU this rationale is functionalism. Within this functionalism the internal market project is the primary source of legitimacy guiding the EU system. Functionalism focusing on attainment of the internal market objective has led to the discussed asymmetries of EU law, the formulation and special treatment of freedom to conduct a business as a freedom from interference, and the asymmetry stemming from the EU notions of individuals. In the same way that heterosexuality is the overarching rationale of the patriarchy,[222] EU functionalism and market integration is the overarching rationale of EU law. Following these rationales the parties that serve the assumptions of that overarching rationales best become normative, which is the male[223] and the capable party respectively. This becomes a teleology that continues to guide EU law even though other aims have been added to EU law, such as the respect for fundamental rights and protection of consumers and employees. 'Other' aims, although certainly recognized within EU law, will be secondary and limited by the functionalist approach that judges them against its system of legitimacy based on contributing to the central objectives. Concepts that would be essential objectives for their own sake under national law, such as consumer protection and human rights, instead find instrumental roles in EU law - as parts to contribute to the central objective of integration and the internal market. The functionalist lens will favour useful normative actors and functionalistic legal norms but disadvantages parties and legal norms that are 'other' for being less conducive to the primary objective. A concept with close ties to the realization of the internal market project, like the freedom to conduct a business, can be expected to receive more recognition because of how it contributes to the internal market in a framework that assesses legitimacy based on functionalism. Likewise actors that are essential for the realization of the project receive greater recognition, such as the economic actors who operate transnationally and reward liberalisation and integration with more intense transnational participation in the internal market. Actors are simultaneously interpreted through the lens of functionalism, leading to focus on the notion of individuals as capable and independent despite reality suggesting otherwise. While functionalism is a beneficial methodology for achieving specific goals it hinders the EU legal order and the CJEU from properly taking account of the legitimate diversity among EU legal subjects and to take account of relevant (social) interests in the development of EU law and the internal market. Based on the liberalising and deregulatory inclinations of EU law, in asymmetries as well as in *Alemo-Herron* and in the notion of individuals, EU law attaches only secondary importance to honouring the social

[218] Baars (n 19) p. 59-62; See Wittig (n 13) p. 21-32; See discussion above in Chapter 5.4
[219] See Isiksel (n 23); Scharpf (n 30)
[220] Bryson (n 11) p. 165-166, 196-201; Freedman (n 15) p. 69-77, 81-84; Ingraham (n 18) p. 1-4; Wittig (n 13) p. 21-32
[221] Bryson (n 11) p. 198-201; Freedman (n 15) p. 69-77
[222] Wittig (n 13) p. 21-32; Ingraham (n 18) p. 1-4
[223] Bryson (n 11) p. 198-201

objectives of Article 2 and 3(3) TEU to respect fundamental rights and establish a social market economy. EU law is indeed, by virtue of its functionalism, founded on respect for market-rights and other provisions that contribute to the realization of the primary EU objectives.

Functionalism without adequate concern for social justice need not be the final form of the market, for in certain sectors of law the EU recognises that the ideal strong capable party as the average individual is but a caricature of reality.[224] In these areas the EU interferes to mend the imbalances and asymmetries that would continue to disadvantage vulnerable and 'otherized' actors. Regulatory intervention is used to bring these vulnerable parties closer to the position they might have enjoyed without the power imbalances working to their detriment.[225] While predominantly governed by the idea of the circumspect and responsible consumer, certain parts of EU consumer policy protect the vulnerable consumer in need of protective regulation to operate on the market with some level of autonomy and justice. Similarly discrimination law recognises, particularly within the context of labour law, that not all parties are capable of asserting their interests and rights in the same way as other parties, particularly when they fall outside of structural social norms.[226] The notion of the capable party may well be adequate for realizing the fully functional internal market.[227] If so it can be the goal, but it cannot represent the reality on the market. The EU legal order can promote the independence and capability of individuals, to make them the circumspect, informed, critical and independent actors that can best realize the internal market - but it cannot expect every party to be that party in itself. Doing so ignores the power imbalances between actors in different constellations on the market, and between different social groups conforming to or diverging from societal norms. In the same way freedom to conduct a business can be formulated in ways that respect not just the realisation of the internal market but also separate public interests and social protection.

This thesis is not aimed at discrediting the value of EU functionalism or its appropriateness for the EU as a constitutional order. Instead this thesis attempts to show that the EU and particularly the CJEU need to be aware of its own functionalist and economic biases plus their effects. Nor does it attempt to argue that fundamental rights and social legislation could or should enjoy the same position as fundamental freedoms under EU law, or show that EU law is incapable of respecting fundamental rights or the social dimension. This thesis instead emphasises how these concerns become secondary or instrumental in the context of EU law by virtue of EU functionalism. Above all this thesis argues that the differences in treatment between fields of policy, provisions and individuals in EU law stems from EU functionalism working as a normative rationale basing legitimacy and 'correctness' on usefulness for the realization of the internal market objective, disadvantaging other objectives.

[224] Howells et al. (n 119) p. 33-34; Leczykiewicz and Weatherill (n 119) p. 17; Micklitz (n 25) p. 21-22
[225] Bartl and Leone (2015) (n 46) p. 145; Gill-Pedro (n 7) p. 110; Leczykiewicz (n 109) p. 177; Weatherill (n 55) p. 173, 176
[226] See Freedman (n 15) p. 81-84 on how the global economy poses the male, western and rich as 'normative' on a global scale
[227] Micklitz (n 25) p. 21

6 Conclusion

The EU legal order is constantly evolving but so far retains its functionalist roots firmly in the project of economic integration.[228] Functionalism and legislative procedural difficulties have led to asymmetries towards judicial action and towards liberalisation in the EU.[229] The internal market project is central for how the EU, and particularly the CJEU, defines and considers the actors operating in the internal market and their market freedom. In *Alemo-Herron* the CJEU characterized freedom to conduct a business as a freedom from interference, disapplying national protective regulation that went above the EU harmonised level.[230] Protection of the freedom to conduct a business aligns with the economic focus of the Union and its definition has strong ties to how the internal market is visualized.[231] Visualizing an internal market with limited regulatory interference in favour of uniformity aligns with how the EU has defined the notion of individuals operating in the market based on the needs of the market, focusing on them as generally capable, independent and self-reliant market agents with limited need of protective regulation[232]. Placing importance on the uniformity of rules and their effect on market freedom over their material level of protection[233] is in the interest of strong actors and realization of the internal market at the expense of vulnerable parties. I contend that this is misguided, as consumers, employees and other parties that are vulnerable to power relations on the market should not be left to the arbitrium of market powers - this is even recognized by the Union itself in certain situations.[234]

Yet the result is not surprising against the context of EU functionalism, the asymmetries of EU law and the market focus - these traits of the EU legal order reinforce one another, where the functionalist focus begets the asymmetries, the asymmetries lead to a skewered development of the market favouring certain actors, and the development achieved feeds back into defining the functionalist focus. Benefitting capable parties as normative EU actors develops the market project, and developing the market project benefits capable individuals that can participate effectively in the market. EU functionalism is not just a theory relevant for understanding the origin or background organisation of the EU as a legal order. Instead I argue that EU functionalism, as a mindset and a normative system, very much continues to influence the substantial direction and content of EU law. By virtue of its close connection to and utility for the realisation of EU primary objectives freedom to conduct a business is particularly symptomatic of this functionalist lens - the freedom is used to re-engineer a market definition, receives elevated capacities of effect similar to fundamental freedoms, ties to the unrealistic notion of market individuals with uniformity over substantial protection and contributes to the liberalising unification trend of EU law. Freedom to conduct a business is a newly discovered means for furthering the primary objectives of EU law, adapted to this purpose by *Alemo-Herron*, through unifiction and liberalisation of market regulation. The normative structure of EU law however leaves certain legitimate objectives and more

[228] Isiksel (n 23) p. 65-83, 86
[229] Isiksel (n 23) p. 7, 79, 83; Sandholtz and Stone Sweet (n 32) p. 19-23; Scharpf (n 30) p. 212-219, 221-232
[230] *Alemo-Herron* (n 3); Gill-Pedro (n 7) p. 123, 128-129
[231] Bartl and Leone (2015) (n 46) p. 149; Bartl and Leone (2017) (n 46) p. 123; Gill-Pedro (n 7) p. 132-134; Scharpf (n 30) p. 226-233
[232] Howells et al. (n 119) p. 33-34; Leczykiewicz and Weatherill (n 119) p. 17; Micklitz (n 25) p. 21-22
[233] Wilhelmsson (n 122) p. 322-323, 328, 333
[234] Howells et al. (n 119) p. 33-34; Leczykiewicz and Weatherill (n 119) p. 17; Micklitz (n 25) p. 21-22;

importantly certain individuals at a disadvantage where they do not fit the established norms of capability, formal equality and market-promotion.

Inequality or relations of power exist not only in the market between actors because of their relative roles but also as overarching structural asymmetries based on denomination of societal norms. These inequalities disadvantage individuals on the basis of characteristics or adherences to particular groups, depending on whether their traits are considered normative or 'other' to the norm. Discourse within the entirety of the system becomes coloured by these norms which affects how entities in the system view the world, organise it and consider what is legitimate.[235] Structural power imbalances thus create biased lenses that may affect how courts perceive and adress power inequalities and stereotypes.[236] Alongside its own functionalist bias or lens the EU and the CJEU as part of an overall societal system are also affected by structural asymmetries.[237] The CJEU has a Straight lens that sometimes guides its rulings, but which it in other cases is aware of and combats.[238] *Achbita* portrays a possible different lens and the risks of intersectional biases.[239] Structural inequalities risk being exacerbated or even legitimized by the functionalist veneration for freedom of contract and limited market intervention that treats individuals as formally equal and capable parties.

Application of freedom to conduct a business in the functionalist style of *Alemo-Herron* is problematic and risks exacerbating power relations in the market and at a structural level. As a deregulatory tool, it poses a threat to the protective aims that form part of the EU social market economy. The advocacy in *Alemo-Herron* for a free market with limited interference ignores the impacts an unregulated market will have on vulnerable and 'otherized' individuals attempting to participate in the internal market. Protection of freedom to conduct a business is still a beneficial right for the Union and the internal market, but must be constructed in a way that takes account of relevant interests tied to the public and individuals in need of regulatory protection. Freedom to conduct a business should therefore be constructed in accordance with its pre-*Alemo* meaning - as a right to enjoy regulated autonomy within a sphere of freedom that can be limited by unarbitrary regulatory intervention. The right should ensure access justice where each party can access and participate in the market, as an important aspect of creating a functional social market economy that is for all Europeans and which balances the economic and social dimensions of European society. Realization of this goal should include recognition of inequalities between market actors and structural inequalities and recognition of the lenses and asymmetries stemming from functionalism that affect the CJEU and the development of the internal market.

[235] See Bryson (n 11) p. 165-166, 196-201; Freedman (n 15) p. 69-77, 81-84
[236] Ingraham (n 18) p. 1-4; Wittig (n 13) p. 21-32
[237] Baars (n 19) p. 59-62
[238] Craig and de Búrca (n 93) p. 917-918, 949
[239] *Achbita* (n 4); Cuypers (n 194) p. 438-445; Marín Aís (n 199) p. 414-415

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